



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT

Introduction

The Tenant applied to cancel a One-Month Notice to End Tenancy signed on December 22, 2021 (the “One-Month Notice”) pursuant to s. 47 of the *Residential Tenancy Act* (the “Act”). The Tenant also seeks the return of her filing fee pursuant to s. 72 of the *Act*.

C.P. appeared as Tenant. She was assisted by her advocate, J.J.. The Tenant also had the support of C.S.. C.S. appeared as support and provided no evidence at the hearing. T.D. appeared as agent for the Landlord.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. The parties confirmed that they were not recording the hearing.

The Landlord’s agent advises that the One-Month Notice was posted to the door of the rental unit, though could not recall when it was served. The Tenant acknowledges receipt of the One-Month Notice. I find that the One-Month Notice was served in accordance with s. 88 of the *Act* based on the Tenant’s acknowledged receipt of the same.

The Tenant advises that the Notice of Dispute Resolution and evidence was served on the Landlord by delivering it to the resident property manager. The Landlord acknowledges receipt of the Notice of Dispute Resolution and the Tenant’s evidence and raised no objections with respect to service. I find that the application materials were served in accordance with s. 89(1)(b) of the *Act* by their delivery to the Landlord’s resident property manager.

The Landlord's agent confirmed that the Landlord did not serve evidence on the Tenant in response to the Tenant's application.

Preliminary Issue – Amending the Style of Cause

At the outset of the hearing, I clarified with the Landlord's agents who, in fact, was the Landlord. The Landlord confirmed that the corporate Landlord, as listed in the tenancy agreement, is the correct Landlord. The Tenant raised no objections with respect to the amendment.

Accordingly, I amend the application pursuant to Rule 4.2 of the Rules of Procedure such that the style of cause reflects the corporate Landlord as listed in the tenancy agreement.

Issue(s) to be Decided

- 1) Should the One-Month Notice be cancelled?
- 2) If not, is the Landlord entitled to an order for possession?
- 3) Is the Tenant entitled to the return of their filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issue in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The Tenant took possession of the rental unit on December 1, 2015.
- Rent of \$958.00 is due on the first day of each month.
- The Landlord holds a security deposit of \$450.00 in trust for the Tenant.

The Tenant provides a copy of the written tenancy agreement in her evidence.

The Landlord's agent indicates that the One-Month Notice was issued on the basis that the Tenant is unreasonably disturbing other occupants of the residential property by coughing. The Landlord's agent advises that the residential property is a 14-unit building. The Landlord's agent indicates that the Tenant coughs frequently and often at night. He says that the Landlord has received complaints from all 13 other occupants

with respect to the Tenant's coughing. The Landlord provides no statements from the other occupants nor were the other occupants called as witnesses to testify to the Tenant's cough.

The One-Month Notice makes reference to another file with the Residential Tenancy Branch and I am told that this is not the first time the Landlord issued a one-month notice to end tenancy with respect to the Tenant's cough. The parties consented to my reviewing the reasons from the previous dispute as it was not put into evidence. The Tenant's advocate notes that the Tenant represented herself during the previous hearing.

The parties were able to settle their previous dispute along the following terms:

The landlord agreed to cancel the 1 month notice dated April 3, 2021.

The tenant agreed to withdraw the application for dispute.

The tenant agreed to the following three terms:

The tenant will no longer smoke in the rental unit or the balcony.

The tenant will go to the designated smoking area on the property to smoke.

The tenant agrees to keep her windows closed at night.

The landlord gives notice to the tenant that in the event he receives another noise complaint regarding coughing at night the landlord will issue and serve to the tenant a notice to end tenancy for cause.

Both parties agreed that the above noted particulars comprised a full and final settlement of all aspects of the dispute arising from their applications for dispute resolution.

The terms listed above are a direct replication from the reasons from the previous dispute, which was heard on May 25, 2021.

The Landlord's agent indicates that the Tenant did not comply with the terms of the settlement and that she continues to smoke within her rental unit rather than go to the smoking area. The Landlord indicated that he still receives complaints with respect to

the Tenant's coughing, which he says can occur at all hours of the evening, including 2:00 AM.

When asked about warnings, the Landlord's agent advises that he has had various conversation with the Tenant but that the problem has persisted. The Landlord's agent advises that the issue is not the Tenant smoking within the rental unit, rather it is persistent coughing that he says is disturbing the other occupants.

The Tenant's advocate emphasizes that the Landlord has called no witnesses and provided no statements from the other occupants. The Tenant denies receiving complaints from the other occupants.

The Tenant's advocate indicates that the Tenant is considerate of other occupants and has a medical condition, specifically asthma, which causes her to cough and that her cough is worse at night. The Tenant's advocate indicates that the Tenant's cough is involuntary and that she takes medication to treat the cough. The Tenant provides a photograph of her inhaler.

The Tenant further states that she stopped smoking 9-months ago and has complied with the terms of the settlement. The Landlord indicates that Tenant has a roommate and that they smoke within the rental unit.

The Tenant further provides photographs of a hole in the roof of her rental unit, which she says causes dust to circulate within her rental unit. The Tenant and her advocate advise that the dust exacerbates the asthma.

Analysis

The Tenant applies to cancel the One-Month Notice and for the return of her filing fee.

Under s. 47 of the *Act*, a landlord may end a tenancy for cause and serve a one-month notice to end tenancy on the tenant. A tenant may dispute a one-month notice by filing an application with the Residential Tenancy Branch within 10 days after receiving the notice. If a tenant disputes the notice, the burden for showing that the one-month notice was issued in compliance with the *Act* rests with the landlord.

Here, the Landlord issues the One-Month Notice pursuant to s. 47(1)(d)(i), which permits a landlord to end a tenancy if the tenant or a person permitted to be at the

residential property by the tenant unreasonably disturbs or significantly interferes with other occupants or the landlord.

The elements that the Landlord must establish to make out that under the ground selected under the One-Month Notice are as follows:

- that the Tenant or person permitted at the residential property by the Tenant interfered with or committed a disturbance to the other occupants of the residential property or the Landlord; and
- that the disturbance was unreasonable or the interference was significant.

The Landlord provides no written statements from the other occupants and did not call them as witnesses at the hearing. I accept the Landlord's evidence that he has received complaints from the other occupants. However, the Landlord's submissions at the hearing were of a generalized nature and do not provide specific information. I place significant weight in the lack of direct evidence from the other occupants. The Tenant may very well be coughing, and these coughs may occur in the evening. However, to rise to the level to justify cause for ending tenancy, it must be significant or unreasonable. Perhaps it is an older building where noise is more prone to travel or perhaps the coughing is of a limited scope. Presently, the Landlord provides no evidence on these points.

I would note that coughing is involuntary and entirely common. It is the type of noise one would normally expect while living in a multi-unit building. Further, I find that the Tenant has taken reasonable steps to address her asthma and mitigate her coughing, both by quitting smoking and using an inhaler. She is not expected to be as quiet as a mouse. The right to quiet enjoyment of the other occupants is not absolute, it is constrained by what is reasonable under the circumstances.

It is the Landlord's obligation to prove that the One-Month Notice was properly issued. I find that Landlord has failed to do so and has failed to demonstrate that the Tenant's coughing is an unreasonable disturbance or significant interference. Accordingly, I grant the Tenant's application and the One-Month Notice is cancelled. It is of no force or effect. The tenancy shall continue until it is ended in accordance with the *Act*.

In making the finding above, I have considered the settlement from the previous dispute. The terms of the settlement are clear that the Landlord had the right to issue a new one-month notice to end tenancy if the coughing issue persisted. The Landlord chose to do so. However, this term does not impose an acknowledgement or admission

on the Tenant that the conduct constitutes an unreasonable disturbance or a significant interference. In other words, I find that the settlement does not constrain my ability to make the findings above that the Landlord failed to establish that the Tenant's conduct rose to the level of significant interference or unreasonable disturbance.

Conclusion

The Landlord has failed to establish that the Tenant's coughing constitutes an unreasonable disturbance or a significant interference with the other occupants. I grant the Tenant's application and cancel the One-Month Notice. It is of no force or effect under s. 47 of the *Act*.

As the Tenant was successful in their application, I find that they are entitled to the return of their filing fee. I order pursuant to s. 72(1) of the *Act* that the Landlord pay the Tenant's \$100.00 filing fee. I exercise my discretion under s. 72(2) of the *Act* and direct that the Tenant withhold \$100.00 from rent owed to the Landlord on **one occasion** in full satisfaction of their filing fee.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: March 15, 2022

Residential Tenancy Branch