



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC FFT

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the "**Act**") for:

- the cancellation of the One Month Notice to End Tenancy for Cause (the "**Notice**") pursuant to section 47; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The tenant attended the hearing. The landlord was represented at the hearing by an agent ("**CT**") and its building manager ("**BR**"). All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenant testified, and CT confirmed, that the tenant served the landlord with the notice of dispute resolution package and supporting documentary evidence. The landlord testified, and the tenant confirmed, that the landlord served the tenant with their documentary evidence. I find that all parties have been served with the required documents in accordance with the Act.

At the hearing, the parties referenced a settlement agreement made between them relating to a prior dispute (the "**Settlement Agreement**"). The landlord's agent signed it on February 12, 2021 and the tenant signed it on February 17, 2021. Neither side entered a copy into evidence. With the consent of the parties, I granted the landlord leave to upload the Settlement Agreement to the Residential Tenancy Branch (the "**RTB**") evidence management system after the hearing. The landlord did this on January 31, 2022. I accept it into evidence and reviewed it prior to writing this decision

Issues to be Decided

Is the tenant entitled to:

- 1) an order cancelling the Notice;
- 2) recover the filing fee?

If not, is the landlord entitled to an order of possession?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into a written tenancy agreement starting December 15, 2019. Monthly rent is \$1,755.95 plus \$75 for parking and is payable on the first of each month. The tenant paid the landlord a security deposit of \$865, which the landlord continues to hold in trust for the tenant. The rental unit is an apartment located on the 4th floor of the residential property. There are five other units on the 4th floor.

The tenancy agreement contains an addendum with the following term:

- A. **Non-Smoking**: The tenant(s) agree to the following **material term** regarding smoking. No Smoking of any combustible material is permitted on the residential property, including within the rental unit.

The tenant(s) also acknowledged the building is transitioning to "no smoking" status. The tenant(s) understand that there may be other suites in the building whose tenancy agreement predated the transition to non-smoking status and in which smoking may occur on the residential premises. I acknowledge the landlord cannot take away the right of these residents to smoke on the residential premises. It is the landlords aim to convert the building to 100% no smoking over time.

(emphasis original; the "**Non-Smoking Clause**")

The tenant and landlord's agent initialed beside this term.

On September 8, 2021, the landlord posted the Notice on the door of the rental unit. It specified an effective date of October 31, 2021. It listed the reasons for ending the tenancy as:

- 1) the tenant or a person permitted on the property by the tenant has:
 - significantly interfered with or unreasonably disturbed another occupant or the landlord;
 - seriously jeopardized the health or safety or lawful right of another occupant or the landlord;
- 2) breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so;

The Notice provided the following details of the cause:

The tenant continues to create significant and serious disturbances to their neighbors by smoking in his apartment which is a breach of a material term of his tenancy agreement.

Other neighboring tenants have complained multiple times (both verbally & in writing). The tenant has been warned multiple times, (both verbally & in writing) by the building manager & the property manager and he had promised several times that the smoking would stop, yet his behavior has not only continued, it has worsened.

The tenant has no respect for their neighbors' rights, nor the tenancy agreement. The landlord strongly feels that it would be completely unfair to the other tenants of the building to allow this tenancy to continue.

The tenant disputed the Notice on September 17, 2021.

CT testified that this was not the first time the landlord had issued a notice to end tenancy for cause to the tenant due to his smoking in the rental unit. He testified that the landlord has issued one previously, and that, prior to the matter coming to a hearing before the RTB, the parties entered into the Settlement Agreement. The Settlement Agreement required that the landlord rescind the prior eviction notice (dated October 29, 2020) and that both parties release the other from any claims it may have against the other as of February 17, 2021. In the Settlement Agreement, neither party admitted fault or liability, and they agreed it represented was a full and final resolution of any and all issues between the parties concerning the dispute in the proceedings and any issues which could have been raised in the proceedings.

CT testified that, despite the Settlement Agreement, the tenant continued to smoke in the rental unit. BR testified that, since August 2020, every time he has been on the 4th floor he has smelled cigarette smoke in the hallway. He testified that he had been in every unit on the 4th floor, and the rental unit is the only unit which smelled of cigarette smoke. BR testified that he is on the 4th floor once a week to vacuum the carpet any smells it each week. He testified that the strength of the odor varies from week to week but some days the smell is overwhelming. This is due to the patio door in the rental unit being opened, which causes air to blow through the rental unit carrying cigarette smoke into the hallway. He testified it is easy to know when the rental unit's patio door is open as there is a whistling sound of air being forced under the door into the rental unit. He testified that he saw the tenant smoking on the balcony a few days prior to the hearing.

During the hearing, I asked the tenant if he had smoked in the rental unit or on the rental unit patio during the last six months. He stated that he had. He stated that he was "not perfect" and that "it was difficult" for him to not smoke. I then asked if he had smoked in the rental unit or on the rental unit patio between when he signed the Settlement Agreement (February 17, 2021) and when the Notice was served (September 8, 2021) (the "**Relevant Period**"). His initial answer was evasive, but then testified that he resisted the urge to smoke the best he could, but that he was "not entirely successful". He stated that he regretted this.

The landlord called the tenant's next-door neighbor ("DD") as a witness. DD testified that he moved into a unit on the 4th floor on April 15, 2021 and he smells cigarette smoke in his unit at least one to two times per week since moving in. He testified he used to live on the 10th floor of the residential property, and the smell of smoke was not an issue. DD believes the smoke is seeping through the shared wall between his unit and the rental unit, as the part of his unit that smells most strongly of cigarette smoke is the hallway along which the shared wall runs. He testified that he advised BR of this and that BR advised him to smell under the doors of different units on the floor in order to confirm which unit it was, but that he declined to do this as he did not want to get in a confrontation with another tenant.

Shortly thereafter, DD delivered a formal written complaint to the landlord, which the landlord entered into evidence. DD wrote:

You asked for it. Here is my official. I woke up last night coughing and sneezing. This is not the first time it's happened to me in the last while. This does not happen at my partner's place or when I lived in [the suite on the 10th floor]. This morning when I got up I could clearly smell cigarette smoke in my apartment. I find this situation completely unacceptable.

I have asthma as well as sleep apnea and require a CPAP machine to breathe properly when I'm sleeping. I have only recently cleaned the breathing tube and change the filters.

I do not believe I'm getting full benefit for the rent I pay and telling me to go smell under the doors and find out who the offender is risking confrontation with another tenant.

The landlord submitted written complaints from two other occupants who live on the 4th floor. One of these occupants ("LH") provided two such complaints. In the first, dated September 9, 2021, she wrote:

After reviewing my previous, formal written complaints, about the obvious breach of no smoking tenancy from [the rental unit], I am again contributing, specific writing to the obvious and consistent hallway smells of ongoing smoking.

Since June 2021 it's become an everyday occurrence of extremely obnoxious cigarette smoking permeating the hallway on the 4th floor. It's very noticeable and yet it continues.

How can one person consistently breach tenancy agreement, by blatant choices of, in [the rental unit] ongoing smoking?

I have contributed for a year now with formal writing of texts and em towards a solution.

Yet it's gotten worse. [...]

[as written]

LH's second email was dated December 10, 2021 and reiterates these concerns. The landlord did not submit any prior written complaint from LH.

The landlord submitted a letter from another occupant of the 4th floor ("**KS**") dated November 5, 2021, in which she wrote:

Further to my original letter of complaint dated July 26, 2021, the smoke on the 4th floor of [the residential property] continues to be an issue.

I am an active and otherwise healthy 70 year old with asthma that I managed without medication. However, smoke can be a trigger for me. I love this place but had I been aware that smoke was an issue, I would not have even considered moving here.

I find it utterly disheartening that one of my closest neighbors clearly cares so little for the well being of the rest of us, and would appreciate your attending to this.

The landlord also submitted an email dated November 26, 2021, from an occupant of the 10th floor, who complained about smelling cigarette smoke that date and the day prior. However, he did not make any reference to the source of the cigarette smoke.

The landlord submitted two warning letters it issued to the tenant related to smoking dated June 29 and August 1, 2020 respectively. The June 29 letter referenced the Non-Smoking Clause and threatened to end the tenancy unless such the smoking ceased. The August 1, 2020 letter reiterated this warning.

The tenant argued that the warnings letters or the written statements were not relevant to the case at hand. He argued that the warning letters, and any incidents described therein, were not relevant to the validity of the Notice, as any breaches that occurred prior to February 17, 2021 (the date he signed the Settlement Agreement) were resolved by the Settlement Agreement.

Furthermore, he argued that as the Notice was issued on September 7, 2021, any written statement produced after that date was not relevant to the current application, as they could not form the basis for issuing the Notice.

The tenant argued that the any disturbance other occupants might have suffered as a result of his smoking in the rental unit was minimal and would not give rise to an eviction.

The tenant also argued that, contrary to section 4(1)(h) of the Act, the landlord did not give him written notice of his breach of a material term of the tenancy agreement, and an opportunity to correct the breach within a reasonable time, before issuing the Notice. He argued that the 2020 warning letters would not satisfy this requirement, as the Settlement Agreement had the effect of cancelling them.

Analysis

The Notice included three reasons for ending the tenancy. It stated that the tenant's smoking in the rental unit: significantly interfered with or unreasonably disturbed another occupant; seriously jeopardized the health of another occupant; and breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The landlord does not have to prove that all three of these allegations are true. It need only prove a single one of them for the Notice to be valid.

I will assess the validity of each these reasons in turn.

1. Material Breach

Section 47(1)(h) of the Act states:

Landlord's notice: cause

47(1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

[...]

(h) the tenant

(i) has failed to comply with a material term, and

(ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;

The tenant has admitted to smoking in the rental unit during the Relevant Period. The tenant did not dispute that the Non-Smoking Clause was a material term. As such, I find that the first requirement of section 47(1)(h) is satisfied: the tenant breached a material term of the tenancy agreement.

However, the only written notice provided by the landlord altering the tenant that he was in breach of a material term of the tenancy agreement was served prior to the parties entering into the Settlement Agreement. It did not issue any such warning during the Relevant Period.

The Settlement Agreement has the effect of resetting the dispute between the parties, as it “fully and finally” resolved any issues between the parties. I do not therefore find that the notices of the tenant’s breach of the Non-Smoking Clause provided in 2020 satisfy the requirement of section 47(1)(h)(ii) of the Act.

As the landlord did not issue any new written warning concerning the tenant’s breach of the Non-Smoking Clause prior to issuing the Notice, I find that the landlord has failed to satisfy both requirements of section 47(1)(h) of the Act. As such, the landlord may not end the tenancy pursuant to that section.

2. Unreasonable Disturbance

Section 47(1)(d) of the Act states:

Landlord's notice: cause

47(1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

[...]

(d) the tenant or a person permitted on the residential property by the tenant has

(i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,

The landlord asserts that by smoking in the rental unit, the tenant has caused cigarette smoke to waft into the 4th floor hallway and then into neighboring units, and that this has unreasonably disturbed the other occupants of the 4th floor. The landlord relied on the testimony of CT and BR (who are not occupants of the 4th floor) and DD (who is), as well as written statements from KS, LH, and DD (all of whom live on the 4th floor).

The tenant has asserted that the written statements of his neighbours submitted into evidence by the landlord are not relevant to this application as they were created after the Notice was served.

While I accept any description of any events contained in these letters occurring after the Notice was issued is not relevant to this application (as I am assessing the validity of the Notice itself), this does not mean that the letters themselves are not relevant.

In her September 9, 2021 letter, LH describes events that occurred during the Relevant Period:

Since June 2021 it's become an everyday occurrence of extremely obnoxious cigarette smoking permeating the hallway on the 4th floor. It's very noticeable and yet it continues.

I find that such evidence is directly relevant to the application, as it speaks to the condition of the 4th floor hallway for June, July, and August 2021, all of which fall within the Relevant Period.

In her letter dated November 5, 2021, KH references a prior written complain made during the Relevant Period:

Further to my original letter of complaint dated July 26, 2021, the smoke on the 4th floor of [the residential property] continues to be an issue.

From this, I understand that her July 26, 2021 complaint referred to smoke on the 4th floor.

These letters are corroborated by the testimony provided at the hearing of DD, CT, and BR. They each testified that they smelled cigarette smoke on the 4th floor during the Relevant Period.

CT testified that he has been inside all of the 4th floor units and that the rental unit is the only one that smells of cigarette smoke. BR testified that he knows the smell comes from the rental unit as the smell is strongest when the rental unit patio door is open which causes air to be pushed from outside, through the rental unit, and under the door into the hallway. I accept his evidence that he can hear the air whistling under the door of the rental unit when this occurs.

All of this is consistent with the tenant's own admission that he has smoked in the rental unit or on its patio during the Relevant Period.

I find that the tenant smokes in the rental unit or on the patio and that this causes the rental unit to smell of cigarette smoke. I also find that the smell escapes the rental unit and enters the hallway of the 4th floor.

KS wrote that smoke could trigger her asthma. LH described the smell as "permeating" the 4th floor hallway. Neither of them specified the exact times which these things occurred. However, LH wrote that the permeation of the hallway has occurred since June 2021. KH's letter does not indicate that the triggering of her asthma was a recent occurrence. Rather, she stated that the smoke "continues to be an issue" following her July 26, 2021 letter. I understand this to mean that the smoke's effect on her asthma was an issue since at least July 26, 2021.

These statements were corroborated by BR's testimony that the smell of cigarette smoke in the hallway could be "overwhelming" at times during the Relevant Period.

Based on these letters and statements, I find that the smell of cigarette smoke in the 4th floor hallway was not minimal, as alleged by the tenant. Rather, I find that during

portions of the Relevant Period, the smell was, at times, overwhelming. It permeated the hallway. It negatively effected LH's asthma.

I find that these all amount to an unreasonable disturbance of his neighbours' quiet enjoyment of the residential property.

As such, I find that the Notice was issued for a valid reason, and I decline to cancel it.

It is therefore not necessary for me to determine whether the tenant seriously jeopardized the health of another occupant of the residential property.

3. End of Tenancy

Section 55(1) of the Act states:

Order of possession for the landlord

55(1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if

- (a) the landlord's notice to end tenancy complies with section 52 [*form and content of notice to end tenancy*], and
- (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

I have reviewed the Notice and find that it complies with the form and content requirements of section 52 of the Act. I have upheld the Notice. Accordingly, the landlord is entitled to an order of possession.

At the hearing the landlord requested that an order of possession be made effective as soon as possible.

The tenant argued that any order of possession made should be made effective in three months, so that he could locate a new residence. He stated that he has always paid rent in full and on time and has complied with all the building's COVID-19 requirements. He testified that he is 70 years, and, while he has no "real big health problems" he has a number of smaller ones which are in remission and handled with medication. He testified that he is "well-integrated" into the community and, if I upheld the Notice, he would like to be able to find a new residence in the community and asked for additional time to do so.

The standard practice of the Residential Tenancy Branch is to make orders of possession effective two days after the landlord serves them on the tenant. In the circumstances, I do not find that this would be appropriate. I find that the tenant's age, minor health concerns, and connection to the community warrant a longer effective date. However, I do not find it appropriate to extend this date for three months. We are

well past the effective date of the Notice (October 31, 2021). The tenant has had ample time to prepare for the possibility that his tenancy will end.

For these reasons I issue an order of possession effective 30 days after the landlord serves it on tenant.

Conclusion

I dismiss the tenant's application to cancel the Notice, without leave to reapply. As such, I decline to order that the landlord reimburse him the filing fee.

Pursuant to section 55 of the Act, I order that the tenant deliver vacant possession of the rental unit to the landlord within 30 days of being served with a copy of this decision and attached order(s) by the landlord.

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 2, 2021

Residential Tenancy Branch