



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT

Introduction

This hearing was convened by way of conference call concerning an application made by the tenants seeking an order cancelling a notice to end the tenancy for cause, and to recover the filing fee from the landlord for the cost of the application.

Both tenants and the landlord attended the hearing, and each gave affirmed testimony. The tenants were also assisted by Legal Counsel. The parties were given the opportunity to question each other and to give submissions.

The parties agree that evidence has been exchanged, all of which has been reviewed and is considered in this Decision.

Issue(s) to be Decided

Has the landlord established that the One Month Notice to End Tenancy for Cause dated March 7, 2022 was issued in accordance with the *Residential Tenancy Act*?

Background and Evidence

The landlord testified that the tenants moved into the rental unit in or around mid-December, 2017. A tenancy agreement has been provided for this hearing indicating a new tenancy starting December 1, 2020 and expiring on June 30, 2021 thereafter reverting to a month-to-month tenancy and the tenants still reside in the rental unit. Rent was \$1,450.00 per month at the commencement of the tenancy, which has been increased and is now \$1,471.25 payable on the 1st day of each month, and there are no

rental arrears. At the commencement of the tenancy the landlord collected a \$700.00 security deposit from the tenants as well as a \$200.00 pet damage deposit, both of which are still held in trust by the landlord. The rental unit is an above ground suite, and the landlord lives in the upper level of the home.

The landlord further testified that on March 7, 2022 the landlord served the tenants with a One Month Notice to End Tenancy for Cause by posting it to the door of the rental unit, and a copy has been provided for this hearing. It is dated March 7, 2022 and contains an effective date of vacancy of April 9, 2022. The reasons for issuing it state:

- Tenant or a person permitted on the property by the tenant has seriously jeopardized the health or safety or lawful right of another occupant or the landlord;
- Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The landlord has had a chronic lung condition since 2013, having suffered 3 recurring bouts of walking pneumonia. It is not a typical or viral pneumonia in that a person is not aware it's pneumonia until it's severe. The landlord has provided a letter from a physician dated May 6, 2014, and the landlord testified that antibiotics are used at all times since it's difficult to diagnose and the landlord can self-administer to prevent a severe stage. Therefore, the landlord keeps a very strict hygiene protocol at all times.

The landlord has provided another letter from a physician dated April 13, 2022 which states that the landlord has an underlying lung condition and should not be exposed to second hand smoke or vapors.

On January 29, 2022 the landlord was out gardening and one of the tenants (JD) was pacing back and forth on the tenants' private patio. The landlord has provided table/chairs and another spot for tenants to smoke at. Up until recently the tenant has been smoking her bong outside on the patio at the bistro table; the other tenant (RB) is rarely there. The landlord would see the tenant (JD) 4 or 5 times per day on a regular basis. On January 29, 2022 the landlord observed her holding 2 balloons filled with something. They were clear plastic balloons about 12 to 14 inches tall and the tenant was holding 1 in each hand. She ducked into the rental unit with the 2 balloons, and the landlord thought she was going to smoke it in the suite. The landlord looked through and saw the tenant with the balloons inside the suite. The landlord has provided a copy of a letter posted to the tenants' door dated January 31, 2022 stating that the tenant brought 2 large filled clear plastic or rubber balloons, commonly used in conjunction with marijuana use within the suite, which is a direct violation of the tenancy agreement.

The landlord researched marihuana and vaping, and testified that a person can buy a kit or make one, which include plastic balloons. A similar photograph has been provided as evidence for this hearing. The landlord also researched how smoke travels because the tenants denied smoking in the suite. Smoke can go through cracks, plumbing, etc., and cannot be reduced by vents. The house has an air to air system which draws old air out and lets fresh air in. There are vents in the kitchen and ensuite and marihuana comes through there, and is extremely potent. It can travel up to 23 feet, and the content is a combination of paper, and marihuana, etc. The landlord is mostly concerned about carcinogens because the smoking triggers pneumonia.

With respect to the second reason for issuing the Notice, the landlord testified that the Residential Tenancy Branch advised that after the first issue is documented, which the landlord did, the landlord doesn't have to wait for a second issue to come up. On January 31, 2022 the landlord posted a letter to the tenants' door stating that smoking inside the rental unit is prohibited. A copy of the letter has been provided for this hearing.

The second event was on March 6, 2022 and a formal notice was posted to the door of the rental unit; the landlord smelled marihuana, and this was the second notice. A copy has been provided for this hearing and it states that the landlord smelled marijuana wafting heavily in the foyer of the main floor, emanating through the common interior door to the rental unit, or being passed through the Air Exchange Unit. It also states to cease and desist from bringing marijuana into the suite.

The landlord also posted notices on March 14 and March 15, 2022 and received a reply from the tenants that they want quiet enjoyment of the rental unit and to stop posting notices. The Residential Tenancy Branch advised that the landlord didn't have to stop, so the landlord started to keep a log of incidents where smoke entered the landlord's home.

The tenant smoked at the bistro table for 7 years without any complaint by the landlord, but in the last 6 months has been smoking or vaping, and the landlord believes vaping inside. The landlord is 75 years old and has suffered lots of stress waiting for this hearing.

The tenants have provided Affidavits for this hearing, and both tenants testified that they have never smoked inside the rental unit.

SUBMISSIONS OF THE TENANTS' LEGAL COUNSEL.

Counsel mentions 3 basic points, the first being an incorrect effective date in the One Month Notice to end Tenancy for Cause.

The second point is that there is no evidence that any marihuana was smoked or vaporized in the rental unit. Vaping does not qualify as smoking, and Section 21.1 (3) of the *Residential Tenancy Act* states that vaporizing is not considered smoking unless the tenancy agreement expressly states that. Out of respect, the tenants have not vaped inside the rental unit. Even if it is found that they did vaporize cannabis, the landlord has failed to provide a breach of a material term, and there is nothing in the tenancy agreement that says it's an important or material term. A notice to end a tenancy for breach of a material term requires a landlord to advise in the written notice that there has been a material breach and give an opportunity for the tenants to correct the breach. Neither of the landlord's letters states that.

The landlord has not provided evidence of a serious health letter, only a single letter dated 2014 and a generic letter in 2022, but no evidence that potential smoke emanated from inside the rental unit.

SUBMISSIONS OF THE LANDLORD:

The landlord is now back on medication twice a day to keep lungs open, and the landlord's health is jeopardized. The truthfulness of the tenants is questioned. The landlord's health is more important than the rent the landlord receives.

Analysis

Where a tenant disputes a notice to end a tenancy given by a landlord, the onus is on the landlord to establish that it was given in accordance with the *Residential Tenancy Act*, which can include the reason(s) for issuing it. I have reviewed the One Month Notice to End Tenancy for Cause, and I find that it is in the approved form.

Legal Counsel for the tenants submitted that the effective date of vacancy contained in the Notice is incorrect, and I agree. Considering that rent is due on the 1st day of each month, and the Notice was served by posting it to the door of the rental unit on March 7, 2022, which is deemed to have been served 3 days later, or March 10, 2022, the

effective date of vacancy must be April 30, 2022, not April 9, 2022. However, the *Act* also specifies that incorrect effective dates are changed to the nearest date that complies with the law, and I find that it is changed to April 30, 2022. The tenants disputed it on March 9, 2022, which is within the 10 days permitted by law.

Legal Counsel for the tenants also raised Section 21.1 of the *Act* in closing submissions. That section states:

- (2) If a tenancy agreement entered into before the cannabis control date
 - (a) includes a term that prohibits or limits smoking tobacco, and
 - (b) does not include a term that expressly permits smoking cannabis,the tenancy agreement is deemed to include a term that prohibits or limits smoking cannabis in the same manner as smoking tobacco is prohibited or limited.
- (3) For greater certainty, vapourizing a substance containing cannabis is not smoking cannabis for the purpose of subsection (2).

The Addendum to the tenancy agreement states:

1. The Tenants agree that this is a Non-Smoking Suite. Any smoking must be conducted in the common areas, outside the home.

The *Act* states that vaping cannabis is not smoking. The landlord testified that the tenant has been vaping inside, and that it can be smelled.

The first reason for ending the tenancy is: The tenant or a person permitted on the property by the tenant has seriously jeopardized the health or safety or lawful right of another occupant or the landlord. Considering Section 21.1, the landlord has not established that the tenants have seriously jeopardized the lawful right of the landlord. But that is not the entire test, and the landlord does not oppose cannabis or vaping, so long as it is not done inside the rental unit.

The landlord claims that the vaping has seriously jeopardized the landlord's health or safety and has provided a physician letter dated May 6, 2014, 8 years ago, as well as another dated April 13, 2022 which states that the landlord has an underlying lung condition and should not be exposed to second hand smoke or vapors. The letters posted to the tenants' door by the landlord do not indicate that the landlord has or had any lung

condition. The tenants must be aware of health or safety concerns prior to issuing a notice to end a tenancy for seriously jeopardizing the landlord's health.

Further, in order to end a tenancy for breach of a material term, the landlord must inform the tenants in writing:

- that there is a problem;
- that the landlord believes the problem is a breach of a material term of the tenancy agreement;
- that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
- that if the problem is not fixed by the deadline, the landlord will end the tenancy.

I have reviewed the letters that the landlord posted to the door of the rental unit, and they do not indicate a date by which any breach must be corrected, or that if not corrected by that date, the landlord will end the tenancy. Therefore, I am not satisfied that the landlord has established breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

I have also read the Affidavits of the tenants, both affirming that the tenants have never smoked, ignited, or combusted marijuana or any other substance inside the rental unit.

In the circumstances, I find that the landlord has not issued the One Month Notice to End Tenancy for Cause in accordance with the *Act*, and I cancel it.

Since the tenants have been successful with the application the tenants are also entitled to recovery of the \$100.00 filing fee. I grant a monetary order in favour of the tenants as against the landlord in that amount, and I order that the tenants be permitted to reduce rent for a future month by that amount or may otherwise recover it by filing the order for enforcement in the Provincial Court of British Columbia, Small Claims division as a judgment.

Conclusion

For the reasons set out above, the One Month Notice to End Tenancy for Cause dated March 7, 2022 is hereby cancelled and the tenancy continues.

I hereby grant a monetary order in favour of the tenants as against the landlord pursuant to Section 67 of the *Residential Tenancy Act* in the amount of \$100.00 and I order that the tenants be permitted to reduce rent for a future month by that amount or may otherwise recover it.

This order is final and binding and may be enforced.

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: June 20, 2022

Residential Tenancy Branch