



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes ET

Introduction

This hearing dealt with the landlord's Application for Dispute Resolution (application) seeking remedy under the *Residential Tenancy Act* (Act) for an urgent application about a tenant who poses an immediate and severe risk to the rental property, other occupants or the landlord and for an order of possession pursuant to section 56 of the Act.

The landlord, counsel for the landlord, PO (counsel), a witness for the landlord, MB (witness) and tenant SG (tenant) attended the teleconference hearing. All participants were affirmed except for counsel who already swore an oath when called to the BC Bar. The parties and counsel were provided the opportunity to provide affirmed testimony, and were provided the opportunity to present evidence submitted in accordance with the Residential Tenancy Branch (RTB) Rules of Procedure (Rules) and makes submissions to me.

Preliminary and Procedural Matters

Pursuant to RTB Rule 10.2, I have excluded all evidence that was not submitted by the landlord at the time the application was filed. RTB Rule 10.2 applies as it relates to Expedited Hearings, which this application before me is, and states:

10.2 Applicant's evidence for an expedited hearing

An applicant must submit all evidence that the applicant intends to rely on at the hearing with the Application for Dispute Resolution.

Issue to be Decided

- Is the landlord entitled to end the tenancy early and obtain an order of possession based on section 56 of the Act?

Background and Evidence

A fixed-term tenancy began on May 1, 2022 and converts to a month-to-month tenancy after April 30, 2023. Monthly rent in the amount of \$1,850.00 is due on the first day of each month.

The landlord has applied for an order of possession to end the tenancy early based on the following:

Tenants contravening a material term of the tenancy agreement and the smoking/cannabis use is causing distress and health issues to myself and my pets.

[Reproduced as written]

Landlord's evidence:

The landlord stated that they were first impacted by the tenants regarding open windows on May 8th, resulting in a caution letter, which was not submitted for my consideration as the landlord stated they did not think it was relevant as it did not mention smoking and was related to windows being left open.

The landlord testified that on May 23, 2022 the tenants were issued a caution letter via email and the landlord said the tenants did not change their behaviour. The landlord insisted that when the tenants were interviewed by the landlord, the tenants denied being smokers and that the landlord advised the tenants that they were highly allergic to smoke including cannabis and other scents. The tenants signed the tenancy agreement, with clause 44 which states as follows:

44 **SMOKING.** The tenant agrees to the following material term regarding smoking

☒ No vaping or smoking of any combustible material is permitted on the residential property, including within the rental unit.

☐ Vaping or smoking of tobacco products only is limited to within the rental unit.

☐ Vaping or smoking of tobacco products only is limited to the area described as _____

Counsel submits that on May 8, 2022, the landlord suspected that there was smoking in the rental unit and by May 9, 2022, the landlord could smell smoke. Counsel referred to two emails sent on May 21, 2022 and May 22, 2022. The first email being what the landlord describes as a “friendly reminder” not to smoke or it will be a breach of a material term of the tenancy agreement and must stop immediately. The second email on May 22, 2022 the landlords follows up with the following which reads in part:

After emailing the note yesterday regarding “no smoking or cannabis in the suite or on the property” AS PER THE CONTRACT...I again today am smelling the stink...and I have a witness to the smell. The smell is affecting my health and is disgusting...I hardly slept last night as my allergies were affected so badly and my cat was crying through the night...it smells so bad in my lower level and the smell is comes upstairs as well. THIS MUST STOP IMMEDIATELY!!!

Counsel referred to several colour photos, one of the landlord with a red face that counsel described as “allergies.” Another photo was a photo of dog vomit on a dog ramp, while another photo was what counsel stated was their dog “squinting due to the smoke”. Two other photos show the same cigarette but one taken close up and the other photo taken at a distance.

Counsel then presented a letter from the landlord’s veterinarian (vet) dated May 26, 2022 (Vet Letter) and a letter from the landlord’s family physician dated May 24, 2022 (Doctor Letter). The Vet Letter reads in part as follows:

Ms. [REDACTED] has been a client of mine since 2014 and in the time that I have worked with her she has been an excellent client giving her pets the best possible care available.

I have been a veterinarian for almost 33 years mainly working with cats and dogs. I was very alarmed when Ms. [REDACTED] informed me that her current pets were being constantly exposed to nicotine smoke from tenants in her suite.

[REDACTED] her Shih Tzu, has allergies, which is common with this breed, requiring constant medication. Exposure to said smoke will exacerbate these allergies as she is already seeing, with him having very irritated eyes. He is suffering greatly at this time from the constant exposure to said smoke. The long-term effects of such smoke can have devastating effects on a dog’s health in general and especially ones with allergies.

[REDACTED] her cat has been seen gasping for breath at times since being exposed to this smoke. On-going exposure to said smoke will also cause significant long term health issues. [REDACTED] is particularly prone to respiratory issues being significantly overweight.

[Personal information redacted to protect privacy]

I am [REDACTED]'s family physician. She suffers from severe environmental allergies which causes her to have significant debilitating symptoms. She is extremely sensitive to scents and smoke (both nicotine or cannabis). She is currently in a situation where she is being exposed to smoke and scents daily in her home by renters. This is causing affecting her sleep, breathing and ability to concentrate. This is a very stressful and anxiety provoking situation for her.

It is strongly recommended that this exposure cease as soon as possible.

[Personal information redacted to protect privacy]

1. The witness did not witness smoking on the property.
2. The witness could smell tobacco/cannabis.
3. The witness first noticed the smell on May 8 or 9, 2022.
4. The witness saw the tenant smoking just off the property.
5. The witness smelled smoke during an inspection.
6. The witness could smell smoke in the rental unit living room, under the kitchen sink, bedroom and hallway.
7. The witness confirmed the smoke has affected the landlord causing coughing, eyes watering and nose dripping.
8. The witness confirmed smoke was not coming from anywhere else and was not possible.

Tenant Cross-Examination

- A. The witness only saw the tenant smoking off the property.
- B. The witness confirmed they absolutely did not think the landlord made a mistake regarding the smoke and disagreed with the tenant that the unit was well kept.

[Witness excused]

The landlord was asked if they have served a 1 Month Notice to End Tenancy for Cause on the tenants. Counsel stated that the landlord has had "no time due to how severe the issue is."

Tenant's evidence:

The tenant confirmed they received the caution letters from the landlord but denies smoking inside the rental unit or on the rental property. The tenants stated that they have the "odd smoke when drinking and that we go off the property at the corner to

smoke occasionally but that does not make us smokers.” The tenant also confirmed that they signed clause 44 of the tenancy agreement.

The tenant states that according to the wording of the tenancy agreement they have complied and even gave away their puppy so they could move into the unit. The tenant stated that to turn around and do a juvenile behaviour would not make sense. The tenant denied smoking cannabis and that any smoking has been off of the property. The tenant reiterated that smoking an occasional cigarette does not make them a smoker.

The tenant testified that they have invited the landlord in to inspect the rental unit on 6 occasions, and the landlord has only inspected on May 24, 2022. The tenant claims that if an unbiased third party was to inspect the rental unit, they would find that it does not smell like smoke, as claimed by the landlord and the landlord’s “friends”.

The tenant claims that the landlord sends text complaints to them late into the night when they are sleeping and that for the unit to smell like smoke as they landlord describes, the entire rental unit would have to be engulfed in smoke. The tenant denies smoking on the property or inside the rental unit.

The tenant stated that it is allergy season and that the tenant also suffers from seasonal allergies and that allergies are bad for everyone, not just the landlord. The tenant stated that the tenancy agreement does not prohibit smoking off the property and that the tenants would never do anything to disrespect the landlord’s home.

The tenant alleged that the landlord may be stereotyping her partner who is First Nations and that all attempts to discuss a solution were met with the landlord being too stressed to talk about it. The tenant stated that they had to increase their medications due to the stress this has caused on the tenants. The tenant stated that they feel the landlord doesn’t like us smoking the odd cigarette here and there and that they even offered to supply a nicotine testing kit.

The tenant stated the rental unit is fully furnished and that a previous tenant was evicted for smoking so that it could be residual smoke smell. The tenant stated they don’t know how else to prove they are not smoking. The tenant stated that this is new to them and that they have never had an experience like this and have good references. The tenant expressed concern about facing possible homelessness.

Supplemental response by landlord:

The landlord testified that the tenants did not have a dog when they were interviewed for the rental unit so that the tenant is not being truthful. The landlord stated the furniture was new but then admitted that a previous tenant had used the furniture, which would not make it new for the tenancy before me. The landlord denies refusing to talk to the tenants about this issue.

Analysis

Based on the documentary evidence and the testimony during the hearing and on a balance of probabilities, I find the following.

Section 56 of the *Act* indicates:

56 (1) A landlord may make an application for dispute resolution to request an order

(a) ending a tenancy on a date that is earlier than the tenancy would end if notice to end the tenancy were given under section 47 [*landlord's notice: cause*], and

(b) granting the landlord an order of possession in respect of the rental unit.

(2) The director may make an order specifying an earlier date on which a tenancy ends and the effective date of the order of possession **only if satisfied, in the case of a landlord's application,**

(a) the tenant or a person permitted on the residential property by the tenant **has done any of the following:**

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

(ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant;

(iii) put the landlord's property at significant risk;

(iv) engaged in illegal activity that

(A) has caused or is likely to cause damage to the landlord's property,

(B) has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property, or
(C) has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord;

(v) caused extraordinary damage to the residential property, **and**

(b) it would be unreasonable, or unfair to the landlord or other occupants of the residential property, to wait for a notice to end the tenancy under section 47 [landlord's notice: cause] to take effect.

[emphasis added]

As mentioned during the hearing, section 56 of the Act includes a **two-part test**, and the burden of proof is on the landlord to prove both parts of that test. The second part of the test is that it would be unreasonable, or unfair to the landlord or other occupants of the residential property, to wait for a notice to end tenancy under section 47 to take effect. RTB Policy Guideline 51 – Expedited Hearings reads in part as follows:

Applications to end a tenancy early are for very serious breaches only and require sufficient supporting evidence. An example of a serious breach is a tenant or their guest pepper spraying a landlord or caretaker.

[emphasis added]

Given the above, I find that smoking by the tenant(s) would not meet the high burden of proof to support the second part of the two-part test as I find it would not be unreasonable or unfair to the landlord to wait for a notice to end tenancy under section 47 to take effect (1 Month Notice to End Tenancy for Cause, aka 1 Month Notice).

In addition, I will address the response to my question about whether a 1 Month Notice was issued. Counsel stated that there was “no time due to how severe the issue is.” I am not persuaded by that response and find that if there was time to serve the application before me on the tenants, there was also sufficient time to serve a 1 Month Notice at the same time.

Based on the above, I find that I do not need to consider the first portion of the two-part test, as the landlord has provided insufficient evidence of the second portion noted above.

In reaching this decision, I agree with the tenant that it is currently allergy season and that regardless of smoking, many people are impacted by seasonal allergies and I do not find the photo evidence from the landlord persuasive in terms of ending a tenancy without a 1 Month Notice.

Given the above, I **dismiss** the landlords' application due to insufficient evidence, without leave to reapply.

The filing fee is not granted as a result.

The tenancy shall continue until ended in accordance with the Act.

The landlord is at liberty to issue a 1 Month Notice.

Conclusion

The application fails in its entirety.

The filing fee is not granted.

This decision will be emailed to both parties.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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 28, 2022

Residential Tenancy Branch