



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding PENINSULA PROPERTY MANAGEMENT
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, OLC, FFT

Introduction

Pursuant to section 58 of the Residential Tenancy Act (the Act), I was designated to hear an application regarding the above-noted tenancy. The tenant applied for:

- cancellation of the One Month Notice to End Tenancy for Cause (the Notice), pursuant to section 47;
- an order requiring the landlord to provide services or facilities as required by the tenancy agreement or the Act, pursuant to section 62; and
- an authorization to recover the filing fee for this application, under section 72.

Both parties attended the hearing. The landlord was represented by manager TV. Witness for the landlord MS also attended. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

At the outset of the hearing the attending parties affirmed they understand the parties are not allowed to record this hearing.

Per section 95(3) of the Act, the parties may be fined up to \$5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than \$5,000.00."

As both parties were present service was confirmed. The parties each confirmed receipt of the application and evidence (the materials). Based on the testimonies I find that each party was served with the respective materials in accordance with section 89 of the Act.

I note that section 55 of the Act requires that when a tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a landlord I must consider if the landlord is entitled to an order of possession if the Application is dismissed and the landlord has issued a notice to end tenancy that is compliant with the Act.

Preliminary Issue – Correction of the Tenant's Name

At the outset of the hearing the tenant corrected the spelling of his first name. Pursuant to section 64(3)(a) of the Act, I have amended the tenant's application.

Preliminary Issue - Unrelated Claims

Residential Tenancy Branch Rule of Procedure 2.3 states that claims made in an application for dispute resolution must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

It is my determination that the priority claim regarding the Notice and the continuation of this tenancy is not sufficiently related to any of the tenant's other claims to warrant that they be heard together.

The tenant's other claims are unrelated in that the basis for them rests largely on facts not germane to the question of whether there are facts which establish the grounds for ending this tenancy as set out in the notice. I exercise my discretion to dismiss all of the tenant's claims with leave to reapply except cancellation of the notice to end tenancy which will be decided upon.

Issues to be Decided

Is the tenant entitled to:

1. Cancellation of the Notice?
2. An authorization to recover the filing fee?

If the tenant's application is dismissed, is the landlord entitled to an order of possession?

Background and Evidence

While I have turned my mind to the evidence of the attending parties, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the tenant's claims and my findings are set out below. I explained rule 7.4 to the attending parties; it is the landlord's obligation to present the evidence to substantiate the Notice.

Both parties agreed the tenancy started on March 01, 2021. Monthly rent is \$656.00, due on the first day of the month. At the outset of the tenancy a security deposit of

\$325.00 was collected and the landlord holds it in trust. The tenancy agreement was submitted into evidence. It states:

3. The Tenant covenants and agrees as follows:

3.12 To ensure that "No Vaping or Smoking" of any combustible material is permitted on the residential property, including within the premises;

Both parties agreed the tenant received the Notice on May 17, 2022. The tenant submitted this application on May 24, 2022 and continues to occupy the rental unit.

The landlord submitted the Notice into evidence. It is dated May 17, 2022 and the effective date is June 30, 2022. The reason to end the tenancy is "Breach of a material term of the tenancy agreement that was not corrected within a reasonable period after written notice to do so".

The details of the cause are:

Warning letter sent Aug 17, 2021 for breach of a material term of lease: smoking in the rental unit.

May 16, 2022 - Visual inspection - evidence of smoking in the unit.

May 13, 2022 - smoking in unit.

Both parties agreed the tenant is not allowed to smoke in the rental unit.

The landlord affirmed the rental building's caretaker inspected the rental unit on August 16, 2021 because she noticed tobacco smoke pollution around the tenant's rental unit and the caretaker confirmed that there was smoke pollution in the tenant's rental unit after the inspection.

The tenant stated the caretaker did not enter his rental unit and talked with him at the rental unit's front door. The tenant testified the caretaker informed him that she smelled a mild smoke pollution, and he informed the caretaker that he does not smoke in the rental unit.

The tenant said that he used to smoke outside the rental building once or twice per week and on December 01, 2021 the tenant completely stopped smoking.

The tenant affirmed that other occupants smoke on his rental unit's floor and that smoke pollution could come from any unit.

The tenant confirmed receipt of the August 17, 2021 letter:

It has come to our attention you have been smoking within your unit. This is a breach of a material term of your tenancy per 5(g). Additional Terms which states:

“Smoking. No smoking of any combustible material is permitted on the residential property, including within the rental unit.”

We remind you that [rental unit] is a smoke free building, tenants that wish to smoke must be at least six feet away from the residential property. You are hereby ordered to cease any smoking/vaping activities in the unit or on the residential property. Any further breach may result in a One Month Notice to End Tenancy with Cause.

We thank you for your anticipated co-operation and understanding in this matter.

Should you have any questions or concerns, please contact the undersigned.

The landlord stated the caretaker smelled smoke pollution around the tenant’s rental unit again on April 15, 2022 and the landlord scheduled a rental unit’s inspection for April 18, 2021. The tenant asked to change the inspection to April 19, 25 and 28 because he was taking a course.

MS testified that he inspected the unit on April 28, 2022 and he could only smell bacon and onion. The tenant said he cooked breakfast before the inspection and that is why MS smelled bacon. The April 28, 2022 inspection report states: “smells like bacon”.

The landlord affirmed the tenant cooked bacon for MS not to notice the smoke pollution.

On May 13, 2022 the caretaker texted the landlord:

Hi, I went for a coffee and when I step out of the exit door (below [the rental unit]) I could smell the cigarette smoke. Took a look at the second floor and who had the window full open?

The tenant’s rental unit is on the 2nd floor. The tenant stated that if someone smokes on his floor the smoke pollution would not be noticeable from the ground floor.

MS inspected the rental unit again on May 16, 2022. The May 16, 2022 inspection report (the May report) states: “smell smoke”. The tenant testified that MS added the sentence “smell smoke” after he signed the May report. The tenant said he did not take a photograph of the May report after he signed it because he trusted MS. The tenant affirmed that MS texted him confirming that the May report originally did not contain the sentence “smell smoke”.

MS stated he can not recall if he noticed smoke pollution on May 16, 2022. Then MS testified that “whatever I wrote on the report was there” and that he did not add sentences after the tenant signed the May report. MS said that he believes the sentence “smell smoke” was on the report when the tenant signed the May report. Later MS affirmed that he is sure the sentence was on the report when the tenant signed it.

The landlord stated that MS did not see smoking paraphernalia in the rental unit. The landlord did not receive smoke pollution complaints from other occupants.

The tenant testified that the landlord is accusing other occupants that do not smoke of smoking on the 5th floor. The landlord said she is not aware of other occupants smoking on the 5th floor.

Analysis

I accept the undisputed testimony that the tenant received the Notice on May 17, 2022. I find the tenant disputed the Notice within the time frame of section 47(4) of the Act.

Pursuant to Rule of Procedure 6.6, the landlord has the onus of proof to establish, on a balance of probabilities, that the notice issued to end tenancy is valid. This means that the landlord must prove, more likely than not, that the facts stated on the notice to end tenancy are correct and sufficient cause to end the tenancy.

Section 47(1)(d) and (h) of the Act state:

- (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 testimony of the parties in regard to the August 16, 2021 inspection was conflicting. When one party provides testimony of the events in one way, and the other party provides an equally probable but different explanation of the events, the party making the claim (in this case the landlord) has not met the burden on a balance of probabilities and the claim fails.

The landlord did not provide any documentary evidence to support her claim that the caretaker entered the rental unit and inspected it on August 16, 2021. I find the landlord failed to prove, on a balance of probabilities, that the caretaker inspected the rental unit on August 16, 2021.

The tenant explained why he rescheduled the April 15, 2022 inspection three times and why the rental unit had a bacon odour on April 28, 2022.

The landlord did not provide any documentary evidence to support her claim that smoke pollution originating on the second floor can be noticeable from the ground floor and that the tenant cooked bacon for MS not to notice the smoke pollution. I find the

landlord failed to prove, on a balance of probabilities, that the smoke pollution originating on the second floor can be noticeable from the ground floor and that the tenant cooked bacon for MS not to notice the smoke pollution in the rental unit.

I find that MS's testimony about noticing smoke pollution in the rental unit on May 16, 2022 and about adding the sentence "smell smoke" to the May report after the tenant signed it was vague. I find that the tenant's testimony stating that the May report did not contain the sentence "smell smoke" when he signed it was convincing. I find the landlord failed to prove, on a balance of probabilities, that the May report contained the sentence "smell smoke" when the tenant signed it and that the rental unit had smoke pollution on May 16, 2022.

I accept the uncontested testimony that the landlord did not see smoking paraphernalia in the rental unit and that the landlord did not receive smoke pollution complaints from other occupants.

I find the tenant's testimony affirming that he only smoked outside the rental building was convincing.

Based on the above, I find the landlord failed to prove, on a balance of probabilities, the grounds of the Notice. Accordingly, the Notice is cancelled and of no force or effect.

As the tenant is successful with this application, pursuant to section 72 of the Act, I authorize the tenant to recover the \$100.00 filing fee. I order that this amount may be deducted from the next rent payment.

Conclusion

The One Month Notice dated May 17, 2021 is cancelled and of no force or effect. This tenancy will continue in accordance with the Act.

Pursuant to section 72(2)(a) the tenant is authorized to deduct \$100.00 from the next rent payment to recover the 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: July 26, 2022

Residential Tenancy Branch