



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Introduction

This hearing was convened in response to an application by the Tenant pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

1. An Order cancelling a notice to end tenancy - Section 47; and
2. An Order to recover the filing fee for this application - Section 72.

The Parties were each given full opportunity under oath to be heard, to present evidence and to make submissions. The Parties each confirmed that no recording devices were being used by them for the hearing.

Preliminary Matter

The Landlord states that they have not received the Tenant’s evidence and seek an adjournment in order to obtain that evidence. The Landlord states that they are waiting to see that evidence before providing their own. The Tenant states that the evidence was given to the building manager in person. The Tenant cannot recall the date. The Tenant is opposed to an adjournment as the matter had taken too long already. It is noted that the Tenant made its application to dispute the notice to end tenancy on May 19, 2022.

Where a tenant disputes a notice to end tenancy the landlord carries the burden of proof that the reasons for the notice are valid. The Landlord’s evidence to support the notice to end tenancy would have to have been present at the time the notice was served and should have been available without receipt of the Tenant’s evidence. Further, the

Tenant is prejudiced in providing their own evidence to rebut the Landlord's evidence by not knowing the case against them where the Landlord does not provide supporting evidence of the validity of the notice. I accept that an adjournment would prejudice the Tenant given the time that has elapsed since the Tenant's application. For this and the above reasons I decline to adjourn the matter. As the Tenant's evidence of provision of their evidence to the Landlord is vague, I find on a balance of probabilities that the Tenant has not substantiated that their evidence was provided to the Landlord. I therefore decline to consider the Tenant's supporting evidence. Each Party was given opportunity to provide their testimony.

Issue(s) to be Decided

Is the notice to end tenancy valid for its reasons?

Is the Tenant entitled to an order cancelling the notice to end tenancy?

Is the Tenant entitled to recovery of the filing fee?

Background and Evidence

The following are agreed or undisputed facts: The tenancy under written agreement started on May 31, 2021. Rent of \$1821.92 is payable on the first day of each month. At the outset of the tenancy the Landlord collected \$500.00 as a security deposit. The Landlord gave the Tenant a two month notice to end tenancy dated May 16, 2022 (the "Notice"). The Notice sets out several reasons and includes details.

The Landlord states that the Tenant has breached a material term of the tenancy that prohibits smoking in the unit. The Landlord points to section 31 of the addendum terms. The Landlord states that the Tenant smoked on the balcony of the unit. The Landlord states that the Tenant was given a letter about the breach, referring to the section in the addendum, however no time was set out in the letter for the Tenant to resolve the breach. The Tenant states that a guest of the Tenant who was not aware of the smoking prohibition smoked on the balcony.

The Landlord states that the Tenant committed illegal acts by breaching various sections of the tenancy agreement, including smoking and partying.

The Landlord states that the Tenant caused serious jeopardy and significant interference or unreasonable disturbance during the summer of 2021 and again on April 28, 2022 by playing loud music “after quiet hours”. The Landlord states that the upper tenant complained about the noise and that it woke this tenant up. The Landlord has no idea how long the noise lasted and states that the upper tenant was “just upset because the toddler was having problems sleeping”. The Tenant states that the music was playing in the afternoon and that the upper unit tenants do not have a toddler.

Analysis

Section 47 of the Act provides that landlord may end a tenancy by giving notice to end the tenancy if, inter alia,

- 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,
 - (ii)seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant;
- the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that
 - (ii)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
 - (iii)has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord; and
- the tenant
 - has failed to comply with a material term, and

- has not corrected the situation within a reasonable time after the landlord gives written notice to do so.

As the evidence of noise from the summer of 2021 occurred over a year ago and as the Landlord did not seek to evict the Tenant at that point in time, I consider that this evidence is too remote in time to now be considered significant, unreasonable or serious. I find that the Notice is therefore not valid for this period of time. As the Landlord provided no supporting evidence from any tenant about being disturbed by noise on April 28, 2022 and no evidence of how long the music played, I find that the Landlord has not provided sufficient evidence that the Tenant did anything on that date to significantly interfere or unreasonably disturb another tenant or the landlord. Further this was a one-time occurrence that by itself cannot be considered significant or unreasonable.

Policy Guideline #32 provides as follows:

The term "illegal activity" would include a serious violation of federal, provincial or municipal law, whether or not it is an offense under the Criminal Code. It may include an act prohibited by any statute or bylaw which is serious enough to have a harmful impact on the landlord, the landlord's property, or other occupants of the residential property.

Breaches of the tenancy agreement is not evidence of illegal activity. As the Landlord has not provided evidence of illegal activity, I find that the Notice is not valid for this reason.

Policy guideline #8 sets out the requirements for ending a tenancy agreement for breach of a material term: the party alleging a breach, whether landlord or tenant, must inform the other party in writing:

- that there is a problem;
- that they believe 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 party will end the tenancy.

There is no evidence that the Landlord included deadline for the smoking breach in their letter to the Tenant. Further it is undisputed that the smoking was done by a guest and there is no evidence of any further breach. For these reasons, even if the term were material, I find that the breach was remedied. The Notice is therefore not valid for this reason.

As none of the reasons for the Notice have been found valid, I cancel the Notice and the tenancy continues. As the Tenant has been successful with their claim, I find that the Tenant is entitled to recovery of the **\$100.00** filing fee and the Tenant may deduct this amount from future rent in full satisfaction of this claim.

Conclusion

The Notice is cancelled and then tenancy continues.

I grant the Tenant an order under Section 67 of the Act for **\$100.00**. If necessary, this order may be filed in the Small Claims Court and enforced as an order of that Court.

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

Dated: October 3, 2022

Residential Tenancy Branch