

DECISION

Dispute Codes **OPC; FFT, CNC**

Introduction

This hearing dealt with an application by the landlord under the *Residential Tenancy Act* (the *Act*) for the following:

- An order for possession under a One Month Notice to End Tenancy for Cause ("One Month Notice") pursuant to sections 47 and 55;

This hearing also dealt with an application by the tenant under the *Residential Tenancy Act* (the *Act*) for the following:

- Cancellation of One Month Notice to End Tenancy for Cause ("One Month Notice") pursuant to section 47;
- An order requiring the landlord to reimburse the tenant for the filing fee pursuant to section 72.

The landlord attended with the agents FL and JL ("the landlord"). The tenant attended.

The parties were given a full opportunity to be heard, to present affirmed testimony, make submissions, and call witnesses. I explained the hearing process and provided the parties with an opportunity to ask questions.

No issues of service were raised. I find each party served the other in compliance with the *Act*.

The parties confirmed they were not recording the hearing.

The parties confirmed their email addresses to which the Decision shall be sent.

Settlement Discussions

I explained the hearing and settlement processes, and the potential outcomes and consequences, to both parties. Both parties had an opportunity to ask questions, which I answered. Neither party made any adjournment or accommodation requests. I informed both parties that I could not provide legal advice to them. I informed them I make my Decision after the hearing and not during the hearing.

Pursuant to section 63 of the *Act*, the Arbitrator may assist the parties to settle their dispute and if the parties do so during the dispute resolution proceedings, the settlement may be recorded in the form of a Decision or an Order.

The Arbitrator assisted the parties in efforts to settle the matter. Settlement discussions were unsuccessful, and the hearing continued.

Issue(s) to be Decided

Is the tenant entitled to an Order cancelling the One Month Notice and reimbursement of the filing fee?

Is the landlord entitled to an Order of Possession?

Background and Evidence

Considerable testimony was submitted in a lengthy hearing of 69 minutes. The landlord submitted documentary evidence. Two agents attended for the landlord.

I have reviewed all evidence before me that met the requirements of the Act and the Rules of Procedure. Not all this evidence is referenced in my Decision. I refer to only the relevant and key evidence regarding the facts, the issues and my findings.

Background

A copy of the tenancy agreement was submitted. The agreement is silent regarding smoking in the unit.

The landlord testified about the background of the tenancy as follows:

Information	Details
Type of tenancy	Monthly
Beginning date	May 1, 2021
Vacancy date	Ongoing tenancy
Rent Payable on First of Month	\$2,200.00
Security deposit	\$1,100.00
Pet Deposit	\$1,100.00

One Month Notice

The parties agreed the landlord issued a One Month Notice to the tenant, a copy of which was submitted in the RTB form. The tenant acknowledged personal service. The Notice is dated May 13, 2022, and has an effective date of June 30, 2022.

The Notice gives the following reasons for issuance:

Tenant or a person permitted on the property by the tenant has (check all boxes that apply):

- 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. put the landlord's property at significant risk.

Landlord's Submissions

The unit is a basement suite in a house in which there is a tenant with a young child upstairs ("the upstairs tenant").

The landlord testified the details in the One Month Notice are correct as follows (as written):

Details of the Event(s):

The upstairs tenant [name] on multiple occasions complained of smoke/marijuana emanating from the downstairs unit occupied by [tenant]. This is of especial concern because her 5 year old son lives in the house and she has concerns about marijuana affecting her son's growth and development.

On Jan. 20, 2022 at approximately 3-15pm. we received a complaint from [upstairs tenant] and my brother [JL] went to investigate and confirmed the presence of marijuana coming from the downstairs unit both by visiting the upstairs unit first and then the downstairs unit.

[JL] verbally told [tenant] not to smoke marijuana on the premises at that time. On a phone call with me, we compromised and I said he could smoke marijuana as long as it was not in the building including garage and as long as he did not allow the smell to enter the building {e.g. - by smoke beside the house below an open window or leaving the garage door open)

I then sent an email on January 24 to [tenant] emphasizing the same.

On Feb. 17, 2022 at approximately 8pm we received another complaint from from [upstairs tenant] that my brother [JL] went to investigate and

confirmed the presence of marijuana coming from the downstairs unit again.

On March 9, 2022 we gave [tenant] his 2nd warning in writing triggered by the Feb. 17th incident and this time I delivered the letter by hand.

Today, May 12th, 2022, we again got a complaint from from [upstairs tenant] and both my brother and I went to investigate. We smelled marijuana in the upstairs unit and ttien went downstairs and I could also smell marijuana

When confronted with smoking marijuana again in the "house", [tenant] claimed he was only smoking marijuana in the garage. The garage is attached to the house with doors and venting leading to the rest of the house

If should be noted that there were other complaints from from [upstairs tenant] of marijuana coming from downstairs between Jan. 20th and May 12th where we were unable to investigate, so this is an on going and continuing issue even after repeated warnings.

The landlord submitted a copy of a letter of complaint from the upstairs tenant dated January 11, 2022:

The downstairs tenant is a chronic week smoker and impacts our ability to breath safely. The overwhelming smoke causes headaches and nausea – occasionally he smokes outside, but he regularly fills the whole house up with smoke as it is right now. This has been going on for months.

The landlord submitted a copy of the complaint of the upstairs tenant dated January 20, 2022:

Hi [landlord], is there any chance your brother would be able to covme over now? As the house is filled with it. He has been smoking in the house but it's usually around midnight.

The landlord sent an email to the tenant dated January 24, 2022:

So for the marijuana smoking, just so it's in writing, I have no problem with you smoking marijuana outside so long as you do not allow the fumes to come inside the building. When my brother was there on Thursday, he did smell marijuana in the garage, which is inside the building. If you are smoking outside and the garage door is open, that could be how the smell ended up inside. I trust that you will be able to find a solution to ensure that smoke/smells from marijuana do not enter the building going forward.

The landlord testified the tenant verbally agreed to only smoke outside.

The upstairs tenant wrote a letter of complaint dated February 6, 2022 stating, "I've been woken up once again to the smell of weed"

The landlord gave a second letter of warning to the tenant dated March 9, 2022, reminding him "that smoking, marijuana use, and/or drugs is not permitted inside the house/building and that it is your responsibility to ensure odours/smoke from such use (when outdoors) does not enter the house".

The tenant replied to the landlord by text of March 26, 2022, a copy of which was submitted claiming the landlord was treating him "unfairly" as the upstairs tenant was harassing the tenant. As well, the tenant claimed the landlord was entering his unit without warning.

On May 11 and 12, 2022, the upstairs tenant sent emails of complaint to the landlord requesting that the landlord tell the tenant, "not to smoke weed in the house". In the latter email, the upstairs tenant stated the tenant "started smoking again after your guys left – it's the same". She stated she could not have her son "come home to this smell" which was "overwhelming".

On May 13, 2022, the landlord issued the One Month Notice as described above.

The landlord testified the upstairs tenant continued to complain about the smell after the One Month Notice was issued.

The landlord testified as follows. They did not enter the tenant's unit. They could smell the smoke in the upstairs tenant's unit. The smoke sometimes came through the air vents connecting the two units. The landlord concluded from their investigation that the tenant was smoking marijuana in his unit.

The landlord denied ever agreeing with the tenant that he could smoke in the house or grow/dry marijuana inside the garage, which is part of the building.

Tenant's Submissions

The tenant acknowledged that he agreed to smoke outside the building. He denied ever smoking in the building. He claimed the landlord's evidence was false and fabricated.

The tenant claimed the upstairs tenant was complaining as retaliation over other incidents that had occurred between them, saying, "she has it out for me" and "she trying to get rid of me".

The tenant acknowledged that the upstairs tenant is right in not wanting to expose her child to marijuana smoke and said he is a parent as well. He testified he would never expose a child to marijuana smoke.

The tenant acknowledged that he grew and dried marijuana in the garage which is part of the building but is currently not doing so. He suggested that the odour may have this historical origin. The tenant claimed the landlord agreed he could do this which the landlord denied.

Summary

The landlord requested an Order of Possession/

The tenant requested the application be dismissed without leave to reapply.

Analysis

Credibility

Given the conflicting testimony, I have considered credibility. A useful guide in that regard, and one of the most frequently used in cases such as this, is found in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), which states at pages 357-358:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions.

In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

Considering the testimony and evidence in its totality, I find the landlord's submissions to be persuasive, credible, and forthright. The landlord provided consistent, logical, testimony supported by well-organized and complete documentary evidence. The testimony was supported in all material aspects by documentary evidence including the repeated written complaints of the upstairs tenant and the personal investigations of the landlord.

I acknowledge that the tenant disagreed with the landlord's evidence, particularly the basis for the complaints and underlying motivation of the upstairs tenant.

However, I do not find the tenant's submissions to be persuasive. I find the suggestion that the landlord and the upstairs witnesses are being untruthful or are exaggerating to be unsupported by the evidence. I also find the landlord has not entered the tenant's unit and testified only to the smell observed elsewhere in

the building, concluding reasonably the tenant was smoking in his unit despite his agreement to smoke outside.

Based on the foregoing, I prefer the landlord's evidence to the tenant's version of events. I accept the documentary evidence of the landlord in its entirety. For these reasons, where the evidence of the parties conflict, I prefer the landlord's version.

Two Month Notice

Section 47 of the Act allows a landlord to end a tenancy on one month's notice for certain reasons.

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

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, ...
- (ii) seriously jeopardized the health or safety or lawful right of another occupant or the landlord. put the landlord's property at significant risk.

Pursuant to section 88 of the Act, and based on the submissions of both parties, the landlord issued and served the Notice as stated above. The tenant filed the Application for Dispute Resolution within the time allowed.

Therefore, the burden shifts to the landlord to prove the reasons on the Notice. The landlord must now show on a balance of probabilities, which is to say, it is more likely than not, the tenancy should be ended for the reasons identified in the Notice.

Findings as to Cause

I find as follows. The tenant agreed to smoke marijuana outside the building in a conversation with the landlord in January 2022 following the warning letter. The complaints of the upstairs tenant are that the smell is unacceptable and frequent despite this agreement. The tenant continued to smoke in the unit despite multiple complaints from the upstairs tenant and two written warnings of the landlord. The landlord verified the smell and the source by attending at the unit on multiple occasions. The landlord properly and reasonably concluded the tenant was smoking marijuana in his unit.

I find the tenant was cognisant of why the landlord was seeking to end the tenancy. Nevertheless, I find the tenant was indifferent and defiant, taking no effective action.

Form of Notice

I find the Notice complies with Section 52.

Conclusion

I find that the landlord has met the burden of proof on a balance of probabilities that the tenant significantly interfered with or unreasonably disturbed the upstairs tenant and the landlord and the Two Month Notice is valid and enforceable.

I dismiss the tenant's application to cancel the Notice and for reimbursement of the filing fee.

As the tenant is still in occupation of the unit, the landlord is therefore entitled to an Order of Possession effective on 2 days Notice.

Conclusion

I grant an Order of Possession to the landlord effective 2 days after service on the tenant. Should the tenant fail to comply with this Order of Possession, the Order of Possession may be enforced as an Order of the Supreme Court of British Columbia.

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: October 06, 2022

Residential Tenancy Branch