



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Nanaimo Affordable Housing
Society and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC

Introduction

Pursuant to section 58 of the *Residential Tenancy Act* (the Act), I was designated to hear an application regarding a residential tenancy dispute. On June 2, 2022 the tenant applied for an order to cancel a One Month Notice to End Tenancy for Cause, dated May 26, 2022 (the One Month Notice).

Procedural History

This hearing was reconvened after being adjourned on October 14, 2022. This decision should be read in conjunction with the Interim Decision issued on October 14, 2022.

The Interim Decision and notices of reconvened hearing (containing the call-in numbers for this hearing) were sent to each of the parties at the emails addresses they provided to the Residential Tenancy Branch.

Each hearing was attended by only the landlord's agent ("the landlord"), who was given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses; they were also made aware of Residential Tenancy Branch Rule of Procedure 6.11 prohibiting recording dispute resolution hearings.

The landlord confirmed that she had received the tenant's Notice of Dispute Resolution Proceeding (NDRP). The landlord testified that they had served their responsive evidence on the tenant by posting it to the door on September 30, 2022 at 3:00 p.m.

Issues to be Decided

Is the tenant entitled to an order to cancel the One Month Notice, and if not, is the landlord entitled to an order of possession?

Background and Evidence

The landlord provided the following particulars of the tenancy. It began December 1, 2020; rent is \$960.00, due on the first of the month; and the tenant paid a security deposit of \$480.00, which the landlord still holds.

A copy of the One Month Notice was submitted as evidence. The landlord testified they served the One Month Notice on the tenant by attaching a copy to the door on May 26, 2022, and submitted a witnessed proof of service form.

The One Month Notice is signed and dated by the landlord, gives the address of the rental unit, states an effective date, states the reason for ending the tenancy, and is in the approved form.

The One Month Notice indicates the reason for the Notice is that the tenant breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

The Details of the Events section of the One Month Notice refers to the tenant admitting to smoking in the unit, it being a non-smoking building, and other tenants being highly allergic to smoke.

The landlord testified that the tenant was served with a warning letter on April 27, 2022. A copy of the letter is submitted as evidence. It states that the landlord has received multiple complaints regarding the tenant smoking cigarettes, and that in the inspection done that day it was found there was a strong smell of cigarette smoke in the unit, and an ashtray was found, along with ashes around the counter. The letter states that the hood fan is stained yellow and smelled of nicotine. The letter states that the tenant has violated section 20 of the tenancy agreement, and her tenancy is at risk.

A copy of the signed tenancy agreement is submitted as evidence. At section 20, it states that smoking is not permitted on the property, other than in the designated outdoor smoking area, or in any area within 6 meters of the building when an outdoor smoking area is not provided.

The landlord also submitted as evidence a record of a May 19, 2022 follow-up call with the tenant regarding her smoking in the unit. It states that the tenant admitted to smoking in the unit, stated that she quit smoking 2 weeks ago, and that staff keep receiving complaints from the tenant's neighbours about the smell of cigarette smoke in the hallway.

The landlord testified that the tenant's neighbours continue to complain that the tenant is smoking in her unit.

The landlord testified that since delivering the evidence package to the tenant in September 2022, she has discussed the issue with the tenant, who said that she continues to smoke in her unit. The landlord submitted that as a result, the tenant understands she must move out as soon as possible. The landlord testified that she has reached a verbal agreement with the tenant and her advocate that the tenant will move out on October 31, 2022, but the landlord is still seeking an order of possession.

The landlord testified that it is very important that people not smoke on the property as the tenants are seniors 65 years old and older, and many of them are on oxygen, have chronic obstructive pulmonary disease, or other health problems that are exacerbated by smoke. The landlord testified that many of the tenants moved into the building specifically as it is designated as non-smoking building to protect the health of the tenants.

The landlord testified that by smoking in her unit, the tenant is putting the health and safety of other tenants at risk.

Analysis

Based on the landlord's evidence, I find the landlord served the tenant the One Month Notice on May 26, 2022, in accordance with section 88 of the Act, and deem the Notice received by the tenant on May 29, 2022, in accordance with section 90 of the Act.

I find the One Month Notice meets the form and content requirements of section 52 of the Act, as it is signed and dated by the landlord, gives the address of the rental unit, states an effective date, states the reason for ending the tenancy, and is in the approved form.

As the One Month Notice was received by the tenant on May 29, 2022, in accordance with section 47(4) of the Act, the deadline to dispute it was 10 days later: June 8, 2022. As the tenant applied to dispute the One Month Notice on June 2, 2022, I find she applied within the deadline.

Section 47(1)(h) of the Act states that a landlord may give notice to end the tenancy if the tenant has failed to comply with a material term, and has not corrected the situation within a reasonable time after the landlord has given written notice to do so.

Rule 6.6 of the Rules of Procedure states:

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.

In this case, the onus is on the landlord to prove that the tenant has failed to comply with a material term, and has not corrected the situation within a reasonable time after the landlord has given written notice to do so.

The landlord has presented testimony and documentary evidence that the tenant smokes in her unit, breaching a material term of the tenancy agreement, and has continued to do so following a written warning issued on April 27, 2022. This evidence includes a copy of the written warning, a record of a follow-up conversation in which the tenant admitted to smoking in the unit, and the landlord's testimony that the tenant's neighbours continue to complain that the tenant is smoking in her unit.

[Policy Guideline 8. Unconscionable and Material Terms](#) defines a material term as a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement. Guideline 8 states that "the question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another."

I find in this case that the non-smoking term in the tenancy agreement is material as the landlord has testified that the tenancies in this property are created to house seniors 65 and older, many of whom have serious health conditions which will be worsened by the presence of cigarette smoke, and that many tenants moved into the building specifically as it is non-smoking, in order to protect their health. Additionally, the landlord has provided undisputed affirmed testimony that the tenant understands that her tenancy must end due to her continuing to smoke in the unit.

Based on the evidence before me, and on a balance of probabilities, I find the landlord is entitled to an order of possession because the landlord has demonstrated that the tenant breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

Therefore, the One Month Notice is upheld, and the landlord is granted an order of possession in accordance with section 55 of the Act.

Conclusion

The tenant's application is dismissed.

The landlord is granted an order of possession.

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: November 08, 2022

Residential Tenancy Branch