Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes ET, FFL

Introduction

The Landlords seek the following relief under the *Residential Tenancy Act* (the "*Act*"):

- an order of possession for an early termination of the tenancy pursuant to s. 56; and
- return of the filing fee pursuant to s. 72.

S.D. appeared as counsel for the Landlord. D.K. appeared as the Landlord and was joined by S.T. who acted as agent for the co-landlord H.K.. M.J. appeared as the Tenant.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

Counsel advised that the landlords served their application and initial evidence on the Tenant by delivering it to her on December 8, 2022. The Tenant acknowledges receipt of the Landlords' application and initial evidence on December 8, 2022 after it was personally delivered to her. I find that the Landlords' application and initial evidence was served in accordance with s. 89 of the *Act*.

The Tenant confirmed that she did not serve response evidence on the Landlords.

Preliminary Issue – Additional Evidence from the Landlords

I was advised by counsel that a second evidence package was served on the Tenant on December 20, 2022 comprising of additional video evidence captured on December 9,

2022. Landlord's counsel explained that the additional evidence was captured after the initial was served and that he was out of country such that it could not be provided until the 20th. Though the Tenant acknowledges receipt of the additional evidence, she says she only received it the day before the hearing and objected to its inclusion.

As this is an expedited hearing, Rule 10.3 of the Rules of Procedure requires the Landlords, as applicants, to serve their application and evidence within one day of receiving the Notice of Dispute Resolution from the Residential Tenancy Branch. Rule 10.6 of the Rules of Procedure permits service of late evidence by application of the new and relevant rule set out under Rule 3.17.

Under the circumstances, I find that the late evidence ought not be included. Leaving aside whether the evidence is material, there is no reasonable explanation for why the Tenant was not served sooner. I note that under Rule 10.5 of the Rules of Procedure the Tenant can serve evidence in response but must serve it at least two days before the hearing. By serving their evidence late, the Landlords have effectively deprived the Tenant of the right to serve response evidence at all. If included, I find that the late evidence would constitute a breach of procedural fairness.

Accordingly, the Landlords' late evidence is not included and shall not be considered by me.

Preliminary Issue – Landlords' Video Evidence

The Landlord has provided various videos captured from a surveillance camera at the property. The Tenant argued that she was unaware of the cameras existence until she was served with the Landlords' evidence and that videos should not be admissible as the constitute a breach of her privacy. The Tenant says that the video looks into the rental unit and says a bed can be seen.

I note that s. 75 of the *Act* permits the inclusion of evidence relevant to a dispute whether or not it would be admissible under the laws of evidence. I would further note that I have not been directed to any rule of evidence which would prohibit the inclusion of evidence in civil procedures even if it constituted a breach of the Tenant's privacy.

Leaving aside whether the videos constitute a breach of privacy, I find that that the videos ought to be admitted into evidence. The dispute pertains to an allegation that the Tenant is smoking at the residential property and that this warrants the application of s.

56 of the *Act*. I am told the videos show the Tenant smoking at the property. It would seem to be directly relevant to the allegations raised such that it ought to be admitted and considered as evidence. I decline to exclude the video evidence as it is directly relevant to the issue in dispute.

Issues to be Decided

1) Are the Landlords entitled to an order of possession without issuing a notice to end tenancy?
2) Are the Landlords entitled to the return of their filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The Tenant moved into the rental unit on April 15, 2018.
- Rent of $1,450.00 is due on the first day of each month.
- The Landlord requested a security deposit of $1,400.00 and a pet damage deposit of $350.00 from the Tenant.

A copy of the tenancy agreement was put into evidence by the Landlord.

Landlords' counsel provided a letter to the Residential Tenancy Branch dated November 30, 2022 advising that the Landlords have served a 10-Day Notice to End Tenancy on October 2, 2022 and a One-Month Notice to End Tenancy on October 24, 2022. I have been provided with a copy of the One-Month Notice to End Tenancy. I understand that a hearing has been set for February 13, 2023.

Counsel advised that the present application was filed due to the Tenant's continued smoking at the residential property, which was argued to pose a health risk to H.K.. I am advised that the rental unit is a basement suite and that the Landlords and their family live in the main portion of the house above the Tenant.

The Landlord and S.T. advised that H.K. has lung cancer and counsel directs me to a letter from H.K.'s physician dated November 21, 2022 confirming this. The physician's

letter notes that “[c]igarette smoke is an irritant and poses a hazard to this patient's health, and it is recommended that he avoid second-hand smoke”. I am told that H.K.’s treatments are directed to prolonging his life but that his cancer is terminal. The Landlord advises that her partner was diagnosed with cancer in November 2021.

Counsel advises that the Landlords have requested the Tenant not smoke at the property and that these requests have gone unheeded. I am directed to a series of text messages pertaining to this issue in the Landlords’ evidence, with the first dated May 8, 2020 and the last one dated September 20, 2022. The Landlords provide video of the Tenant smoking outside the property, which I am told was captured between October 15, 2022 and October 22, 2022.

Both the Landlord and S.T. testified that the Tenant smokes cigarettes and cannabis and that the smoke wafts into the upper portion of the property. I am told that the area in which the Tenant is seen smoking is below the kitchen and the floor above that is H.K.’s bedroom. S.T. testified that H.K. loves the outdoors and has been impeded in his ability to make use of the outdoor space at the property due to the smell of smoke. S.T. described the smoke as being a daily issue.

The Tenant raised concerns with respect to her privacy and the video footage provided by the Landlords. The Tenant does acknowledge smoking outside on the dates captured by the Landlords in the video evidence, though specifically denies smoking within the rental unit. The Tenant testified that she has smudged within the rental unit, though only occasionally. The Tenant advises that smudging is of cultural and religious significance. The Tenant advises that she was unaware of the seriousness of the Landlord’s prognosis.

Both parties made submissions with respect to other issues respecting the tenancy, including mutual allegations of causing noise disturbances. The Landlord and S.T. testify to the degree of stress caused by the Tenant, specifically as it relates to the stress caused to H.K.. The Tenant for her part expressed concerns on keeping her blinds closed due to what she argued was a breach of her privacy.

The parties confirmed that the Tenant continues to reside within the rental unit.

Analysis

The Landlord applies for an early termination of the tenancy pursuant to s. 56 of the *Act*. A landlord may end a tenancy early under s. 56 where a tenant or a person permitted on the residential property by the tenant:

- significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property;
- put the landlord's property at significant risk;
- engaged in illegal activity that has caused or is likely to cause damage to the landlord's property, 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 has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord; or
- caused extraordinary damage to the residential property,

These grounds, as set out in s. 56(2)(a), mirror those found within s. 47(1)(d) to (f). The key difference between ss. 47 and 56 is that under s. 56(2)(b) a landlord is not required to issue a notice to end tenancy on the basis that it would be unreasonable or unfair to the landlord or other occupants of the residential property to wait for a one-month notice given under s. 47 to take effect.

Policy Guideline #51 sets out, at page 4, that applications to end a tenancy early are for very serious breaches only and require sufficient supporting evidence. Policy Guideline 51 provides examples, including acts of assault, vandalism, production of illegal narcotics, and sexual harassment.

Though not specifically argued by the Landlords, the only ground upon which the relief sought could be justified is under s. 56(2)(a)(i) of the *Act*, which is for significant interference or unreasonable disturbances. There is no allegation that the Tenant was causing property damage, putting the Landlord’s property at risk, or that the Tenant has engaged in illegal activity.

The issue with the present application is that the alleged conduct, being smoking at the residential property, would not generally rise to a level of being sufficiently serious to justify the application of s. 56. The key distinction to the present circumstances is that the Landlord, namely H.K., is particularly vulnerable to second hand smoke.

The problem, however, is that there is no nexus between the alleged conduct and the current application. I note by the Landlords' own evidence demonstrates that smoking was raised by them with the Tenant as early as May 2020. In other words, it appears to have been a longstanding issue. According to the Landlord, her husband was diagnosed with cancer in November 2021. The current application was first filed on November 30, 2022, though finalized on December 7, 2022, so approximately one-year after the diagnosis was made.

The Landlords filed the present application after serving two notices to end tenancy, including a One-Month Notice signed on October 24, 2022 in which the smoking issue was cited. The letter from counsel dated November 30, 2022 summarizes that one of the causes for issuing the One-Month Notice was that the "[t]enant is constantly smoking in/around the rental unit".

Within this context, I find it more likely than not that the present application was brought about by the delay caused when the Tenant filed to dispute the notices to end tenancy. Throughout the hearing, the Landlord and S.T. testified to the stress the Tenant was putting the family through. I accept the Landlords are facing one of the most profoundly stressful moments in their lives and I appreciate the sense of urgency to have the matter dealt with. However, the expedited process ought not be used to avoid waiting for standard hearings, particularly when the conduct is not sufficiently serious and appears to have only risen to the fore after the notices to end tenancy were served.

I find that the Landlords have failed to demonstrate that it would be unreasonable or unfair to wait for a notice to end tenancy issued under s. 47 to take effect. Their application under s. 56 of the *Act* is dismissed without leave to reapply.

I wish to note that I have specifically avoided making any findings on whether the Tenant's conduct constitutes an unreasonable disturbance or significant interference. That issue has been squarely raised by the One-Month Notice and whatever findings that are to be made are to be left to the arbitrator assigned to the matter.

Conclusion

The Landlords application under s. 56 of the *Act* is dismissed without leave to reapply.

The Landlords were unsuccessful in their application. I find they are not entitled to the return of their filing fee. Their claim under s. 72 of the *Act* is dismissed without leave to reapply.

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: December 22, 2022

Residential Tenancy Branch