



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CASCADIA APARTMENT RENTALS
LTD. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, OLC, FFT

Introduction

This hearing dealt with an Application for Dispute Resolution (the Application) that was filed by the Tenant on August 8, 2022, under the *Residential Tenancy Act* (the Act), seeking:

- Cancellation of a One Month Notice to End Tenancy for Cause;
- An order for the Landlord to comply with the Act, regulation, and/or tenancy agreement; and
- Recovery of the filing fee.

The hearing was convened by telephone conference call at 11:00 A.M. (Pacific Time) on January 6, 2023, and was attended by the Tenants and two agents for the Landlord A.K. and E.M. (Agents). All testimony provided was affirmed. As the Agents acknowledged service of the Notice of Dispute Resolution Proceeding (NODRP), and stated that there are no concerns regarding the service date or method, the hearing proceeded as scheduled. The parties were provided the opportunity to present their evidence orally and in written and documentary form, to call witnesses, and to make submissions at the hearing.

The parties were advised that pursuant to rule 6.10 of the Residential Tenancy Branch Rules of Procedure (the Rules of Procedure), interruptions and inappropriate behavior would not be permitted and could result in limitations on participation, such as being muted, or exclusion from the proceedings. The parties were asked to refrain from speaking over me and one another and to hold their questions and responses until it was their opportunity to speak. The parties were also advised that pursuant to rule 6.11 of the Rules of Procedure, recordings of the proceedings are prohibited, except as allowable under rule 6.12, and confirmed that they were not recording the proceedings.

Although I have reviewed all evidence and testimony before me that was accepted for consideration as set out above, I refer only to the relevant and determinative facts, evidence, and issues in this decision.

At the request of the parties, copies of the decision and any orders issued in their favor will be emailed to them at the email addresses confirmed in the hearing.

Preliminary Matters

Preliminary Matter #1

Although the Agent A.K. was personally named as the Landlord in the Application, the tenancy agreement in the documentary evidence before me indicates that the Landlord is a named corporation. As a result, I find that A.K. is an agent for the landlord, and I have amended the Application to properly name the corporation as the Landlord.

As only J.A. is listed as a tenant under the Tenancy agreement, and E.D., is listed as one of two occupants of the rental unit, I have also removed them as a named applicant as I find that they are an occupant of the rental unit, and not a tenant under the tenancy agreement, and therefore they do not have a right under the Act to file an Application for Dispute Resolution. Throughout this decision “Tenant” will therefore refer only to J.A.

Preliminary Matter #2

The Tenant and E.D. stated that they sent their documentary evidence to the Landlord by registered mail on December 30, 2022, and by email on January 3, 2023. However, the Agents for the Landlord stated at the hearing that although they had received an email from the Tenant on January 3, 2023, this was only a few days prior to the hearing and in any event, the attachments could not be opened by them. The Agents also stated that they have not yet received the registered mail, and only received a delivery notice yesterday indicating that the package could be picked up on the date of the hearing, January 6, 2023, after 1:00 P.M., which is after the date and time of the hearing. As a result, they stated that they do not have any documentary evidence from the Tenant.

The Tenant and E.D. argued that the Landlord’s documentary evidence, which they received by registered mail on December 29, 2022, was late, therefore the service of their documentary evidence on the Landlord was delayed. The Tenant and E.D.

provided me with the registered mail tracking number, which I have recorded on the cover page of this decision, and with the consent of all parties, I tracked the registered mail. Registered mail tracking information shows that the registered mail was accepted at the post office on January 3, 2023, and that a notice card was left on January 5, 2023, at 11:39 AM.

Although the Tenant and E.D. argued that the service of their documentary evidence was delayed by the late service of the Landlord's documentary evidence on them, applicants and respondents are subject to different evidence service and submission timelines under the Residential Tenancy Branch Rules of Procedure (Rules of Procedure). Rule 2.5 of the Rules of Procedure states that to the extent possible, the applicant should submit copies of all documentary and digital evidence to be relied upon by them at the hearing, at the time the application is submitted to the Residential Tenancy Branch (Branch). Rule 3.14 of the Rules of Procedure goes on to say that documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the Residential Tenancy Branch directly or through a Service BC Office not less than 14 days before the hearing, unless it meets the criteria for consideration as new and relevant evidence under rule 3.17.

As a result, I find that the Tenant was required to submit their evidence to the Branch, and serve it on the Landlord, not later than 14 days prior to the hearing. As I am satisfied that both the registered mail and the email containing the Tenant's documentary evidence were not sent until January 3, 2023, which is only 3 days before the hearing, I therefore find that the Tenant failed to comply with the evidence service timelines set out in the Rules of Procedure. Further to this I am satisfied by the affirmed testimony of the Agents, and the absence of any evidence from the Tenant to the contrary, that the Landlord's agents could not access the digital evidence sent to the Landlord by email. As a result, I find that the Tenant also failed to comply with rule 3.10.5 of the Rules of Procedure with regards to confirming that their digital evidence was accessible to the Landlord. Finally, I am satisfied that as of the date and time of the hearing, the registered mail was not yet available for pick-up by the Landlord.

Having reviewed the documentary evidence from the Tenant, I find that the circumstances for admission and consideration of this evidence as new and relevant do not apply, as the evidence either significantly pre-dates the dates of service in relation to this hearing, or is not relevant to the matter of validity of the One Month Notice.

Based on the above, I therefore excluded the Tenant's documentary evidence from consideration, as I find that it would be a breach of the Rules of Procedure as well as the principle of administrative fairness, to accept it for consideration, under the circumstances.

Although the Tenant and E.D. argued that the Landlord's documentary evidence was served on them late, I disagree. As previously stated, applicants and respondents have different evidence submission and service timelines under the Rules of Procedure. Rule 3.15 of the Rules of Procedure states that the respondent must ensure evidence that they intend to rely on at the hearing is served on the applicant and submitted to the Branch as soon as possible and in any event, must be received by the applicant and the Branch not less than seven days before the hearing. I find it reasonable under the circumstances for the Landlord to have waited until the evidence service timelines for the applicant had passed, as no evidence had been served on them, prior to gathering and serving their evidence in response to the Tenant's application. Further to this, I am satisfied that the Landlord's documentary evidence was both sent by registered mail, and received by the Tenant at least 7 days prior to the hearing date, as the Tenant acknowledged receipt of the registered mail on December 29, 2022. As a result, I therefore find that the Landlord's documentary evidence was not served late on the Tenant, as alleged by the Tenant and E.D., and I have therefore accepted the Landlord's documentary evidence for consideration.

Preliminary Matter #3

In their Application the Tenant sought remedies under multiple unrelated sections of the Act. Section 2.3 of the Rules of Procedure states that claims made in an Application must be related to each other and that arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

As the Tenant applied to cancel a One Month Notice, I find that the priority claim relates to whether the tenancy will continue or end. As a result, I have dismissed all claims for an order for the Landlord to comply with the Act, regulation, and/or tenancy agreement that I have found not to be sufficiently related to the One Month Notice, with leave to reapply.

Issue(s) to be Decided

Is the Tenant entitled to cancellation of a One Month Notice?

If not, is the Landlord entitled to an Order of Possession?

Is the Tenant entitled to an order for the Landlord to comply with the Act, regulation, and/or tenancy agreement with regards to smoking?

Is the Tenant entitled to recovery of the filing fee?

Background and Evidence

The tenancy agreement in the documentary evidence before me, which lists J.A. as the tenant and E.D. as one of the two occupants, states that the fixed-term tenancy agreement commenced on January 1, 2021, and that the tenancy would continue on a month-to-month (periodic) basis after the end of the fixed-term on December 31, 2021. At the hearing the parties agreed that the tenancy is currently periodic.

The Agents stated that despite having signed a smoke-free housing addendum, the occupant E.D. was found to be smoking on the rental unit property, and stated that E.D. continued to smoke in impermissible areas, specifically in the front and back yards, despite having received several warnings and a breach letter. The Agents stated that the Tenant J.A. had indicated on the application for tenancy that they were non-smokers, so they did not anticipate an issue with smoking. The Agent A.K. stated that they live beside the Tenant and have asthma, and as a result, they were significantly disturbed by E.D.'s smoking. The Agents stated that the former occupants of the rental unit on the other side also complained about the smoke via email, as they have a young child, and that those tenants ultimately ended their tenancy because of the impact E.D.'s smoking was having on their family's health and the quiet enjoyment of their rental unit. The Agents submitted a copy of a complaint email and a notice to end tenancy from the former occupants in support of this testimony.

The Agents stated that noise complaints were also received by the former occupants of the rental unit beside the Tenant, and submitted an email complaint in support of this testimony. Finally, the Agents stated that on January 8, 2022, E.D. caused a fire in the front garden of the rental unit when they discarded a cigarette butt into the dry grass of the yard, resulting in a 911 call and the attendance of the fire department. The Agents

stated that due to the above, and E.D.'s failure to abide by the terms of the smoke-free housing addendum, despite numerous warnings and a breach letter, the below described One Month Notice was posted to the door of the rental unit on August 5, 2022, and at the hearing the Tenant confirmed receipt on that date.

The One Month Notice in the documentary evidence before me is on a 2021 version of the form, contains the address for the rental unit, is signed and dated August 5, 2022, and states the following grounds for ending the tenancy:

- the tenant or a person permitted on the residential property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property;
- the tenant or a person permitted on the residential property by the tenant has 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 put the landlord's property at significant risk; and
- the tenant has failed to comply with a material term, and has not corrected the situation within a reasonable time after the landlord gave written notice to do so.

The Agents submitted significant documentary evidence in support of the One Month Notice, including but not limited to photographs, videos, copies of text message and email communications, audio recordings of voicemails, a copy of the tenancy agreement and addendum, a copy of the application for tenancy, an email complaint, a copy of a breach letter dated January 12, 2022, a fire department incident report, proof that A.K. has asthma, and a notice to all tenants about smoking dated August 12, 2022.

The Tenant and occupant E.D. stated that E.D. smoked at the rental unit for approximately 1.5 years without issue, and stated that they do not understand why it is now an issue. E.D. stated that they even smoked with A.K.'s spouse, who is a maintenance person for the property, right after they moved in, and that other residents of the complex also smoke. The Tenant and E.D. stated that after they received the One Month Notice, E.D. ceased smoking on the property. They also denied any involvement in the fire, suggesting that perhaps they had been framed in an effort by the Landlord to end the tenancy, as E.D. was asleep in the rental unit at the time and the Tenant had not seen a fire when they had left the rental unit sometime earlier that day. The Tenant stated that the fire department even apologized to them and acknowledged that there was no fire.

The Tenant and E.D. stated that contrary to the Agents' testimony, the neighbours on the other side of them moved out due to domestic abuse, not because of E.D.'s smoking, and argued that the Landlord's argument that E.D.'s smoking was the cause for the other tenants' end of tenancy is illogical as they also smoked. The Tenant argued that the landlord and their agents inconsistently applied the smoke-free policies as other residents were clearly permitted to smoke, and stated that contact from the Agents was bordering on harassment.

The Tenant argued that the One Month Notice had been served in bad faith and alleged that the landlord simply wants to end their tenancy so that the rental unit may be re-rented at a higher rental rate. Finally, the Tenant and E.D. denied that they are causing any noise, stating that they have even gotten rid of their sound system and stopped inviting friends and family over, and that their stereo is now broken. As a result, they stated that there is no noise and that they are not disturbing anyone.

The Agents reiterated their position that E.D. has not stopped smoking at the rental unit, despite the previous warnings, breach letter, One Month Notice, and fire, and argued that E.D.'s smoking is a breach of a material term of the tenancy agreement, specifically the smoke-free housing addendum, that it has and continues to unreasonably disturb other occupants, and that it poses a significant risk to the property given the fire. The Tenant and E.D. reiterated their claims that E.D. has stopped smoking, that they were not the cause of any fire, and that the claims against them have been made up to make them look bad.

Analysis

Section 47(1) of the Act states that a landlord may end a tenancy, after having given proper notice under the Act, if at least one of the following circumstances apply:

- The tenant or a person permitted on the residential property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property;
- The tenant or a person permitted on the residential property by the tenant 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;
- The tenant or a person permitted on the residential property by the tenant has put the landlord's property at significant risk; or
- 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.

For the following reasons, I am satisfied that the Landlord has grounds to end the tenancy for at least three, if not more, of the above noted reasons, pursuant to section 47(1)(d) of the Act. In one of the videos submitted, the occupant E.D. can be seen and heard speaking with a member of the fire department and acknowledging that they sometimes smoke outside their rental unit in the location where the fire occurred. The member of the fire department can also be heard advising E.D. that whoever smoked out there last caused a fire when they extinguished their cigarette. A video which shows E.D. smoking by the garage in front of the rental unit, as well as numerous photographs and videos showing cigarette butts littered in the front garden where the fire occurred and a chair and ashtray by the front door of the rental unit were submitted for my review and consideration. Further to this, a report from the fire department regarding the incident was submitted for my review and consideration wherein it states that on January 8, 2022, they were dispatched to the rental unit address due to a complaint from a neighbouring tenant, where they found a patch of smouldering grass outside the rental unit, which they extinguished. As a result, I am satisfied by the Agents on a balance of probabilities that a fire was caused in the front garden of the rental unit on January 8, 2022, because of E.D.'s smoking, and I find that this fire put the Landlord's property at significant risk and seriously jeopardized the safety of other occupants of the property.

I am also satisfied based on the smoke-free housing addendum that neither the Tenant, nor E.D. are permitted to smoke in the rental unit, on the residential premises rented to the Tenant under the tenancy agreement, including the balcony/patio(s), or on the residential property's parking areas. I am satisfied by the significant documentary evidence before me from the Landlord and Agents, as well as the admissions of the Tenant and E.D. at the hearing, that E.D. failed to abide by the terms of the smoke-free housing addendum. Finally, based on the documentary evidence and testimony before me from the Agents, I am also satisfied that E.D.'s smoking unreasonably disturbed at least two other occupants of the residential property.

Although the Tenant and E.D. argued that E.D. has since stopped smoking, I am not satisfied that this is the case and, in any event, I find that the Landlord is entitled to end the tenancy due to the fire, safety risk, and the previous disturbances suffered by other residents of the property due to E.D.'s smoking, regardless of whether that behaviour has now ceased. While the Tenant and E.D. argued that other residents of the property also smoke, I find that the Landlord remains entitled to enforce the terms of the tenancy agreement and seek an end to the tenancy under section 47 of the Act with regards to

smoking, regardless of whether other residents of the property are also subject to the smoke-free housing addendum, which I am not sure they are, as the Agents stated that some tenancy agreements pre-dated the smoke-free policy and the smoke-free housing addendum indicates that not all tenants are prohibited from smoking under their tenancy agreements.

As a result of the above, I therefore find that the Landlord has grounds under section 47(1)(d)(i), (ii) and (iii) to end the tenancy, and I therefore dismiss the Tenant's Application seeking cancellation of the One Month Notice, an order for the Landlord to comply with the Act, regulation, or tenancy agreement with regards to smoking, and recovery of the filing fee, without leave to reapply.

Although the One Month Notice also lists breach of a material term as a reason for ending the tenancy pursuant to section 47(1)(h) of the Act, as I have already found above that the tenancy is over under sections 47(1)(d)(i), (ii) and (iii) of the Act, I find it unnecessary to address this additional ground.

As I am satisfied that the One Month Notice complies with section 52 of the Act, I therefore grant the Landlord an Order of Possession. At the hearing the Agents sought an Order of Possession for the end of January, but the Tenant asked for additional time as their grandson is ill and they have eye surgery upcoming. However, the Tenant was unable to provide me with a timeline for when the tenancy should end, if the One Month Notice is found to be valid. While I appreciate the Tenant's circumstances, I find that the risk posed to both the property and the health and safety of other occupants by E.D.'s smoking to be very significant, as I have already found that it has not only unreasonably disturbed two other occupants of the property, but that it has also resulted in a fire at the rental unit property earlier this year. As a result, I do not find it appropriate to extend the tenancy past the end of this month, and had the Landlord requested it, I would have found it reasonable and appropriate under the circumstances to end the tenancy two days after service of an Order of Possession on the Tenant. However, as the Agents stated at the hearing that the Landlord is willing to continue the tenancy until the end of the month, I therefore grant the Landlord an Order of Possession effective January 31, 2023, pursuant to sections 55(1) and 68(2)(a) of the Act and Residential Tenancy Policy Guideline (Policy Guideline) #54.

Conclusion

Pursuant to section 55 of the Act, I grant an Order of Possession to the Landlord effective at **1:00 P.M. on January 31, 2023, after service of this Order** on the Tenant. The Landlord is provided with this Order in the above terms and the Tenant must be served with **this Order** as soon as possible. Should the Tenant fail to comply with this Order, this Order may be filed in the Supreme Court of British Columbia 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 the Act.

Dated: January 10, 2023

Residential Tenancy Branch