



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes CNC

Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenant filed under the *Residential Tenancy Act*, (the “Act”), to cancel One Month Notice to End Tenancy for End of Employment (the “Notice”) dated November 1, 2022. The matter was set for a conference call.

The Landlord’s Agent and both Tenants attended the hearing and were each affirmed to be truthful in their testimony. The Landlord and Tenants were provided with the opportunity to present their evidence orally and in written documentary form, and to make submissions at the hearing. The parties testified that they exchanged the documentary evidence that I have before me.

In a case where a tenant has applied to cancel a Notice, Rule 7.18 of the Residential Tenancy Branch Rules of Procedure require the landlord to provide their evidence submission first, as the landlord has the burden of proving sufficient cause to terminate the tenancy for the reasons given on the Notice.

I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this decision.

Preliminary Matter – *Application Amended*

At the outset of these proceedings, it was noted that the Tenants applied to cancel and notice to end tenancy due to end of employments.

The parties agreed that the Notice issued by the Landlord was a One-Month Notice to end tenancy for Cause, not end of employment.

I find it appropriate to amend the Tenants' application during these proceedings to an application to cancel a One Month Notice to End Tenancy for Cause ("the Notice") dated November 1, 2022.

Issues to be Decided

- Should the Notice dated November 1, 2022, be cancelled pursuant to section 47 of the Act?
- If not, is the Landlord entitled to an order of possession pursuant to section 55 of the Act?

Background and Evidence

While I have turned my mind to all of the accepted documentary evidence and the testimony of the parties, only the details of the respective submissions and/or arguments relevant to the issues and findings in this matter are reproduced here.

Both parties testified that the tenancy began on February 1, 2014, that rent in the amount of \$880.13 is to be paid by the first day of each month and the Tenants paid a \$400.00 security deposit. The parties agreed that there is no signed tenancy agreement for this tenancy. The Landlord Agent testified that the Landlord is their grandparents, and that the Landlord specifically choose to not have written tenancy agreements for any of their tenancies.

The agreed upon testimony of these parties was that the Notice to end tenancy was personally served to the Tenants on November 1, 2022. The reason for the Notice was checked off as follows:

- *Tenant or a person permitted on the property by the tenant has:*
 - *Seriously jeopardized the health or safety or lawful right of 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.*
- *Tenant or a person permitted on the property by the tenant has caused extraordinary damage to the unit/site or property/park.*

The Notice states the Tenants must move out of the rental unit by January 1, 2023. The Notice informed the Tenants of the right to dispute the Notice within 10 days after receiving it. The Notice also informed the Tenants that if an application to dispute the

Notice is not filed within 10 days, the Tenants are presumed to accept the Notice and must move out of the rental unit on the date set out on page one of the Notice. The Tenants testified that they filed to dispute the notice on November 4, 2022.

The Landlord's Agent testified that the Tenants have been smoking inside their rental unit in breach of the rental property rules, which state that tenants must smoke outside on the patio of the rental unit. The Landlord's Agent testified that it is a rule of the property, that there is no smoking indoors and that the Tenants have breached this rule, and have put the other occupants, the Landlord and the Landlord's Agent's health at risk, stating "we all are well aware of the effects of second-hand smoke". The Landlord's Agent submitted a copy of the rental property rules into documentary evidence.

The Landlord's Agent testified that the property rules were provided to the Tenants when they moved in and again on February 16, 2023, but that the Tenants have refused to sign that they would abide by the property rules.

The Landlord's Agent testified that it was first noted that the Tenants were smoking inside their rental unit on December 31, 2019, right after they moved into the unit next door. The Landlord's Agent testified that they spoke to the Tenants at that time reminding them of the property rules of not smoking inside their rental unit. The Landlord's Agent testified that the Tenants' response to them at that time was that they didn't know they couldn't smoke in their unit and that they promised to stop.

The Landlord's Agent submitted that a written letter was delivered to all residents at the rental property on January 12, 2020, reminding everyone that there was no smoking permitted inside of the rental units. The Landlord submitted a copy of the letter into documentary evidence.

The Landlord's Agent testified that they live in the unit next to the Tenants and that between June 2020 to January 2022, they continued to smell smoke in their unit but were unable to confirm the smoke was coming from the Tenants' unit, until January 12, 2022, when the fresh air intake systems failed. The Landlord's Agent testified that it became clear that the smoke was coming from the Tenants' rental unit at that point. The Landlord's Agent submitted that they personally observed persistent smoke coming from the Tenants rental unit between January 12 to 14, 2022, the period of time that the fresh air intake system was malfunctioning.

The Landlord's Agent was asked why they waited so long to act in evicting these Tenants due to smoking. The Landlord's Agent testified that they had discussed the

matter with the Landlord at that time but that there were other issues to be dealt with that were more important, so they let this go for a while, hoping that the Tenants would comply with their verbal request to stop smoking inside.

The Landlord's Agent testified that between July 20 to 22, 2022, they were personally inside the Tenants rental unit to make repairs to the patio, when they saw the smoke damage in the Tenants rental unit. The Landlord's Agent testified that due to the Tenants smoking inside their rental unit, they have caused damage to the walls and ceiling, turning them a smoke stained yellow, that the light fixture and vents were covered in a smoke residue, and that the smell of smoke was everywhere in the rental unit. The Landlord submitted eighteen pictures into documentary evidence.

When asked, when was the last time the Tenants rental unit was painted, the Landlord's Agent, was unsure but eventually testified that it must have been about nine years ago, before the Tenants' tenancy began.

The Landlord's Agent testified that they had spoken to the Tenants several times about not smoking in the rental unit and that the Tenants have both denied smoking inside the unit and admitted to it and refused to stop the behaviour. The Landlord testified that due to the Tenants refusal to stop smoking in the rental unit and the damage they have caused to the rental unit by smoking inside, they are requesting an order of possession to enforce their Notice to end tenancy.

The Tenants testified that they have smoked inside their rental unit since the day they moved in, and that they have even smoked inside their unit while the Landlord was present to make repairs to the rental unit, over the years of their tenancy. The Tenants testified that no other renters have complained about them and that they have not had any issues before the new Agent of the Landlord moved into the rental unit right beside them in December 2019.

The Landlord's Agent acknowledged that several of the tenancies in the building are renters who also smoke but that it is their belief that the other renters all smoke outside, as per the rental property rules.

The Landlord's Agent was asked about any entries the Landlord may have made to this rental unit between February 2014 and December 2019, and if smoke had been observed during any of those visits. The Landlord's Agent responded that they did not know of any entry of the Landlord to this rental unit between February 2014 and December 2019.

The Tenants requested that the Notice be cancelled, as their rental unit has always been a smoking unit, that the Landlord has always been aware that they smoked in their unit and that it is only since the Agent moved in next door that they have been asked to stop smoking. The Tenants testified that they have done nothing wrong and that their tenancy should continue.

Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows:

I find that the Tenants received the Notice on November 1, 2022. Pursuant to section 47 the *Act*, the Tenant had ten days to dispute the Notice. Accordingly, I find the Tenants had until November 11, 2022, to file his application to dispute the Notice. The Tenants filed their application on November 4, 2022, within the statutory time limit.

After reviewing the totality of the submission of the Landlord, I find that the crux of their claim is that the Tenants are smoking in their rental unit in breach of the rental agreement with the Landlord and that this is causing health concerns for the Landlord's Agent.

During the hearing, I heard contradictory testimony from both parties regarding the Tenants' smoking inside of the rental unit, with the Landlord claiming that smoking in the rental unit is prohibited and the Tenants testifying that smoking inside the unit has always been allowed under their tenancy. In cases where two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making a claim has the burden to provide sufficient evidence over and above their testimony to establish their claim. As stated above it is the Landlord who holds the burden of proof to show that their Notice was issued in accordance with the *Act*.

After careful review of the Landlord's documentary and digital evidence, I noted that there is no signed agreement of any kind between these parties. Section 13 of the *Act* states the following regarding a Landlord's responsibility to create a tenancy agreement:

Requirements for tenancy agreements

13 (1) A landlord must prepare in writing every tenancy agreement entered into on or after January 1, 2004.

(2) A tenancy agreement must comply with any requirements prescribed in the regulations and must set out all of the following:

- (a) the standard terms;*
- (b) the correct legal names of the landlord and tenant;*
- (c) the address of the rental unit;*
- (d) the date the tenancy agreement is entered into;*
- (e) the address for service and telephone number of the landlord or the landlord's agent;*
- (f) the agreed terms in respect of the following:*
 - (i) the date on which the tenancy starts;*
 - (ii) if the tenancy is a periodic tenancy, whether it is on a weekly, monthly or other periodic basis;*
 - (iii) if the tenancy is a fixed term tenancy, the date on which the term ends;*
 - (iii.1) if the tenancy is a fixed term tenancy in circumstances prescribed under section 97 (2) (a.1), that the tenant must vacate the rental unit at the end of the term;*
 - (iv) the amount of rent payable for a specified period, and, if the rent varies with the number of occupants, the amount by which it varies;*
 - (v) the day in the month, or in the other period on which the tenancy is based, on which the rent is due;*
 - (vi) which services and facilities are included in the rent;*
 - (vii) the amount of any security deposit or pet damage deposit and the date the security deposit or pet damage deposit was or must be paid.*

(3) Within 21 days after a landlord and tenant enter into a tenancy agreement, the landlord must give the tenant a copy of the agreement.

[Bolded and underline section added for my emphasis]

I accept the testimony of the Landlord's Agent that the Landlord specifically chose not to write tenancy agreements for any of their tenancies. I find that the Landlord wilfully disregarded the law when they choose to not write a tenancy agreement for this tenancy, in direct contravention of section 13 of the *Act*.

In the absence of the required written tenancy agreement, I will have to determine the terms of this tenancy based on any mutual agreement provided by of these parties during these proceedings, and where a term is in dispute, the historical actions of these parties will be assessed to determine if a term exists.

I have reviewed all of the testimony and documentary evidence submitted during these proceedings and note that there is no documentary evidence before me to prove to my satisfaction that this tenancy began as a non-smoking tenancy. Additionally, I find that on a balance of probabilities these Tenants have been smokers for years, and I accept the Tenants' sworn testimony that they have been smoking inside this rental unit since they took possession in February 2014.

Furthermore, there is no documentary evidence before me to support the Landlord's claim that these Tenants had been served with a copy the "property rules" before February 16, 2023, nor is there any evidence that these Tenants had ever signed these rules indicating that they had agreed to them.

On a balance of probabilities, I find that the Landlord, knew these Tenants were smoking in their rental unit throughout this tenancy, and that it wasn't until December 2019, when the Landlord's new Agent moved in to the next door unit, that their smoking became a problem for the Landlord.

I acknowledge that smoking in a rental unit is viewed differently today than it was nine years ago when this tenancy began, and this decision is not meant to condone a tenant smoking in a rental unit; however, if a Landlord wants to end a tenancy over smoking, where smoking has been historically permitted, or ignored, a landlord needs to submit compelling evidence of the issues that this Tenant's smoking is causing. It is insufficient of a Landlord or their Agent to appear and make broad and general statements like regarding second-hand smoke and expect them to be sufficient to deprive a tenant of their long-term home.

I have also reviewed the pictures entered into evidence by the Landlord that they claim depicts extraordinary damage to the unit, and I find that these pictures depict an aged and discoloured rental unit. However, considering the testimony of the Landlord's Agent, that no routine maintenance has been conducted to this rental unit, except for the patio repairs in July 2022, I find this unit to be in reasonably good condition. Section 32 of the *Act* states the following regarding the landlord's and tenant's obligations to repair and maintain:

Landlord and tenant obligations to repair and maintain

32 (1) A landlord must provide and maintain residential property in a state of decoration and repair that

(a) complies with the health, safety and housing standards required by law, and

(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

(2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.

(3) A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

(4) A tenant is not required to make repairs for reasonable wear and tear.

(5) A landlord's obligations under subsection (1) (a) apply whether or not a tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement.

After reviewing these pictures and the Landlord's testimony on this point, I find that the discoloured walls, depicted in these pictures do not constitute "extraordinary damage," and that the current condition of these walls would be reasonably expected in a nine-year-old tenancy, where the Landlord has not completed any regular maintenance, combined with the fact that the Landlord had permitted smoking tenancies in this building. The Landlord is reminded of section 32(1) of the *Act* that requires them to maintain residential property throughout the tenancy.

As for the smoke residue depicted on the vents, light fixtures, and door frames in these pictures, I find that these pictures show that a deep cleaning of the rental unit is required; however, cleaning does not constitute "extraordinary damage" as cleaning can reasonably be easily completed by the Tenants. The Tenants are reminded of section 32(2) of the *Act* that requires them to maintain reasonable cleanliness and sanitary standards throughout the rental unit.

Finally, the Landlord has testified that the smell of smoke in the rental unit constitutes damage; where I can agree that removing the smell of smoke from a rental unit is more difficult than cleaning residue and refreshing paint, I find that since the Landlord permitted smoking in their rental building for over eight years before taking any corrective action, that the removal of the smell of smoke from a rental unit is more in the nature of a common or expected business expense, and not "extraordinary damage" as claimed by the Landlord in this case.

I can understand the desire of a landlord to transition to a non-smoking building; however, the rights of "grandfathered" smoking tenants still remain and a Landlord must work with all occupants of their rental properties to ensure that everyone has access to

the quiet enjoying of the property they have legally rented. I acknowledge this is a difficult task, transitioning from a smoking building to a non-smoking building; however, a landlord must be reasonable in their actions in achieving their goal of creating a non-smoking rental property, and not just reach of the easy way out of evicting those tenants who do not conform to the desired end state. A smoking tenant has as much right to a home as a non-smoking tenant.

Ultimately, I find that the Landlord has not provided sufficient documentary evidence, to satisfy me, that the Tenants' smoking has seriously jeopardized the health or safety or lawful right of another occupant or the landlord or that the smoking has caused extraordinary damage to the rental unit. I find there is an absence of physical evidence that would outweigh the contradictory verbal testimony of the parties, in this case.

Therefore, I find that the Landlord has not provided sufficient evidence to show that this tenancy should end of any of the reasons the Landlord has indicated on the Notice.

I grant the Tenants' application to cancel the Notice dated November 1, 2022.

Conclusion

The Tenants' application to cancel the One-Month Notice dated November 1, 2022, is granted. The tenancy will continue until legally ended in accordance with the *Act*.

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: March 27, 2023

Residential Tenancy Branch