



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Ministry of Housing

A matter regarding PACIFIC QUORUM VANCOUVER
ISLAND and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **CNC**

Introduction

This hearing dealt with the Tenant's application pursuant to the *Residential Tenancy Act* (the "Act") for cancellation of the Landlord's One Month Notice to End Tenancy for Cause (the "One Month Notice") pursuant to Sections 47 and 62 of the Act.

The hearing was conducted via teleconference. The Landlord's Agent and the Tenant attended the hearing at the appointed date and time. Both parties were each given a full opportunity to be heard, to present affirmed testimony, to call witnesses, and make submissions.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch (the "RTB") Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they were not recording this dispute resolution hearing.

Both parties acknowledged receipt of:

- the Landlord's One Month Notice served by attaching a copy to the Tenant's door on January 5, 2023, the Tenant confirms receipt, deemed served on January 8, 2023;
- the Tenant's Notice of Dispute Resolution Proceeding package and evidence served personally on March 14, 2023, the Landlord's Agent confirmed receipt, served on March 14, 2023; and,
- the Landlord's evidence package served by attaching a copy to the Tenant's door on May 1, 2023, the Tenant confirms receipt, deemed served on May 4, 2023.

Pursuant to Sections 88, 89 and 90 of the Act, I find that both parties were duly served with all the documents related to the hearing in accordance with the Act.

Issues to be Decided

1. Is the Tenant entitled to cancellation of the Landlord's One Month Notice?
2. If the Tenant is unsuccessful, is the Landlord entitled to an Order of Possession?

Background and Evidence

I have reviewed all written and oral evidence and submissions presented to me; however, only the evidence and submissions relevant to the issues and findings in this matter are described in this decision.

The parties confirmed that this tenancy began as a fixed term tenancy on July 1, 2022. The fixed term is to end on June 30, 2023. Monthly rent is \$1,925.00 payable on the first day of each month. A security deposit of \$962.50 was collected at the start of the tenancy and is still held by the Landlord.

The One Month Notice stated the reason the Landlord was ending the tenancy was because the Tenant or a person permitted on the property by the Tenant has put the Landlord's property at significant risk, and the Tenant has failed to comply with a material term of the tenancy agreement, and has not corrected the situation within a reasonable time after the Landlord gives written notice to do so. The effective date of the One Month Notice was February 28, 2023.

The Landlord provided further details of the causes to end this tenancy as:

After repeated warnings, the tenant continues to smoke on his balcony [sic]

The Landlord's Agent testified that they have received multiple complaints about the Tenant's smoking, dealing drugs and having people over. The Landlord's Agent stated on October 12, 2022, the Landlord issued a letter to the Tenant that dealt with smoking on his balcony. The letter reminded the Tenant there is no smoking on the property which includes his rental unit and the balcony. He was asked to immediately stop, and if there are any further complaints, they will result in the Landlord ending his tenancy.

The tenancy agreement addendum, provision #3, states:

NO SMOKING, INCLUDING MEDICAL OR RECREATIONAL MARIJUANA, INSIDE THE UNIT OR ON THE COMMON PROPERTY IS ALLOWED, HOWEVER, CONSUMING MEDICAL MARIJUANA WITH A VAPORIZER OR IN CANNABIS EDIBLES, TONICS, OR CONCENTRATES IS PERMITTED.

The Landlord's Agent testified that the no smoking provision is a material term of the tenancy.

The Landlord's Agent uploaded a log of incidents involving the Tenant. It includes:

Dec 21: A complaint was made to the building about the loud music, yelling, screaming, slamming of doors, police calls, etc. At all hours of the day and night. Please, it needs to stop. You're affecting other tenants peace and quiet enjoyment. Sincerely, Neighbours in the building

Dec 26th 10:23 am: Will last night just a lil after midnight it woke me and [name] up to screaming out the door to get the f out my house the a lot of smashing and banging in his unit screaming get the f out then throwing dishes out his balcony window screaming the same the thing.the police showed talked to him and it and made it worse the next door naboure to him not to this the police gave him a chance to go sleep it off and next thing happened he fought the cops and arrested him for disturbing the peace and obstructing a police officer so he has charges laid against him the [city]pd gave a file # to give to u it is XX##-##### if u wanna follow up and just could picture the damages in there and sending a photo of what was thrown out his window

It followed with a picture of a smashed plate on the walkway out of the building when it meets the sidewalk.

Dec 26 6:26 pm: 1140 am slamming doors ..2.00 pm blasting music and now 6.15 pm pacing and screaming wtf in front on the building and have it on video to show u and it still going at I'm about to call the cops this needs to stop 🙏 please

Dec 27 8:43am: It's [nameX] from apartment ###. [nameY] asked me to send you this video. The guy from ### brought over a bunch of friends yesterday

afternoon. They smoke on their balcony and out front. The guy yelling and swearing is one of them.

We aren't sure who called the police but they arrived around 11:15. Before the police showed up, the guy from ### went out on the balcony, told him to leave and threw a glass cup at him.

When the police came the asked the who was yelling if he lived here. He said, no my "brother" lives here and he's helping take care of me because I hurt my ankle.

The guy from ### quickly left the building while the cops were there. Saying something like, "you need to leave, you're making the place look bad".

The police stayed in front until the guy left.

The Tenant testified that he does not smoke cigarettes or marijuana, and he does not do drugs. He said he quit smoking 12 years ago. He did confirm he had a guest visiting who had a cigarette on his balcony. He said he found out after, and he asked that person if they smoked on his balcony and they admitted they did. He said he told them that smoking is not allowed in the building.

The Tenant stated he smells cigarette smoke on his floor of the building, and he smells marijuana smoke on the floor directly below him. The Tenant said it is quite windy in the neighbourhood and often he finds cigarette butts that have landed on his balcony.

The Tenant argued that the person in the Landlord's video is not him. The Tenant said down the street from where he lives is a bad area of town, and often these people are squatting at the back of the building.

The Landlord's Agent's log says it is the Tenant throwing plates off his balcony, but the Tenant says this is not true. He said he has a very clean house, he has a bit of OCD, so he likes his place smelling good. He does not like that the whole floor below him smells of marijuana smoke.

The Tenant maintained that he wants to remain in the building. He was working across the street, before he stopped working due to an injury.

That Landlord replied that she does not believe the Tenant is telling the truth about smoking. She said the whole lower floor does not smell of marijuana smoke, maybe a unit here or there.

Analysis

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. Where a tenant applies to dispute a notice to end a tenancy issued by a landlord, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the notice to end tenancy were based.

Section 47 of the Act is the relevant part of the legislation in this application. It states:

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*

...

- (iii) *put the landlord's property at significant risk;*

...

- (h) *the tenant*

- (i) *has failed to comply with a material term, and*

- (ii) *has not corrected the situation within a reasonable time after the landlord gives written notice to do so;*

...

- (2) *A notice under this section must end the tenancy effective on a date that is*

- (a) *not earlier than one month after the date the notice is received, and*

- (b) *the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.*

- (3) *A notice under this section must comply with section 52 [form and content of notice to end tenancy].*

- (4) *A tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.*

...

The Tenant was deemed served with the One Month Notice on January 8, 2023. I find that the One Month Notice complied with the form and content requirements of Section 52 of the Act. The Tenant applied for dispute resolution on January 11, 2023 which was within the 10 days after receiving the One Month Notice.

The Landlord claims that the Tenant has put the Landlord's property at significant risk. The Landlord did not provide evidence for me that proves on a balance of probabilities that this is the case. I cancel this part of the Landlord's One Month Notice.

Residential Tenancy Policy Guideline #8-Unconscionable and Material Terms deals with material terms of tenancy agreements. It states that a material term is 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. I must assess the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term was a material term. To end a tenancy agreement for breach of a material term the Landlord must inform the other party in writing:

- *that there is a problem;*
- *that they believe the problem is a breach of a material term of the tenancy agreement;*
- *that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and,*
- *that if the problem is not fixed by the deadline, the party will end the tenancy.*

... the party alleging the breach bears the burden of proof. ... (emphasis mine)

The Landlord's Agent said the no smoking addendum provision is a material term. The term is not initialled like the rent and arrears provisions in the tenancy agreement. I note having an initial would not be sufficient to prove materiality, but it would be more than what the Landlord's Agent has provided me. She stated that the whole lower floor does

not smell of marijuana smoke, “maybe a unit here or there.” It appears there are more smokers in the building.

The Landlord’s Agent did not upload a copy of the breach letter she said was sent to the Tenant. She read the contents into evidence in the hearing, and I note that the deadline specified in the letter was that the Tenant must “immediately” stop smoking. A deadline of ‘immediately’ is not reasonable. A tenant must be given an opportunity to rectify the problem to which the landlord is saying is a material term of the tenancy agreement.

I find the Landlord has not proven on a balance of probabilities that the Landlord has cause to end this tenancy based on a breach of a material term. The Tenant’s application to dismiss the One Month Notice is granted. The tenancy shall continue until it is ended in accordance with the Act.

Conclusion

The Tenant’s application to cancel the Landlord’s One Month Notice is granted.

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: May 09, 2023

Residential Tenancy Branch