



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

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A matter regarding 220 DEWDNEY INVESTMENT INC.
and [tenant name suppressed to protect privacy]

Dispute Codes: CNC FFT

DECISION

Introduction

The Tenants seek an order cancelling a One Month Notice to End Tenancy for Cause (the “Notice”) under section 47(4) of the *Residential Tenancy Act* (the “Act”). The Tenants also seek to recover the cost of the application fee under section 72 of the Act.

Issues

1. Are the Tenants entitled to an order cancelling the Notice?
2. Are the Tenants entitled to recover the cost of the application fee?

Evidence and Analysis

In reaching this decision, I have only considered relevant and necessary oral and documentary evidence that helped resolve the issues of the application.

On February 14, 2023, the Landlord served, by registered mail, the Notice upon the Tenants. A copy of the three-page Notice was in evidence. On page two of the Notice, two grounds for ending the tenancy were (1) the 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, and (2) 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.

These are grounds enumerated in sections 47(1)(d)(ii) and 47(1)(h) of the Act.

Landlords' counsel presented evidence that the Tenant or Tenants have smoked cigarettes on the residential property in breach of a material term of the tenancy agreement. The written tenancy agreement addendum contains a clause ("10. NO SMOKING" on page 3) that prohibits any form of smoking in the rental unit, on outdoor balconies, and on the entire property.

The Landlords submitted video footage—dated from November 2020—of the Tenant (L.S.) smoking on the property. The Landlords also submitted written complaints from third parties, who were, or are, other occupants of the residential property. Some of the complaints are quite dated, as are warning letters from 2021. These previous incidents, as I will call them, led to a dispute resolution hearing on November 23, 2021. On or about November 29, 2022, a "notice of lease violation" was sent to the Tenants for purported violation of the no smoking term after the Landlords received a complaint from another tenant in the building.

Landlord's counsel submitted that not only is the Tenants' smoking a breach of a material term of the tenancy agreement, but that smoking on the property may void the Landlords' property insurance policy. That policy requires that the policy holder warrant that no smoking of any kind occur on the property. This potential voiding of the policy establishes the first ground on which the Notice was given.

The Tenant (L.S.) testified under oath that the video of him smoking was from two-and-a-half years ago, and that it was when he had knee surgery and thus limited mobility. The Tenants (L.S. testified but his wife could be heard agreeing with him in the background) testified that "we don't smoke on the property or on the patio." They go to the street to smoke. Certainly, they admit that when it is windy or when there is any wind that smoke can be blown around everywhere. But, they stressed that "we go out to the sidewalk, that's where we smoke."

When a tenant disputes a notice to end a tenancy under the Act, the onus shifts onto the landlord who issued the notice to prove, on a balance of probabilities, at least one of the grounds for wanting to end the tenancy and for thus giving the notice.

In this dispute, there is little direct evidence that the Tenants were, or are, smoking in the rental unit, on the balconies, or anywhere else on the residential property. The only evidence before me are third party, unsworn email complaints. None of the third parties who created these complaints—and who would presumably be the best evidence that the Tenants were, in fact, smoking on the property—attended the hearing to provide sworn testimony. I must place little evidentiary weight on this third-party evidence.

For what it is worth, it is in fact wholly reasonable to accept that the cigarette smoke (caused by whomever is on the street smoking) unfortunately blows around the property when it is windy.

As for the digital evidence consisting of a video from two-and-a-half years ago, this evidence pertains to what may amount to a single incident so long ago that I find it irrelevant to the facts which may have led to the issuing of the Notice.

Nor, I should note, is there is any circumstantial evidence for me to conclude that the Tenants have breached or continue to breach a material term of the tenancy agreement.

In summary, after taking into careful consideration all the relevant oral and documentary evidence before me, it is my finding that the Landlords have not proven, on a balance of probabilities, a ground under section 47(1)(d)(ii) or section 47(1)(h) of the Act from which a notice to end tenancy may be given. For this reason, I grant the Tenants' application and order that the Notice be cancelled effective immediately.

The tenancy shall continue until it is ended in accordance with the Act.

Under section 72 of the Act, the Residential Tenancy Branch will generally order an unsuccessful party to reimburse a successful party for the application fee. As the Tenants were successful in this application, I find that the Landlords must pay the Tenants \$100 for the application fee. Pursuant to section 72(2)(a) of the Act the Tenants may make a one-time deduction of \$100 from a future rent payment.

Conclusion

The Tenants' application is hereby GRANTED. The Notice is cancelled effective immediately and the tenancy continues until ended in accordance with the Act.

This decision is made on delegated authority to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the Act.

Dated: June 21, 2023

Residential Tenancy Branch