



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes **CNC OLC FFT**

This hearing was convened as a result of an application for dispute resolution (Application) made by the Tenant under the *Residential Tenancy Act* (Act). The Tenant seeks:

- an order cancelling a One Month Notice for Cause dated January 12, 2023 (1 Month Notice) pursuant to section 47;
- an order for the Landlord to comply with the Act, *Residential Tenancy Regulations* (Regulations) and/or tenancy agreement pursuant to section 62; and
- authorization to recover the filing fee for the Application from the Landlord pursuant to section 72.

The original hearing of the Application was held on May 16, 2023 (Original Hearing). The Landlord's agents (KR, ND, LM and BH), the Tenant and the Tenant's advocate (NE) attended the Original Hearing. I explained the hearing process to the parties who did not have questions when asked. I told the parties they were not allowed to record the hearing pursuant to the *Residential Tenancy Branch Rules of Procedure* (RoP). The parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. Two witnesses (SC and AK) attended the hearing to provide testimony on behalf of the Landlord.

At the Original Hearing, the Tenant stated she served the Notice of Dispute Resolution Proceeding on the Landlord in-person on February 3, 2023. KR acknowledged the Landlord received the NDRP in-person. As such, I find the NDRP was served on the Landlord pursuant to section 89 of the Act.

At the Original Hearing, the Tenant stated she served her evidence on the Landlord in-person on April 21, 2023. KR acknowledged the Landlord received the Tenant's evidence in-person. As such, I find the Landlord was served with the Tenant's evidence pursuant to the provisions of section 88 of the Act.

At the Original Hearing, KR stated the Landlord served its evidence in the Tenant's mailbox on February 2 and May 2, 2023. The Tenant acknowledged she received the Landlord's evidence in her mailbox. As such, I find the Landlord's evidence was served on the Landlord pursuant to section 88 of the Act.

The Original Hearing was scheduled for 60 minutes. However, by 72 minutes into the hearing, it became clear that the parties would not be able to complete their testimony and rebuttals. Based on the foregoing, I adjourned the Original Hearing and issued a decision dated May 17, 2023 (Interim Decision) pursuant to Rule 7.8 of the RoP. The Interim Decision stated the parties were not to serve each other with, or submit to the Residential Tenancy Branch (RTB), any additional evidence. The Tenant was ordered not to amend the Application. The Interim Decision and Notices of Dispute Resolution for the adjourned hearing, scheduled for May 16, 2023 (Adjourned Hearing), were served on the parties by the RTB. KR, ND, LM, the Tenant and NE attended the Adjourned Hearing. The parties attending the Adjourned Hearing were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

Preliminary Matter – Severance and Dismissal of Tenant's Claim

At the outset of the Original Hearing, I observed the Application included a claim for an order that the Landlord comply with the Act, Regulations and/or tenancy agreement (Tenant's Other Claim).

Rule 2.3 of the Rules states:

2.3 Related issues

Claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

Where a claim or claims in an application are not sufficiently related, I may dismiss one or more of those claims in the application that are unrelated. Hearings before the RTB are generally scheduled for one hour and Rule 2.3 is intended to ensure disputes can be addressed in a timely and efficient manner.

The Original Hearing was scheduled for one hour. At the outset of the hearing, I advised the parties the primary issues in the Application were whether the tenancy will continue, or end based on the 1 Month Notice. Accordingly, I find the Tenant's Other Claim was not sufficiently related to the primary issues of whether the 2 Month Notice would be cancelled. Based on the above, I will dismiss the Tenant's Other Claim, with or without leave, depending upon whether I cancel the 1 Month Notice.

Issues to be Decided

- Is the Tenant entitled to cancellation of the 1 Month Notice?
- Is the Tenant entitled to recover the filing fee for the Application from the Landlord?
- If the Tenant is not entitled to cancellation of the 1 Month Notice, is the Landlord entitled to an Order of Possession pursuant to section 55(1) of the Act?

Background and Evidence

While I have turned my mind to all 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. The principal aspects of the Application and my findings are set out below.

KR submitted a copy of a signed tenancy agreement, and addenda, dated September 22, 2022 between the Landlord and Tenant. The parties agreed the tenancy commenced on October 1, 2020, on a month-to-month basis, with rent of \$625.00 payable on the 1st day of each month. The Tenant was required to pay a security deposit by October 1, 2020. The parties agreed paragraph 4 of the addendum to the tenancy agreement states:

4. [Name of Landlord] is a non-smoking facility. There is a zero tolerance for smoking in unit or on [First name of Landlord] property. Violation of this will result in immediate (sic) eviction.

KR stated the Tenant paid the security deposit and that the Landlord was holding it in trust for the Tenant. The parties agreed the current rent is \$464.00 per month. Based on the foregoing, I find there is a residential tenancy between the parties and that I have jurisdiction to hear the Application.

The parties submitted into evidence a copy of the 1 Month Notice. KR stated the 1 Month Notice was served in the Tenant's mailbox on January 12, 2023. The 1 Month Notice stated the reason for ending the tenancy was because:

- 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.

The details of the cause for ending the tenancy stated in the 1 Month Notice were:

Tenant signed addendum at beginning of tenancy on Sept 22, 2020 that stated that the [First name of Landlord] is a non smoking facility

Notice sent March 15th, 2022 about smoking on property.

Notice sent Oct 21, 2022 about smoking on property.

Notice sent Dec 6th, 2022 about smoking on property.

Week of December 5th, 2022:

Direct of Operations went into Unit [Unit Number of unit above Tenant's rental unit] and the unit smelt bad of cigarette smoke.

Week between Christmas and New Years 2022:

Tenant rep saw tenant from [Number of Tenant's rental unit] smoking right in front of her unit door.

Jan 5th, 2023:

Tenant from [Unit Number of unit above Tenant's rental unit] complained of cigarette smoke in his unit, which is right above [Unit Number of unit above Tenant's rental unit]

KR stated she went into the unit above the Tenant's rental unit during the week of December 5, 2022 and the odor of cigarette odour was quite bad. KR admitted the Landlord did not serve the Tenant with a warning letter requesting the Tenant stop smoking in the rental unit or on the residential property and request that the Tenant correct the breach of the terms of the tenancy agreement. The Landlord stated that the

Landlord had placed notices in the mailboxes of all the tenants in the residential property warning tenants that the residential property is a non-smoking facility. KR stated the notices were placed in the mailboxes of tenants of the residential property on March 15, 2022, October 21, 2022 and on December 6, 2022.

AK was called as a witness and she stated she saw the Tenant, with several other tenants in the building in late December 2022, smoking on the stairwell leading to several other units in the building. AK stated she recognized the Tenant.

SC was called as a witness and she stated she saw the Tenant smoking at the bottom of the stairs. AK stated she has spoken to the Tenant previously and recognized the Tenant when she saw her smoking.

The Tenant stated the testimony of AK and SC was not true. NE stated he has seen other tenants from the building smoking on the residential property. NE stated the Landlord has not sought to end the tenancies of other tenants who smoke on the residential property and that the Landlord's notice to end the tenancy was selective prosecution of the Tenant. NE argued that the Landlord was acting in a discriminatory manner.

Analysis

Rule 6.6 of the *Residential Tenancy Branch Rules of Procedure* provides that, when a tenant applies to cancel a notice to end tenancy, the landlord must present their evidence first as it is the landlord who bears the burden of proving (on a balance of probabilities) the reasons for ending the tenancy. Consequently, even though the Tenant applied for dispute resolution and he is the Applicant, the Landlord presents its testimony first.

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. In this case, the onus is the Landlord to establish on a balance of probabilities that it is entitled to an order for an early end of the tenancy.

Section 47(1) of the Act states a landlord may end a tenancy for cause if the landlord can prove, on a balance of probabilities, that there has been a breach of one or more of the causes listed in sections 47(1)(a) Act. Sections 47(3), 47(4) and 52 of the Act state:

Subsections 47(1)(d)(ii), 47(1)(h) and sections 47(2) to 47(5) of the Act state:

- 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
 - [...]
 - (ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or
 - [...]
 - (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.

- (5) If a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (4), the tenant
 - (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and
 - (b) must vacate the rental unit by that date.

[emphasis in italics added]

The 1 Month Notice was served in the Tenant's mailbox on January 12, 2023. Pursuant to section 90 of the Act, the Tenant was deemed to have received the 1 Month Notice on January 15, 2023. Pursuant to section 47(4) of the Act, the Tenant had until January 25, 2023, being the expiry of the 10-day dispute period, to make an application for dispute resolution to dispute the 1 Month Notice. The records of the RTB disclose the Application was made on January 23, 2022. As such, the Application was made within the 10-day dispute period required by section 47(4) of the Act.

KR stated that the Landlord placed three notices in the mailboxes of all the tenants in the residential property warning them that the residential property is a non-smoking facility. KR admitted the Landlord did not serve the Tenant with a warning letter requesting the Tenant stop smoking in the rental unit or on the residential property and request that the Tenant correct the breach of the terms of the tenancy agreement.

Paragraph 4 of the addendum to the tenancy agreement states:

- 4. [Name of Landlord] is a non-smoking facility. There is a zero tolerance for smoking in unit or on [First name of Landlord] property. Violation of this will result in immediate (sic) eviction.

KR stated she went into the unit above the Tenant's rental unit during the week of December 5, 2022 and the odor of cigarette odour was quite bad. AK she stated she saw the Tenant, with several other tenants in the building in late December 2022, smoking on the stairwell leading to several other units in the building. SC stated she saw the Tenant smoking at the bottom of the stairs. Based on the testimony of KR, SC and AK, I find the Landlord has proven, on a balance of probabilities, that the Tenant smoked in the rental unit and on the residential property in breach of paragraph 4 of the addendum to the tenancy agreement.

Residential Tenancy Policy Guideline 8 (PG 8) provides guidance on unconscionable and material terms in a tenancy agreement. PG 8 states in part:

Material Terms

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.

To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon 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.

The question of whether a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another. Simply because the parties have put in the agreement that one or more terms are material is not decisive. During a dispute resolution proceeding, the Residential Tenancy Branch will look at the true intention of the parties in determining whether the clause is material.

To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – 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.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

Paragraph 4 of the addendum is clear that there is a zero tolerance of smoking in the rental unit or the residential property and that, violation of this term would result in an immediate eviction of the Tenant. As such, I find the parties intended this provision to be a material term of the tenancy and one, if breached, gives the Landlord the right to end

the tenancy. Section 47(1)(h) of the Act requires a Landlord to firstly give the tenant a written notice advising the tenant of the breach and giving the tenant a reasonable period to correct the breach within a reasonable period of time prior to serving a One Month Notice for Cause on the tenant. In this case, the Landlord chose to rely on cause for ending the tenancy on the basis that the Tenant had seriously jeopardized the health or safety or lawful right of another occupant or the Landlord. I find the Landlord chose this cause rather than cause based on a material breach of the tenancy agreement to sidestep the requirements of section 47(1)(h) of the Act. I find this is inconsistent with the remedial provisions of the Act.

Based on the foregoing, I find the Landlord should have served the Tenant with a written notice stating there had been a breach of section 4 of the addendum and that the Tenant was required to correct the breach within a reasonable period of time, before the Landlord served the 1 Month Notice on the Tenant. Although the three notices were served in the Tenant's mailbox, none of the notices stated that the Tenant herself was in breach of a term of the tenancy agreement nor did any of the notices state the Tenant was required to correct the breach within a reasonable period of time. Although the Landlord served the Tenant with a notice regarding non-smoking in the residential property, this in itself did not comply with the requirements of section 47(1)(h) of the Act. As such, I find the Landlord is not entitled to rely on section 47(1)(d)(ii) of the Act to end the tenancy. Based on the foregoing, I find the Landlord has failed to prove, on a balance of probabilities, that there was cause to end the tenancy under subsection 47(1)(d)(ii) of the Act. Accordingly, I order the 1 Month Notice to be cancelled. This tenancy continues until lawfully ended in accordance with the Act.

As the Tenant has been successful in the Application, I grant the Tenant recovery of the filing fee of \$100.00 pursuant to subsection 72(1) of the Act. Pursuant section 72(2)(a) of the Act, the Tenant is allowed to enforce this order by deducting \$100.00 from the next month's rent, notifying the Landlord when this deduction is made. The Landlord may not serve the Tenant with a 10 Day Notice to End Tenancy for Unpaid Rent when this deduction is made by the Tenant.

As the tenancy has not ended, I dismiss the Tenant's Other claim with leave to reapply. The Tenant may make a new application for dispute resolution with the RTB to make that claim.

The Tenant is warned that, if she receives written notice from the Landlord advising her that there has been a breach of a material term of the tenancy agreement or addendum and she does not correct the breach within a reasonable date requested by the Landlord, then there may be dire consequences to her tenancy.

Conclusion:

I allow the Tenant's application to cancel the 1 Month Notice. The 1 Month Notice is of no force or effect. The tenancy continues until lawfully ended in accordance with the Act.

The Tenant is ordered to deduct \$100.00 from next month's rent in satisfaction of her monetary award for recovery of the filing fee for the Application.

The Tenant's Other Claim is dismissed with 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: June 18, 2023

Residential Tenancy Branch