



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding TOWLINE PROPERTY MANAGEMENT
CORP and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC

Introduction

This hearing was convened by way of conference call concerning an application made by the tenants seeking an order cancelling a One Month Notice to End Tenancy For Cause.

Both tenants and an agent for the landlord attended the hearing, and the tenants were assisted by an Advocate. The parties each gave affirmed testimony and were given the opportunity to question each other and to give submissions.

The parties agree that all evidence has been exchanged, all of which has been reviewed and the evidence I find relevant to the application is considered in this Decision.

Issue(s) to be Decided

Has the landlord established that the One Month Notice to End Tenancy For Cause dated August 23, 2023 was given in accordance with the *Residential Tenancy Act*?

Background and Evidence

The landlord's agent testified that this fixed-term tenancy began on October 2, 2017 and reverted to a month-to-month tenancy after October 31, 2018, and the tenants still reside in the rental unit. Rent in the amount of \$1,250.00 was payable on the 1st day of each month, which has been increased over time and is now \$1,378.00 per month, and there are no rental arrears. On August 16, 2017 the landlord collected a security deposit from the tenants in the amount of \$625.00, as well as a FOB deposit of \$150.00,

both of which are still held in trust by the landlord, and no pet damage deposit was collected. The rental unit is one of 97 residential units in a complex also containing 6 commercial units. A copy of the tenancy agreement has been provided for this hearing.

The landlord's agent further testified that on August 23, 2023 the tenants were served with a One Month Notice to End Tenancy For Cause (the Notice) by posting it to the door of the rental unit. A copy of the Notice has been provided for this hearing and it is dated August 23, 2023 and contains an effective date of vacancy of September 30, 2023. The reason for issuing it states: Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

On multiple occasions the tenants were caught smoking in or on the rental property. There have been 2 prior warnings on March 8 and April 10, 2023. Copies of the written warnings have been provided for this hearing. On August 16, 2023 the tenants were found smoking on common property and the Notice was served. A statement of the resident manager has also been provided for this hearing, whose first language is not English, stating that he observed smoke from air vents and smelled tobacco smoke. Also provided is a statement from another tenant in close proximity to the rental unit dated November 10, 2023 which indicates that the writer suffers from allergies, and has not been able to use the patio for 2 summers due to 2 other suites smoking. It also states that the stairwell smells from 2 people smoking coming through the cement walls.

On all occasions where warnings were given, the resident manager witnessed the tenants smoking. Due to the aggressive tone of the tenants' emails, the landlord's agent didn't feel it necessary to respond to the tenants' emails after the first warning letter and thought it would further cause issues.

The resident manager also observed an ashtray in the rental unit during an inspection.

Section 41 of the tenancy agreement and Section 23 of the Rules Addendum specify that no smoking is allowed on the landlord's property.

When the tenancy agreement was created, smoking was not allowed inside and in the interior of common property, but the rules have changed to include the exterior of the property as well as on the balcony and patios. Notice was posted on multiple occasions in the building. The building opened in 2017 and the tenants agreed to the term prior to that.

The city sidewalk is not considered part of the property, but the landscape area is within the landlord's property line.

The first tenant (MC) testified that the tenants are well aware of housing problems and would never break the rules. The tenant found out the tenant's Native heritage and was given a pack for smudging by an elder, which contained tobacco. The tenant switched over to using sweet grass. However, after the second warning letter, the tenant was trying to explain that to the resident manager, and that it was very important to the tenant. The resident manager kept cutting the tenant off, saying to just stop it, so the tenant hasn't done so since then.

The tenant got upset with the resident manager in the parking lot, and apologized, but the resident manager has a vendetta. The tenants' lives have been turned upside down. Knowing that an inspection was scheduled, it makes no sense for the tenants to have an ashtray in the rental unit.

The tenant doesn't drive, and has disabilities preventing walking very far. The tenant took a tape measure from the exhaust to the curb. Witness statements from other people who have witnessed this and who are not close friends of the tenants have also been provided for this hearing. One of the statements indicates that the writer did not know that the tenants were smokers, and saw the tenants smoking after the letter was signed.

The second tenant (GS) testified that the tenant moved into the rental unit the day the complex opened, with no complaints about smoking until the resident manager took over as caretaker. The previous resident manager never saw the tenants smoking. The rule about smoking on the property was never signed by the tenants. The Notice said that people had to go to city property to smoke. The resident manager said that he saw the tenants smoking, but the tenants were on city property.

The tenant has checked the landlord's website, and the biggest reason they want to evict is because new rent will be \$600.00 per month more than the tenants pay. Neighbours are also getting hassled for one thing or another. The tenants have not smoked on the property, but go to the Legion and that's where they smoke. The resident manager has seen the tenants there.

In order to see the tenants smoke in the rental unit, the resident manager would have to be looking against the window because it is tinted. There have been so many false statements.

Analysis

Where a tenant disputes a notice to end a tenancy given by a landlord, the onus is on the landlord to establish that it was given in accordance with the *Residential Tenancy Act*, which can include the reason(s) for issuing it. In this case, I have reviewed the One Month Notice to End Tenancy For Cause (the Notice) and I find that it is in the approved form and contains information required by the *Act*. The reason for issuing it is in dispute.

To end a tenancy agreement for breach of a material term the party alleging a breach 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.

I have reviewed all of the evidence provided by the parties.

The landlord's warning letter of March 8, 2023 states that the landlord company received a report that smoke was observed coming from inside the rental unit on March 7, 2023. It also states that should the behavior continue, the landlord would be forced to end the tenancy.

The warning letter of April 10, 2023 states that despite being previously warned, the tenants had been observed smoking on the landlord's property. It also states that is a final warning letter, and should the behavior continue, the landlord will be forced to end the tenancy.

The landlord's letter dated August 16, 2023 states that active smoking from the rental unit on August 14, 2023 was reported, and that someone from the rental unit was observed by the resident manager smoking on the property, despite prior warnings. It also states that due to the infraction, the landlord is issuing a "formal Lease Violation Letter," and to cease the detailed behaviour immediately.

The Details of the Event(s) portion of the Notice states that the tenants were observed smoking on the property on August 16, 2023.

The landlord's agent testified that the tenants were found smoking on common property on August 16, 2023, but the evidence indicates August 14, 2023. I find that to be an oversight by the landlord's agent.

The landlord has also provided a copy of a notice to all tenants dated March 31, 2023, indicating that as of that date, the rental property now has a designated smoking area, with a cigarette butt disposal receptacle being placed in the landscaped area on the southeast end of the parking lot for all cigarette butts to be disposed of. It also states that smoking anywhere else on the property is still a violation of the rules. It also states that any tenant found contravening the rules will be issued a notice to end the tenancy for violating a material term of the tenancy agreement.

The letter from the landlord to the tenants dated August 16, 2023 states that smoking is not allowed anywhere on the property, including inside the units, on the balcony, hallways, the underground parking, and the outside grounds of the building except where designated, as per Section 42 of the tenancy agreement. The March 31, 2023 notice states that smoking anywhere else on the property, including within units, patios, parking lot or any other common areas is a violation of the rules. A landlord may not add or change any term in a tenancy agreement without the written agreement of the tenant, or it is not an agreement. Therefore, the posted notice dated March 31, 2023 does not relate to any agreement made by the tenants.

I have also reviewed the original tenancy agreement, signed by one of the tenants and a landlord on August 16, 2017, which states:

41. SMOKING. The Tenant agrees to the following material term regarding smoking: No smoking of any combustible material or the use of vaporizers is permitted on the residential property, including inside the rental unit and on the balcony/deck.

42. ADDITIONAL TERMS. The tenant acknowledges receiving and agrees to the attached (building name) RULES addendum. The attached (building name) RULES shall form a material part of this Residential Tenancy Agreement.

Both of those paragraphs are initialed by the landlord and the tenant. The Addendum states:

23. No Tenant, Occupant or invitee shall smoke on interior common property, including, but not limited to, hallways, stairwells, parkade, elevators, patios and balconies or within the leased suite itself. The (building name) is a 100% NON-SMOKING Building.

The Addendum is initialed by both parties at the bottom of each page and signed by the parties on August 16, 2017.

The tenants deny smoking on the property, but testified that the resident manager saw the tenants smoking on the sidewalk.

The tenants have provided a number of character letters and testified they were written by other tenants, not friends. In particular, the letter dated November 13, 2023 states that the writer lives next door to the tenants and the units share a common wall with air intake vents between the 2 units. It also states that the writer has never smelled or seen the tenants smoking anywhere on the property, but has observed the tenants smoke near the outside area of the sidewalk and in a vehicle parked outside the Legion. The letter also explains that the writer is outside with plants and dogs so would have seen or smelled smoke.

The tenants have also provided a copy of a string of emails, one of which is from the tenants stating that it is a complete falsehood that the tenants were smoking on the landlord's property, but on the city sidewalk. It also asks for a copy of the inspection report of August 14. The response is from the landlord's agent who states that the tenants were in breach of a material term of the tenancy agreement, and there is no formal report for the August 14 inspection.

As mentioned above, the onus is on the landlord to establish the breach. The landlord's agent did not call the resident manager to testify. I have read the resident manager's report. Considering the testimony of the tenants, and the evidentiary material, particularly that of the neighbour who shares a wall with the tenants, and in the absence of any affirmed testimony from the resident manager, I am not satisfied that the landlord has established that the tenants have breached a material term of the tenancy agreement.

Therefore, I cancel the One Month Notice to End Tenancy For Cause and the tenancy continues until it has ended in accordance with the law.

Conclusion

For the reasons set out above, the One Month Notice to End Tenancy For Cause dated August 23, 2023 is hereby cancelled and the tenancy continues until it has ended in accordance with the law.

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: December 05, 2023

Residential Tenancy Branch