Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MT, CNC

Introduction

The tenant applies to cancel a one month Notice to End Tenancy dated July 3, 2014 and, by amended, to cancel a second one month Notice dated July 21, 2014. He also requests more time to apply but there was no allegation or evidence to indicate that he was late in applying or amending his application to cancel either Notice.

Issue(s) to be Decided

Does the relevant evidence presented at hearing show on a balance of probabilities that there is a basis for the tenant's eviction under s. 47 of the *Residential Tenancy Act* (the "*Act*")?

Background and Evidence

The rental unit is a bachelor apartment in a one hundred unit apartment building operated by a non-profit housing society for the benefit of seniors and the disadvantaged in our community.

This month to month tenancy started only in May 2014. The portion of rent the tenant pays is $366.00 per month. The landlord holds a $239.50 security deposit.

The first Notice to End Tenancy, dated July 3, 2014, alleges two different grounds for eviction. The first allegation is that the tenant or person permitted on the premises by him has "significantly interfered with or unreasonably disturbed another occupant or the landlord." The second allegation in the first Notice is that the tenant has "breached a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

Both of these grounds are listed as justification for the eviction of a tenant under s. 47 of the *Act*.

After the giving of the first Notice, other incidents occurred which caused the landlord to issue the second Notice. It alleges that again the tenant or a person he has permitted on the property has "significantly interfered with or unreasonably disturbed another occupant or the landlord."

It is not disputed that the tenant has placed a "window mount" air conditioner on a table just inside a window to his seventh floor apartment. The landlord's representatives claim it is a breach of a term in the tenancy agreement, that it poses a significant danger as it could fall out the window and that it consumes an extravagant amount of power, the cost of which is included in the tenant's rent. They refer to a June 3rd letter to the tenant warning him not to put an air conditioner in his window, noting that it was contrary to the tenancy agreement and that it would draw too much power.

The landlord's representative Mr. M. testified that the tenant's response to the letter was to tell him to "go fu** yourself." His note to Mr. D.'s incident report of July 3rd regarding the air conditioner unit states, "I gave the tenant a NTE after an unhappy telephone call."

The tenant says he has now removed the air conditioner and that, anyway, he only used the fan portion, not the cooling portion. The landlord responds that the unit was still there, observable from below, a few minutes before the hearing and that Mr. D. can feel the cooled air from the tenant's door.

In regard to the interference and disturbance claimed in the first Notice, the landlord's representatives did not present any evidence of anyone being unreasonably disturbed or significantly interfered with.

In regard to the second Notice and its allegation of unreasonable disturbance and significant interference, the landlord refer to a written complaint from a tenant on the fifth floor indicating that on July 20th his sleep was disturbed by music emanating from the seventh floor and that it wasn't the first time.

The landlord presented another tenant's incident report but that tenant's name and address were not disclosed. Evidence from anonymous witnesses is not admissible to prove a fact except under very special circumstances and only with advance permission.

The caretaker Mr. D. filled out an incident report dated July 18th indicating he'd received several complaints about loud music from the tenant's suite and that there were a half dozen notes on the tenant's door about the music.

Mr. D. also alleges that the tenant threatened him one day by saying "keep it up" as he passed by.

The landlord's representatives wished to present evidence of occurrences after the second notice but that evidence was refused as the Notices must stand or fall on circumstances as they existed at the time the Notice was given.

The landlord filed evidence regarding the tenant operating a business from the rental unit, by Mr. M. for the landlord indicated the landlord was not relying on that issue to substantiate the eviction.

The tenant claims he does not have a "stereo" but merely a 62 inch television with speakers attached to each side. He says he's never been approached by anyone about the music.

Analysis

The ending of a tenancy is a very serious matter. The evidence required to prove grounds for eviction must be cogent; convincing. In regard to these two Notices, that evidence falls well short of what is required and I cancel both Notices to End Tenancy.

In regard to the first Notice there is no evidence, or certainly insignificant evidence of any particular interference or disturbance and certainly none that would be considered "significant" or "unreasonable."

The evidence about the air conditioner unit is simply not adequate. It is on a table wholly inside the apartment and has not been shown to be a danger unless someone slid it or picked it up and threw out the window. Regarding power consumption, even if this were a valid consideration, evidence of the relative power consumption of various consumer appliances like window mount air conditioners must come from a source more authoritative than the unsubstantiated comments/opinions of the landlord's representatives.

Lastly, I am not persuaded that the tenancy agreement completely bars such appliances. The clause in question, clause 26, reads:

26 Alteration of Premises

Tenants must not, without prior written consent of the landlord, do any of the following;

(a) Place on or affix any electromagnetic wave receiver any object whatsoever to the outside of property
(b) Make any structural alterations, paint, paper, carpet, or alter the provided window coverings
(c) Repair or service any vehicle on the property
(d) **Install or store heavy appliances or equipment on the property.**

(*my emphasis*)

The landlord's representatives specifically refer to the last item (d) as being breached.

The term "heavy appliance" is not defined in the agreement. I accept that the air conditioner unit is an "appliance" but whether it is a "heavy appliance" is a matter of speculation and not directly addressed by the parties.

The clause in question bars the installation or storage of heavy appliances or equipment "without the prior written consent of the landlord." That provision indicates that such installation or storage is not, in itself, prohibited and that, in some circumstances the installation or storage of heavy appliances could be permitted. It follows that such installation or storage, without permission and in violation of clause 26, is not a breach of a material term of the agreement, that is, a term so fundamental to the existence of the tenancy that when making their agreement both parties would have likely agreed a breach of it would end the agreement. While a breach may give the landlord cause to obtain an order for removal of the unapproved appliance, it is not a ground under s. 47 for ending a tenancy.

In regard to the second Notice and its allegations of unreasonable disturbance and significant interference, the evidence does not substantiate that cause. The most cogent evidence is the signed statement of the tenant on the fifth floor regarding an incident on July 20th. The statement confirms a noise but does not indicate the author was unreasonably disturbed or significantly interfered with. It is not for an adjudicator to guess whether it was a major interference or a minor disturbance. The author thought the noise was from next door and went and knocked on that door. How he determined the noise came from the seventh floor is not stated. He does not say, nor does any collateral evidence establish that the noise in question was coming from the tenant's rental unit. It is not open for an adjudicator to speculate on these matters.

Mr. D. relates the tenant commenting "keep it up" as a threat. The evidence does not establish the tenant was threatening bodily harm or any other illegal action. The surrounding circumstances, the age of the parties, their size, physical location at the time of the utterance, are unknown. There is no basis to conclude Mr. D. had

reasonable cause to feel threatened with an unlawful action such as bodily harm. It should be noted that it is not against the law to threaten to do something that is not illegal; file a complaint for example.

It should be noted that notwithstanding the determinations made in this decision, matters could have gone radically different for the tenant had there been better evidence of disturbance or interference. I found the tenant's testimony to be inconsistent at best. I don't accept his evidence that he has acquired and positioned an air conditioner in front of his window simply to use the "fan" function. I don't accept his testimony that he had removed the unit when later in his testimony he implied it was still there.

Conclusion

The tenant's application is allowed the two one month Notices to End Tenancy dated July 3, 2014 and July 21, 2014 are cancelled and of no force or effect.

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: September 15, 2014

Residential Tenancy Branch