Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FF

Introduction

This is this the tenants' application pursuant to s. 47(4) of the *Residential Tenancy Act* (the "Act") for cancellation of the landlord's 1 Month Notice to End Tenancy for Cause dated November 26, 2016, with an effective date of December 31, 2016 (the "1 Month Notice").

Both tenants and both landlords attended the hearing. The hearing process was explained and the participants were asked if they had any questions. Both tenants and both landlords provided affirmed testimony and had the opportunity to present their evidence orally and in written and documentary form, to make submissions, and to respond to the other party.

At the outset of the hearing I advised the parties of their option to have me assist in mediating an agreement with respect to this tenancy. A settlement was not reached.

The parties agreed that the tenants were served with the 1 Month Notice on November 26, 2016. The tenants filed an application to dispute the 1 Month Notice on December 5, and served it on the landlords by registered mail. The landlords confirmed that they received the tenants' application on December 9, 2016.

The tenants submitted evidence to the Residential Tenancy Branch ("RTB") and served it on the landlords. The landlords confirmed receipt of this evidence.

The landlords also submitted evidence to the RTB. However, not all of it was served on the tenants. In particular, they did not share a digital thumb drive or witness statements with the tenants. I have not considered the materials submitted to the RTB by the landlord that were not shared with the tenants in advance of the hearing as the tenants have not had an opportunity to respond to those materials.

Issues to be Decided

Are the tenants entitled to an order cancelling the 1 Month Notice?

If not, are the landlords entitled to an order of possession?

Are the tenants entitled to return of the filing fee?

Background and Evidence

A substantial amount of documentary evidence was submitted by both parties, including written submissions and written responses to submissions. As set out above, I have not considered evidence submitted by the landlord that was not shared with the tenants.

It was agreed that a month to month tenancy began in October of 2012 and that the current rent is $900.00 monthly, due on the first of each month. A security deposit of $450.00 remains in the landlords' possession. The tenants' suite is on the lower floor of a residence and the landlords occupy the upper floor. The landlords only recently purchased the property and have only been the tenants' landlords and neighbours since then.

All parties acknowledged that the tenancy agreement includes an addendum that prohibits smoking in the rental unit. It does not prohibit smoking outside of the unit. The addendum also includes a provision by which the tenants have agreed to ensure their personal conduct does not impact the landlords or neighbours.

It was also agreed that the landlords issued a "letter of concern" dated October 18, 2016, which the tenants acknowledge having received the following day. The letter of concern sets out approximately 9 instances of indoor smoking over a period of one week.

It was also agreed that on November 23 the landlords issued a "letter of intent" stating that they had contacted the RTB on October 12 about how to proceed with "continued smoking" and that they had been advised to evict with cause. That letter also alleged "continued smoking" with the "most notable infraction" on November 7. The tenants say the reference to October 12 in this "letter of intent" shows that the landlord contacted the RTB after the first concern about indoor smoking in October rather than attempting to address the problem directly with them. The tenants testified that they received correspondence from the landlord suggesting that they move out with two months' notice voluntarily but on the same day that their response to this offer was due, they received the 1 Month Notice that they have now applied to cancel.

The female landlord who is also the upstairs occupant testified that in addition to the instances set out in the October 18 letter, she had been exposed to smoke that appears to have originated inside of the lower unit on October 20, November 7, November 29, December 5, 26, and 28, and January 1. She testified that when the cigarette smoke affects her she "shuts herself" in the bedroom with the window open and the fan on to avoid the smoke in the rest of the suite. The male landlord testified that the landlords have purchased an air ionizer as a response to the smoke and that it works "fairly well" but only in one room at a time so that they are required to move it from room to room in an attempt the clear the air in the whole of their living space. The landlords also stated that when the tenants went away they were not affected by smoke at all.

Only one of the two tenants smokes. She admits to having smoked inside of the rental suite in the week before October 18. However, she states that she has not once smoked indoors since receiving the landlords' letter of October 18. She says that since then she has only smoked outdoors, on the patio of the rental unit. It is agreed that the tenants' patio is below the landlords' living room window. However, the landlords believe that the smoke is entering their suite from the tenants' suite below.

The tenant who smokes says that the times and dates when the landlords have complained of cigarette smoke since October 18, 2016 coincide with when she has been smoking outside, on the patio.

The other tenant says that as a non-smoker he would know if there had been smoking inside the unit and he is certain that there has not been. He says that if he suspected the other tenant was smoking indoors he would raise it with her. They both say that they would not do anything further to jeopardize their tenancy and that they took the receipt of the October 18 letter very seriously.

The tenants are concerned that the landlords have not been speaking with them directly when they smell smoke. The parties have spoken personally very little if at all since October 18. The tenants have invited the landlords to "knock on their door" and investigate if they believe smoking is occurring in the rental suite. The landlords say they have not done so because the tenants have asked them to not visit when the male tenant is away because the female tenant is apprehensive about being alone with the landlord. The landlords further say that the male tenant works nights, and the smoking usually occurs in the evening, so they are prohibited by the tenants' own request from knocking on the door and investigating whether someone is smoking in the rental unit. The tenants say they asked the landlord to avoid coming to their door when the male tenant is away because landlord entered their unit without notice in their absence.

An issue was raised about a smoke detector in the tenants' suite. On one occasion the landlords discovered that the batteries had been removed. At a later date the landlord hardwired the smoke detector into the electrical system. The tenants say that the landlords accused them of tampering with the smoke detector in order to avoid being caught smoking in the unit. The tenants say that they removed the batteries because the smoke detector was not meant to run on batteries and that it was "chirping" and disrupting them at all hours before it was hardwired into the electrical system. The tenants further say, pointing to an email from the manufacturer of the smoke detector to the landlords, that the smoke detector would have gone off if there had been smoking inside the rental unit, and that it has not once gone off in response to cigarette smoke.

Analysis

Section 47(1)(h): failure to comply with a material term after reasonable notice to do so

The landlords rely on s. 47(1)(h) in their 1 Month Notice. That section provides that a landlord may end a tenancy for cause if the tenant has filed to comply with a material term and has not corrected the situation within a reasonable amount of time after the landlord gives written notice to do so.

It is agreed that smoking indoors is not permitted under the terms of the tenancy agreement, and I accept that this constitutes a "material term" of the tenancy. The landlords gave written notice of the contravention on October 18. However, the landlords have not established on the balance of probabilities that the tenant smoked indoors after this point.

The tenants say there has been no further indoor smoking since October 18. The landlords strongly suspect that there has been. The testimony is conflicting and there is no reason for me to prefer the credibility of one party over another. There is insufficient evidence on a balance of probabilities for me to find in favour of the landlords.

The landlords may also have been able to succeed under this section if they had investigated the origins of any cigarette smoke they smelled after October 18, or had asked another person to do so, but they have not. I do not accept that the landlords are precluded from investigating by the tenants' request that they not attend at the rental unit when the female tenant is there alone. As landlords they are responsible

to investigate any suspected breaches of the tenancy agreement and there are other ways the landlords could investigate their concern, including by asking a third party to attend at the rental unit, whose evidence could then be used to establish an infraction by the tenants.

Section 47(1)(d)(i): significant interference or unreasonable disturbance

Section 47(1)(d)(i) of the Act provides that a landlord may end a tenancy for "cause" if the tenant or a person permitted on the residential property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord.

I accept the landlords' evidence that one of them suffers from migraines, that cigarette smoke is a trigger for these migraines, and that one of the landlords/occupants has been negatively affected by cigarette smoke between October and early January.

Based on the undisputed documentary evidence and testimony of both parties provided during the hearing, it is clear that one of the tenants smoked inside of the rental unit on many occasions in the week before October 18, 2016. The letter from the landlords lists at least nine instances of indoor smoking over that week, and the tenants signed that letter and admitted the smoking. Smoking indoors in contravention of the tenancy agreement on this many occasions over the length of a week itself qualifies as "significantly interfering with or unreasonably disturbing" the landlords/occupants.

In addition to the admitted smoking indoors in October, the landlords complain that there have been approximately seven additional instances of smoke in their living space between the October 18 letter and early January. Although the 1 Month Notice was issued November 26, I can consider the instances in December and January when the landlords say they were affected, because they are consistent with the other allegations. The smoking tenant has admitted smoking on these occasions but says that she was smoking outside.

Although smoking outdoors is not prohibited under the tenancy agreement, the landlord's November 23 letter made clear that the landlords were still affected by cigarette smoke. Even if the tenant was only smoking outdoors on the patio, she had clear notice that she was negatively impacting the upstairs occupants. At that point she could have chosen to refrain from smoking on the property at all.

Section 47(1)(d)(ii) seriously jeopardizing health or safety or lawful interest

The landlords also allege that the tenants have seriously jeopardized the health or safety or lawful right or interest of the landlord or another occupant. This is another ground upon with a landlord can end a tenancy for cause under s. 47(1)(d)(ii). However, I do not need to consider this ground because I have concluded that the tenancy must end based on s. 47(1)(d)(i).

Section 55(1)

Section 55(1) of the Act provides that if a tenant applies to dispute a landlord's notice to end a tenancy, the decision-maker must grant the landlord an order of possession if the landlord's notice to end tenancy complies with the specifications around the form and content of the notice as set out in s. 52 and the tenant's application is dismissed or the landlord's notice is upheld. As I am satisfied that the 1 Month Notice complies with s. 52, the landlords are granted an order of possession. I find that the tenancy ended on December 31, 2016.

As the tenants have paid January's rent, the order of possession is effective at 1:00 pm on January 31, 2017.

Conclusion

The tenants and the landlords are all clearly reasonable and intelligent people. The tenants have submitted solid character references and have to some degree attempted to respond to the landlords' concerns. Unfortunately, the parties live in very close proximity to one another and the tenants have not been able to avoid significantly and unreasonably affecting their upstairs neighbours.

The tenants' application is dismissed and the landlords' 1 Month Notice upheld.

As January's rent has been paid, I grant an order of possession effective 1:00 pm, January 31, 2017. Should the tenants or anyone on the premises fail to comply with this order, it may be filed and enforced as an order of the Supreme Court of British Columbia.

As the tenants' application has been denied, I do not grant the tenants their application filing fee.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under s. 9.1(1) of the *Act.* Pursuant to s. 77 of the *Act,* a decision or an order is final and binding, except as otherwise provided in the *Act.*

Dated: January 19, 2017

Residential Tenancy Branch