



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding VERNON AND DISTRICT COMMUNITY LAND TRUST SOCIETY
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 tenant seeking an order cancelling a notice to end the tenancy for cause. The hearing did not conclude in the time allotted and was adjourned to the afternoon for continuation.

The tenant attended the hearing with a Legal Advocate and called one witness. An agent for the landlord also attended accompanied by Legal Counsel. The tenant and the tenant's witness and the landlord's agent each gave affirmed testimony. Two other employees of the landlord also attended, but did not testify or take part in the hearing, and observed only. The parties, or their representatives, were given the opportunity to question each other and the witness and give submissions.

No issues with respect to service or delivery of documents or evidence were raised, and all evidence provided has been reviewed and is considered in this Decision.

Issue(s) to be Decided

Has the landlord established that the One Month Notice to End Tenancy for Cause was issued in accordance with the *Residential Tenancy Act*?

Background and Evidence

The landlord's agent testified that this month-to-month tenancy began on November 1, 2013 and the tenant still resides in the rental unit. Rent is subsidized, and the tenant's share is currently \$320.00 per month, plus \$34.00 for cable, payable on the 1st day of each month, and there are no rental arrears. At the outset of the tenancy the landlord collected a security deposit from the tenant in the amount of \$250.00 which is still held in trust by the landlord, and no pet damage deposit was collected. The rental unit is an apartment in a

complex containing 75 suites, in a not-for-profit housing complex providing affordable housing for low income seniors.

A copy of the tenancy agreement has been provided as evidence for this hearing, which contains Addendums, one of which states, in part: "It is a material term of this tenancy agreement that smoking of any combustible material in the rental unit or on the residential property is prohibited, unless designated areas where smoking is permitted are noted below," and no designated area is written on the Addendum. It also states:

- I hereby acknowledge that I have read and understand the above no-smoking term and I agree to comply fully with it, recognizing it is a material term of my tenancy agreement, dated October 15, 2013. I also acknowledge that the prohibition of smoking applies to my guests and visitors;
- I understand that failure to comply with the no-smoking policy constitutes a breach of a material term of my tenancy agreement and may be cause for ending my tenancy.

The landlord's agent testified that she signed it and was present when the tenant signed it.

The landlord inspects all rental units quarterly, but this became a hostile environment, and the tenant complained to BC Housing about the landlord's agent and made allegations. A copy of a letter from the Board of Directors dated September 23, 2016 has been provided for this hearing stating, in part, that an investigation had been completed and no evidence of impropriety was found. The landlord's agent did not issue a notice to end the tenancy at that time, and this evidence is provided to establish that there is no bias on behalf of the landlord's agent as against the tenant.

The last time inspections were completed 3 suites, including this rental unit were not in a satisfactory state. The landlord gave the tenant warnings, and referred to the first letter dated September 30, 2015. The landlord's agent testified that the non smoking rule also applies to guests of tenants. Also, with respect to cleanliness of the rental unit, the tenants are offered a community person to assist tenants in order to maintain independence, but the tenant has refused to entertain it.

The parties attended a dispute resolution hearing in November, 2016 with respect to a One Month Notice to End Tenancy for Cause which was issued by the landlord for lack of care of the rental unit by the tenant. The Arbitrator cancelled the Notice and the tenancy continued. A copy of the Decision has been provided for this hearing, and the Analysis portion was read into the testimony of the landlord's agent. It states, in part: "With respect to a breach of a material term, it is unclear to me whether the Landlord is considering a lack of cleaning to be a breach of material term, or whether it is the allegation of smoking.

The Tenant testified that he does not smoke cigarettes and testified that he is not responsible for the smell of marijuana in the rental property. The Tenant submitted that after the landlord left, he dressed and went into the hall and could only smell perfume.”

There were no issues between then and April 17, 2018. However, a letter was given to the tenant on April 12 or 13, 2018 concerning health and safety standards. A copy has been provided for this hearing. It is not dated and is addressed to the tenant, but the language used appears to be a report of some sort, referring to the tenant. It states that the employee of the landlord who completed an inspection on April 12, 2018 pointed out that the suite smelled of smoke and the dust was a hindrance to the tenant’s health, and that the tenant indicated that possibly company did smoke in the rental unit.

On July 27, 2018 the landlord’s agent had to attend the rental unit around 10:00 or 10:30 p.m. for another matter, and smelled cigarette smoke. An Incident Report has been provided for this hearing, written by the landlord’s agent stating that the landlord’s agent and the maintenance man attended at the janitor room across the way from suite 132 (the tenant’s suite). It states there is only 1 apartment on that side and the smell of marijuana was so strong in the hallway right at the tenant’s suite causing the landlord’s agent to feel nauseas. It also states that cigarette smoke coming from suite 102 was strong enough to almost be visible. Letters were given to each of the occupants in suites 102 and 132 on July 30, 2018 respecting no smoking and that a further infraction will affect their tenancy. The tenant replied to the letter, stating, in part, that the tenant is sick of what’s coming out of the mouth of the landlord’s agent. It also alleges that the landlord’s agent keeps accusing the tenant and others of whatever she feels like, and has been doing so for 2 years.

On October 1, 2018 the landlord’s agent let cleaners into another suite and smelled marihuana, and followed up with an eviction notice to the tenant as well as a letter referencing, “(Quiet Enjoyment) smoking in your suite/balcony.” It states that on October 1, 2018 between 12:00 and 1:00 the landlord’s agent was walking down the hallway and the smell of marijuana coming from the tenant’s suite was so strong that the landlord’s agent and person with her both felt nauseas, and that an eviction will be issued..

The tenant is hostile, very confrontational, refuses to work with the landlord’s agents and employees, saying he doesn’t need help.

Also provided for this hearing are a One Month Notice to End Tenancy for Cause (the Notice) and a Proof of Service document. The Notice is dated October 3, 2018 and contains an effective date of vacancy of November 30, 2018. 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.” The Details of Cause(s) section states:

“Tenant continues to smoke in suite. Tenant has been given multiple letters and chances to correct the issue and refuses to do so.”

The Proof of Service document states that the Notice was served by hand delivering it to the tenant on October 3, 2018. It also states, “Tenant refused to sign. Documents left on kitchen countertop as per witness statement & signature.” The witness statement says that on November 5, 2018 the witness received landlord evidence from the landlord’s agent, and that on November 5, 2018 the witness observed the landlord’s agent give the landlord evidence & additional evidence to the tenant by leaving a copy with the tenant.

Another Proof of Service document has been provided for this hearing, which is signed by the landlord’s agent stating that the Notice was served by sending it registered mail.

The tenant testified that he stopped smoking a few years ago, but never did smoke in the rental unit. No one, except for the landlord’s agent, has ever said that the tenant’s rental unit smells of smoke, and the tenant has provided a letter from a friend indicating that cigarette smoke is very bothersome to the writer, and the writer has never smelled smoke on the tenant’s person or in the tenant’s rental unit. The tenant feels the issuance of the eviction notice is based on the complaint made by the tenant to BC Housing in 2016.

The tenant testified that the landlord’s agent stands at the door screaming, saying that the tenant is smoking, and the tenant says he is not. The tenant has provided a letter from another person who states he has lived across from the tenant in the rental complex since the tenant moved in, and has never smelled an odor of marijuana or tobacco around his door. The writer also states he has been in the tenant’s suite and only smelled cooking food.

The tenant has also provided a copy of his bank statement showing his routine, and does not believe he was even at home when the landlord’s agent alleges she smelled smoke from the rental unit on October 1, 2018. The tenant would generally go to Safeway and sometimes takes another person there later. The bank statement doesn’t have times of the day that purchases were made, however the tenant testified that he left home around 10:00 a.m. and would not have been in the building after 10:00. The tenant went out for lunch at 1:00.

The tenant does not smoke marihuana, and testified that other employees of the landlord have been in the rental unit a lot and no one ever said it smelled of marihuana or cigarette smoke.

The tenant’s witness testified that he is the manager of a manufactured home park, and has known the tenant for just under 2 years. The witness has visited the tenant’s

apartment 4 or 5 times and sees the tenant once every week or 2, but seldom longer than 2 weeks. The witness quit smoking cigarettes 30 years ago and testified that he would know if there was an odor of cigarette or marihuana smoke in the rental unit.

The tenant does not smoke, and the witness has never smelled it on him but noticed a faint odor of old smoke in the tenant's rental unit, which is a different smell than new smoke. New smoke gets in his sinuses and he can't stand it. The witness testified that if he walks into a hotel room where someone has smoked, he can tell. The witness is certain he would smell any smoke – on clothing, breath and skin of others. There was no hint of new smoke detected in the rental unit.

Landlord's Submissions:

The landlord's Legal Counsel submits that the testimony of the landlord's agent should be believed over that of the tenant. The tenant continues to ignore the tenancy agreement and letters, continued conduct of smoking or allowing someone else. It was smelled by the landlord's agent who testified that it made her nauseous. The breach has continued, is ongoing and the tenant responds poorly and has been issued warnings. Has refused to comply and has acted in confrontational manner.

The testimony of the tenant's witness is not relevant, and counsel submits that it's not credible that he would smell marihuana on the tenant even if they only see each other every 2 weeks or so.

The tenant had no specific recollection about when he departed the rental unit on October 1, 2018, and that testimony cannot be credible.

The landlord relies on 2 Decisions taken from the Residential Tenancy Branch website, the first of which states that the Arbitrator was satisfied that the tenant had unreasonably disturbed other occupants respecting smoking and declined to cancel the notice to end the tenancy. The other Decision held that second-hand smoke to be a health risk. In this case, the landlord's agent said she felt nauseous.

Tenant's Submissions:

The burden of proof is on the landlord, and the Decision relevant to this hearing is the Decision of the 2016 hearing between the parties. The Arbitrator found that the landlord failed to prove breach of a material term and references testimony from Interior Health. What has happened before then is not relevant. The only issue in the One Month Notice to End Tenancy for Cause is with respect to smoking, and the landlord can't raise other issues.

The tenant recalled his routine, and although the time of day isn't evident, the tenant provided his bank statement to prove that he wasn't home on October 1, 2018, and it's common to not keep receipts.

There are no details from the landlord of other complaints and the tenant's witness says the tenant doesn't smoke marihuana or cigarettes. The hallway is a common area, but the landlord's agent testified that others have smoked in the building. The tenant cannot prove a negative.

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. The reason for issuing it, breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written reason to do so, is in dispute.

I have reviewed the One Month Notice to End Tenancy for Cause and I find that it is in the approved form and contains information required by the *Act*. However no one gave any testimony with respect to serving it on the tenant. The Proof of Service document provided by the landlord does not give information from a witness sufficient to satisfy me that the tenant was served or when or how. It appears that page 2 of the 2-page Proof of Service document has been inadvertently exchanged with another Proof of Service document for evidence. Another Proof of Service document of the landlord states that the Notice was served by mailing it to the tenant by registered mail. It is signed and dated October 3, 2018 by the landlord's agent but doesn't say when it was served. Further, the bottom portion of the One Month Notice to End Tenancy for Cause states that it was left on the door or mail box or mail slot.

The *Act* specifies the ways that such a Notice can be served, and with conflicting evidence and no testimony, I cannot be satisfied that it was served in accordance with the *Act*. However, given that the tenant has disputed it, clearly the tenant received it.

The *Act* also specifies how a tenancy ends, and in the case of a notice to end the tenancy for cause, it states, in part:

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

(i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,

- (ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or
 - (iii) put the landlord's property at significant risk;
- (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;

In this case, the parties lead evidence with respect to the cleanliness of the rental unit and other issues that are not the reasons that the landlord issued the Notice. The landlord has issued it citing paragraph (h), not paragraph (d). Therefore, I find that some of the evidence and testimony is not relevant to this hearing. However, I do find that evidence and testimony of inspections by the landlord inside the rental unit are relevant.

In order to rule in favour of the landlord, I must be satisfied 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. There is no question that the tenant has been given written notice about smoking.

I have reviewed all of the evidentiary material provided by the parties, and what's missing for me is how the landlord's agent and landlord's maintenance man know that the odor of smoke was emanating from this particular rental unit. Are there vents in the common hallway, or are there other units in the vicinity that have smelled of smoke? There are no complaints from other tenants, a letter from a neighbour who states he has never smelled smoke around the rental unit, and affirmed testimony from a witness. The landlord has provided several written Suite Inspection Reviews, none of which mention a smell of smoke. The tenant believes he wasn't even home at the time the landlord's agent attended at the rental complex on October 1, 2018.

The landlord's Legal Counsel submits that the testimony of the tenant's witness is not credible, but I disagree. I find it to be common for ex-smokers or non-smokers or those with sensitivities to smoke to be able to smell it in the way the witness described.

Ending a tenancy for cause is a serious matter considering the well-known low vacancy rate of rentals in the Province, and where such a notice is disputed there must be no question. Where it boils down to one person's word over another, the claim has not been proven. Given that there is insufficient evidence before me of service of the One Month Notice to End Tenancy for Cause, and given that the tenant has provided evidence of not being at home for at least part of the day on October 1, 2018, I find that it boils down to one person's word over another. In the circumstances, I find that the landlord has failed to establish that the Notice was given in accordance with the *Act*, and I cancel it.

Conclusion

For the reasons set out above, the One Month Notice to End Tenancy for Cause dated October 3, 2018 is hereby cancelled and the tenancy continues.

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: November 21, 2018

Residential Tenancy Branch