



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FF

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the "Act") for:

- cancellation of the landlords' 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47;
- authorization to recover their filing fee for this application from the landlords pursuant to section 72.

Both parties attended the hearing via conference call and provided affirmed testimony. Both parties confirmed the tenants served the landlords with the notice of hearing package and the submitted documentary evidence in person. Both parties confirmed the landlords served the tenants with the submitted documentary evidence in person. Neither party raised any service issues. I accept the undisputed testimony of both parties and find that both parties have been sufficiently served as per sections 88 and 89 of the Act.

Issue(s) to be Decided

Are the tenants entitled to an order cancelling the 1 month notice?
Are the tenants entitled to recovery of the filing fee?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the applicant's claim and my findings are set out below.

This tenancy began on January 1, 2018 on a month-to-month basis as per a submitted copy of the signed tenancy agreement dated December 3, 2017. The monthly rent is \$1,500.00 payable on the 1st day of each month. A security deposit of \$750.00 was paid on December 3, 2017.

Both parties confirmed in their direct testimony that on March 27, 2019, the landlord served the tenant with the 1 Month Notice dated March 27, 2019 in person. The 1 Month Notice sets out an effective end of tenancy date of April 30, 2019 and that it was being given as:

- the tenant or 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 cause listed on the 1 month notice are:

*On Jan 5th, 2019 around 9am A.T.C. approached me in a very aggressive manner.
March 1st, 2019 around 5pm A. spoke to my wife in a very rude and aggressive manner
therefore she is very fearfull of him.*

*My son suffers from asthma, his asthma seriously aggravates by tenants cigarette
smoke. Reason for notice: safety of my family & seriously risked to my son's health.
Breach of agreement by.*

Extended discussions with both parties clarified that the landlords state that the tenants are smoking cigarettes on or in the rental property. The landlord stated that this is contrary to the "no smoking" policy as provided in the signed tenancy agreement.

Section 3 of the signed tenancy agreement dated December 3, 2017 provides for:

*Pets and **smoking is not permitted**. No guests allowed after 10pm.*

Both parties confirmed that there were no other issues listed in the 1 month notice dated March 27, 2019.

Both parties confirmed the landlords served the tenants with a caution letter on February 3, 2019 in which the landlords claim the tenants are smoking on or in the property. The landlords claim that after this letter was served the tenants continued to smoke on or in the property.

The tenants dispute this claim stating that once the letter on February 3, 2019 was received all smoking was conducted off the property.

The landlords has submitted in support of their allegations, exhibit(s) "E", a screen shot of a text message of communications between the two parties on February 11, 2019. It references a visit to inspect if the heat is working; a bathroom light left on regarding hydro usage. Exhibit "C" a copy of a review consideration decision, re: tenants' monetary claim review on the grounds of fraud which was dismissed.

The landlords have argued that the tenants lack credibility and have referred to a exhibit "M" a Doctor's note stating that the landlord, N.V. was admitted to hospital. The landlords' have claimed that the tenants had "lied" stating that the landlord was not in the hospital and was at home. The landlords claim because of this the tenants cannot be credible.

The tenants responded stating that the "Doctor's Note" which cannot be relied upon. A Doctor will write down anything that a patient would request. The tenants stated that this is insufficient to rely on the landlords' claim of a credibility challenge by the landlords. The tenants also argue that the landlords' credibility is in question by the landlords' argument in a previous dispute resolution hearing in that the landlord, B.V. did not give permission for the tenants to operate a daycare in the residence.

The landlords responded stating that exhibit "E" of the landlords evidence is a photograph of cigarette butts lying around the base of the garbage can. The landlords also stated in an affidavit that the tenants were asked "Do you smoke?" for which the tenant, A.C. replied, "No".

Analysis

In an application to cancel a 1 Month Notice, the landlord has the onus of proving on a balance of probabilities that at least one of the reasons set out in the notice is met.

I accept the undisputed testimony of both parties and find that the tenants were properly served with the 1 month notice dated March 27, 2019.

In this case, the tenants confirmed that smoking was taking place in or on the rental property prior to February 3, 2019 when the landlords served the tenants with a warning letter to stop smoking. The landlords have provided direct testimony and affidavit material stating that the smell of smoke can be frequently detected surrounding the basement rental unit. No details of the dates of these incidents were provided in the affidavit or in the landlords' direct testimony. The landlords have stated that after February 3, 2019, the tenants were still smoking on the property as shown by the submitted photographs of cigarette butts found in and around the garbage can. The landlords have also provided direct testimony and sworn affidavit material stating that the tenants were still smoking on or in the property. The tenants have disputed this claim stating that once the February 3, 2019 letter was received all smoking was conducted off of the property.

The onus or burden of proof lies with the party who is making the claim. When one party provides evidence of the facts in one way and the other party provides an equally probable explanation of the facts, without other evidence to support their claim, the party making the claim has not met the burden of proof, on a balance of probabilities, and the claim fails. In this case, both parties rely primarily on direct testimony. Both parties have made argument regarding the credibility of the other party.

On the issue of credibility, I find that neither party has provided sufficient evidence that would lend any weight to the credibility of the other party regarding this issue before me, which is if the tenants had "smoked" on or in the rental property after the February 3, 2019 letter was received. As such, no determination on credibility is made.

The landlords have relied heavily on the affidavit material of the two named landlords and their son (an occupant). All of which have provided affidavit evidence that the tenants have smoked on the rental property. The tenants have repeatedly argued that no smoking took place in or on the rental property after February 3, 2019. As such, I find on a balance of probabilities that the landlords have failed to provide sufficient

evidence that the tenants have smoked in or on the rental property after February 3, 2019. The tenants' application to cancel the 1 month notice dated March 27, 2019 is granted. The tenancy shall continue.

The tenants having been successful are entitled to recovery of the \$100.00 filing fee. As the tenancy continues, I order that the tenants are authorized to withhold one-time \$100.00 from the next months' rent upon receipt of this decision.

Conclusion

The tenants' application to cancel the 1 month notice dated March 27, 2019 is granted. The tenancy shall continue.

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: May 13, 2019

Residential Tenancy Branch