Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, OLC

Introduction

In this dispute, the tenant seeks an order cancelling two One Month Notices to End Tenancy for Cause (the "Notices") pursuant to section 47 of the *Residential Tenancy Act* (the "Act"). The tenant also seeks an order that the landlord comply with the Act, the *Residential Tenancy Regulation* or the tenancy agreement under section 62 of the Act.

It should be noted that section 55 of the Act requires that when a tenant applies for dispute resolution seeking to cancel a notice to end tenancy issued by a landlord, the arbitrator must consider if the landlord is entitled to an order of possession if the application is dismissed and the landlord's notice to end tenancy complies with the Act.

The tenant filed an application for dispute resolution on July 21, 2020 and a dispute resolution hearing was held, by teleconference, on August 27, 2020. The tenant, her advocate, and the corporate landlord's agent (hereafter the "landlord") attended the hearing and were given a full opportunity to be heard, present affirmed testimony, make submissions, and call witnesses. The landlord stated that he had not received any of the tenant's evidence; however, all of the tenant's evidence consisted of letters given to her by the landlord.

I have only reviewed and considered oral and documentary evidence submitted meeting the requirements of the *Rules of Procedure,* to which I was referred, and which was relevant to determining the issues of this application.

On an unrelated note, two individuals from another dispute had accidentally dialled into the hearing. I was able to provide them with the correct access codes for their hearing, after which they promptly left this hearing.

Issues

1. Is the tenant entitled to an order cancelling the Notices?
2. If not, is the landlord entitled to an order of possession?
3. Is the tenant entitled to an order pursuant to section 62 of the Act?

Background and Evidence

By way of background, the tenancy began several years ago. The landlord did not have the exact start date of the tenancy nor did he know how much the monthly rent was. (He later noted that it was about $700.) However, the tenant interjected and said that the tenancy started eleven years ago. There was no written tenancy agreement submitted into evidence.

Two Notices were served on July 14, 2020 (the first Notice) and on July 28, 2020 (the second Notice). The first Notice had to do with the tenant's smoking, and the second Notice had to do with the tenant's alleged harassment of other occupants of the property, who had apparently worked against the tenant's interests. Both copies of the Notices were submitted into evidence.

The landlord testified that, while there is no clause in the tenancy agreement which prohibits smoking in the rental unit, he explained that the entire property (which is a two-story building consisting of 25 rental units) is non-smoking. He said that there are signs to this effect. The landlord gave the tenant several notices, including a more informal latter, over a span of time starting January 5, 2020. It is alleged that the tenant was smoking in her rental unit, and the second-hand smoke wafts throughout the building into other units, including the landlord's. Copies of the letter and the warning notices were submitted into evidence.

The landlord explained that it was a non-smoking building for health and safety reasons. He testified that a couple of tenants in the property have ailments and allergies to cigarette smoke, and have symptoms related to the inhalation of such smoke. While the smoke does not always go into and throughout the building, some days it is worse than others.

The first Notice was issued on three grounds, namely, under sections 47(1)(d)(i), 47(1)(d)(i), and 47(1)(h), which I shall review in greater detail below.

The second Notice was issued on the same three grounds. However, the landlord testified that it was related to the tenant's alleged harassment of other tenants. He noted that it began after June 12, 2020 (which correlated with a warning notice given to the tenant). He testified that the tenant "intimated and harassed" a tenant in another rental unit. The police attended multiple times and asked the tenant not to harass the neighbour. Further, the tenant apparently "tried to recruit" another tenant into supporting her fight with the landlord over the smoking. The other tenant contacted the landlord who in turn called the police. They came and asked the tenant to stop her behavior.

In her testimony, the tenant testified that she smoked in the rental unit for the first six years of the tenancy. However, she has "not smoked inside" for the past year, and instead only smokes on the balcony. In terms of the alleged harassment, she explained that she is a social butterfly and talk to everyone. And she speaks the truth. And if someone is intimidated by her speaking the truth "then that's on them."

She added that the tenant who complained to the landlord about the alleged harassment is "a very, very nervous woman [with] mental illness." The woman is "very easily influenced," and it was the landlord who recruited this nervous woman into helping his cause. However, she reiterated that "if talking to people is harassment, then I'm guilty."

The tenant's advocate added that the tenant is of good character, and "is a good person." The advocate added, "[D] smokes on her balcony, but smoke follows her in." Indeed, the advocate quipped, "she smells like a cigarette." However, the tenant is, the advocate said, allowed to smoke on the balcony.

At the end of the hearing, the landlord noted that there was a fire inspection completed and it was noted that there was the smell of fresh, second-hand smoke coming from the tenant's apartment.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

Where a tenant applies to dispute a One Month Notice to End Tenancy for Cause, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the Notice is based.

The grounds on which both Notices were given are those under sections 47(1)(d) and 47(1)(h) of the

Section 47(1)(d) of the Act states that a landlord may end a tenancy for cause when

> 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 [. . .]

Section 47(1)(h) of the Act states that a landlord may end a tenancy for cause when

> 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 dispute, it was firmly established by the landlord's testimony that there is no term of the tenancy agreement which prohibits the tenant from smoking. In the absence of any such term, then the section 47(1)(h) ground on which one or both of the Notices were issued is not proven.

While the landlord testified about smoke wafting throughout the building, the entirety of his evidence was based on uncorroborated, third party hearsay. Written statements from other occupants in the building are, where a tenant disputes the grounds on which those statements purportedly support, must be given little evidentiary weight and are inadmissible. Further, while the landlord argued that the tenant smokes inside her rental unit – which is, as I have found, not an activity that is prohibited by the tenancy agreement – there is no evidence that she has, or does, smoke inside the rental unit.

Whether she smokes inside the rental unit or outside on the balcony is, at the end of the day, immaterial. The non-smoking policy of the property as a whole is not a policy which applies to a tenant in their rental unit unless that policy forms part of the tenancy agreement or is included as an addendum to the tenancy agreement. If the other occupants of the building have an issue with cigarette smoke, then that is an issue with which the landlord must deal, but not at the expense of the tenant's otherwise permitted right to smoke in her rental unit, including the balcony.

Indeed, the landlord testified that he renewed the tenancy agreement in September 2019, but for whatever reason chose not to then include a non-smoking term. While the other occupants may very well be bothered by cigarette smoke that permeates from the rental unit, the tenant cannot be evicted because of a legal activity that is not prohibited by her tenancy agreement. Should the landlord wish to put such a term into effect, they must follow section 14 of the Act. Finally, that the landlord (and the previous landlord) have essentially permitted the tenant to smoke for the first six years of the tenancy, and then only recently started to have the tenant stop smoking, essentially estops the landlord from taking issue with the tenant's smoking.

Having considered the testimony of the Landlord and the Tenant, I hold that the Landlord is further, or as an alternative, prevented from issuing the 10 Day Notice on the basis of estoppel.

Estoppel occurs when one party to a legal claim is stopped from taking legal action that is inconsistent with that party's previous words, claims, or conduct. Estoppel is a legal doctrine which holds that one party may be prevented from strictly enforcing a legal right to the detriment of the other party, if the first party has established a pattern of failing to enforce this right, and the second party has relied on this conduct and has acted accordingly. In order to return to a strict enforcement of their right, the first party must give the second party notice (in writing), that they are changing their conduct and are now going to strictly enforce the right previously waived or not enforced.

However, given that the tenancy agreement never prohibited smoking to begin with, the landlord is restricted to making any desires changes under section 14 of the Act.

Finally, regarding the landlord's claim that the tenant has harassed the other occupant or occupants, any evidence in relation to this is hearsay, and I place no evidentiary weight on it. The landlord argues that the other occupant was harassed or intimidated. The tenant disputes this, and said that the other occupant is very, very nervous, and possibly intimidated by the tenant's forthright nature.

When two parties to a dispute provide equally reasonable accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim. In this case, I find that the landlord has failed to provide any evidence that the tenant significantly interfered with or unreasonably disturbed another occupant. Had the landlord called the other occupant as a witness to the hearing, then I might have been in a position to decide differently.

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the landlord has not met the onus of proving any of the grounds on which both of the Notices were issued.

Therefore, I order that the Notices issued on July 14 and July 28, 2020 are cancelled. The Notices are of no force or effect and the tenancy shall continue until it is ended in compliance with the Act.

Turning now to the second aspect of the tenant's application, the tenant sought an order under section 62 of the Act. Specifically, section 62(3) of the Act states that an arbitrator

> [. . .] may make any order necessary to give effect to the rights, obligations and prohibitions under this Act, including an order that a landlord or tenant comply with this Act, the regulations or a tenancy agreement and an order that this Act applies.

In her application under this claim, the tenant states that this order is being sought because of the following (reproduced as written): "Stop accusing me of things i haven't done. Not to bully me. To stop gossiping about me to other tenants."

While there is little doubt in my mind that the parties are at odds over the smoking issue, there is insufficient evidence that the landlord had bullied, or gossiped about, the tenant. In the landlord's mind, he appears to be pursuing what he considers to be an appropriate course of action in rectifying the issue of cigarette smoke. (Notwithstanding, however, that his actions in trying to end the tenancy have no basis supported by law.)

Having dismissed the two Notices under which the landlord obviously appeared to have issued in good faith, I see no reason to issue any specific order under this section that might now prohibit further conduct by the landlord. The landlord is aware of how the application of the Act now applies to this situation.

Given the above, I do not find that it is appropriate for me to grant an order against the landlord under section 62 of the Act.

Accordingly, this aspect of the tenant's application is dismissed without leave to reapply.

Conclusion

I grant the tenant's application to dispute of the two Notices. The Notices issued on July 24, 2020 and on July 28, 2020 are both hereby cancelled.

I dismiss the tenant's application for an order under section 62 of the Act, without leave to reapply.

This decision is made on authority delegated to me under section 9.1(1) of the Act.

Dated: August 28, 2020

Residential Tenancy Branch