



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT

The tenant filed an Application for Dispute Resolution (the “Application”) on January 11, 2021 seeking an order to cancel the One Month Notice to End Tenancy for Cause (the “One Month Notice”) and a reimbursement of the Application filing fee. The matter proceeded by way of a hearing pursuant to section 74(2) of the *Residential Tenancy Act* (the “Act”) on February 4, 2021. In the conference call hearing I explained the process and offered each party the opportunity to ask questions.

Both parties attended the hearing. The landlord was assisted by a witness and an advocate. Each party had a chance to present their submissions, refer to the evidence, and respond to the submissions of the other. Throughout the hearing, I repeated submissions verbally and asked follow-up questions to ensure statements were clear to the other side.

The tenant gave the notice of this hearing to the landlord in advance. The landlord stated they received the Notice of Dispute Resolution on January 14, 2021. This is within the timeframe allotted by the *Residential Tenancy Branch Rules of Procedure* #3.1.

The tenant confirmed they received the prepared evidence of the landlord and referred to it throughout the hearing.

Issue(s) to be Decided

Is the tenant entitled to an order to cancel the One Month Notice pursuant to section 47 of the *Act*?

If the tenant is unsuccessful in their Application, is the landlord entitled to an Order of Possession pursuant to section 55 of the *Act*?

Is the tenant entitled to recover the filing fee for this Application pursuant to section 72 of the *Act*?

Background and Evidence

The tenant provided a copy of 4 pages of the tenancy agreement when they applied for this hearing. It shows the tenant and landlord signed it on December 4, 2020. The rent was \$1,250 per month. The tenant paid a \$625 security deposit and a pet deposit of \$625 at the start of the tenancy. The agreement indicates there are 5 pages of an addendum; however, neither the landlord nor the tenant provided this addendum.

The tenant provided a copy of the One-Month Notice. This shows the landlord signed the document on December 30th. The indication on page 2 of 3 is that “in person received” on December 30, 2020.

On page 2 of the document, the landlord provided the reasons for giving notice:

- Tenant or a person permitted on the property by the tenant has:
 - seriously jeopardized the health or safety or lawful right of another occupant or the landlord.
- Breach of a material term of the tenancy agreement that was not corrected within a reasonable amount of time after written notice to do so.

On page 3 the landlord rewrote these portions of the document. They provided the dates in question on the tenant’s actions were December 8 – 11 and December 22 – 27.

In the hearing the landlord presented that they have legitimate medical conditions that are impacted to a serious degree with the tenant smoking. They had numerous discussions and messages with a mutual contact they have with the tenant on this discrete issue. They provided that they observed multiple people smoking near their bedroom window and this causes an immediate problem with smoke drifting in to their living space.

The landlord provided pictures of video image captures. One picture with a close-up depicts the tenant smoking in the doorway of their rental unit. The landlord described the image as showing the tenant exhaling smoke in this exact spot. The landlord also

provided a copy of the tenant's initial application for tenancy in which they stated they were not a smoker.

They also drew attention to item #11 in the Addendum which provides that there is to be no smoking in the unit. It is their understanding that the doorway is leading into the house. With an older structure to the home it is very easy to detect smoke inside.

The tenant provided specific responses to the above testimony and evidence of the landlord:

- no photo showing multiple people is present in the landlord's evidence – at some point they may have smoked with others in a nearby alleyway
- they stand in the doorway on a regular basis due to heat in the unit that arises when cooking with insufficient ventilation
- the tenancy agreement states there is no smoking in the unit – being in the doorway is a distinction, and any other time they have been outside
- some pages in the 5-page addendum contradict things in the tenancy agreement itself – there is nothing specific on smoking on the property
- the door to their unit is in the middle “down on the side” and the landlord's window is on the front of the house
- the images of the photos are not clear depictions of smoking – the pictures are blurry
- they were in the process of quitting smoking when the move-in meeting occurred and that is the indication on the application form.

Analysis

Section 47 of the *Act* states, in part:

(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
 - (ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or
- (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 matter, the onus is on the landlord to provide they have cause to end the tenancy. The landlord spoke to the reasons in oral testimony; however, I find there is not sufficient evidence to show the One Month Notice is valid.

The photos don't meet the threshold of proof to show definitively that the tenant smoked within the unit. The doorway images are not clearly showing the tenant smoking at the doorway. Additionally, the landlord's description of a group of people smoking is not presented with a date time or exact number of people present; nor is there a description of the situation with reference to the house.

The tenant has challenged the content of the Addendum as providing different terms than what is in the tenancy agreement. There is no copy of the addendum in the evidence so I cannot make the comparison to establish the wording in the addendum. I find it more likely than not the addendum refers to smoking *within* the unit. The landlord presents the doorway leads straight into the unit and is therefore "inside" and I accept that as a reasonable interpretation; however, the photos don't establish that the tenant was smoking at that precise location.

At the point, I accept the tenant's interpretation that the landlord was at the outset specific about smoking, though specifying *within* the unit, and *not* anywhere on the *property*. If that now is an established term the parties can agree on, then I recommend a re-drafted Addendum to incorporate this important point.

The landlord indicated the tenant's actions were a breach of a material term of the tenancy agreement. The *Act* section 47(1)(h) specifies there must be a written notice from the landlord to the tenant identifying this breach. Minus a record of that in the evidence, this reason for issuing the One-Month Notice is not valid.

For these reasons, the landlord has not met the burden of proof to show the One-Month Notice is valid. I order that the One Month Notice is cancelled.

As the tenant was successful in this application, I find the tenant is entitled to recover the \$100.00 filing fee paid for this application. I authorize the tenant to withhold the amount of \$100.00 from one future rent payment.

Conclusion

For the reasons above, I order the One-Month Notice issued on December 31, 2020 is cancelled and the tenancy remains in full force and 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 *Act*.

Dated: February 5, 2021

Residential Tenancy Branch