



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding REALSTAR MANAGEMENT and
[tenant name suppressed to protect privacy]

REVIEW HEARING DECISION

Dispute Codes OPC, CNC

Introduction

On December 28, 2020, the Landlord applied for a Dispute Resolution proceeding seeking an Order of Possession based on a One Month Notice to End Tenancy for Cause (the “Notice”) pursuant to Section 47 of the *Residential Tenancy Act* (the “Act”).

On December 29, 2020, the Tenant applied for a Dispute Resolution proceeding seeking to cancel a One Month Notice to End Tenancy for Cause pursuant to Section 47 of the *Act*.

A Dispute Resolution proceeding was set down for March 23, 2021 for the Landlord’s Application and a Decision was rendered on that same day.

A Dispute Resolution proceeding was set down for March 25, 2021 for the Tenant’s Application and a Decision was rendered on that same day.

The Tenant did not attend the March 23, 2021 hearing. However, she applied for Review Consideration of that Decision on March 24, 2021 and was granted a Review Hearing. This Review Hearing was set down for April 30, 2021 at 9:30 AM and the Tenant’s Application was joined to be heard as a cross-application with the Landlord’s file.

B.C. and A.K. attended the Review Hearing as agents for the Landlord. K.K. attended the Review Hearing as counsel for the Tenant. At the outset of the hearing, I explained to the parties that as the hearing was a teleconference, none of the parties could see each other, so to ensure an efficient, respectful hearing, this would rely on each party taking a turn to have their say. As such, when one party is talking, I asked that the other party not interrupt or respond unless prompted by myself. Furthermore, if a party had an

issue with what had been said, to please make a note of it and when it was their turn, they would have an opportunity to address these concerns. The parties were also advised that recording of the hearing was prohibited and they were reminded to refrain from doing so. All parties acknowledged these terms. As well, all parties in attendance, with the exception of K.K., provided a solemn affirmation.

All parties were satisfied that the Notice of Hearing packages were received. B.C. advised that additional evidence was served to the Tenant by hand on or around April 10, 2021 and K.K. confirmed that this was received. As such, all of the Landlord's evidence will be accepted and considered when rendering this Decision.

K.K. advised that the Tenant did not serve any evidence to the Landlord for consideration on this file.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

I note that Section 55 of the *Act* requires that when a Tenant submits an Application for Dispute Resolution seeking to cancel a notice to end tenancy issued by a Landlord, I must consider if the Landlord is entitled to an Order of Possession if the Application is dismissed and the Landlord has issued a notice to end tenancy that is compliant with the *Act*.

Issue(s) to be Decided

- Is the Tenant entitled to have the Notice cancelled?
- If the Tenant is unsuccessful in cancelling the Notice, is the Landlord entitled to an Order of Possession?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

All parties agreed that the tenancy started on June 1, 2018 and the tenancy ended when the Tenant gave up vacant possession of the rental unit on March 29, 2021 due to an Order of Possession that was granted in the original Decision on the Landlord's Application.

All parties also agreed that the Notice was served to the Tenant by being posted on her door on December 1, 2020. The reason the Landlord served the Notice is because the Tenant has breached a material term of the tenancy agreement that was not corrected within a reasonable time after the Landlord gave written notice to do so. The effective end date of the tenancy was noted as December 31, 2020 on the Notice.

B.C. advised that the Tenant was given at least four written warnings that smoking in the rental unit was prohibited as per the tenancy agreement, that smoking in the rental unit is a breach of a material term of the tenancy agreement, and that the Tenant should cease from smoking in the rental unit, or face eviction. She referenced comment sheets and complaint letters from other residents of the building that were submitted as documentary evidence to support the Landlord's position that the Tenant continued to smoke in the rental unit despite these warnings. She stated that rental unit smelled heavily of smoke during the tenancy and that it did not smell of smoke during the move-out inspection because the Tenant used an excessive amount of bleach to cover up the odour. However, days after this inspection, the smoke smell returned despite the rental unit being re-painted.

K.K. advised that the warning letters were served a considerable time ago, that the wording of the letters is more permissive, and that the wording does not meet the criteria of Policy Guideline # 8 for a warning with respect to ending a tenancy due to a breach of a material term in a tenancy agreement. In addition, he questioned the reliability of the complaint letters by other residents of the building as the details were vague and sometimes referenced hallways or other units, but not specifically the Tenant's rental unit. In addition, while no evidence was provided to support this, he submitted that the Tenant was on vacation from June 29, 2019 to January 15, 2020 so she could not have been accused of smoking in the rental unit during this period of time. He stated that the Tenant is adamant that she never smoked in the rental unit and he suggested that the dispute between the Landlord and the Tenant likely arose from an issue with the Tenant's service dog.

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

With respect to the Notice served to the Tenant on December 1, 2020, I have reviewed this Notice to ensure that the Landlord has complied with the requirements as to the form and content of Section 52 of the *Act*. In reviewing this Notice, I am satisfied that the Notice meets all of the requirements of Section 52 and I find that it is a valid Notice.

The undisputed evidence is that the Notice was posted to the Tenant's door on December 1, 2020 and the Tenant indicated on her Application that she received this Notice on December 1, 2020. According to Section 47(4) of the *Act*, the Tenant has 10 days to dispute this Notice, and Section 47(5) of the *Act* states that *"If a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (4), the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit by that date."*

After receiving the Notice, the tenth day fell on Friday December 11, 2020 and the undisputed evidence is that the Tenant did not pay for her Application to dispute this Notice until December 29, 2020. Therefore, her Application was not submitted until this date. I find it important to note that the information with respect to the Tenant's right to dispute the Notice is provided on the third page of the Notice.

Ultimately, as the Tenant disputed the Notice outside of the required 10-day time frame, I am satisfied that the Tenant is conclusively presumed to have accepted the Notice and I dismiss her Application in its entirety. However, I must still determine whether the reason the Landlord served the Notice is valid.

I find it important to note that a Landlord may end a tenancy for cause pursuant to Section 47 of the *Act* if any of the reasons cited in the Notice are valid. Section 47 of the *Act* reads in part as follows:

Landlord's notice: cause

47 (1) *A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:*

(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;*

With respect to the reason on the Notice of a breach of a material term, I find it important to note that the Policy Guideline # 8 states that “it is possible that the same term may be material in one agreement and not material in another.” I find that this means that determining what would be considered a material term is based on the fact pattern of each specific scenario and that it is up to the Arbitrator in each case to evaluate the evidence presented and make a determination on this matter. In reviewing the tenancy agreement in conjunction with the Landlord’s submissions, and with no submissions to the contrary from K.K., I am satisfied that there is a term in the tenancy agreement which states that there is to be no smoking in the rental unit or on the property, with the exception of the designated smoking area only, and that this is a material term of the tenancy.

The consistent and undisputed evidence is that the Landlord served the Tenant with multiple warning letters regarding the Tenant allegedly smoking in the rental unit. While K.K.’s position is that these letters do not meet the criteria of Policy Guideline # 8 with respect to outlining that there was a problem, that the problem was a breach of a material term of the tenancy, and that if it was not fixed within a reasonable period of time, that it would result in an end of the tenancy, I do not agree with this interpretation. I also find it important to note that the policy guidelines are only guidelines, and I am not bound by these when rendering a Decision.

In my view, it is evident in these warning letters that the Landlord has outlined that smoking is prohibited in the rental unit, that this is clearly a breach of a material term of the tenancy, and that continuation of smoking would lead to service of the Notice. I do not find it reasonable that the Tenant would not have understood this messaging after receiving the warning letters.

Furthermore, I find it important to note that there is no dispute that the Tenant received multiple warning letters regarding allegations of her smoking in her rental unit. However, there is no evidence with respect to what actions the Tenant took in response to these warning letters. Had the Tenant not smoked in her rental unit, it is not consistent with common sense and ordinary human experience that she would simply accept these warnings and not take any action to dispute them, or even respond to them. I find that this causes me to afford little weight to the submissions made by K.K. on the Tenant’s behalf.

Ultimately, when reviewing the totality of the evidence and submissions before me, I find that I prefer the Landlord's evidence on the whole. As such, I find that the Landlord has provided sufficient evidence to justify service of the Notice under the reason of a breach of a material term. As such, I find that the Landlord is entitled to an Order of Possession. However, as I am satisfied that the tenancy is over by way of this Review Hearing Decision, and as the Tenant already gave up vacant possession of the rental unit on March 29, 2021, I do not find it necessary to grant an Order of Possession.

Conclusion

The Landlord is successful in this Application and the tenancy is determined to have ended in accordance with this Review Hearing Decision. An Order of Possession has not been awarded as the Tenant has already given up vacant possession of the rental unit.

The Tenant's Application is dismissed without leave to reapply.

This Review Hearing 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: April 30, 2021

Residential Tenancy Branch