



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

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

DECISION

Dispute Codes **CNC, FFT**

Introduction

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

1. Cancellation of the Landlord's One Month Notice to End Tenancy for Cause (the "One Month Notice") pursuant to Sections 47 and 62 of the Act; and,
2. Recovery of the application filing fee pursuant to Section 72 of the Act.

The hearing was conducted via teleconference. The Landlord's Agent, MS, and two witnesses, NF and AB, attended the hearing at the appointed date and time. The Tenant, FH, also attended the hearing at the appointed date and time. Both parties were each given a full opportunity to be heard, to present affirmed testimony, to call witnesses, and make submissions.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they were not recording this dispute resolution hearing.

The Landlord served the Tenant with the One Month Notice by posting the notice on the Tenant's door on July 22, 2021. The Tenant confirmed receipt of the One Month Notice but did not remember the date. The Landlord served their evidence package on the Tenant via registered mail on October 28, 2021. MS referred me to the Canada Post registered mail tracking number as proof of service. I noted the registered mail tracking number on the cover sheet of this decision. I find the Landlord served the Tenant with the One Month Notice on July 25, 2021 pursuant to Sections 88(g) and 90(c) of the Act.

The Tenant confirmed that he applied for dispute resolution on July 26, 2021 and that he personally served the Landlord with the Notice of Dispute Resolution Proceeding package for this hearing (the “NoDRP package”). The Landlord confirmed receipt of the NoDRP package on August 11, 2021. I find that the Landlord was served with the documents for this hearing on August 11, 2021, in accordance with Section 89(1)(a) of the Act.

Issues to be Decided

1. Is the Tenant entitled to a cancellation of the Landlord’s One Month Notice?
2. Is the Tenant entitled to recovery of the application filing fee?

Background and Evidence

I have reviewed all written and oral evidence and submissions before me; however, only the evidence and submissions relevant to the issues and findings in this matter are described in this decision.

The parties confirmed that the tenancy for this rental unit began on June 1, 2008. Rent in the amount of \$941.32 is payable on the first day of each month. The Tenant paid a security deposit of \$387.50. The Landlord still holds the security deposit in trust.

A copy of the One Month Notice was not submitted into documentary evidence by either party, but a copy of the One Month Notice was submitted with the Tenant’s application for dispute resolution. The Landlord’s reason on the One Month Notice is the Tenant or a person permitted on the residential property by the Tenant has significantly interfered with or unreasonably disturbed another occupant or the Landlord of the residential property.

Written complaints from the tenant below FH follow:

Complaints submitted via maintenance portal by the tenant in 206 at [address of residential property]:

Ticket 193146: (Letter dated March 9th 2020)

Since we moved here, we have been smelling cigarettes both in our bathroom and in the closet in my room (the master bedroom). In the bathroom, the smell comes from under the sink, from the hole where the

sink's pipes go. In my room, my closet constantly smells like cigarettes. I can smell it all over my room whenever my closet doors are open. If I close my closet doors, I won't smell it in my room, but sometimes the smell in my closet is so strong that I am afraid my clothes and extra bedding might start smelling like cigarettes too, especially the items I use the least. My roommate and I are pretty sure it is the person below us that is smoking inside, though it could also be the person beside us, as I am not sure how the smell is getting into my closet. Please can you talk to the person responsible, it is actually a really disturbing smell to have inside of your house, especially for my roommate and I who are both non-smokers. (emphasis mine)

Ticket 198631: (letter dated March 25th 2021)

Please do not close my service request until you have spoken to the unit below us that is smoking inside and fully addressed my concerns. The smell has gotten much worse and much more frequent over the last month and I am no longer feeling comfortable in my own bedroom due to this. I have read the Residential Tenancy Act, and I want to point out Section 28 on Quiet Enjoyment, which quotes that all tenants have a right to "freedom from unreasonable disturbance." I would argue that smelling cigarette smoke in my room every day while living in a non-smoking building is an unreasonable disturbance. Please come speak to the person responsible, otherwise I would like to come into the office and discuss either a rent decrease or terminating my lease early.

Ticket 265575: (Letter dated May 21st 2021)

Hi. I know I have complained many times about my bedroom closet smelling like cigarettes, but it is getting worse and worse. yesterday even with my closet doors shut, my entire bedroom smelt like cigarettes. It was like someone was smoking in my room. I think this is unacceptable. Can someone who is a non-smoker come and smell my closet so you can understand the extent of my frustration with this? I don't understand how the smell is so strong in my closet or where it is coming in from. I need someone to take this seriously.

FH has lived in the building for 13 years. He said the first he knew about a tenant's complaint about smelling smoke was when a new tenant submitted a complaint to the management company in about August 2020. He said he has never had a conversation

with the tenant above him, in fact, he did not know who he might have been disturbing. He testified that he does not smoke on his balcony, and when inside smoking, he does not have his windows open. He mostly smokes in his living room. FH said management sent a maintenance person to his home who did some sealing work, and FH installed a ceiling fan in his living room to help dissipate the smoke.

NF said she moved into the unit above FH in August 2020. She started to notice the smell of cigarette smoke in her closet, so she complained to the Landlord. NF said she slid a note under FH's door after she complained to the Landlord. NF testified that the smell of smoke continued. Her last complaint made was in June or July 2021. The maintenance person came into her unit and sealed a hole under her bathroom sink around a pipe. She said this did not resolve the problem.

FH said the dates of the Landlord's resident's portal notices do not coincide with when NF was complaining about the smell of smoke and when she moved into the building. He also did not receive notices that were allegedly slid under his door. He submitted that he went over and above what the Landlord asked him to do, for instance, he installed an air freshener in his unit.

The Landlord said he copied the upstairs tenant's complaints from the tenants' portal communications and uploaded these reports into documentary evidence for the hearing. As the upstairs tenants moved in in August 2020, the Landlord stated he must have copied the dates incorrectly. The Landlord also submitted corresponding letters addressed to FH with the same dates as noted from the portal communications.

AB, a zone lead maintenance person for the building, has been in both FH and NF's units on two occasions. He testified that he smelled a strong odour of cigarette smoke in FH's unit. AB completely sealed around where the sink drains in NF's bathroom into the floor. He re-caulked around NF's tub, and sealed inside her vanity. AB also sealed around a bedroom outlet in the wall but stated there are no openings or electrical outlets in the closet. AB said the smoke smell could be coming up into the bedroom through an exterior window, or through the ceiling light fixture if it is not airtight. The only other place the smell of smoke could be coming from is through the bathroom, possibly a backflow through the fan. When the fans are on, they vent through the roof.

The Landlord said that residents are allowed to smoke in their rental units, but that residents' smoke cannot be disturbing other building occupants.

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 notice to end a tenancy issued by a landlord, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the notice to end tenancy were based.

Section 47 of the Act is the relevant part of the legislation in this application. It states:

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,

...

For the Landlord to be successful, the smell of smoke in this case must have originated from FH, and it must have significantly interfered with or unreasonably disturbed another occupant or the Landlord. Not every interference or disturbance is a legal wrong, it must be shown to be substantial and unreasonable in the eyes of an objective observer.

This residential property is a smoking permitted building. The tenants' March 25, 2021 complaint notes that this is a non-smoking building, although I do not find this is true as FH is a smoker who has lived in the building upwards of 13 years, and at least one other resident, the person beside the complaining tenants is also a smoker. There may be more. NF is unsure from where the smell of smoke originates, and she asked the Landlord to talk to the person who is the responsible party.

The maintenance person did a cursory assessment and some remedial work in the complaining tenants' unit and in FH's unit. FH has also taken action to remedy this problem by installing a ceiling fan and an air freshener in his rental unit. This has not resolved the issue. AB said he sealed one electrical outlet in NF's bedroom, but there are other electrical outlets and lighting fixtures that were not sealed. Despite all the remedial work undertaken by the maintenance person and FH, this has not reduced the level of smoke smell in NF's rental unit, which is suggestive that FH's smoking is not the

source of the problem. Again, I note, there are other smokers who live in the residential property.

I cannot find, on a balance of probabilities, that FH's cigarette smoke is the offending smoke bothering the complaining tenants in this smoking permitted building.

Accordingly, I cannot uphold the Landlord's One Month Notice to end this tenancy. FH's application to dismiss the One Month Notice is granted. The tenancy shall continue until it is ended in accordance with the Act.

As the Tenant is successful in his claim, he is entitled to recovery of the application filing fee. The Tenant may, pursuant to Section 72(2)(a) of the Act, withhold \$100.00 from one month's rent due to the Landlord.

Conclusion

The Tenant's application to dismiss the Landlord's One Month Notice is granted.

The Tenant may withhold \$100.00 from one month's rent to recover his application filing fee.

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: December 08, 2021

Residential Tenancy Branch