Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding HOMELIFE ADVANTAGE REALTY LTD. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, FFT, OLC, RP, OPC

Introduction

The tenants applied to dispute two One Month Notice to End Tenancy for Cause (the "Notices" or "Notice") pursuant to section 47(4) of the *Residential Tenancy Act* ("Act"). In addition, they applied to recover the cost of the filing fee, under section 72 of the Act.

The tenants' application included claims for landlord compliance (section 62 of the Act) and for an order for repairs (sections 32 and 62). However, given the limited time of the hearing and the secondary nature of these latter claims, they will be dismissed with leave to reapply. The tenants remain at liberty to re-apply for those two claims.

Both tenants and an agent for the landlord attended the hearing. No service issues (other than an issue with the Notice of Dispute Resolution Proceeding, which is addressed below) were raised, the parties (the tenant D.G. and the agent) were affirmed. It should be noted that, through an oversight, I neglected to advise the parties that any recording the hearing was prohibited under the *Rules of Procedure.*

Preliminary Issue: Service of Notice of Dispute Resolution Proceeding

The tenants received the first Notice on July 27, 2021. They subsequently made an application for dispute resolution on August 3, 2021 and were sent a copy of the Notice of Dispute Resolution Proceeding document by email on August 18, 2021. The tenant (D.G.) testified that he served a copy of the Notice of Dispute Resolution Proceeding package on the homeowner (that is, the legal landlord who is represented by the agent) on or about August 18, 2021. The homeowner ("Jesse") refused to accept the package. However, the tenant then believed that there was a mix-up, and then gave the Notice of Dispute Resolution Proceeding package to the then-current property manager P.M. The agent in this hearing (V.F.) took over from P.R. near the end of August. The agent V.F. testified that she never received anything from P.R., and that the first she became

aware of the tenants' application was when she made an application for dispute resolution on November 1, 2021 and received a copy of the tenants' *Tenant Request to Amend a Dispute Resolution Application* document.

There was no Proof of Service document submitted into evidence by the tenants. The tenant referred to video footage of P.R. holding a package. However, there was no video evidence in the file. If the tenants had submitted this evidence, it is not before me.

Based on the testimony of the parties, it is my finding that it is more likely than not that the previous property manager P.R. failed to provide the package to the current property manager. I find the tenant's oral evidence in respect of serving first the homeowner, and then the property manager P.R., to be credible. Indeed, that the landlord's application is for an order of possession based on the second Notice, and not the first, is indicative that there was a disjunct between P.R.'s and V.F.'s roles as property manager.

Be that as it may, given that the landlord seeks an order of possession based on the second Notice, and given that the landlord (that is, the agent) was provided with a copy of the tenants' amendment (albeit a less-than-perfectly completed one), it is my finding that there was satisfactory service of the tenants' Notice of Dispute Resolution Proceeding.

Issues

1. Are the tenants entitled to an order cancelling the second Notice?
2. Is the landlord entitled to an order of possession?
3. Are the tenants entitled to recover the cost of the filing fee?

Background and Evidence

Relevant evidence, complying with the *Rules of Procedure,* was carefully considered in reaching this decision. Only relevant oral and documentary evidence needed to resolve the specific issues of this dispute, and to explain the decision, is reproduced below.

The tenancy began on March 1, 2013. Monthly rent is $700.00, and the tenants paid a $325.00 security deposit. A copy of the written tenancy agreement was submitted into evidence.

The agent testified that they served the second Notice (hereafter simply the “Notice” unless otherwise noted) by Canada Post registered mail on September 22, 2021. All three pages of the Notice were served, and a copy of the Notice was submitted into evidence. The Notice was signed by the agent V.F. on September 22, 2021.

The agent confirmed the address of the rental unit as well as the legal name of the landlord, which has been amended on the cover page of this Decision.

Page two of the Notice indicates that it was issued because the tenants have (1) significantly interfered with or unreasonably disturbed another occupant or the landlord, and (2) seriously jeopardized the health or safety or lawful right of another occupant or the landlord.

The agent gave evidence that the tenants have continuously smoked marijuana and cigarettes both inside and outside of the rental unit. This has led to the health of the upstairs property owner’s wife being negatively affected. They have asked the tenants to stop smoking, but the tenants have not stopped. The warnings have mostly been verbal. The first written “warning” was the first Notice that was issued in the Summer.

In addition to the smoking, the tenants have apparently thrown cigarette butts onto the dry grass, which was a fire hazard. One incident occurred on July 27, 2021.

The tenancy agreement includes a clause in the addendum which requires that any smoking occur outside the rental unit. There does not appear to be any term of the tenancy agreement which prohibits smoking entirely from the property.

The tenant testified that there is something “strange” that, in the eight-and-a-half years that he and his father have resided in the rental unit, and have smoked outside, that all of a sudden, they received an eviction notice. The tenant argued that the first Notice was served not long after a series of arguments between the tenant R.G. and the upstairs landlord. Much of the arguments stemmed from an incident involving the garden hose. Apparently, the tenant R.G. was either drinking from the hose or using it to cool off in 40°C-plus heat, and the landlord told him he could not use it.

The tenant further testified that the female homeowner may have not been familiar with the smell of meat being cooked (the tenant was cooking oysters and steak) and may have thought this was cigarette smoke. This caused breathing problems. The tenant reiterated that at no time was he or his father smoking inside the rental unit.

Analysis

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. In this dispute, only the second Notice will be addressed. (For all intents and purposes the first Notice is considered moot.)

The Notice was issued under two grounds: section 47(1)(d)(i) ("significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property") and section 47(1)(d)("seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant") of the Act.

First, in respect of the cigarette butt being thrown onto the lawn, there is no evidence that this single documented instance seriously jeopardized the safety or lawful right or interest of the landlord. Certainly, throwing a cigarette butt onto dry grass during a heatwave is unwise. But there is no evidence before me to establish that a fire was started. For this reason, this specific ground for issuing the Notice is not proven.

(That having been said, the tenants are cautioned that any further tossing of butts or roaches onto the lawn may result in a further notice to end tenancy. Not to mention that such behavior does not exactly help a landlord-tenant relationship.)

Second, in respect of the landlady's health issues, there is no doubt that marijuana or cigarette smoke affect her health. Indeed, the physician's note submitted into evidence clearly states that the landlady "has history of Asthma. Her symptoms get worse w/ any kind of smoke inhalation. At present, cannabis smoke @ home is making her symptoms worse." And it is not lost on me that the tenants' smoking outside the rental unit (there is no evidence before me to find that the tenants smoke inside the rental unit) interferes with the upstairs homeowner in some manner.

However, the tenants' smoking is in fact permitted by the tenancy agreement. Smoking outside the rental unit has been permitted since the tenancy began in March of 2013. In other words, the very activity for which the landlord seeks to end the tenancy is expressly permitted under the tenancy agreement. Moreover, the tenants' activity is legal, including the smoking of marijuana, which became legal on October 17, 2018.

In short, while the upstairs landlord may be disturbed by the smoke, given the timing of the first Notice being issued it is more likely than not that the Notice was issued in retaliation for an unresolved, long-running dispute between the parties over a garden hose. In summary, then, and 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 proven the grounds on which the Notice was issued.

Given the above, the Notices are both cancelled and of no legal force or effect. The tenancy shall continue until it is ended in accordance with the Act. The landlord's application is dismissed without leave to reapply.

As the tenants were successful in disputing the Notices, they are awarded $100.00 in compensation for the cost of the application filing fee, pursuant to section 72 of the Act. Pursuant to section 72(2)(a) of the Act the tenants are entitled to make a one-time deduction of $100.00 from a future rent payment in satisfaction of this award.

Conclusion

The tenants' application is granted.

The landlord's application is dismissed, without leave to reapply.

The One Month Notice to End Tenancy for Cause served on July 27, 2021 and the One Month Notice to End Tenancy for Cause served on September 22, 2021 are hereby cancelled. The tenancy shall continue until it is ended in accordance with the Act.

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 6, 2021

Residential Tenancy Branch