

Residential Tenancies Tribunal

Decision 19-177-05

John R. Cook
Adjudicator

Introduction

1. The hearing was called at 11:15 am on 04 April 2019 at the Government Service Centre, Motor Registration Building, 149 Smallwood Drive, Mount Pearl, NL.
2. The applicant, [REDACTED], hereinafter referred to as “the tenant” participated in the hearing in the hearing by teleconference.
3. The respondent, [REDACTED], hereinafter referred to as “the landlord”, participated in the hearing and she was represented by [REDACTED].

Issues before the Tribunal

4. The tenant is seeking a determination of the validity of a termination notice issued to him on 06 March 2019.
5. The landlord is seeking the following:
 - An order for a payment of rent in the amount of \$360.00;
 - An order for a payment of late fees in the amount of \$56.00;
 - An order for vacant possession of the rented premises.

Legislation and Policy

6. The jurisdiction of the Director of Residential Tenancies is outlined in sections 46 and 47 of the *Residential Tenancies Act, 2018*.
7. Also relevant and considered in this case are Sections 15 and 24 of the *Residential Tenancies Act, 2018*.

Preliminary Matters

8. The hearing of these applications was originally scheduled to take place on 21 March 2019. On the day of that hearing, the adjudicator determined that the tenants had not been served 10 clear days prior to the hearing date and the hearing was postponed to 04 April 2019. There are affidavits on file showing that the landlord's representative had personally served both of the tenants with the notice of the rescheduled hearing on 21 March 2019, 13 clear days prior to this rescheduled hearing date. The tenants did not attend the rescheduled hearing on 04 April 2019 and I contacted the tenant, [REDACTED], by telephone from the hearing room. He testified that he had mistakenly thought the hearing was scheduled for 10 April 2019 and he requested another postponement. I informed the tenant that he was properly served with notice of the hearing and I denied his request for a postponement. He elected to participate in the hearing by teleconference.
9. The landlord amended her application at the hearing and stated that she was now seeking \$1060.00 in rental arrears.
10. The landlord called the following witnesses:
 - [REDACTED] – daughter of landlord
 - [REDACTED] – friend of landlord

Issue 1: Determination of the Validity of Termination Notice

Issue 2: Vacant Possession of Rented Premises

Relevant Submissions

The Landlord's Position

11. The landlord stated that she had entered into monthly rental agreement with the tenants on 22 January 2019 and a copy of that executed agreement was submitted at the hearing ([REDACTED] #1). The agreed rent was set at \$700.00 per month and it is acknowledged in the rental agreement that the tenants had paid a security deposit \$400.00.
12. The rental unit is a basement apartment and the landlord lives in the upstairs unit with her 5 children
13. According to the submitted rental agreement, the tenants were prohibited from smoking tobacco or cannabis in the apartment but the landlord testified that since the tenants moved into the apartment she has been able to detect a strong smell of smoke in her unit. She submitted a log at the hearing ([REDACTED] #3) recounting the dates and times she noticed that there was a smell of smoke coming from the tenants' unit. That log indicates that there were over 30 separate incidences where the landlord could smell smoke in her apartment.

14. The landlord stated that on 11 February 2019 she had spoken to the tenant about the smell she was detecting in her apartment and she instructed him to stop smoking in his apartment. She testified that she had received assurances from the tenant that he would stop smoking but he has not lived up to his promise.
15. The landlord's 15-year old daughter, [REDACTED], was called as a witness and she corroborated the landlord's claim that there is a strong smell of cigarette and marijuana smoke coming from the tenant's unit into her bedroom. [REDACTED], a friend of the landlord, testified that he visits the landlord at her home on a semi-regular basis and he too corroborated her claim that there is a strong smell of smoke coming from the downstairs tenants.
16. The landlord also played an audio recording at the hearing which was made during an inspection of the rental unit in March 2019. In that recording, the tenant denied that he smoked in the rental unit but claimed that when he does smoke a cigarette he stays in his porch and puts his head out the porch window. The landlord's representative argued that this was an admission that the tenant smoked inside the unit and claimed that if this was indeed the tenant's practice when he smoked a cigarette one could reasonably expect that cigarette smoke would flow back in through the open window, into the tenant's apartment and would then make its way to the landlord's upstairs unit.
17. The landlord claimed that the smell of smoke in her apartment is interfering with her quiet and peaceful enjoyment and she expressed concerns for the health of her 5 children. She claimed that the smell is so strong in her unit that her children's clothing smells of cigarettes.
18. Besides the issue of the smell of cigarette smoke, the landlord also complained about an incidence which occurred on 11 February 2019. The landlord claimed that because the tenant had been late paying his rent she had issued him a termination notice for non-payment. She stated that the tenant visited her unit to complain about the notice and he was greeted by her 15-year old daughter, [REDACTED]. [REDACTED] testified that the tenant threw the notice in her face and yelled: "I'm not [REDACTED] paying for that". [REDACTED] stated that the tenant was aggressively yelling at her and she felt afraid.
19. The landlord stated that because of the issue of smoking and because of the incident with her daughter on 11 February 2019 she decided to terminate this tenancy. With her application she submitted a copy of a termination notice which was posted to the tenant's door on 06 March 2019 ([REDACTED] #2). That notice was issued under section 24 of the *Residential Tenancies Act, 2018* and it had an effective termination date of 12 March 2019.

20. The tenants have not vacated the rented premises as required and the landlord is seeking an order for vacant possession of the rented premises.

The Tenant's Position

21. The tenant denied that he had been smoking in the rental unit and contested the landlord's claim that there was any smell of cigarette smoke coming from his unit. He admitted that he sometimes would smoke out of the porch window, but he denied that he had smoked inside the apartment.
22. The tenant also pointed out that the landlord's representative had visited the tenant's apartment in March 2019 and the tenant had invited him into to the unit to see if he could detect any smell of cigarette smoke. The tenant claimed that he refused that offer and would not enter his unit.
23. Regarding the alleged incident with [REDACTED], the tenant also denied that he had been yelling at her or had been aggressive and he claimed that she would not have given him a set of lamps if he had been acting in that sort of manner.
24. The tenant argued that this whole issue of smoking only arose because the tenant had requested that the landlord install new windows in the rental unit. Prior to that request, the landlord had not once complained to him about the smell of cigarettes.

Analysis

25. Statutory condition 7.(a), set out in section 10.(1) of the *Residential Tenancies Act, 2018* states:

Statutory conditions

10. (1) *Notwithstanding an agreement, declaration, waiver or statement to the contrary, where the relationship of landlord and tenant exists, there shall be considered to be an agreement between the landlord and tenant that the following statutory conditions governing the residential premises apply:*

...

7. Peaceful Enjoyment and Reasonable Privacy -

(a) The tenant shall not unreasonably interfere with the rights and reasonable privacy of a landlord or other tenants in the residential premises, a common area or the property of which they form a part.

and according to section 24 of this Act:

Notice where tenant contravenes peaceful enjoyment and reasonable privacy

24. (1) *Notwithstanding subsection 18(2) and paragraph 18(3)(b), where a tenant contravenes statutory condition 7(a) set out in subsection 10(1), the landlord may give the tenant notice that the rental agreement is terminated and the tenant is required to vacate the residential premises on a specified date not less than 5 days after the notice has been served.*

(2) *In addition to the requirements under section 34, a notice under this section shall*

(a) *be signed by the landlord;*

(b) *state the date on which the rental agreement terminates and the tenant is required to vacate the residential premises; and*

(c) *be served in accordance with section 35.*

26. It was the landlord's testimony that she can detect a smell of cigarette smoke coming into her upstairs' unit from the tenant's apartment. I found that testimony to be credible and it was corroborated by her 2 witnesses. Based on this preponderance of evidence, I find it probable that that the tenant had indeed been smoking in his apartment.
27. I also agree with the landlord that the smell of cigarette smoke is interfering with her quiet and peaceful enjoyment especially as there are 5 children, including a toddler, living in that upstairs' apartment with the landlord. I also find it probable, based on the testimony provided by the landlord and her witnesses, that this smell of smoke can be detected on her children's clothing and is therefore interfering with their peaceful enjoyment.
28. Furthermore, and in addition to the issue of smoking, I accept [REDACTED]'s testimony concerning her interaction with the tenant on 11 February 2019. According to that testimony, the tenant was aggressive and acting in an anti-social and I find that this sort of behaviour is also unreasonable, especially given that [REDACTED] is a child.
29. In sum, I agree with the landlord that the tenants had been unreasonably interfering with the landlord's, and her family's, peaceful enjoyment of their home. As the termination meets the requirements set out in this section of the Act and as it was properly served, that notice is valid.

Decision

30. The termination notice issued to the tenants on 06 March 2019 is a valid notice.
31. The landlord's claim for an order for vacant possession of the rented premises succeeds
32. The tenants shall pay to the landlord any costs charged to the landlord by the Office of the High Sheriff should the landlord be required to have the Sheriff enforce the attached Order of Possession.

Issue 3: Rent - \$1060.00

Relevant Submissions

The Landlord's Position

33. The landlord submitted a rent ledger at the hearing (█ #4) showing the payments she had received from the tenants since they had moved in. According to these records, the tenants had paid a pro-rated rent of \$100.00 for January 2019 and all the rent for February 2019 had been paid.
34. The records show that the last payment the landlord had received was \$340.00 on 01 March 2019.
35. The landlord is seeking an order for a payment of the remaining \$360.00 for March 2019 as well as an order for a payment of April's rent: \$700.00.

The Tenant's Position

36. The tenant stated that he is in possession of all of the rent that is owing to the landlord. He claimed that he will be putting that rent into a trust fund until the windows are repaired.
37. He reiterated that he is not being evicted by the landlord because he is smoking in the rental unit, which he denies, but rather because he had served the landlord with a notice to have the windows repaired.
38. The landlord and her representative denied that they had received any request or notice from the tenant to repair any windows.

Analysis

39. I accept the landlord's claim that the tenant had only paid \$340.00 in rent for March 2019 and that no rent was paid for April 2019. That claim was not disputed by the tenant.

40. No evidence was presented at the hearing to corroborate the tenant's claim that he had served the landlord with a notice to repair the windows. In any case, even if the tenant did believe that the landlord had not been adequately maintaining the rental unit he is not permitted to withhold rent without the express authorization of the Director of Residential Tenancies. No such order has been issued by the Director and the tenant has not filed an application with this Section seeking such an order.
41. As the landlord is also seeking an order for vacant possession of the rental unit, I find that she is entitled to a payment of rent to the date of the hearing and a per diem thereafter.
42. I calculate the rent owing to the date of the hearing to be \$452.04 (\$360.00 for the period ending 31 March 2019 and \$92.04 for April 2019 (\$700.00 per month x 12 months = \$8400.00 per year ÷ 365 days = \$23.01 per day x 4 days = \$92.04)).

Decision

43. The landlord's claim for a payment of rent succeeds in the amount of \$452.04.
44. The tenants shall pay a daily rate of rent in the amount of \$23.01, beginning 05 April 2019, and continuing to the date the landlords obtain vacant possession of the rented premises.

Issue 4: Late Fees - \$56.00

45. The landlord has assessed late fees in the amount of \$56.00.

Analysis

46. Section 15.(1) of the *Residential Tenancies Act, 2018* states:

Fee for failure to pay rent

15. (1) *Where a tenant does not pay rent for a rental period within the time stated in the rental agreement, the landlord may charge the tenant a late payment fee in an amount set by the minister.*

47. The minister has set the following fees:

Where a tenant has not paid the rent for a rental period within the time specified in the Rental Agreement, the landlord may assess a late payment fee not to exceed:

(a) \$5.00 for the first day the rent is in arrears, and

(b) \$2.00 for each additional day the rent remains in arrears in any consecutive number of rental payment periods to a maximum of \$75.00.

Decision

48. As the tenants have been in arrears since 02 March 2019, the landlord is entitled to an award for the late fees in the amount of \$71.00 (\$5.00 for 02 March 2019, \$58.00 for the remainder of March 2019 (29 days x \$2.00 per day) and \$8.00 for April 2019 (4 days x \$2.00 per day)).

Issue 5: Security Deposit

49. The landlord testified that the tenants paid a security deposit of \$400.00 on 22 January 2019 and receipt of that deposit is acknowledged in the submitted lease. As the landlords' claim has been successful, she shall retain the security deposit as outlined in this decision and order.

Issue 6: Hearing Expenses

50. As the landlord's claim has been successful, the tenants shall pay her hearing expense of \$20.00 for the costs of filing this application.

Summary of Decision


51. The landlord is entitled to the following:

- A payment of \$143.04, determined as follows
 - a) Rent Owing\$452.04
 - b) Late Fees\$71.00
 - c) Hearing Expenses.....\$20.00
 - d) **LESS: Security Deposit..... (\$400.00)**
 - e) Total Owing to Landlord\$143.04
- A payment of a daily rate of rent in the amount of \$23.01, beginning 05 April 2019 and continuing to the date the landlord obtains possession of the rental unit,

- An order for vacant possession of the rented premises,
- The tenants shall also pay to the landlord any costs charged to the landlord by the Office of the High Sheriff should the landlord be required to have the Sheriff enforce the attached Order of Possession.

10 April 2019

Date



John R. Cook
Residential Tenancies Tribunal