

Order under Section 69
Residential Tenancies Act, 2006

File Number: NOL-07219-12

LR (the 'Landlord') applied for an order to terminate the tenancy and evict JF (the 'Tenant') because he, another occupant of the rental unit or someone he permitted in the residential complex has substantially interfered with the reasonable enjoyment or lawful right, privilege or interest of the Landlord or another tenant.

This application was heard in Thunder Bay on February 15, 2012.

The Landlord and the Tenant with his legal representative, RA, attended the hearing. CT is another tenant in the residential complex that provided a written statement.

Determinations:

1. The Landlord served a “first” notice of termination (Form N5) in April, 2011 which was voided by the Tenant.
2. The Tenant is smoking in the rental unit contrary to the tenancy agreement.
3. This conduct has substantially interfered with the Landlord's and the other tenants' reasonable enjoyment of the residential complex.
4. This conduct also substantially interferes with a lawful right, privilege or interest of the Landlord as the Landlord may lose tenants as a result of the Tenant's behaviour.
5. The Tenant was given a first Notice of Termination under section 64 of the *Residential Tenancies Act, 2006* (the 'Act') in April, 2011. This notice was void because the Tenant corrected the problem within the time period set out in the notice.
6. The Landlord served another “first” notice of termination (Form N5) in July, 2011 which was also voided by the Tenant. It is not contrary to the Act to serve a second “first” notice of termination, which is voidable by a tenant, even if the Landlord was entitled to serve a “second” N5 notice.
7. Serving a second Notice of Termination was permissible pursuant to Section 67 of the Act.
8. I have considered all of the disclosed circumstances in accordance with subsection 83(2) of the *Residential Tenancies Act, 2006* (the 'Act'), and find that it would not be unfair to grant relief from eviction subject to the condition(s) set out in this order pursuant to subsection 83(1)(a) and 204(1) of the Act.

It is ordered that:

1. The Tenant shall not smoke in the rental unit or in the residential complex.
2. In the event that the Tenant fails to follow the provisions outlined under paragraph 1 of this order, then the Landlord shall be entitled to apply to the Board, no later than 30 days after a breach of this order, without notice to the Tenant, for an order terminating the tenancy and evicting the Tenant pursuant to Section 78 of the *Residential Tenancies Act 2006*.
3. Should the Landlord choose to make application to the Board pursuant to paragraph 2, then the Landlord shall be required to submit a sworn affidavit(s) from the person(s) who personally observed the breach of this order.
4. The Tenant shall pay to the Landlord \$170.00 for the cost of filing the application.
5. If the Tenant does not pay the Landlord the full amount owing on or before March 9, 2012, he will start to owe interest. This will be simple interest calculated from March 10, 2012 at 3.00% annually on the balance outstanding.

2012 CanLII 21953 (ON LTB)

February 28, 2012
Date Issued

Lisa Stevens
Member, Landlord and Tenant Board

Northern-RO
199 Larch Street, Provincial Building, Suite 301
Sudbury ON P3E5P9

If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.

REASONS

Reasons to Order NOL-07219-12 issued on February 28, 2012 by Lisa Stevens.

The Landlord applied for an order to terminate the tenancy and evict the Tenant because he, another occupant of the rental unit or someone he permitted in the residential complex has substantially interfered with the reasonable enjoyment or lawful right, privilege or interest of the Landlord or another tenant.

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REASONS

1. The parties have a written tenancy agreement dated December 28, 2012. (*Landlord Exhibit #1*)
2. Paragraph 4 of the agreement reads: The Landlord and Tenant agree that this accommodation is designated as : Smoking Non-Smoking
3. The advertisement for the rental unit does not state the building is non-smoking. (*Tenant Exhibit #3*)
4. The Tenant is a smoker and as an artist often works from home. The Tenant testified he would not have rented an apartment in which he could not smoke.
5. He further stated he did not receive a copy of the tenancy agreement until three months after it was signed and the "X" in paragraph 4 was inserted after he signed.
6. If the Tenant was concerned about his ability to continue smoking wherever he choose to live I believe that he would have ensured that the rental agreement, which has a specific paragraph for that purpose, would be marked "smoking" and not left blank as he alleges. If he "read it quickly" as he testified then it is possible he missed the fact the paragraph was marked as "non-smoking".
7. The building has signs in the public areas indicating it is a non-smoking building. The letter from CT confirms the complex was a non-smoking building from at least 1995. It is unlikely the Landlord would ignore or omit this important condition of tenancy when taking new tenants. (*Landlord Exhibit #3*)

8. The Landlord discussed with the Tenant the problem with his smoking in the rental unit and provided him with a written warning dated March 1, 2011. The Tenant did stop for a period but commenced again which led to the termination notice.
9. The Tenant testified that he quit smoking for the period of July to December, 2011 and that the incidents of smoke at the complex on the "second" N5 notice of termination in that period were not caused by him. He did start smoking again in December.
10. The Landlord received a formal written complaint on February 6, 2012 from CT about cigarette smoke from the Tenant's unit entering her unit. CT has allergies and the smoke causes headaches and sinus problems. CT will move if the issue is not resolved.
11. CT's letter states further she met with the Tenant on February 4, 2012 and when asked by him if there was a problem she clearly expressed her concerns. The Tenant told her he would smoke outside.
12. CT provided an additional letter dated February 13, 2012 that the Tenant did not fulfill his promise to smoke outside and it continues to be a problem. The Tenant acknowledged he smokes in his bathroom. (*Landlord Exhibit #4*)

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