Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes:

MNDC
OLC

Introduction

This hearing dealt with an Application for Dispute Resolution by the tenant seeking the following:

- A Monetary Order for money owed or compensation for damage or loss under the Act, Regulation or tenancy agreement;
- An Order compelling the Landlord comply with the Act;

Both parties attended and gave affirmed testimony in turn.

Issue(s) to be Decided

At this hearing the issues to be determined, based on the testimony and the evidence, were:

- Whether or not the tenant has proven that the tenant suffered loss or damage due to landlord's failure to comply with the Act or tenancy agreement.
- Whether or not the tenant has proven that the landlord is in breach of the Act and should be ordered to comply with the Act or agreement.

Background and Evidence

The Tenant testified that the tenancy began on June 1, 2005 and that since a tenant moved into a nearby unit the tenant has been subjected to smoke infiltration into her unit and in the common areas. The tenant testified that at the time she entered into the tenancy agreement, there was a verbal assurance from the caretaker that the section of the complex in which the rental unit was located had been designated as "non-smoking". The tenant was also led to believe that the building was non-smoking due to a sign on the front that states, "*THANKYOU FOR NOT SMOKING IN OUR BUILDING*" The tenant testified that had this not been the case, she would not have accepted the tenancy, having relocated from another rental complex because of smoke contamination in that building. The tenant submitted a substantial amount of evidence including a chronological accounting of the presence of smoke in the hallways and the tenant's unit, complaints and comments from other residents, medical symptoms suffered by the tenant and copies of complaints lodged by the tenant. The tenant submitted a note from her doctor, a copy of her application for tenancy, photos of the building, articles about the dangers of second-hand smoke and cocaine use, signed testimonials from other occupants and visitors, copies of letters to the landlord from the tenant and others discussing alleged smoking and drug use by another resident in the building, copies of the landlord's response to the letters of complaint and copies of police reports regarding complaints lodged by another resident about noise, smoke and possible drug use.

The tenant gave extensive testimony alleging that the hallways have been consistently filled with "heavy acrid chemical smoke" coming from a particular rental unit nearby. The tenant's position was that her rights under section 28 of the Act are being violated by the landlord's inaction on the issue. This section of the Act states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to: (a) reasonable privacy; (b) freedom from unreasonable disturbance; (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29;

(d) use of common areas for reasonable and lawful purposes, free from significant interference

The tenant also submitted that the landlord was not in compliance with section 32 of the Act which requires that a landlord provide and maintain residential property in a state of decoration and repair that

> (a) complies with the health, safety and housing standards required by law, and
>
> (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

In regards to what action the landlord should take, the tenant was adamant that the landlord should enforce no smoking in the vicinity of her unit as agreed-upon and that the landlord should take other action to ensure that she was not subjected to second-hand smoke exposure.

The tenant had submitted into evidence a letter she had written to the landlord dated October 30, 2009 that complained about the second-hand smoke in the hallway and smoke infiltrating her unit jeopardizing her health with suggestions for a solution including:

- Make (the building) a non-smoking building
- Place on every floor the best air exchanger and air purification unit you can purchase
- Thoroughly and professionally clean all air ducts, walls ceilings, floors, carpet, doors stairwells and apartments.
- Move smokers to new residences

The tenant's witnesses supported the tenant's testimony and confirmed that complaints from multiple sources had been directed to the landlord about the smoking issue and

that the police had been contacted, but referred the residents to pursue the matter through Residential Tenancy Dispute Resolution.

The tenant's position is that the landlord should be ordered to comply with the Act and that the tenant is entitled to compensation for the damage caused by the landlord's disregard for the Act. The tenant stated that the monetary amount of her claim was based on what she was advised and did not represent a specific percentage of rent abatement.

The landlord testified that there was never any agreement that the individual units within the building were smoke-free and that any alleged representations otherwise were not authorized by the landlord. The landlord referred to evidence submitted showing that the tenancy agreement signed by the tenant did not include any term about her unit or others being "non-smoking". The landlord pointed out that several residents who live on the same floor as the tenant now smoke in their units and have done so since they moved in. The landlord testified that the sign outside the building was placed there in compliance with the municipal bylaws to ensure that no smoking was permitted in the common areas such as hallways and elevators. This compliance, according to the landlord, is strictly enforced.

The landlord submitted evidence including a written submission, a copy of the tenant's tenancy agreement signed on April 17, 2005 that contains no non-smoking term, a photo of an air intake vent and the hallway, an illustration of the hall floor plan, a copy of the municipal bylaw, written testimony from resident managers reporting on finding no evidence of smoke or smokers in the hallways and a copy of a letter received in March 2006 from the applicant tenant defending against an apparent noise complaint that was about her with a request to be moved to another unit in a non-smoking area.

The landlord testified that, although the landlord now includes a non-smoking term in new tenancy agreements, they do not have the legal right to impose non-smoking terms on existing tenants who are free under the law to smoke within their own unit as they

see fit. Furthermore, according to the landlord, it does not have any authority to require that a resident move to another rental unit in the building or another building. In regards to the allegation of drug use in the unit being complained about, the landlord testified that this was investigated to the best of their ability and no evidence was found. The landlord testified that measures taken include regular cleaning of the common areas, installing weather stripping around the tenant's door, investigating complaints about alleged violations of the Act and including a no-smoking term in agreements for all new residents. The landlord's position was that the landlord has not violated the Act in any respect and the tenant is therefore not entitled to compensation nor to an order that the landlord comply.

Analysis

In regards to the monetary claim for a rental abatement in the amount of $25,000.00, I find that an Applicant's right to claim damages from the other party, Section 7 of the Act states that if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for any damage or loss that results. Section 67 of the Act grants a Dispute Resolution Officer authority to determine the amount and order payment under the circumstances.

I find that in order to justify payment of damages under section 67, the Applicant would be required to prove that the other party did not comply with the Act and that this non-compliance resulted in costs or losses to the Applicant, pursuant to section 7.

It is important to note that in a claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,

2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act, agreement or an order
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage

In this instance, the burden of proof is on the claimant; that being the tenant; to prove the existence of the damage/loss and that it stemmed directly from a contravention of the Act, on the part of the respondent. Once that has been established, the claimant must provide evidence verifying the actual monetary amount of the loss or damage.

On the question of whether or not the landlord was in violation of the Act, I find that section 28 states that a tenant is entitled to quiet enjoyment including, but not limited to:

> (a) reasonable privacy;
>
> **(b) freedom from unreasonable disturbance;**
>
> (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*;
>
> (d) use of common areas for reasonable and lawful purposes, free from significant interference. (my emphasis)

I find that under the Act, a landlord is expected to take reasonable measures to ensure that the quiet enjoyment of a tenant is not violated. In this instance I find that the key questions to be answered are:

- Was there an “unreasonable disturbance” ?

- If so, then did the landlord meet its responsibilities under the Act to take appropriate action to rectify the problem of interference of one tenant by another?
- If not - then did this non-compliance of the Act devalue the tenancy warranting a retroactive rental abatement?

In case law, in order to prove an action for a breach of the covenant of quiet enjoyment, the tenant would have to show that there had been a substantial interference with the ordinary and lawful enjoyment of the premises by the landlord's actions or the inaction by the landlord which permitted physical interference by an external force that was within the landlord's power to control.

I find that the term "unreasonable disturbance" is a subjective determination that may widely vary from one individual to another. However, when any resident is exercising his or her freedom to pursue quiet enjoyment within their own suite, engaged in activities that do not violate their tenancy agreement, it naturally follows that their actions could not possibly be considered to constitute an "unreasonable disturbance".

In this instance, I find that the landlord was not empowered to control to source of the tenant's dissatisfaction. I find that it is clear the tenant and others are genuinely bothered by the normal activities of their neighbours occurring in their own rental units. While this may be due to an unusual sensitivity or health issue of particular concern to the tenant, a solution that involves restricting the lawful rights of others is not feasible. Regardless of any other factors, I find that nothing put forth during these proceedings would serve to give a resident or a landlord authority to dictate what lawful private activities another resident can pursue within the confines of their own suite, nor will these circumstances furnish the landlord with a valid enforceable reason under the Act to terminate the tenancy based on such complaints.

In regards to the tenant's allegation that the landlord was in violation of section 32 of the Act, I find that the landlord has in fact maintained this residential property in a state of decoration and repair that complies with the health, safety and housing standards

required by law, particularly given the age, character and location of the rental unit, as suitable for occupation by a tenant.

Unlike section 28, the factors for a finding under section 32 do ***not*** involve a subjective determination. I find as a fact that the tenant was not able to identify precisely what specific building laws were being violated nor how the landlord has failed to be in compliance with an identifiable provision within any health, safety or housing standards law. I find as a fact, the landlord has provided evidence that it was in strict compliance with all applicable property laws imposed by the municipality in regards to prohibiting smoking in the common areas.

I find that the landlord has gone further than its legal obligations in what appears to be a fruitless attempt to satisfy this tenant and accommodate her needs. I find that the landlord's actions in installing weather stripping around the tenant's interior entry door and the landlord's intervention in approaching the resident who was the focus of the tenant's complaints, succeeding in obtaining a voluntary agreement to relocate to another area of the complex, were measures that went well above and beyond reasonable expectations.

Given the evidence and testimony, I find no merit in the tenant's monetary claim for compensation as the claim failed to meet element 2 of the test for damages and loss. I find that, based on the testimony and evidence, the tenant's application must be dismissed.

Conclusion

Accordingly, I hereby dismiss the tenant's application in its entirety without leave to reapply

December 2009

Date of Decision

Dispute Resolution Office