



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes OLC, FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the tenant for an Order for the landlord to comply with the *Residential Tenancy Act* (*Act*), regulation or tenancy agreement and a Monetary Order to recover the filing fee.

The tenant served the landlord in person on July 14, 2010 with a copy of the Application and Notice of Hearing. I find that the landlord was properly served pursuant to s. 89 of the *Act* with notice of this hearing.

The tenant and the landlords agent appeared gave affirmed testimony, were provided the opportunity to present their evidence orally, in written form, documentary form, to cross-examine the other party, and make submissions to me. On the basis of the solemnly affirmed evidence presented at the hearing I have determined:

Issues(s) to be Decided

- Is the tenant entitled to an Order for the landlord to comply with the Act?

Background and Evidence

This month to month tenancy started on June 01, 2009. Rent for this unit is \$965.00 per month which is due on the first of each month. The tenant states this is a verbal agreement and the landlord has never given her a written tenancy agreement.



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The tenant states when she moved into the rental unit she told the landlord she could not live in a smoking building as she was allergic to cigarette smoke. The tenant claims the landlord assured her this was a non smoking building. The tenant claims new tenants moved into the unit underneath hers and they have been smoking cigarettes and marijuana both inside and outside the building and this smoke gets into her rental unit.

The tenant states she informed these tenants that she was allergic to the smoke and they said “which ones the cigarette smoke or the marijuana smoke”. The tenant states the downstairs tenant said he would try to be more considerate and although it has got a little better smoke still filters into her unit. The tenant states the downstairs tenants told her that the landlord had never told them it was a non smoking building.

The tenant states she informed the landlord and he has failed to stop these tenants smoking. They stand outside on their patio and the smoke comes up onto her patio and into her unit.

The landlords’ agent states that although this is a non smoking unit tenants are allowed to smoke outside their unit. As this is part of the agreement with these tenants the landlord cannot now change the terms of their tenancy to suit another tenant. The landlords’ agent states she has spoken to the downstairs tenants and will continue to monitor them to ensure they do not smoke inside their unit.

The landlords’ agent also states that the two units are completely separate and do not have connecting ducts for heating so she questions how smoke would filter into the tenants unit if it was found that these tenants were smoking inside. The landlords’ agent suggests the tenant closes her door and window when the downstairs tenants go outside for a cigarette.



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Analysis

I have reviewed the verbal evidence of both parties. In the absence of a written tenancy agreement, the burden of proving that an agreement was in place that this is a non smoking building, include the outside of the building, lies with the person making the claim. In this case it is just the tenants' word word against that of the landlord and when it is just one persons word against that of the other that burden of proof is not met.

In order to meet the burden of proof the tenant would have to show that this agreement included the outside of the building as a non smoking area and that the tenants were smoking inside their unit and the smoke was penetrating into the tenants unit upstairs. In the absence of any evidence from the tenant this burden of proof is not met and the tenants' application is dismissed.

Conclusion

The tenant's application is dismissed with leave to reapply.

As the tenant has been unsuccessful with her application she must bear the cost of her own 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 *Residential Tenancy Act*.

Dated: September 03, 2010.

Dispute Resolution Officer