

DECISION

Dispute Codes:

MNDC, OLC, RP, FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the tenant seeking a Monetary Order for money owed or compensation for damage or loss under the Act, or tenancy agreement; an Order compelling the Landlord comply with the Act or agreement; an order that the landlord complete repairs. Both parties attended and gave 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.
- Whether the landlord should be ordered to complete repairs or work committed to in the agreement or required under the Act

Background and Evidence

The fixed term tenancy began in June 1, 2010, and was to run for one year with rent set at \$1,265.00 and a security deposit of \$632.50 was paid. The tenant testified that at the start of the tenancy the parties made an agreement for certain work to be completed, including:

- Replacement of leaking kitchen faucet,
- Replacement of kitchen flooring
- Renovation of kitchen cabinetry and provision of matching paint
- Repair of bathroom fan.

The tenant testified that these items were detailed in the Move-In Condition Inspection Report. However, a copy of this report was never given to the tenant and was not in evidence. The tenant testified that some of the promised repairs and upgrades, including the faucet and flooring were recently completed but repairs to the kitchen cabinetry and bathroom fan were not resolved. The tenant was requesting an order that the landlord comply with the Act and agreement by completing outstanding work and attending to the maintenance issues.

In regards to the issue of smoking, the tenant testified that at the time the tenancy began, the landlord had verbally assured the tenant that there was no smoking permitted in the complex including the balconies, hallways and common areas. However the tenant soon discovered that other suites were *not* smoke-free and found that fumes from adjacent suites and balconies drifted into the tenant's suite contaminating the air and jeopardizing their health. The tenant testified that the landlord responded to their concerns stating that, while the building was moving towards being a "smoke-free environment", some of the existing tenants had a "grandfathered" arrangement permitting them to smoke. According to the tenant, this fact was never disclosed at the time they entered into the tenancy and in fact the landlord had implied that no smoking whatsoever was allowed.

The tenant testified that had the landlord revealed the true situation while they were still in the process of finalizing the tenancy, they would have declined the contract as they are both seriously affected by smoke and one of the co-tenants has an asthmatic condition. The tenant considered the non-smoking commitment to be a material term of the tenancy that was breached by the landlord was seeking a rent abatement of \$250.00 per month due to loss of quiet enjoyment by being unwillingly subjected to smoke coming into their suite from hallways and balconies and suffering a loss of living space.

The tenant commented that in future, despite the fact that there is a prohibition on smoking in the complex's common areas which is being enforced, the landlord should also make it clear to rental applicants that they must expect a certain amount of exposure to smoke coming in from other units.

The tenant was also seeking an order that the tenant be allowed to end the lease if the living conditions deteriorate further. The application indicated that they would be seeking moving costs if they felt forced to move out of the building.

The landlord acknowledged that it should have given the tenant a copy of the Move-In Condition Inspection Report as required under the Act and agreed that if it was confirmed that the promised repair jobs had not been done, this would be addressed

without delay. The landlord agreed to attend the site today to assess the situation and the tenants set a time to meet with the landlord.

In regards to the tenant's problem with smoke exposure, the landlord testified that there was never any agreement that individual units within the building would be smoke-free, and any alleged representations otherwise were not authorized by the landlord. The landlord stated that, other than common areas, it was never a smoke-free building and there were no foreseeable plans to convert the building to be totally smoke free.

No copy of the written tenancy agreement was submitted into evidence. However the landlord testified that the agreement signed by this tenant has no specific term restricting a tenant from smoking inside his or her own rental unit nor on the balcony. That being said, according to the landlord, every tenant was expected to follow the policy prohibiting all smoking in common areas inside the building and within 3 meters of the entry doors. The landlord stated that this rule was being strictly enforced.

The landlord did not agree with the tenant's allegations that the Act or agreement was contravened and objected to the tenant's request for a rent abatement. The landlord did, however, acknowledge and sympathize with the tenant's predicament in having to endure smoke that was beyond both the tenant's and the landlord's ability to eradicate.

Analysis

In regards to the monetary claim for a rental abatement, I find that 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.

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 amount to compensate for the loss or to rectify the damage.
4. Proof that the claimant took reasonable steps to minimize the loss or damage

In this instance, the burden of proof is on the tenant; to prove the existence of the damage/loss stemming directly from a contravention of the Act or agreement. I find that

there was no violation of the *Act* by the landlord, being that the issue of smoking is not specifically mentioned in the legislation.

On the question of whether or not the landlord was in violation of the *tenancy agreement*, I find that the written agreement was also silent on the subject of smoking and certainly did not contain any provision promising that the entire complex would be smoke-free. The tenant's allegation was that there were additional verbal representations made by the landlord to assure the tenant that smoking was not allowed. Although the definition of *tenancy agreement* in section 1 of the *Act* includes both written and oral terms, express or implied which may be enforced, the tenant's testimony alleging the verbal assurances, was denied by the landlord.

It is important to note that in a dispute such as this, the two parties and the testimony each puts forth, do not stand on equal ground. This is true is because one party must carry the added burden of proof. The applicant tenant, had the onus of proving during the proceedings, that the compensation being claimed is justified under the *Act*.

I find that, in any dispute when the evidence consists of conflicting and disputed verbal testimony, in the absence of independent documentary evidence, then the party who bears the burden of proof is not likely to prevail. Therefore it is not necessary for me to determine which side is more credible nor which set of "facts" is more believable. Due to the presence of conflicting verbal testimony, I find that the claimant was unable to sufficiently meet the burden of proof.

A mediated discussion ensued and the landlord made a commitment to permit the tenant to vacate with one full month advance written notice, prior to the end of the fixed term. The tenant also agreed to cooperate with re-rental efforts at that time.

Conclusion

Based on the testimony and evidence, I find that the portion of the tenant's application relating to the repairs and improvements has been resolved. I find that the portion of the tenant's application for monetary compensation relating to the smoke issue must be dismissed as it failed to meet all elements in the test for damages. Accordingly, I hereby dismiss the tenant's application in its entirety without leave to reapply

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: October 25, 2010.

Dispute Resolution Officer