



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

### **Dispute Codes:**

MNDC, OLC, ERP, PSF, FF

### **Introduction**

This hearing dealt with an Application for Dispute Resolution by the tenant for monetary compensation in the form of a retro-active rent abatement and additional damages for loss of enjoyment of the suite or devalued tenancy. Both parties appeared and gave testimony.

The application also contained a request for an order to force the landlord to comply with the Act or agreement, to supply services and facilities required by law and to make emergency repairs. However, the tenant has given written Notice to vacate as of the end of September and has already physically vacated the unit. Therefore the tenant's request for an order to force the landlord to comply, the order to supply services and facilities, and the order to make emergency repairs are now moot and will not be dealt with during these proceedings.

### **Issue(s) to be Decided**

The remaining issue to be determined based on the testimony and the evidence is whether the tenant is entitled to monetary compensation under section 67 of the Act for damages or loss and a rent abatement. The burden of proof is on the applicant.

### **Background and Evidence**

The tenancy began on February 1, 2011 with rent set at \$750.00. A security deposit of \$375.00 was paid. The tenant testified that, at the start of the tenancy, the landlord had advised the tenant that the building was smoke-free and verbally assured the tenant that this policy was strictly enforced. There were also signs posted in the complex stating that it was a smoke-free building. The tenant testified that the landlord stated that any use of illicit drugs would not be tolerated. Although the landlord did not provide a copy of a written tenancy agreement that specifically included the above terms within it, the tenant testified that she agreed to rent the unit based on the landlord's verbal assurances.

However, according to the tenant, shortly after taking occupancy, the tenant was horrified to find that marijuana smoke from the unit below entered the tenant's unit on a frequent basis and was of a magnitude and frequency that it interfered with the tenant's quiet enjoyment of the suite. The tenant said that the fumes severely affected the tenant's ability to breathe and interfered with guests, some of whom refused to visit because of the problem. The tenant testified that the fumes affected her family's health and she even felt it necessary to send her daughter away to stay with a relative due to medical symptoms she was suffering because of the continued infusion of cannabis smoke. The tenant testified that she made repeated verbal complaints to the building manager, but felt that the manager was not taking her complaints seriously. The tenant testified that the source of the smoke came mostly from the rental unit below and she discovered that this unit was occupied by the manager's daughter. The tenant stated that after a number of verbal complaints she then sent written complaints about the problem.

The tenant testified that a written response came from the landlord on May 19, 2011 and it reiterated that there was a policy forbidding smoking in the building and stated that a notice would be sent to remind people that there was no smoking in the building. The tenant testified that the smoke continued as before, and after three more months of misery, the tenant concluded that the landlord and the owner were not going to take steps to ensure her quiet enjoyment of the suite. The tenant stated that she then made an application for dispute resolution and also gave notice to vacate.

The tenant is seeking compensation of a 100% rent abatement for the entire 8 months of the tenancy in the amount of \$6,000.00, the \$400.00 cost of moving in, estimated cost of \$1,000.00 for moving out, \$8,000.00 for health problems suffered by the tenant and \$8,000.00 for health problems suffered by the tenant's daughter. The total claim was for \$23,400.00 plus the cost of filing the application.

The landlord disputed that she had repeatedly assured that tenant that there would be no exposure to smoke, only that the building was smoke-free in the common areas and tenants were not permitted to smoke inside their units. Smoking outside, including the balconies is permitted and the landlord testified that no representation was made that this was not so.

The landlord testified that the tenant's complaints were not ignored and in fact, other residents were first verbally warned not to violate the no-smoking rule and when the tenant complained again, were later cautioned in writing. The landlord testified that the tenant was still complaining of smoke infusion after May 2011, but the landlord was of the opinion that they had done everything possible to deal with the problem.

The landlord pointed out that even the police who attended on a complaint from the tenant stated that they could not intervene. The landlord testified that in cases where a tenant has a particular sensitivity to air contaminants or allergies, it would be impossible for the landlord to ensure that they did not suffer reactions from the smoking or barbequing that takes place on the balconies, which is allowed in the complex, or from other urban pollutants in the atmosphere. With respect to the tenant's allegation that her unit was literally filled with cannabis smoke, the landlord speculated that the tenant had "over-dramatized" the situation. However, the landlord did admit that she never inspected the tenant's unit to confirm or dispel the allegation of smoke infusion.

The landlord's position is that the tenant is not entitled to be compensated by the landlord for loss of quiet enjoyment or for exposure to smoke in her unit.

### **Analysis**

Section 7 of the Act states that if a party fails to comply with the Act, or tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a Dispute Resolution Officer authority to determine the amount and to order payment under such circumstances.

I find that in order to justify payment of damages under section 67, the Applicant has a burden of proof to establish that the other party did not comply with the agreement or Act and that this non-compliance resulted in costs or losses to the Applicant, pursuant to section 7. The evidence 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 or agreement
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 tenant to prove a violation of the Act or agreement and a corresponding loss.

Section 28 of the Act protects a tenant's right to quiet enjoyment and states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

- (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, lawful purposes, free from interference.

I find that the landlord and tenant had contracted for a tenancy that included a rental unit that was comfortable and liveable. I accept that there should be some expectation of smoke that may occasionally drift from other balconies outside. However, I find that the quantity of smoke entering the unit from another rental unit below, as described by the tenant, would not be an expectation of the tenancy. I find that smoke in the unit that was sufficient to impede the tenant's ability to breathe would adversely affect the value of this tenancy and likely exceeded the level of interference permitted to comply with section 28 of the Act.

I find that, under the Act, the landlord has an obligation to investigate a complaint and take action if found to be warranted. I find that the landlord did initially address the situation by first issuing verbal warnings and following up in May 2011, by issuing written warnings to residents about smoking indoors. However, when it became apparent that these preliminary measures did not succeed in eradicating the problem, I find that the landlord should have gone further including:

- Investigating the extent of the problem by going into the tenant's unit to find out first-hand whether the amount of smoke and fumes being claimed were actually invading the tenant's suite.
- Determining the source of the problem including whether it came from the unit below or from one or more other units.
- Taking remedial action by imposing sanctions against the violators of the policy, up to and including issuing a One-Month Notice to End Tenancy for Cause.

I find that the landlord did sufficiently pursue the matter with due diligence after the month of May 2011 and the landlord's failure to take reasonable steps contravened the landlord's responsibility to ensure that the unit was fit under section 32 of the Act and that the tenant's quiet enjoyment was protected under section 28 of the Act. I find that these violations resulted in a loss of value of the tenancy for four additional months and essentially forced the tenant to find her own solution by relocating.

Given the above, I find that the tenant is entitled to be compensated the equivalent of 40% of her rent for June, July, August and September totalling an abatement of \$1,200.00. I also find that the tenant is entitled to be compensated \$800.00 for the estimated cost of moving and also for a portion of the filing fees in the amount of \$50.00.

With respect to the tenant's other monetary claims including the move-in costs and additional compensation for health issues, I find that these claims do not meet elements 2 and 3 of the test for damages and must therefore be dismissed.

### **Conclusion**

Based on the testimony and evidence discussed above, I hereby grant a monetary order to the tenant for \$2,050.00 comprised of a rent abatement of \$1,200.00 for loss of value, estimated moving costs and tax of \$800.00 and the \$50.00 paid by the tenant for the application. The tenant must serve this on the landlord and the order may be enforced through an application to Small Claims Court if it remains unpaid.

This decision is final and binding and 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 22, 2011.

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Residential Tenancy Branch