



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDC, OLC, FF

Introduction

This hearing was scheduled in response to the tenant's Application for Dispute Resolution, in which the tenant has made application requesting compensation for damage or loss under the Act, an Order the landlord comply with the Act, and to recover the filing fee from the landlord for the cost of this Application for Dispute Resolution.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing. The tenant provided affirmed testimony that he did not receive any of the evidence submissions made by the landlord; all of which had been taped to the tenant's door on different occasions. The landlord acknowledged receipt of the tenant's evidence.

The landlord's evidence was set aside; he was at liberty to provide oral testimony in relation to his evidence submissions and I asked that specific documents be referenced during the hearing in order to ensure that all parties were fully informed. I have considered all of the evidence before me and testimony provided.

Preliminary Matters

The tenants submitted a claim for compensation in the sum of \$5,100.00. On November 23, 2011, the tenant submitted evidence which included a monetary worksheet, increasing the amount claimed to \$5,250.00. The tenant did not amend his application, nor serve an amended application to the landlord.

The landlord confirmed receipt of an original monetary worksheet in which the tenant had set out a claim in the sum of \$5,100.00. A copy of this worksheet was not supplied to the Residential Tenancy Branch.

During the hearing the tenant reduced his claim to the cost of a doctor's note in the sum of \$40.00 plus his \$50.00 filing fee.

Issue(s) to be Decided

Is the tenant entitled to compensation for the cost of a doctor's note?

Is the tenant entitled to filing fee costs?

Background and Evidence

The tenancy commenced on March 1, 2004; rent is \$1,025.00 due on the first day of each month. The tenant lives in the 3rd floor, which is the upper level, of a building; the unit faces away from the street.

The landlord manages 180 units over 3 buildings which are older, wood-frame construction.

The parties agreed to the following facts:

- When the tenancy commenced smoking was allowed in the building;
- That in July, 2011, the landlord informed all occupants that, as new tenants move into the building it will be converted to a non-smoking property;
- That the occupants who currently reside in the unit beneath the tenant are heavy smokers who were not prohibited from smoking when their tenancy began.

The tenant stated that he has suffered a complete loss of value of his rental unit since the occupants below him moved in 4 months ago. The tenant suffered from TB as a child and the current excessive exposure to smoke that enters his unit via the electrical outlets and fixtures has resulted in his need to almost abandon his home.

The tenant supplied a copy of a note from his M.D. which confirms his lung damage, that exposure to smoke is aggravating to his condition and that those residing below him are contributing to a decline in his well-being as the result of their second-hand smoke. The M.D. recommended that those occupants be moved to another unit.

The tenants supplied copies of other written notes from individuals confirming the issues that have emerged due to the tenant's exposure to second-hand smoke.

The tenant acknowledged that on the two occasions an agent of the landlord has entered the unit in attempts to detect the smell of smoke; the unit appeared to be smoke-free on one of those dates.

The tenant agreed he was recently offered another suite that was not bordered by smokers, but it was on the 2nd floor and faced a busy street, so he declined the unit.

The tenant testified that they have gone to the health authority and have been unable to identify anyone who will come to the home to carry out an inspection or issue orders to the landlord. The tenant has looked at internet sites such as the Province of British Columbia site on second-hand smoke and they have referenced B.C. Health Link, which indicates that smoke can travel through light fixtures, electrical outlets and result in toxicity.

The landlord responded that they have issued letters to all occupants of the buildings informing tenants that any new occupants will be signing tenancy agreements that prohibit smoking anywhere on the residential property. Those occupants who became tenants prior to the new directive are free to smoke, as previous tenancy agreements, such as the tenant's and the occupants of the lower unit, do not prohibit smoking in units. In July, 2011, the landlord did ask all occupants to show courtesy by not smoking on balconies.

The landlord stated that the tenant has not contacted him to report serious smoke egress into his unit; that the tenant has his cell phone number and is free to contact him. The landlord stated that an attempt to accommodate the tenant was made by offering him another unit; which the tenant declined.

During the hearing the landlord offered the tenant a 2nd unit; this one a larger, corner unit, on the quiet side of the building which is surrounded by occupants who do not smoke. The parties agreed that immediately following the hearing the landlord would attend at the tenant's unit in order to inspect his unit for smoke; as the tenant reported it was currently very obvious in his unit. The parties agreed they would then immediately go to view the corner unit, so that the tenant could determine if it suited him.

The landlord offered the tenant the new unit at the same monthly rental rate and stated he would investigate the possibility of paying \$200.000 toward moving costs for the tenant. The landlord stated the unit will be rented quickly, so the tenant needs to make a decision as to whether he will accept the offer.

The landlord stated they are not in a position to evict the occupants below, as they are not breaching the terms of their tenancy agreement. The landlord stated that the previous occupants of the lower unit also smoked, used marijuana and the tenant never complained. It was only after the July, 2011, notice went out indicating the units would become smoke-free that the tenant complained. The tenant stated this was coincidental.

Analysis

When making a claim for damages under a tenancy agreement or the *Act*, the party making the allegations has the burden of proving their claim. Proving a claim in damages requires that it be established that the damage or loss occurred, that the damage or loss was a result of a breach of the tenancy agreement or *Act*, verification of

the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

The tenant chose to drastically reduce the monetary claim made; the tenant acknowledged that no monetary compensation is going to provide him relief and that what he seeks is a solution to the problem of smoke finding its way into his unit.

Section 32 of the Act provides, in part:

32 (1) *A landlord must 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.

The tenant has not come forward with evidence that the landlord has failed to comply with any housing standard that is required by law. The parties both agree that the occupants of the lower unit are smokers but there was no evidence before me of any dates when the tenant contacted the landlord to investigate his unit when he believed the smoke reached intolerable levels. The tenant has referenced health authority internet sites that point to issues around cigarette smoke, but there was no evidence before me that the landlord has been given any compliance order, that an order would be possible under current legislation and who might issue an order.

During the hearing I suggested that perhaps the landlord and tenant could work together in an attempt to secure the outlets and fixtures in the tenant's unit and the lower unit with items such as foam backing; but whether this would form a sufficient solution is unknown. The parties are at liberty to attempt to reach some sort of agreement on what potential solutions might provide the tenant with some relief. There was no evidence before me that would allow me to conclude that the landlord has had ample opportunity to investigate the tenant's concerns; however, it is clear the landlord has made sincere efforts to accommodate the tenant by offering him alternate units.

The lower occupants cannot be evicted or forced to move as their tenancy agreement does not prohibit smoking in their unit. I find that any expectation that those occupants move is not something that can be enforced by the Act.

The hearing concluded with the landlord and tenant agreeing to meet so the landlord could inspect the unit for the smell of smoke and then take the tenant to view the corner unit that was being offered as a solution. The tenant understood that he will have a short period of time to either accept the corner unit or, if not, choose to remain in his unit in the hope that the smoke issue may be mitigated.

There was no evidence before me that the landlord has breached the Act; or failed to comply with an order directing the landlord to obey health and safety standards established in the City of Surrey. While the tenant has clearly expressed the loss he has suffered due to smoke; there is no evidence the landlord has failed to respond to the few requests for assistance or that the landlord failed to offer the tenant a solution. It was apparent that the landlord is willing, within reason, to take steps to investigate specific reports of smoke and the possibility of providing some methods that might allay the impact of the lower occupant's legal right to smoke.

Therefore, in the absence of evidence that the landlord has breached the Act, I find that the tenant's claim is dismissed.

Conclusion

The tenants claim is dismissed.

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: December 06, 2011.

Residential Tenancy Branch