

DECISION

Dispute Codes:

MNDC, FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the tenant seeking a Monetary Order for compensation for damage or loss under the Act, or agreement

Both parties attended and gave testimony in turn.

Issue(s) to be Decided

At this hearing the issue to be determined, based on the testimony and the evidence, was whether or not the tenant is entitled to monetary compensation for the landlord's failure to comply with the Act or tenancy agreement.

Background and Evidence

The fixed term tenancy began on March 15, 2011, and rent is \$837.00 and a security deposit of \$419.00 was paid. The tenant testified that, at the start of the tenancy, it was confirmed that the rental unit was on a non-smoking floor. However, shortly thereafter the tenant found that smoke from another unit was invading her rental unit. The tenant testified that it appeared that smoke vapours were coming through the walls from the adjacent unit. According to the tenant, people in this unit also were seen smoking on the balcony as well. The tenant testified that the problem with contaminated air occurred in the evenings on week days and all day and night on weekends. The tenant testified that she reported the problem to the landlord and requested that someone come to her unit and observe the problem. However, no staff was available to conduct a first-hand investigation after hours.

The tenant was requesting a rent abatement based on the resulting loss of quiet enjoyment and devalued tenancy.

The landlord acknowledged that the floor was strictly non-smoking, including the balconies, and that the tenant had, indeed, been complaining about smoke infusion into her unit from the adjacent unit. The landlord stated, that although no staff were available to be there at the times when the alleged smoke was observed by the tenant, they did take measures to investigate and to address the problem by cautioning the

adjacent tenant about smoking in her unit. The landlord testified that the adjacent tenant vehemently denied engaging in any kind of smoking, but did acknowledge burning incense, which is not in contravention of the agreement or the Act. The landlord submitted a letter from the adjacent tenant denying that she smoked as she had allergies and accusing the landlord of harassment for persisting in their accusations. The landlord stated that unsuccessful attempts were made to arrange a meeting between the affected tenant and the adjacent resident to discuss and resolve the issue.

The landlord stated that, they continued to monitor the matter and tried to find out whether the complaint had any validity. The landlord testified that if their inquiries found that others were engaged in smoking in the building, the landlord would not hesitate to act and would first warn the residents and then, if it persisted, they would certainly sanction them and issue an eviction notice if necessary.

However, according to the landlord, there was not sufficient cause to terminate the tenancy of the adjacent resident in this case. The landlord pointed out that each rental unit is sealed from all others without any interconnecting vents, as the complex is heated with hot water. The landlord stated that the walls are made of gypsum and are not porous, as the tenant had testified.

Analysis

In regard 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 was on the tenant; to prove the existence of the damage/loss stemming directly from a contravention of the Act or agreement. I find that

the issue of smoking is not specifically prohibited in the legislation, but is not permitted under this particular tenancy agreement. I find that, contractually, the tenant would be entitled to a smoke-free environment, failing which a loss of quiet enjoyment could be found, as a violation of the Act.

I find that the landlord did take some measures, and as such did not ignore their duty under the Act and agreement. However, I also find that the landlord failed to thoroughly investigate the problem by sending someone to visit the site to observe the tenant's unit at the time the smoke was reported.

A mediated discussion ensued and the landlord made a commitment to arrange for someone to respond to the tenant's complaints of smoke in a timely way when they occur after hours so that the tenant's unit can be observed and assessed during the actual incident.

The tenant also agreed to cooperate with these efforts and I leave it to the parties to create a plan to take care of this without resorting to issuing an order. However, the parties are free to seek dispute resolution in future if any further problems arise.

Conclusion

Based on the testimony and evidence, I find that the tenant's application must be dismissed and I do so with leave to reapply. The tenant is at liberty to pursue this matter again if no acceptable resolution is found through the landlord's intervention.

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 14, 2011.

Residential Tenancy Branch