



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

MNDC, FF

Introduction

This matter was convened to hear the Tenants' application for monetary compensation for damage or loss under the *Residential Tenancy Act* (the "Act"), regulations or tenancy agreement; and to recover the cost of the filing fee from the Landlord.

Both parties signed into the Hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Issue(s) to be Decided

1. Have the tenants established an entitlement to compensation for damage or loss under the Act, regulations or tenancy agreement pursuant to the provisions of Section 67 of the Act?

Background and Evidence

This tenancy commenced July 15, 2011. Rent is \$1,520.00 per month, due on the first day of each month. The Tenants paid a security deposit in the amount of \$760.00 at the beginning of the tenancy.

The residential property contains two towers, one with 29 floors and the other with 24 floors. The residential property was built in the 1970s. The rental unit is located on the second floor of the 29 storey tower.

The Tenants gave the following testimony

The Tenants seek compensation in the amount of \$1,600.00 on their Application for Dispute Resolution. The Tenants submitted that they were misled when they signed the tenancy agreement. They testified that they were excited when they viewed the suite because of the large patio area. They stated that when they saw the patio they

commented that the current occupants must smoke a lot because of the number of cigarette butts on the patio. They stated that the Landlord's agent who showed them the rental unit simply muttered, but did not tell them that debris is commonly thrown from the suites above. The Tenants submitted that if they knew this, they would not have agreed to rent the suite.

The Tenants testified that since they moved in, bags of garbage, cigarette butts, a coffee percolator, and gobs of spit and other debris have all fallen on the patio from the suites above. They stated that they cannot use the patio for health and safety reasons, and that they have therefore lost enjoyment of a portion of their rental unit. The Tenants provided photographs of some of the debris.

The Tenants testified that they wrote to the Landlord on September 14, 2011, complaining about the garbage that was being thrown from above. They stated that they asked the Landlords to provide a barrier, such as an awning, over their patio but the Landlord has refused. They stated that the Landlord has issued a notice to all of the occupants in the building to stop throwing articles off their balconies, but that the notice has been ineffective. The Tenants testified that their neighbours recently moved out of the building because they were hit by falling garbage.

The Tenants stated that they would like to move to a different suite in the rental building but cannot afford the moving costs. They stated that the \$1,600.00 that they are seeking in compensation is what they estimated would be the approximate cost for moving. Since filing their application, they have received an estimate from a moving company in the amount of \$1,347.36. A copy of the estimate was provided in evidence.

The Tenants stated that if another suite became available, they would also expect free storage (the upper units are smaller) and the Landlord to waive the transfer fee.

The Landlord's agents gave the following testimony

The Landlord's agents denied that the leasing agent had misrepresented the rental unit to the Tenants. They submitted that the Tenants were not used to living in a high rise building and that it is normal for debris to fall off balconies above or be blown around by the wind.

The Landlord's agents stated that they sent out memos to all occupants in the building stating that people who were found to be responsible for throwing debris off their balconies would be evicted.

The Landlord's agents stated that they replied to the Tenant's complaint letter on September 19th and offered another suite on a higher floor at market rent (\$1,685.00), stating that they would provide one free storage unit and would waive the transfer fee. The Landlord's agents stated that the Tenants did not accept this offer. The Landlord's agents testified that putting up an awning would be cost prohibitive because of the size of the patio area.

The Landlord's agents stated that the Tenants approached the Landlord's leasing agent, complaining about the garbage and a few other issues. They stated that they made another offer to the Tenants. They stated that they offered the Tenants another suite on the 10th floor at market rent (\$1,620.00) if they agreed to sign a new lease for 6 months to a year and that they offered to waive the transfer fees and provide them free storage for the term of the lease. The Landlord's agents testified that the Tenants refused their offer.

The Landlord's agents testified that there are 12 other occupants on the same floor as the Tenants and that some occupants had been living at the rental property since 1994; 2004 and 2009. They stated that none of the other occupants have complained about debris falling from upper floors.

The Landlord's agents testified that the Tenant's patio is approximately 50 ft x 8 ft (400 square feet) and that the inside of the rental unit is approximately 1100 to 1200 square feet.

Analysis

Section 28 of the Act provides that a tenant is entitled to quiet enjoyment of the rental unit.

Section 7(1) of the Act provides that if a landlord does not comply with the Act, the regulations or the tenancy agreement, the non-complying landlord must compensate the tenant for the damage or loss which results.

Section 67 of the Act provides that if damage or loss results from a party not complying with the Act, the director may determine the amount of, and order that party to pay, compensation to the other party.

This is the Tenant's claim for damage or loss under the Act and therefore the Tenant has the burden of proof to establish their claim on the civil standard, the balance of probabilities.

In this situation, to prove a loss and have the Landlord pay for the loss requires the Tenant to prove, on the balance of probabilities, that they have suffered a loss because of the actions or neglect of the Landlord in violation of the Act.

Based on the testimony of both parties, I do not find that the Landlord's agent made misrepresentations when the Tenants viewed the rental unit. A misrepresentation would have been telling the Tenants that no debris ever fell from above onto their patio, which the Landlord's agent did not do.

However, I do not accept the Landlord's agent's submission that the debris shown in the Tenant's photographs could have been blown in by the wind, or simply "fallen" from above. The pictures show a kitchen-sized bag of garbage, a mop, an empty food box, a cigarette package, cigarette butts, a Styrofoam meat tray, phlegm, and egg shells.

I note that the Landlord provided the Tenants with two offers to move to other suites, but that both suites were for considerably higher rent.

The Landlord's agents testified that they had provided memos to all occupants of the building warning them not to throw items from their balconies, but provided no further evidence that they had attempted to discover who is responsible. Instead, the Landlord's agents submitted that they believed that falling debris was a normal occurrence in high rise living.

I find it unlikely that the items shown in the Tenant's photographs, with the exception of perhaps a few cigarette butts, could have simply "fallen" from balconies above, or been blown onto the Tenant's patio by the wind. I find it probable that they have been deliberately thrown from above and that the Landlord has not been reasonably diligent in its attempts to prevent this from reoccurring.

The Landlord's agents testified that no other occupants on the same floor as the Tenants had complained about falling debris, and therefore a good place to start would be to investigate occupants above the Tenants who moved into the residential property at about the same time or after the Tenants.

I accept the Tenants' evidence that they do not have quiet enjoyment of the patio because of the Landlord's neglect in violation of Section 28 of the Act. Therefore, I grant the Tenants compensation in the form of a **rent reduction in the amount of \$50.00 per month** until the Landlord is successful in discovering who is throwing items onto the Tenant's patio and causing it to cease.

This rent reduction is effective February 1, 2012, and will continue until the Landlord files an Application for Dispute Resolution and is successful in proving that it has taken reasonable steps to ensure that other occupants refrain from dropping cigarette butts, garbage and spitting onto the Tenant's patio.

The Tenant's application had merit and I find that they are entitled to recover the cost of the filing fee from the Landlord. Pursuant to the provisions of Section 72 of the Act, the Tenants may deduct **\$50.00** from future rent due to the Landlord. For clarification, rent for the month of February, 2012, will be \$1,420.00. Rent for the month of March, 2012, will be \$1470.00.

Conclusion

The Tenants may deduct the cost of the **\$50.00** filing fee from future rent due to the Landlord.

Effective February 1, 2011, the Tenants' rent is reduced by **\$50.00** per month until the Landlord has filed an Application for Dispute Resolution and is successful in obtaining an Order from a Dispute Resolution Officer to cancel the rent reduction.

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: January 20, 2012.

Residential Tenancy Branch