



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDC, ERP, RP, OLC, LRE, LAT, RR, and FF

Introduction

This hearing was scheduled in response to the Tenant's Application for Dispute Resolution, in which the Tenant has made application for a monetary Order for money owed or compensation for damage or loss; for an Order requiring the Landlord to make repairs to the rental unit; an Order requiring the Landlord to comply with the *Residential Tenancy Act (Act)* or the tenancy agreement; an Order suspending or setting conditions on the Landlord's right to enter the rental unit; an Order authorizing the Tenant to change the locks to the rental unit; authorization to reduce the rent for services and facilities agreed upon but not provided; and to recover the filing fee from the Landlord for the cost of this Application for Dispute Resolution.

Both parties were represented at the hearing. They were provided with the opportunity to submit documentary evidence prior to this hearing, to present relevant oral evidence, to ask relevant questions, and to make submissions to me.

At the hearing the Tenant withdrew the application for an Order authorizing the Tenant to change the locks to the rental unit and for an Order requiring the Landlord to make repairs to the rental unit.

The Landlord submitted documents to the Residential Tenancy Branch, copies of which were served to the Tenant. The Tenant acknowledged receipt of the Landlord's evidence and it was accepted as evidence for these proceedings.

The Tenant submitted documents to the Residential Tenancy Branch, copies of which were served to the Landlord. The Landlord acknowledged receipt of the Tenant's evidence, with the exception of four documents that summarize the Tenant's claims. All documents submitted by the Tenant, with the exception of the aforementioned four documents, were accepted as evidence for these proceedings. The Tenants were given the opportunity to testify regarding the content of the aforementioned four documents.

Although all documents submitted by the parties, with the exception of the aforementioned documents have been reviewed, they are not necessarily summarized in this decision.

Issue(s) to be Decided

The issues to be decided are whether the Tenant is entitled to financial compensation for the loss of the quiet enjoyment of their rental unit; whether there is a need for an Order requiring the Landlord to comply with the *Residential Tenancy Act (Act)* or the tenancy agreement; whether there is a need for an Order suspending or setting conditions on the Landlord's right to enter the rental unit; and whether the Tenant is entitled to recover the filing fee from the Landlord for the cost of this Application for Dispute Resolution.

Background and Evidence

The Landlord and the Tenant agree that this tenancy began on September 01, 2011 and that the Tenant currently pays monthly rent in the amount of \$2,295.00.

The Landlord and the Tenant agree that there is a term in the Tenant's tenancy agreement that stipulates they are not permitted to smoke in their rental unit or on the residential property. The parties agree that they discussed smoking prior to the start of the tenancy and that the female Tenant specifically asked that this be included in the tenancy agreement.

The female Tenant contends that she was very clear that she wished to reside in a non-smoking complex. The Landlord contends that she did advise the female Tenant that the occupant of the lower unit did not smoke but she did not represent it as a non-smoking complex. The Landlord stated that neither the tenant who was living in the lower rental unit when this tenancy started nor the tenant who moved into the rental unit after this tenancy started had/have a clause that restricts smoking on the residential property.

The Landlord and the Tenant agree that the occupant of the lower rental unit moved into the rental unit on October 31, 2011, at which time he began smoking in the rental unit. The parties agree that the Tenant frequently complained to the Landlord regarding the second hand smoke; that the Landlord attempted to reduce the impact of the smoke by having the occupant of the lower unit smoke inside his bathroom with the fan running; and that the Tenant subsequently advised the Landlord that the problem persisted. The Landlord stated that the occupant of the lower rental unit has agreed to not smoke on the property and she believes this matter is now resolved. The Tenants agree that the occupant of the lower rental unit has not smoked on the residential property since December 16, 2011, except for one occasion.

The Tenant contends that they have exclusive use of a storage shed on the rental property and that an agent for the Landlord entered the shed without proper notice. The Landlord contends that the both the Landlord and the Tenant has the right to use the shed and that she stores her lawn mower in the shed, albeit the Tenant uses the lawn mower.

The Tenant submitted a letter from the individual who lived in the lower unit at the start of the tenancy, who stated that he did not have access to a basement storage area or the storage area that is accessible from the back yard, which were exclusively used by the upper tenants.

The Landlord and the Tenant agree that the Landlord entered the rental unit on the morning of December 01, 2011 and that the Landlord gave written notice, via email, on November 30, 2011. The Tenant contends that the email was sent at approximately 5 p.m. on November 30, 2011 and the Landlord stated that she cannot recall when it was sent.

The Tenant submitted numerous emails/text messages as evidence. I was unable to find any reference to the aforementioned notice however I did find a text message, dated October 04, 2011 at 3:55 p.m., in which the Landlord informs the Tenant that she needs access to the rental unit the following date at 10:00 a.m.

The Tenant is seeking compensation for the loss of the quiet enjoyment of the rental unit, in part, because of painting that occurred in the unit at the start of the tenancy. The Landlord and the Tenant agree that one wall in the "north" bedroom needed to be repaired and painted at the start of the tenancy and that the Landlord agreed to repair and paint that wall.

The female Tenant stated that once they took possession of the rental unit they also noticed that other areas in the rental unit needed painting because there were holes left from the previous occupant hanging items on the wall; that she asked the Landlord to paint other areas in the unit; that she asked the Landlord to change the color in the "north" bedroom; that the Landlord agreed to paint additional areas in the rental unit; that the Landlord did tell her that she would be out of town and could not oversee the painting; that she assumed the Landlord would have an agent oversee the painting; that she never agreed to oversee the painting; that she told the painter where to store his supplies; that the painting in the bedroom was complete by September 15, 2011; and that the painting in the rest of the unit was complete by September 23, 2011.

The Landlord stated that the rental unit had been painted recently and did not need repainting, even though there were some holes in the walls from the previous occupants hanging items on the wall; that she agreed to repaint a variety of areas in the rental unit at the request of the Tenant; that she only intended to paint one wall in the "north" bedroom but, at the request of the Tenant, she painted the entire room and changed the color; that she told the Tenant that she was going to be away and could not oversee the painting; that the Tenant agreed to purchase the paint and oversee the work; and that the painting in the unit was complete by September 23, 2011.

The Tenant contends that the painting was very disruptive and interfered with their ability to fully use the rental unit. The Tenant contends that they could not use the "north" bedroom until September 15, 2011 and that they could not use the foyer until

September 23, 2011. The Landlord argued that the photographs submitted by the Tenant clearly show that they were using the foyer to store personal items.

The Tenant submitted photographs that show their belongings are stored in a manner that would accommodate painting and that painting supplies were stored in various areas of the home. The Landlord contends that the painter would have moved his supplies to any area in the house if he had been asked to do so by the Tenant.

The Landlord submitted a letter from the individual who painted a portion of the rental unit, in which he stated that he had almost finished painting when the female Tenant spoke with him in a manner he did not appreciate so he left the unit and did not complete the job. The Landlord declared that she had to find someone else to complete the painting, which contributed to the delay in completing the painting.

Both parties submitted photographs of the rental unit prior to the tenancy beginning. In my view these photographs show that the interior paint was in reasonably good condition and that it did not require painting.

The Tenant is seeking compensation for the loss of the quiet enjoyment of the rental unit, in part, because the current occupant of the lower rental unit is disturbing them. The Tenant contends that the occupant of the lower unit, who moved into his unit on November 01, 2011, has repeatedly complained about noise emanating from the rental unit; that he has repeatedly complained that they use an excessive amount of hot water; that the relationship between them and the occupant of the lower unit has deteriorated to the point that he yells profanities at them through the floor and bangs on the floor; and that on December 10, 2011 the occupant of the lower unit damaged their personal property, for which he was arrested.

The Landlord contends that she has received numerous complaints about the Tenants from the occupant of the lower unit and numerous complaints about the occupant of the lower rental unit from the Tenant. She stated that she has spoken with both parties regarding the complaints; that neither party accepts responsibility for the conflict; and that she believes both parties are contributing to the conflict. The Landlord submitted a letter she provided to the Tenant, dated December 16, 2011, in which she advised the Tenant that the occupant of the lower unit has been agreed to have no further contact with them; in which she directed the Tenant to have no further contact with the occupant of the lower rental unit; and in which she advised the Tenant she would act as an intermediary.

The Tenant contends that the complaints from the lower occupant are simply normal daily living activities; that the noise is exacerbated because the house is poorly insulated; and they should not be required to curtail normal daily living activities. The Tenant believes that the Landlord should advise the occupant of the lower unit to stop complaining.

The Tenant submitted copies of several text messages that the Tenants exchanged with the occupant of the lower rental unit, in which both parties complain of being disturbed by the other party.

Analysis

I find that the female Tenant very clearly expressed her desire to live in a non-smoking complex and that the Landlord implied that this residential complex was non-smoking. In reaching this conclusion, I was heavily influenced by the fact the parties agree they discussed smoking; that the Landlord advised the Tenant that the other tenant living in the residential complex did not smoke; and that the Landlord included a clause in the Tenant's tenancy agreement that prohibited smoking on the property. Although the Landlord did not specifically advise the Tenant that other persons were prohibited from smoking on the rental unit, I find that it was reasonable for the Tenant to conclude, on the basis of the Landlord's words and actions, that smoking was prohibited on the residential property.

I find, however, that the Landlord does not have the right to prevent the tenant in the lower rental unit from smoking on the residential property, as that tenant does not have a similar restriction in his tenancy agreement. I find that the Landlord has acted reasonably and responsibly in response to the Tenant's concerns regarding smoking and it appears that the occupant of the lower rental unit has agreed to refrain from smoking on the property.

Section 27(1) of the *Act* stipulates that a landlord must not terminate or restrict a service or facility if the service or facility is essential to the tenant's use of the rental unit as living accommodation or is a material term of the tenancy agreement. Although the issue of smoking is of such importance to these Tenants that it is likely a material term of their tenancy, I find that it may be impossible for the Landlord to provide a non-smoking environment to the Tenant, given that she cannot legally prevent the lower occupant from smoking.

Section 27(2) of the *Act* stipulates that a landlord may terminate or restrict a service or facility, other than one referred to in subsection (1), if the landlord gives 30 days' written notice, in the approved form, of the termination or restriction, and reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

As the Landlord cannot legally prevent the lower occupant from smoking I find, in these unique circumstances, that the Landlord must compensate the Tenant in an amount that is equivalent to the reduction in the value of the tenancy agreement as a result of the occupant in the lower rental unit smoking on the property. I find that the tenant smoking in the lower unit reduces the value of this tenancy by \$75.00 per week. This value is obviously subjective. This award is somewhat higher than I would typically award however the amount is based, in part, on the fact that the matter is clearly very

important to the Tenant and they made that clear to the Landlord at the start of the tenancy.

I find that the Tenant is entitled to compensation, in the amount of \$450.00, for the period between November 01, 2011 and December 16, 2011 when the occupant of the lower unit was smoking in his rental unit. In the event the occupant continues to smoke on the residential property, I find that the Tenant has the right to deduct \$75.00 for any week in which the occupant of the lower unit smokes on the property in a manner that disturbs the Tenant, providing the Landlord agrees the lower occupant has smoked in a manner that disturbs the Tenant during the week in question. In the event the Landlord does not agree that the occupant of the lower unit has smoked in a manner that disturbs the Tenant during any given week, the Tenant has the right to file another Application for Dispute Resolution seeking compensation for this matter.

I find that the Tenant has submitted insufficient evidence to show that they have exclusive use of a storage shed on the property. In reaching this conclusion I was heavily influenced by the fact that this issue is not outlined in the tenancy agreement, which quite clearly specifies a variety of services and facilities provided to the Tenant. I find it entirely possible that when the Landlord told the Tenants that they could use the storage area the Tenants simply assumed this meant they had exclusive use of the area.

In making this determination I have placed little weight on the letter from the individual who lived in the lower rental unit. While I accept that he did not have the right to access the storage area in question, I find that I have no evidence that he understood the agreement between the Landlord and the former upper tenants. Even if he did know that the former upper tenants had exclusive use of a particular storage area, this does not mean that the Landlord entered into the same agreement with her new tenants.

On the basis of the testimony of the Tenant and the text message, dated October 04, 2011 at 3:55 p.m., in which the Landlord informs the Tenant that she needs access to the rental unit the following date at 10:00 a.m., I find that the Landlord may not be strictly complying with section 29 of the Act. I therefore Order the Landlord to strictly comply with section 29 of the Act, which reads:

A landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:
(a) the tenant gives permission at the time of the entry or not more than 30 days before the entry;
(b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:
(i) the purpose for entering, which must be reasonable;
(ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;

- (c) the landlord provides housekeeping or related services under the terms of a written tenancy agreement and the entry is for that purpose and in accordance with those terms;*
- (d) the landlord has an order of the director authorizing the entry;*
- (e) the tenant has abandoned the rental unit;*
- (f) an emergency exists and the entry is necessary to protect life or property.*

The Act establishes a tenant's right to quiet enjoyment, which includes, but is not limited to, reasonable privacy, freedom from unreasonable disturbance, exclusive possession, subject to the landlord's right of entry under the Legislation, and use of common areas for reasonable and lawful purposes, free from significant interference.

While I accept that the Tenant's use of the rental unit was disrupted for the first 23 days of this tenancy as a result of painting, I do not find that the disruption constitutes a breach of their right to quiet enjoyment. In reaching this conclusion I was influenced by the following findings:

- With the exception of one wall in the north bedroom all of the painting in the unit was completed at the request of the Tenant
- Had the Tenant not requested additional painting, the painting would have been limited to one wall and would, quite likely, have been completed within a reasonable time
- The photographs before me do not cause me to conclude that the rest of the rental unit required painting
- Although the Tenant was disrupted by the painting, they benefitted significantly from the painting
- The Tenant could have minimized the disruption by insisting that the painter store his supplies in a particular area of the rental unit
- The Tenant contributed to the delay, to some degree, by interacting with the first painter in such a manner that he left the site before completing the painting.

As I have found that the painting did not constitute a breach of the Tenant's right to the quiet enjoyment of their rental unit, I dismiss their claim for compensation for this inconvenience.

The Residential Tenancy Branch Policy Guidelines suggest that inaction by the landlord which permits or allows physical interference by an outside or external force which is within the landlord's power to control could be considered a breach of the right to quiet enjoyment. I concur with this guideline. In these circumstances, I find that the Landlord has taken reasonable steps to intervene in the dispute between the parties but has been unable to resolve the conflict. I am not convinced that it is within her power to resolve this conflict, as the parties do not seem to be inclined to live cooperatively.

When one party is clearly disturbing another party a landlord generally has an obligation to end that party's tenancy. In these circumstances, however, I find that, until recently, it would be difficult, if not impossible, for the Landlord to end the tenancy of either party. I accept that the occupant of the lower rental unit has disturbed the Tenant by yelling and banging. On the basis of the texts exchanged between the parties, I find that the Tenant has also disturbed the occupant of the lower rental unit and that his actions have been in response to his perception that the Tenant is not responding appropriately to his complaints.

Although inadequate insulation between the floors and a small hot water tank may contribute significantly to the disturbances, I find those deficiencies are not uncommon in a home of this era and I find it was reasonable for the occupant of the lower rental unit to expect the Tenants to modify their behaviour in an attempt to minimize the disturbances.

As the occupant of the lower rental unit has an equal right to the quiet enjoyment of his rental unit, I find it unreasonable for the Tenant to expect that the Landlord should direct the lower occupant to simply stop complaining. Rather, I find the Landlord acted reasonably and responsibly when she directed the parties to stop communicating with each other and to use her as an intermediary. As the Landlord has acted reasonably and responsibly in this matter, I find that she cannot be held liable for the disturbances. I therefore dismiss their claim for compensation for disturbances arising from the conflict between the two parties.

I do note that the Landlord may have grounds to end the tenancy of the lower occupant if it can be established that he damaged personal property belonging to the Tenant. I have not taken this incident into account when determining whether the Landlord acted responsibly in this matter, as this is a relatively recent development and I have no indication that evidence supporting the allegation was provided to the Landlord prior to December 20, 2011, when evidence for these proceedings was served to her.

I find that the Tenant's Application for Dispute Resolution has some merit and I find that the Tenant is entitled to compensation, in the amount of \$50.00, for the cost of filing this Application for Dispute Resolution.

Conclusion

I find that the Tenant has established a monetary claim, in the amount of \$500.00, which is comprised of \$450.00 in compensation for not being provided with a smoke free environment and \$50.00 in compensation for the filing fee paid by the Landlord for this Application for Dispute Resolution.

In full satisfaction of this monetary claim, I authorize the Tenant to reduce their rent payment in February of 2012 by \$250.00 and their rent payment in March of 2012 by \$250.00, pursuant to section 72(2) of the *Act*.

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 30, 2011.

Residential Tenancy Branch