



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNDC, RP, RR, FF

Introduction

This hearing dealt with an application by the tenant for a monetary order, an order compelling the landlord to perform repairs and an order authorizing the tenant to reduce her rent until repairs are completed. Both parties participated in the conference call hearing.

Issues to be Decided

Is the tenant entitled to a monetary order as claimed?
Should the landlord be ordered to perform repairs?
Should the tenant be authorized to reduce her rent?

Background and Evidence

The tenancy began in 2004 at a time when the residential property was owned by a different landlord. The respondent acquired the building in 2007. The tenancy agreement specifies that the unit is a “designated non-smoking unit.”

The tenant testified that in December 2011, new occupants moved into the unit immediately beside her and the tenant immediately began to be bothered by cigarette smoke seeping into her unit from the adjacent unit. The tenant testified that she has a severe allergy to smoke and in support of that assertion provided a note from her doctor, who reported that the tenant was living in a smoke free building due to an extreme sensitivity to smoke.

The tenant reported the problem to the landlord and the landlord did work in the adjacent unit in an effort to contain the smoke therein. The landlord testified that he installed, sealed and painted drywall that was placed over the area from which the tenant complained that the smoke was escaping into the rental unit.

The tenant claimed that the landlord's repairs were insufficient and that she has made efforts to rid the rental unit of the smell of smoke. She testified that she attempted to

remove the smoke by using a pipe exhausted to a window, that she has opened windows and used a fan and that she has caulked the area around the staircase through which the smoke is entering. The tenant seeks reimbursement for the cost of piping and caulk as well as anticipated increased hydro as a result of having to leave the window open.

The parties agreed that the building was built in the 1970's at a time when the building code did not require a vapour barrier between units. The tenant seeks an order that the landlord install a vapour barrier between the units which should include a plastic sheet.

The tenant seeks to recover \$200.00 in loss of use of part of the unit for the months of January, February and March as it has become unreasonably cold because she has to leave the window open and a further \$250.00 in rent which she claims to have paid to another party because she had to move out of the rental unit for a period due to her extreme sensitivity.

The tenant seeks a reduction of rent until repairs are completed and the return of a \$5.00 late payment fee she was charged when she paid her rent late in the month of February.

Analysis

In order to establish her claim, the tenant must prove that she has a contractual right to live in a smoke free building. While I accept that the rental unit is a designated non-smoking unit, there is no documentary evidence to support the tenant's claim that the entire building was smoke free. I am not satisfied on the balance of probabilities and I find insufficient evidence to support the tenant's claim that the prior owner of the residential property had represented that the entire building was smoke free and for this reason I dismiss the bulk of the tenant's claim.

The only part of the tenant's claim which I accept is the claim for the return of the \$5.00 late payment fee collected in the month of February. Sections 7(1)(d) and 7(2) of the Residential Tenancy Regulations permit a landlord to charge a late payment fee only where there is an explicit term in the tenancy agreement which permits that charge. In this case, there is no such term in the tenancy agreement and I find that the landlord must return the \$5.00 fee. The tenant may deduct \$5.00 from a future rental payment.

As the tenant has been substantially unsuccessful in her claim, I find that she must bear the cost of the filing fee.

Conclusion

The tenant may deduct \$5.00 from a future rental payment in compensation for the late payment fee paid in February 2012. The balance of the tenant's 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: April 03, 2012

Residential Tenancy Branch