



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OLC, RR

Introduction

This hearing was convened by way of conference call in repose to the tenant's application for an Order for the landlord to comply with the *Residential Tenancy Act* (Act), regulations or tenancy agreement and an Order to reduce rent for repairs, services or facilities agreed upon but not provided.

During the hearing the tenant withdrew his application for an Order to reduce rent for repairs services or facilities agreed upon but not provided.

The tenant and the landlords agents attended the conference call hearing gave sworn testimony and were given the opportunity to cross examine each other on their evidence. The landlord and tenant provided documentary evidence to the Residential Tenancy Branch and to the other party in advance of this hearing. All evidence and testimony of the parties has been reviewed and are considered in this decision.

Issue(s) to be Decided

Is the tenant entitled to an Order for the landlord to comply with the Act, regulations or tenancy agreement?

Background and Evidence

Both parties agree that this month to month tenancy started on February 01, 2003. Rent for this unit is \$590.00 per month and is due on the first day of each month.

The tenant testifies that when he first moved into his unit he did not have any neighbours who smoked near his unit. The tenant states that last spring a new tenant moved into the unit underneath the tenants. On the day this tenant moved in the elevator was out of order and this tenant had to leave his belongings in the lobby. The tenant testifies that this tenant's belongings smelt badly of smoke. The tenant testifies that whenever he opened his window and the tenant below his unit had his window open the smell of smoke and ashtray would come into the tenants unit.

The tenant testifies that there is another tenant who moved in next door to the tenants unit in unit 302. The tenant testifies that he had to ask this tenant not to smoke in her bathroom as the smell of smoke would filter through into the tenants unit through the air vents. The tenant testifies that the smell of smoke from this tenants unit also comes out of her door every time she opens her door. On one occasion that tenant stood in her doorway entertaining her visitors and smoking. The tenant testifies that he informed the landlords and they told that tenant that she could not smoke in the hall or her doorway and cannot entertain visitors in the hallway. The tenant testifies that he also spoke to that tenant and was told that she moved to this building because she was able to smoke in her unit.

The tenant testifies that there was an occasion when he saw another tenant running down the stairway with a lit cigarette. The tenant testifies that on June 02, 2012 he was coming out of his bedroom when he could smell cigarette smoke. The tenant states he went into the hallway and could still smell the smoke. The tenant states in the hallway there is fan that blows air around the hallways.

The tenant testifies that there is only one no smoking sign on the third floor stairway and one outside on the back door. The tenant testifies that because the landlords do not enforce a No Smoking policy in the building the second hand smoke can harm non

smokers like the tenant. The tenant states that it is the responsibility of the landlord to free the building from smoking and the landlords should tell all the tenants that this is a non smoking building. The tenant wants the landlords to put up extra signs to inform the smokers that they cannot smoke near doors, windows or fans and the tenant wants the landlord to put these signs up this afternoon. The tenant testifies that this situation has caused a 'war' in the building which has come to the tenant's door.

The landlords' agent testifies that this building has always been a smoking building. The landlord's agent testifies that although they are now making this a non smoking building any tenants who were original living in the building are grandfathered in and are able to smoke in their units. All new tenants have a non smoking clause in their tenancy agreements and a designated area has been set up for these tenants outside the building and is over 23 feet away from a door.

The landlords' agent testifies that after receiving a complaint from the tenant about his neighbour smoking the building manager walked the halls and could not smell smoke. The other tenant's door is 26 feet away from this tenant's door and that tenant has been asked not to leave her door open.

The landlord's agent testifies that the building is fitted with air exchange fans that are continually on and these draw fresh air into the hallways. The landlord's agent testifies that the tenant was offered a different unit away from his neighbour and on the opposite corner of the building. The landlord's agent testifies that the tenant said he would think about it but has not yet made that decision.

The landlords agent testiies that unless a tenant has a no smoking clause in their tenancy agreement the landlord cannot ask that tenant to stop smoking and no enforcement action can be taken against a tenant for smoking in their unit. The landlord's agent testifies that they have no smoking signs on the front door, the back door, the laundry room and the tenants know that there is no smoking in the common areas.

Analysis

I have carefully considered all the evidence before me, including the sworn testimony of both parties. In this matter the tenant has the burden of proof to show that the landlord has not complied with a section of the *Act*, regulations or tenancy agreement.

I find that this building was a residential building which was rented to tenants who were able to smoke in their units. A landlord cannot now remove this right from those tenants that were in residence at the time this tenant moved in. The tenant should have been aware that this was a building in which tenants could smoke when he moved into the building in 2003 and as it was the tenants choice at that time to live in this building I cannot now make any orders against the landlord to comply with the *Act*, regulations or tenancy agreement as the tenant has not shown how the landlords have breached the *Act*, regulations or tenancy agreement.

I am satisfied that the landlords are doing all they can at this stage to introduce new non smoking measures for new tenants and enforcing the no smoking policy in the common areas with signs and due diligence, consequently, it is my decision that the tenant has not met the burden of proof in this matter and I deny the tenants application.

Conclusion

The tenant's application is dismissed without leave to reapply.

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: June 29, 2012.

Residential Tenancy Branch