

DECISION

Dispute Codes OLC FF

Introduction

This hearing dealt with the tenant's Application for Dispute Resolution under the *Residential Tenancy Act* (the "Act") for an order directing the landlord to comply with the Act, regulation or tenancy agreement, and to recover the filing fee.

The tenant and the landlord attended the teleconference hearing and gave affirmed testimony. During the hearing the parties were given the opportunity to provide their evidence orally. A summary of the testimony is provided below and includes only that which is relevant to the hearing.

The parties confirmed that they received the evidence from the other party prior to the hearing and had the opportunity to review the evidence.

Issue to be Decided

- Should the landlord be ordered to comply with the Act, regulation or tenancy agreement?

Background and Evidence

A month to month tenancy began on May 1, 2010. Monthly rent in the amount of \$725.00 is due on the first day of each month. The rental unit is currently one of three rental units in the building, and in the coming months, may include a fourth rental unit.

According to the tenancy agreement addendum #16 (i) states that "No smoking is allowed in the building." The landlord testified that the tenant was advised that smoking was permitted outside including on the balconies of the rental unit. The tenant stated that he does not recall being advised of that.

The landlord advised that two of the three tenants in the building are non-smokers, while the third is a smoker; however due to her daughter suffering from asthma and the tenancy agreement rules, only smokes outside and on the balcony.

The tenant is seeking an order directing the landlord to enforce that there is not smoking on the balconies or within three metres of the building as the second hand smoke is impacting this quiet enjoyment of the rental unit.

The tenant confirmed that he did not submit a copy of any bylaws to support that smoking was not permitted outside of the building. The tenant referred to a letter from his wife submitted in evidence that claims his children smell like smoke after leaving the rental unit. The tenant claims that the person living above him smokes inside the rental unit and that he can smell and is impacted by their smoking.

The landlord disputes that the tenants living above the applicant tenant deny smoking in their rental unit, have not been found to be smoking in their rental unit after random visits by the landlord to check for smoking, and submitted a letter in evidence stating that they deny smoking inside the rental unit as their daughter suffers from asthma.

The landlord testified that in she estimates that within the next three months, the HVAC system will be changed from the current forced air heating system to an isolated system that will prevent shared air between the tenant and the other tenants.

Analysis

Based on the documentary evidence and the oral testimony provided during the hearing, and on the balance of probabilities, I find the following.

The tenant alleges that second hand smoke is entering his rental unit. The tenant provided a letter from his wife as evidence that his children smell like smoke after leaving his rental unit. The landlord disputes the tenant's testimony that tenants are smoking inside their rental units. The landlord submitted a letter from the tenant living above the applicant tenant who writes that she does not smoke inside the rental unit and that her daughter suffers from asthma so she has never smoked in any home they have lived in.

The landlord testified that she has attended the rental units on a random basis and has not found any smoke inside the rental units. The landlord stated that she allows smoking outside the building and on the balconies, however, indicated that the tenant was reminded of this before he moved into the rental unit. The tenant does not recall being advised of that.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

In this matter, the burden of proof is on the tenant to prove the landlord has breached the *Act*, regulation or tenancy agreement. I find the tenant has failed to prove the

landlord has breached the *Act*, regulation or tenancy agreement. As a result, **I dismiss** the tenant's request in full due to insufficient evidence, without leave to reapply.

As the tenant was not successful with their application, I do not grant the recovery of the filing fee.

Conclusion

I dismiss the tenant's application in full due to insufficient evidence, without leave to reapply.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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 10, 2013