



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDC, RR, OLC, LA

Introduction

This hearing dealt with an Application for Dispute Resolution by the tenant seeking a Monetary Order for money owed or compensation for damage or loss under the Act, or tenancy agreement; an Order compelling the Landlord comply with the Act or agreement; and an order allowing the tenant to change the locks.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to this hearing, and the evidence has been reviewed. The parties were also permitted to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the evidence and testimony provided.

Issue(s) to be Decided

- Is the tenant entitled to compensation in the form of a rent abatement?
- Should the landlord be ordered to comply with the Act or agreement?
- Is the tenant entitled to an order permitting the tenant to change the locks?

Background and Evidence

The tenancy began December 1, 2010, and market rent is \$970.00 per month, but the tenant's rent was subsidized based on her income and the current rent is now set at \$315.00. A security deposit of \$485.00 was paid.

Submitted into evidence were copies of communications, photographs, a written chronology of the tenant's observations with respect to cigarette and marijuana smoke and odours, informational material and other documents. The landlord confirmed receipt of the tenant's evidence. No evidentiary material was submitted by the landlord.

The tenant testified that she suspects that the landlord had released copies of the master key to the units in the complex to a third party thereby allowing access to her

rental unit. The tenant testified that she has found evidence that somebody had entered her suite. The tenant is requesting an order that she be allowed to change her locks without providing a key to the landlord.

The landlord testified that no unaccounted-for master keys had been circulated to anyone. According to the landlord, a previous contractor had been given keys to the common areas only and these were returned. The landlord testified that nobody representing the landlord had ever entered the tenant's suite without notice and there were no other reports from any other tenants about similar occurrences. The landlord testified that they have no objection to the tenant installing a safety lock and would possibly consider allowing the tenant to install her own lock too, although they have some serious reservation based on safety concerns. The landlord pointed out that the lock may hamper them from responding quickly to an emergency in the suite.

The tenant testified that , beginning at the start of the tenancy, she has been subjected to ongoing exposure to smoke and odours from other residents smoking. According to the tenant, she had asked for intervention by the landlord to seal her unit as a measure to eliminate the smoke filtering in from other units. The tenant alleged that the landlord delayed some of the work and also failed to properly address the problem.

The tenant is requesting an order that the landlord comply with the Act. The tenant is also requesting that she be granted a retroactive rent abatement of \$3,335.20 in compensation for the effect on her tenancy.

The landlord disputed the tenant's allegation that they violated the Act and objected to the accusation that they had failed to properly address the tenant's complaints. The landlord stated that they had sealed everything the tenant requested and went "above and beyond" their basic responsibilities under the Act. The landlord testified that they offered the tenant an air purifier, which she declined, and the landlord had gone so far as to ask the resident below to voluntarily use an air purifier and to refrain from smoking on the outside balcony. The landlord testified that this other resident had been living in the complex for many years and her tenancy agreement did permit her to smoke in the unit and on her balcony.

The landlord pointed out that, while the building was moving towards being entirely a "smoke-free environment", the existing tenants had a "grandfathered" arrangement permitting them to smoke and this cannot be altered. The landlord's position is that they do not have the authority to ban all smoking and have no control over odours or smoke in that drift in the air.

Analysis

With respect to the tenant's monetary claim for a rental abatement, I find that section 7 of the Act states that if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for any damage or loss that results. Section 67 of the Act grants a Dispute Resolution Officer authority to determine the amount and order payment under the circumstances.

It is important to note that in a claim for damage or loss under the Act, the party making the claim bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent *in violation of the Act, agreement or an order*
3. Verification of the amount to compensate for the loss or to rectify the damage.
4. Proof that the claimant took reasonable steps to minimize the loss or damage

In this instance, the burden of proof is on the tenant; to prove the existence of the damage/loss stemming directly from a contravention of the Act or agreement.

I find that section 32 of the Act imposes responsibilities on the landlord to provide and maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law, having regard to the age, character and location of the rental unit to make it suitable for occupation by a tenant.

In this instance, I find that there was insufficient evidence to verify that there was any violation of the *Act* or tenancy agreement perpetrated by the landlord. Smoking activity of neighbours in the complex is not prohibited under the Act or agreement. Moreover, I find that the landlord had no part in causing the adverse environmental conditions that the tenant is forced to endure. I find that the landlord could not possibly have taken any tangible measures to control air-borne pollution, beyond what the landlord had done to date by sealing the tenant's suite .

Given that the tenant has not succeeded in proving that element 2 of the test for damages has been met, I find that the tenant's monetary claim is not sufficiently supported under the Act.

At the end of the hearing, after all the testimony was heard, but before I was able to conclude the hearing, the tenant's conference call suddenly ended. The landlord

stated that this was likely a loss of the connection due to a sudden power outage affecting their area.

Based on the evidence, I find the following:

- The portion of the tenant's application relating to the locks has been tentatively resolved by the landlord's willingness to contemplate allowing a change of locks and this portion of the tenant's application is therefore dismissed.
- The portion of the tenant's application seeking monetary compensation relating to the smoke is dismissed as the claim failed to meet all elements in the test for damages.

Accordingly, I hereby dismiss the tenant's application in its entirety without leave to reapply.

Conclusion

The tenant is not successful in this application and it is dismissed without leave.

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 14, 2013

Residential Tenancy Branch

