



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding NEW CHELSEA SOCIETY
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC, OLC, O, FF

Introduction

This matter dealt with an application by the Tenant for a Monetary Order for compensation for loss or damage under the Act, regulations or tenancy agreement, for the Landlord to comply with the Act, regulations or the tenancy agreement, to recover the filing fee for this proceeding and for other considerations.

The Tenant said she served the Landlord with the Application and Notice of Hearing (the “hearing package”) by registered mail on May 25, 2013. Based on the evidence of the Tenant, I find that the Landlord was served with the Tenant’s hearing package as required by s. 89 of the Act and the hearing proceeded with both parties present.

This hearing is convened as an adjournment of a hearing held on June 17, 2013.

The original conference call to hear this matter was on June 17, 2013, but the hearing was adjourned because the Arbitrator did not receive an evidence package that the Applicant had submitted to the Residential Tenancy Branch on June 7, 2013. The hearing was adjourned to August 12, 2013 so that the Arbitrator could receive the Tenant’s evidence package. The Arbitrator put a search out for the evidence, but was unable to obtain the evidence for the hearing of August 12, 2013. All parties agreed to continue the hearing on August 12, 2013 without the missing evidence package. The day after the meeting the Tenant called into the Burnaby office of the Residential Tenancy Branch to inquire about the missing evidence package and was instrumental in the Branch finding the evidence package. The Arbitrator received the Tenant’s evidence package by email on August 13, 2013. The Arbitrator reviewed the evidence prior to the decision being written.

Issues(s) to be Decided

1. Is there a loss or damage to the Tenant and if so how much?
2. Is the Tenant entitled to compensation for loss of damage and if so how much?
3. Has the Landlord complied with the Act, regulations and tenancy agreement?
4. What other considerations are there?

Background and Evidence

The Tenant has been living in this rental complex since July 1, 1998, but this tenancy started when the Landlord took over management of the rental complex on August 26, 2008. The tenancy is a month to month tenancy and rent is \$704.00 due on the 1st day of each month. The Tenant did not pay a security deposit.

The Tenant said she and her family have been forced to move out of the rental unit because the tenant below her unit is smoking on his balcony and the smoke drifts into her rental unit. The Tenant indicated she has a health condition that is very sensitive to second hand smoke and she cannot tolerate the second hand smoke coming into her unit from the downstairs tenant. The Tenant said the second hand smoke has also adversely affected her family. The Tenant continued to say that they have moved out of the rental unit and will not return until this situation is resolved.

The Tenant said she has made this application as the rental unit is uninhabitable for her and her family and the Landlord has not upheld their duty to enforce the smoking policy of the building or the tenancy agreement to resolve this situation. The Tenant continued to say that she understands this rental complex allows smoking in the rental units. The Tenant also said she agreed that the balcony is considered to be part of the rental unit and is not part of the common areas. The Tenant said the smoking policy of the rental complex says **“smoking is permitted only inside a resident’s own suite or at least 6 metres away from any entryway, openable window or air intake vent”**. The Tenant said the downstairs tenant is in violation of the 6 meter rule of the smoking policy. The Tenant said her balcony door and windows are only feet away from the downstairs tenant’s balcony where he smokes. As a result the Tenant believes it is the Landlord’s responsibility to resolve the smoking issue created by the downstairs tenant.

Further the Tenant said clause #14 of the tenancy agreement says **“The Tenant shall take all steps necessary to prevent the creation of a hazard and shall rectify any hazards created by Residents or Guests”**. The Tenant said smoke is a hazard and the Landlords have not responded to her requests to remove or stop the hazard being created by the downstairs tenant in the form of second hand smoke.

As a result the Tenant said she has made the following application. The Tenant is requesting the Landlord to Comply with the Act, regulations or tenancy agreement in order to stop the issue of second hand smoke entering her rental unit. As well the Tenant is requesting the following monetary compensation as a result of the second hand smoke issue.

1. Compensation for the purchase of an air purifier	\$ 175.00
2. Compensation for the purchase of a purifying hepa unit	\$ 150.00
3. Medication costs	\$ 498.07
4. Lost wages due to second hand smoke related sickness (58.95 hours @ \$115.00 per hour)	\$6,779.25
Total claim	\$7,602.32

The Tenant submitted a letter outlining the events and her claims, two unsigned receipts for the air purifiers, a typed list of medical expenses and a typed list of hours of work missed because of second hand smoke related health issues from the rental unit as well as her hourly wage of \$115.00 per hour. The Tenant submitted 2 lists of persons who signed that they had seen the Tenant have allergic reactions to second hand smoke and a signed letter from a doctor confirming the Tenant's health conditions and her allergic reactions to smoke.

The Tenant said they have lived in this complex for 17 years and this has not been a problem until the downstairs rental unit was sublet to a smoker who is not willing to help resolve this issue.

The Landlords said they are sympathetic to the Tenants health issues and they have tried to resolve this situation, but have been unsuccessful to date. The Landlord said they have spoken with the downstairs tenant without success, they have contacted the city bylaws and were told that the city bylaws about smoking do not apply to balconies and they have suggested that the Tenant and the downstairs tenant who smokes trade units so that the smoke does not go into the Tenant's unit. The Landlord said this suggestion was not accepted. The Landlord has also tried to find a different rental unit for the Tenant, but none have become available to date.

The Landlord said when they wrote their smoking policy it was to comply with the city's bylaws and they are now finding the wording is not as clear as it should have been. The Landlord said the rental complex allows smoking in the tenant's suite and this includes the balcony as the balcony is part of the rental unit. When the Landlord wrote the smoking policy the 6 meter rule was meant to apply to the common areas so that the second hand smoke would not come back into the building. The Landlord said this is to comply with the city bylaws. The Landlord said the 6 meter rule in the smoking policy is not enforceable on the tenant's balcony as it is part of the rental suite and the smoking policy allows smoking inside the tenant's own suite.

The Landlord continued to say that because smoking is allowed in the building the monetary claim that the Tenant is making as a result of smoking is not the Landlord's responsibility, but is a result of the Tenant's pre-existing health condition. The Landlord said that if the Tenant cannot tolerate second hand smoke then maybe this rental complex is not the best place for the Tenant's health. The Landlord said they have some non smoking rental buildings in the complex, but there has not been a vacancy

since this situation has come up. The Landlord said they will offer the Tenant an alternate non smoking unit if one came up.

The Tenant said she may accept that solution if the non smoking rental unit was acceptable to her. But for now the Tenant said the Landlord is responsible to resolve this issue.

Analysis

During the hearing both sides agreed the smoking policy of the rental complex was poorly written. The smoking policy says that **smoking is permitted only inside a resident's own suite or at least 6 metres away from any entryway, openable window or air intake vent.** The Landlord says the balcony is included in the suite therefore smoking is allowed on the balcony and they cannot stop or restrict the downstairs tenant from smoking on his balcony. As well the Landlord said the intent of the 6 meter rule is for the common areas, to comply with the city bylaws, although the smoking policy does not say this. The Tenant says the downstairs tenant is breaking the 6 meter rule of the smoking policy; therefore it is the Landlord's responsibility to correct the problem of second hand smoke. The Tenant said they have lost the quiet enjoyment of her rental unit and now have had to move out of the unit because of the second hand smoke.

The Act defines the rental unit as living accommodation rented or intended to be rented to a tenant. In this situation the balcony is rented to the tenant and therefore it is part of the rental unit or suite. As the first part of the smoking policy states smoking is only permitted inside a resident's own suite; I find the balcony is considered inside the tenant's suite or rental unit and therefore smoking is permitted on the balcony. Further I accept the Landlord's testimony that the smoking policy is poorly written and the intent of the 6 meter rule is for the common areas. If the 6 meter rule applied to the balconies there would be no smoking on the balconies because the balconies are not big enough to apply the 6 meter rule too. I find the 6 meter rule in the smoking policy does not apply to balconies. Therefore, I dismiss without leave to reapply the Tenant's claim based on the smoking policy of the rental complex.

With respect to the Tenant's claim that second hand smoke is a hazard and the Landlord is not enforcing clause #14 of the tenancy agreement which relates to hazards in the rental complex; I find that as smoking is allowed in the unit this is a smoking building, the residents have accepted that smoking is permitted and as such the residents have accepted that smoking is an acceptable hazard. The Tenant is a resident of the building and has accepted smoking is allowed in the building; therefore the Tenant has accepted that smoking is an acceptable hazard in this building. Consequently, I dismiss without leave to reapply the Tenant's claim based on the tenancy agreement.

As the Tenant has not been successful with her claims, I find the Landlord has complied with the Act, regulations and tenancy agreement.

For a monetary claim for damage of loss to be successful an applicant must prove a loss actually exists, prove the loss happened solely because of the actions of the respondent in violation to the Act, the applicant must verify the loss with receipts and the applicant must show how they mitigated or minimized the loss.

Although the Tenant gave affirmed testimony the Tenant has the burden of proving the monetary claims that she has made. The Tenant has not provided corroborating evidence that proves the Landlord is **solely** responsible in violation of the Act for her losses or damages as the Tenant has a pre-existing health condition of allergies to smoke which has nothing to do with the Landlord. I find the Tenant has not proven the Landlord is solely responsible for her loss or damage. As well the Tenant has not provided corroborating evidence to support the medication cost with paid receipts or third party verification of lost time at work and what the Tenant's wages are. Further the Tenant did provide receipts for the purchase of air purifiers, but these receipts were unsigned and therefore the receipts do not met the burden of proving a claim. Consequently as a result of lack of evidence I dismiss the Tenant's monetary claim without leave to reapply.

I dismiss the Tenant's application without leave to reapply.

As the Tenant has been unsuccessful in this matter I order the Tenant to bear the application filing fee of \$50.00 which the Tenant has already paid

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: August 19, 2013

Residential Tenancy Branch