



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OLC O RR FF

Introduction

This hearing dealt with an application by the tenant pursuant to the Residential Tenancy Act (the Act) for orders as follows:

- a) An Order that the landlord obey the Act and ensure his reasonable enjoyment pursuant to section 28 by enforcing the agreed non smoking rule on adjacent suites and freeing him from second hand smoke;
- b) A monetary order for compensation/rent rebate for the loss of the use of his master bedroom due to the second hand smoke fumes; and
- c) Recovery of the filing fee for this application.

SERVICE

I find that the landlord was served with the Application for Dispute Resolution hearing package by registered mail. He stated he received it.

Issue(s) to be Decided:

Has the tenant proved on the balance of probabilities that the landlord through act or omission is not protecting his right to peaceful enjoyment and he is entitled to compensation or a rent rebate for the loss of use of part of his unit?

Background and Evidence

Both parties attended the hearing and were given opportunity to be heard, to present evidence and to make submissions.

It is undisputed that the tenancy commenced in July 2012 under different ownership and was transferred to the present landlord in September 2012, rent is \$1400 a month for this upper suite and a security deposit of \$700 plus a pet damage deposit of \$700 was paid. It is undisputed that a new tenant moved into the lower suite in March 2013 and since then, the tenant in this application has complained of suffering from second hand smoke penetrating his unit and causing him severe distress. He said the manager "K." had assured him that she would screen for non smoking tenants. His doctor confirms

his allergy and problems in a letter in evidence. He agrees his lease does not include a statement that the home is non smoking and the new tenant has refused to sign an addendum that they will not smoke inside the unit.

The landlord said that he has been unable to find objective evidence of this second hand smoke, the filter was not coloured brown when he changed it and neither he nor his caretaker could smell this reported second hand smoke smell when they attended the unit. He said that he did not have a manager, "K", she was only a caretaker and had no authority to make verbal promises. He agreed that this tenant was a very good tenant up to the time of the smoke issue when problems arose between the tenants. The downstairs tenant says she does not smoke inside as she has grandchildren and visitors and she knows the dangers. She said she does smoke outside but she has found the situation intolerable as the upstairs tenant constantly complains about her and slams his door in the middle of the night to protest what he thinks she is doing.

After further discussion, the parties agreed to settle the matter as follows:

Settlement Agreement:

- 1. The tenant will vacate the unit on October 1, 2013.**
- 2. The parties will jointly agree on a date and perform a condition inspection report and the landlord agrees he will have in cash (\$1400) and return the security and pet damage deposits in full if there are no damages.**

On the basis of the documentary and solemnly sworn evidence presented at the hearing, a decision has been reached.

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Analysis:

Section 28 of the Act sets out the tenant's right to quiet enjoyment:

Protection of tenant's right to quiet enjoyment

28 A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

- (a) reasonable privacy;*
- (b) freedom from unreasonable disturbance;*
- (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted];*
- (d) use of common areas for reasonable and lawful purposes, free from significant interference.*

Page 6 of the Residential Tenancy Policy Guideline explains further that "inaction by the landlord which permits or allows ...interference by an outside or external force which is

within the landlord's power to control" may be a basis for finding of a breach of quiet enjoyment. Examples of such interference include "unreasonable and ongoing noise".

As explained to the parties in the hearing, I find the weight of the evidence is that the landlord has diligently tried to resolve this matter but I find the lease of either tenant does not contain a "No Smoking" clause so the tenant was never guaranteed the right to a smoke free unit and the landlord is unable to enforce such a provision now on the other tenant. However, I found both parties were very reasonable persons who tried to resolve the matter by agreement that the tenant vacate to protect his health. In accordance with the agreement, I find the landlord entitled to an Order of Possession effective October 1, 2013 and the tenant to an Order that the landlord make a mutually agreeable date for a move out inspection when the matter of the security and pet damage deposits will be resolved.

Conclusion:

In accordance with the Settlement Agreement, I find the landlord entitled to an Order of Possession effective October 1, 2013. I find the tenant not entitled to recover the filing fee as I find the landlord had not neglected his obligations as a landlord under section 28 of the Act.

I HEREBY ORDER that the landlord and tenant make a mutually agreeable date for a move-out condition inspection report on or before October 1, 2013.

I HEREBY ORDER that the landlord have the full security and pet damage deposit in cash (\$1400) at the time of the condition inspection report and that he either return it in full to the tenant at that date or file an Application within 15 days to claim against it in accordance with section 38 of the Act.

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 13, 2013

Residential Tenancy Branch