



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, OLC

Introduction

This hearing dealt with an application by the tenant for an order compelling the landlord to comply with the Act, regulation or tenancy agreement and a monetary order. Both parties appeared and had an opportunity to be heard.

In his written material and frequently during the hearing the tenant described himself as having Post Traumatic Stress Disorder, Autism, and Tourette's Syndrome. For part of his testimony he was accompanied by an advocate. When his advocate had to leave partway through the second date set aside for this hearing the tenant indicated that he was able to carry on by himself. During the hearing he thanked me for not making him feel too stressed thereby allowing him to carry on.

Issue(s) to be Decided

- Is the tenant entitled to a monetary order and, if so, in what amount?
- Should any order be made against the landlord and, if so, on what terms?

Background and Evidence

This month-to-month tenancy started in July of 2008. The monthly rent of \$560.00 is due on the first day of the month. The tenant receives a Supported Independent Living subsidy and his portion of the rent is \$375.00.

The tenant lives in a bachelor suite on the main floor of this two story building. The suite has sliding glass doors that open onto a patio. There are 27 units in this building.

It is common ground that the tenancy agreement and the residence rules prohibit smoking anywhere on the property, including all common areas.

The tenant is passionate about the dangers of smoking and second hand smoke. He is also very upset that so many residents of this building have smoked in their units, in common areas of the building, or on the grounds. It is acknowledged by both sides that since he moved into this building he has filed over 500 written complaints in the topic. He has written newsletters on the topic and has raised the issue at every opportunity.

The tenant has also focused on clauses 23 and 29 of the tenancy agreement which state:

“23. Use of Common Areas

- a) The tenant must take all reasonable steps to ensure that the use of common areas of the residential property. . . by any occupant will:
 - (i) Comply with all notices, rules or regulation on or about the residential property regarding the use, or restrictions on use of such common areas . . . “

29. Rules and Regulations

The tenant agrees to observe, and to cause all other occupants to observe, the rules and regulations delivered with this tenancy agreement and such reasonable variations, amendments or additions that may be made to them from time to time.”

He interprets these clauses as requiring all tenants to participate actively in the enforcement of the building's rules and regulation. He does this by knocking on the doors of tenants he thinks are smoking in their units and asking them to quit or by speaking to them directly. It would appear from his own written material that he does this with zeal and tenacity.

The tenant says he has been bullied in many ways and by many people but particularly by a small group of tenants, all smokers, led by one man in particular. He says:

- They make fart noises when he is around.
- They say things like “I’m going to kill you” or “You’re going to die” to him.
- They use foul language towards him.
- They took the bulletin board off his door.

Someone also left three fish heads and other fish trimmings near his deck and vandalized his car. He is of the opinion that this same group is responsible for these actions.

His most serious allegations are regarding an incident that occurred off the property in which his hand was hurt. The tenant reported the incident to the police, a charge has been laid against one of this group, and the matter is proceeding through the regular criminal court procedures.

The tenant also says that on another occasion he was “sucker-punched” by another of these individuals and that this caused him permanent hearing loss. The doctor's report

filed by the tenant says it was a temporary reduction in hearing probably caused by “an episode of middle ear effusion, which has resolved at this point”. No charges appear to have been laid.

The tenant has had issues with this same group of tenants in another setting. They were all members of a community garden that is unconnected with the landlord. As a result of some dispute the tenant was permanently barred from the garden.

The tenant argues that because the landlord has not enforced its’ no smoking policy and he has been obliged to do so for his health and for the health of other non-smokers in the building, he has raised the ire of the smokers and they have retaliated by bullying him. According to the tenant, it is only his opposition to smoking that has generated this antipathy.

The tenant also argues that this same group has co-opted some of the landlord’s staff, most particularly AL, and that members of the management staff are part of the conspiracy that is controlled by the leader of the smokers.

The tenant argues that is because of the landlord’s failure to act that he has suffered from bullying and therefore the landlord should compensate him financially for his suffering.

The landlord’s witnesses testified that their mandate is to provide housing to a wide variety of homeless, inadequately housed or marginalized members of the local community. They say that because many of their residents have some level of cognitive or mental deficiency they try to exercise a higher level of patience and understanding and not to act too hastily. They say that 11 of the units are occupied by smokers.

They point out that it is more difficult to create a fully compliant non-smoking environment in a social housing context but they have been trying. They have:

- Created a smoking area adjacent to their property but not on it. This smoking area is at the opposite side of the property from the tenant’s unit. It is located behind the recycling and bike storage shed. The tenant says that anyone who takes out their garbage or picks up their bicycle is exposed to smoke. As a result, he does not use the storage shed for his bicycle.
- Evicted the two worst offenders. The tenant downplays this action saying these tenants were the easiest to kick out and that the landlord has avoided taking any action against the men he says are bullying him. The tenants who were evicted are not the people the tenant accuses of bullying him. Both parties agree that

the level of smoke in the building has decreased since these two tenants moved out.

- Maintain a stop smoking support group. The tenant argues that this group merely creates a forum where the smokers can complain about him. His position is that all smokers should be evicted from the building.
- Continually remind residents through letters, posters and other communications, that this is non-smoking facility. The tenant dismisses these efforts as mere window-dressing.
- Look for signs of smoking when they do the annual inspection.

The landlord testified that other than the complaints from the tenant they have not received many other complaints from other residents about smoking in the facility. They have received many complaints from other residents about the tenant's behaviour and how they feel harassed by him.

The landlord also testified that the police attend at the facility at least once a month in response to a complaint from the tenant. The police have long conversations with the tenant in which they ask the tenant not to call them for non-criminal events.

The landlord said that one of their challenges is the HVAC system in this building. It is designed to be dependent upon a gap around the door of each unit. The hallways are pressurized and air is pushed into each unit. The result is that the smell of smoke travels through the building and it is difficult to locate the source of the smoke. There is an ell in the hallway that is particularly problematic as the air seems to pool there.

Part of the tenant's evidence was a character reference from someone who has known the tenant for twelve years. Some extracts from that letter are relevant to this dispute: "I am aware that he is a figure who draws both attention and controversy. Some of the feelings towards him are alarmingly vicious. I will refute none of this . . . I had issues with [tenant]. He had no social awareness. He lived in a make-believe world, wrote song after song and insisted on playing them for me. There is no question that [tenant] can be annoying." The writer then describes the kindnesses shown to him by the tenant. He goes on to describe the tenant: "He believes in a world of peace, and he wishes no one any harm, especially physical harm. He is naïve, has trouble delivering his message, makes awkward and sometime dangerous mistakes of judgment. A human, you might say." The writer then describes a recent achievement of the tenant and concludes by saying: "I both like and respect [tenant], but that doesn't mean I want to live in the same house with him again. But an apartment building? No problem."

Analysis

The tenant explained that he is constantly working on the creation of hip-hop songs or raps so always carries a tape recorder with him. He also uses the tape recorder to record many of his interactions with the landlord's staff or other individuals. He filed several disks of video and audio recordings as part of his evidence. He stressed the importance of this evidence and I undertook to listen to all of them before I wrote my decision.

I honoured my commitment to the tenant and reviewed all of this evidence, with one exception. I did not listen to the 54 minute long recording of the tenant's conversation with a police officer. The conversation appeared to be about possible criminal charges and therefore of marginal relevance to a residential tenancy issue. Some of the tapes were just recordings of the tenant leaving a message on the landlord's answering machine, which is only proof of the fact that he left a message, not of the veracity of the contents of that message.

Although listening to this material was very time consuming it was also illuminating. After listening to the recordings of the tenant interacting with the landlord's staff and other people, most of whom do not appear to be aware of the fact that the tenant is recording their conversation, I made the following observations:

- Although the tenant went to great lengths to depict AL as intimidating, threatening and disrespectful, the conversations he submitted show just the opposite. He does not seem at all intimidated and is very forceful in presenting his side of the debate or his viewpoint. In fact, he refuses to listen to anything she tries to tell him; he just keeps talking over her. At the end of one conversation when AL walks away from him in frustration the tenant asks her if she's upset. When she replies that she is, he tells her that it's fault that she's upset. Another conversation, in which AL never raises her voice, ends with the tenant saying to her "I'm going to get you replaced."
- The tenant recorded everything after the point when he says another tenant threw a lit cigarette but at him. The tenant tells this person "You're going to go to jail, that's where you belong. You are going to be fired from your job. You are going to be kicked out." Both men keep saying "get away from me" but somehow the volume of the recording remains constant, suggesting that at least one man was making an effort to stay close to the other man. It is at the end of this conversation that the tenant says the other man slammed the car door on his hand. The landlord described the other man as having a brain injury and a short fuse. This is the incident which has resulted in criminal proceedings.

- Although in his written material the tenant claims that the landlord threatened him with consequences if he proceeded with his application to the Residential Tenancy Branch another recording reveals that the tenant is just as capable of making his own threats as when he announces to a staff member that his is proposing changes to the building – all the smokers should be kicked out or he'll file a \$2 million law suit with the Residential Tenancy Branch or a class action law suit against the landlord for \$50 to \$80 million.
- One long conversation is of a police officer trying to explain to the tenant the difference between unpleasant behaviour and criminal behaviour.
- In all the conversations the staff members display considerable patience with the tenant.
- In all the conversations the tenant talks over the other people. He also appears unwilling or unable to accept that there may be another side to the issue or to see the other side.

The tenant's characterizations of events as set out in his written material and oral evidence is very different from what I heard in these recordings:

- In his interactions with other tenants, even the unpleasant ones, the tenant seems quite able to give as good as he gets, nor does he sound at all intimidated.
- The same can be said of his conversation with the landlord's staff.
- Long conversations and many, many pages of argument were devoted to the allegation that the landlord was stifling his right to free expression by refusing to allow him to file complaints or to get copies of previously submitted complaints. In fact, the landlord does not refuse to accept complaints; only asks him not to submit each complaint on a separate sheet of paper but to record the relevant information such as time, time and place on a log she has created for these complaints. The landlord's request clearly relates to the costs of paper and storage space for all of that paper. Further, the landlord does not refuse to print out copies of the previously submitted complaints but asks that they not undertake the time and expense of this task without hearing from myself whether I needed copies of every complaint in order to make my decision.

Although the tenant has applied for an order compelling the landlord to comply with the Act, regulation or tenancy agreement as well as a monetary order his real objectives also appear to include the following:

- The removal of two of the landlord's employees from their positions.
- His reinstatement in the Car Share program.
- The eviction of any other tenant who smokes, either on or off the property.

- The evictions of the individuals who he says bully him.

There are some legal limitations, both on the Residential Tenancy Branch and the landlord, which the tenant does not appear to understand.

The Residential Tenancy Branch does not have jurisdiction regarding a landlord's human resources administration or the administration of any ancillary program operated by the landlord. Accordingly, no order could be made regarding the continued employment of the landlord's staff members or the Car Share program.

A landlord cannot refuse to rent to smokers; only include a term in the tenancy agreement that prohibits a tenant from smoking in their unit or on the property. What a tenant does off the property is outside the jurisdiction of the landlord and the Residential Tenancy Branch.

It is not that easy to legally evict a tenant. If a landlord is of the opinion that a tenant has breached any term of the tenancy agreement in a manner that would give them cause within the meaning of the *Residential Tenancy Act* the landlord may serve the tenant with a 1 Month Notice to End Tenancy for Cause. If the tenant disputes the notice, as is their right, there will be a dispute resolution hearing where the onus is on the landlord to prove, on a balance of probabilities, the circumstances upon which the notice was based.

If the issue is whether a tenant has breached a "no smoking" clause evidence of the smell of smoke in the hallway or on one side of the building is not sufficient. The landlord must be able to prove that the smoke came from that particular tenant's unit. Having heard and decided several of these cases, I can report that this is a high standard for the landlord to meet.

In his written material the tenant highlighted a portion of clause 30 of the tenancy agreement as part of his argument that the landlord should be able to evict any smoker for even one breach of the agreement: "A single violation of any provision of this addendum shall be deemed a serious violation and material non-compliance with the Residential Tenancy Agreement. It is understood and agreed that a single violation shall be good cause for a notice to end a Residential Tenancy Agreement. Unless otherwise provided by law, proof of violation shall not require criminal conviction but shall be predominant of the evidence."

Section 6(3) of the *Residential Tenancy Act* states that a term of a tenancy agreement is not enforceable if the term is inconsistent with the *Act* or regulation. Regardless of

what a tenancy agreement states a landlord may only end a tenancy in compliance with the *Residential Tenancy Act* and subsections 47(1)(d) & (e) of that *Act* place a much higher standard for ending a tenancy than just a single violation.

Smoking is a difficult issue and the landlord will always have to be vigilant. However, the steps taken by the landlord are the usual measures available to landlords. Having considered all of the evidence I am not satisfied that the landlord is not making reasonable attempts to enforce the terms of the tenancy agreement.

With respect to the tenant's claim for a monetary order the tenant must prove, on a balance of probabilities:

- that the damage or loss exists;
- that the damage or loss is attributable solely to the actions or inaction of the other party; and,
- the genuine monetary costs associated with rectifying the damage.

In other words, he must prove that he has been bullied and the only reason for being bullied is the landlord's failure to enforce the no smoking policy.

After listening to the tenant's recordings I am not satisfied that he is the victim of bullying. The tenant has been involved in some unpleasant interactions with other tenants but those sounded like arguments between equals, not one party bullying the other. The only exception is the incident that has resulted in criminal charges. I did not hear the other side of that story and that issue will be heard and decided in another forum. However, one altercation between two disadvantaged, middle-aged men does not establish a pattern of bullying behaviour by one man, or group of men, against the other.

As far as the incident with the fish heads, there is no direct evidence of who put them in the alley or that whoever put them there did so with a particular intent against the tenant. The tenant is only able to prove that he has had conflict with particular tenants and those tenants went fishing shortly before the fish heads appeared. These particular individuals are not the only people who go fishing, catch fish, or even leave fish trimmings in this alley for the sea gulls. The tenant was not able to prove this allegation on a balance of probabilities.

The tenant's claim that he has suffered a permanent loss of hearing because he was punched by another tenant is not substantiated by the medical evidence filed by the tenant.

The tenant has not met the test for establishing a monetary claim and it is dismissed.

In the hearing the parties appeared to want some clarification on the interpretation of clauses 23 and 29. Neither party filed a full copy of the tenancy agreement so I do not know whether the term “occupant” is defined in the agreement. Assuming that it is not, I offer the following observations.

Both clauses have been poorly drafted. Usually clauses like this includes words like “of the rental unit” after the word “occupants” as the intention of the clause is to remind tenants that they are responsible for the behaviour of their guests and roommates.

Even if these clauses give the tenant the authority he claims to have he must remember that under the *Residential Tenancy Act* he has a legal obligation not to significantly interfere with or unreasonable disturb other occupants of the building. The tenant’s own evidence establishes that he does not understand or interpret social situations very well. He should accept the advise of others, particularly that of the landlord who bears the ultimate legal responsibility for enforcing the rights of all tenants of the building, as to when his behaviour may be crossing the line into significant interference with, unreasonable disturbance of, or even harassment of other residents. If the tenant is asked not to approach other tenants about their alleged breached of the tenancy agreement he should seriously consider that advice.

Conclusion

The tenant’s application is dismissed in full without leave to re-apply.

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: December 09, 2013

Residential Tenancy Branch

