Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding D.T WARREN HOLDINGS
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCT OLC FFT

Introduction

This hearing dealt with an Application for Dispute Resolution ("application") by the tenants under the *Residential Tenancy Act* ("*Act*") for a monetary order for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement for loss of quiet enjoyment, for an order directing the landlord to comply with the *Act*, regulation or tenancy agreement, and to recover the cost of the filing fee.

The tenants and an agent for the landlord ("agent") attended the teleconference hearing. The parties gave affirmed testimony, were provided the opportunity to present their relevant evidence orally and in documentary form prior to the hearing, and make submissions to me.

Both parties confirmed that they were served by the other party with documentary evidence and that they had the opportunity to review that evidence. As a result, I find that both parties were sufficiently served under the *Act.*

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary and Procedural Matter

At the outset of the hearing the parties confirmed their email addresses at the outset of the hearing. The parties also confirmed their understanding that the decision would be emailed to both parties.

Issue to be Decided

- Are the tenants entitled to a monetary order under the *Act,* and if so, in what amount*?*
- Should the landlord be directed to comply with the *Act,* regulation or tenancy agreement?
- Are the tenants entitled to the recovery of the cost of the filing fee under the *Act?*

Background and Evidence

A copy of the tenancy agreement was submitted in evidence. A fixed term tenancy began on September 1, 2017 and is scheduled to revert to a month to month tenancy after August 31, 2018. At the start of the tenancy, the tenants paid a security deposit of $1,000.00 which the landlord continues to hold. The monthly rent of $2,000.00 is due on the first day of each month according to the tenancy agreement.

The tenants have claimed loss of 10% of the value of the tenancy due to what the tenants allege is smoke entering their rental unit from the neighbour who smokes marijuana in the until next to them. The parties agreed that the rental unit is a duplex.

There is no dispute that the person who the tenants are complaining about smoking lives next door to the tenants and will be referred to as the "neighbour" for the remainder of this decision.

The agent disputed that the rental unit is a non-smoking building which the agent was advised during the hearing I did not agree with his assertion as the tenancy agreement clearly indicates in clause 43 of the tenancy agreement the following:

> "43. **SMOKING.** The tenant agrees to the following material term regarding smoking:
>
> X No smoking of any combustible material is permitted on the residential property, including within the rental unit."
>
> [Reproduced as written]

The tenants initialled clause 43 whereas the landlord did not initial that clause.

The tenants referred to the advertisement of the rental unit, a copy of which was submitted in evidence. There is no dispute that the advertisement indicates that no smoking was indicated in the advertisement. The agent claims that the tenancy agreement clause 43 and the advertisement were both errors and that the landlord does

not have non-smoking rental units and that the rental unit has never been non-smoking and that he has been involved in managing rental properties for over 30 years. The tenants replied that they only rented the rental unit due to the fact that it was a non-smoking unit, and that it was advertised as such and that the tenancy agreement indicated as such also.

The tenants indicated that on September 28, 2017 the first contacted the agent to complain about the neighbour smoking marijuana next door and that they communicated by text with the agent. The agent confirmed that he received the texts from the tenants. The tenants stated that they felt the landlord has not taken their complaints about the neighbour's smoking seriously and as a result, they sent a formal email on November 21st to the agent which the agent confirms he did not respond to by email and that all responses were by phone.

The agent confirmed that he did not come to the rental unit to speak with the tenants and that on November 22, 2017 the tenants complained in person to the agent when he was at the property and gave the agent a written letter of complaint about how the smoking by the neighbour was impacting their quiet enjoyment of the rental unit.

The agent confirmed that he received the letter from the tenants and that he stated his response was to show that letter to the neighbour. The agent claims that by showing the letter to the neighbour as far as he was concerned, the "problem was solved" but was unable to provide any specific dates of his interactions with the neighbour throughout the hearing.

The agent also claims to have provided a "caution letter" to the neighbour and admitted that such a letter was not submitted in evidence in support of his testimony. Later in the hearing the agent changed his testimony that he has only spoken to the neighbour about the complaints about his smoking. The agent confirmed that he has not issued an eviction notice to the neighbour due to the negative impact the neighbour is having on the tenants enjoyment of the rental unit.

The tenants referred to many exhibits to support the "copius amounts" of compliants they made to the agent about the negative impact the neighbour was having on them and their child/children due to the smoke coming into their rental unit. The agent also confirmed that when the tenants specifically invited the agent to enter their rental unit to smell the smoke coming into their rental unit the agent refused to enter the rental unit of the tenants.

The tenants testified that they feel a 10% reduction in their monthly rent since September 2017 is reasonable as they feel the agent has been neglectful in ensuring their right to the enjoyment of the rental unit free from smoke as the rental unit is a non-smoking unit. The tenants also state that as of the date of the hearing, the rental unit continues to smell like smoke which is coming over into their unit from the neighbour's rental unit.

Analysis

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

Test for damages or loss

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the *Act.* Accordingly, an applicant must prove the following:

1. That the other party violated the *Act,* regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application what was reasonable to minimize the damage or loss.

Item 1 – I have carefully considered all of the testimony and evidence submitted. Firstly, section 32(1)(a) of the *Act* applies and states:

> **Landlord and tenant obligations to repair and maintain**
>
> **32** (1) A landlord must provide and maintain residential property in a state of decoration and repair that
>
> (a) **complies with the health, safety and housing standards required by law, and**
>
> (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.
>
> [My emphasis added]

In addition, Residential Tenancy Branch ("RTB") Policy Guideline 6 – Entitlement to Quiet Enjoyment applies and states in part:

> **"B. BASIS FOR A FINDING OF BREACH OF QUIET ENJOYMENT**
>
> **A landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected.** A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.
>
> …
>
> In determining whether a breach of quiet enjoyment has occurred, it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises.
>
> **A landlord can be held responsible for the actions of other tenants *if* it can be established that the landlord was aware of a problem and failed to take reasonable steps to correct it."**
>
> [My emphasis added]

Based on the above, I find the landlord's response to the tenants' complaints about smoking coming into their rental unit which I accept began in September 2017 were insufficient and unreasonable. I prefer the evidence of the tenants over that of the agent as I find the agent's testimony was vague and contradictory compared to the tenants' testimony which I find was articulate, specific and consistent. I also disagree with the agent that the rental unit is not a non-smoking rental unit. I find that the rental unit was advertised as and remains a non-smoking rental unit based on the wording of the tenancy agreement and the original rental ad. I find the agent's assertion that both were "errors" to be self-serving and unreasonable. I also find that the agent failing to initial clause 43 does not make the non-smoking clause unenforceable. I find the agent's testimony to be inconsistent and contradictory with the rental unit listing and the tenancy agreement which clearly indicate in writing that the rental unit is a non-smoking unit. I find it highly unlikely that if the agent has been managing rental properties for 30 years that he would have never realized an error in their listings and the related tenancy

agreements that specify non-smoking units if he has never rented a non-smoking unit and as a result, I find that testimony to be unbelievable.

I find the landlord has breached the tenants' right to quiet enjoyment by failing to reasonably deal with the smoke that I find is coming into the rental unit from the neighbours rental unit. I have reached this decision as the landlord failed to submit any documentation to the neighbour such as a warning letter and also note that the agent contradicted himself when he said he wrote a warning letter and later affirmed he has only spoken to the neighbour about how the smoke is impacting the tenants living next door.

As a result, I find the tenants have met the burden of proof and are entitled to **$1,800.00** in compensation due to what I find is smoking causing a significant interference with their enjoyment of their rental unit. I find the landlord breached section 32(1)(a) of the *Act* and that the tenants have suffered a loss of quiet enjoyment as claimed. I also find that the loss of quiet enjoyment has been on a regular basis and ongoing and disagree with the agent that the issue is resolved. Therefore, as the tenancy continues the tenants are granted leave to reapply for future compensation should the neighbour continue to cause smoke to enter their rental unit if the landlord continues to fail to comply with the landlord's obligation to ensure the tenants right to quiet enjoyment. I have arrived at the amount of $1,800.00 as follows:

1. September 2017 loss of 10% of rental unit value due to smoke = $200.00
2. October 2017 loss of 10% of rental unit value due to smoke = $200.00
3. November 2017 loss of 10% of rental unit value due to smoke = $200.00
4. December 2017 loss of 10% of rental unit value due to smoke = $200.00
5. January 2018 loss of 10% of rental unit value due to smoke = $200.00
6. February 2018 loss of 10% of rental unit value due to smoke = $200.00
7. March 2018 loss of 10% of rental unit value due to smoke = $200.00
8. April 2018 loss of 10% of rental unit value due to smoke = $200.00
9. May 2018 loss of 10% of rental unit value due to smoke = $200.00

As the tenants' application had merit and was fully successful, I grant the tenants the recovery of their **$100.00** filing fee pursuant to section 72 of the *Act.*

I find that the tenants have established a total monetary claim of **$1,900.00** comprised of $1,800.00 for loss of quiet enjoyment between September 2017 and May 2018 inclusive as indicated above, plus the $100.00 filing fee. Accordingly, I grant the tenants

a one-time rent reduction pursuant to sections 67 and 72 of the *Act* from a future month's rent in full satisfaction of the tenants' monetary claim.

I ORDER the landlord to not breach a tenants' right to quiet enjoyment under the *Act* in the future and for the remainder of this tenancy.

I ORDER the landlord to comply with section 32 of the *Act* in the future.

Failure to comply with my orders could lead to a recommendation for an administrative penalty under the *Act.* The maximum penalty for an administrative penalty under the *Act* is $5,000.00 per day and may be imposed for each day the contravention or failure continues.

Conclusion

The tenants' application is fully successful.

The tenants have been granted a one-time rent reduction of $1,900.00 as indicated above.

The landlord has been ordered to comply with section 32 of the *Act* and not to breach the tenants' right to quiet enjoyment in the future. Failure to do so could lead to a recommendation for an administrative penalty under the *Act.*

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: June 11, 2018

Residential Tenancy Branch