



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: CNR OPR FFT MNDCT MNR FFL

Introduction:

Both parties made application and attended the hearing. The parties and witnesses gave sworn or affirmed testimony. The landlord said they served the tenant with a 10 Day Notice to End the Tenancy for non-payment of rent dated May 7, 2018 to be effective May 22, 2018 by registered mail on May 14, 2018. The tenant said they served the landlord with their Application for Dispute dated May 15, 2018 by registered mail. The parties acknowledged receipt of each other's application. The landlord applies pursuant to sections 46 and 55 of the Act for an Order of Possession and a monetary order for unpaid rent.

The tenant applies pursuant to section 46 of *The Residential Tenancy Act* (the Act) to cancel the Notice to End Tenancy and for a monetary order for a full refund of rent for the landlord's failure to protect her reasonable enjoyment pursuant to sections 28 and 67.

Issues: Is the landlord entitled to an Order of Possession and a monetary order for unpaid rent? Or is the tenant entitled to any relief?

Has the tenant proved on a balance of probabilities that the landlord failed to protect her peaceful enjoyment and that she is entitled to compensation?

Are the parties entitled to recover their filing fees?

Background and Evidence:

Both parties and witnesses attended the hearing and were given opportunity to be heard, to provide evidence and to make submissions. It is undisputed that the tenancy commenced October 7, 2017, rent is \$1400 a month and a security deposit of \$700 was paid. The landlord testified that the tenant failed to pay the rent for May 2018 and was served with a Notice to End the Tenancy and she has not paid rent since April. She owes \$1400 for each of May, June and July 2018. He requests an Order of Possession. The tenant said she had a new place for August 15, 2018 and the landlord

agreed to an Order of Possession effective August 15, 2018 provided his monetary order included two months rent for August. The tenant did not object to this terms or the calculation of rent owed which is \$4900 ($1400 \times 3 + 700$).

The tenant testified she did not pay the rent because she lost her job due to the health issues she has because of the second hand smoke and disturbance of her peaceful enjoyment by the upstairs tenants. She described how she quit smoking about 7 years ago and the landlord promised her and advertised that the unit would be non-smoking. However, the upstairs tenants are heavy smokers and they smoke very close to her front door. She described how the female upper tenant blows smoke in her face if she tries to talk to her and both of them swear at her. In evidence is a doctor's note stating second hand smoke is injurious to the tenant's health and may cause a relapse in PTSD and/or to nicotine addiction. The tenant had told him that she had been promised a smoke free environment.

The landlord said the lease in evidence stated clearly that smoking was not permitted inside the residence but was permitted outside. To be clear, there was an addendum signed by the tenant on September 19, 2017 that the owner could not guarantee a smoke-free environment. The interior is smoke free but there were no guarantees regarding outside. Also he said there were no guarantees regarding the behaviour of the other tenants in the property although he did inform the other tenants of any complaints about their behaviour.

The tenant complains about the upper tenants' loud music and their cussing and calling her names. The landlord introduced an email from a neighbour in evidence; the tenant said she did not receive it but it transpired that it was available for pickup on Friday July 6, 2018 at the post office but she did not pick it up for she said it was 'too late'. In any case, this is irrelevant as the neighbour attended the conference to testify in person. She said the tenant is the person disturbing the peaceful enjoyment of others. She roars down their private road too fast, yelling and screaming on her motorcycle. The tenant said she was excited for she had just gotten the motor cycle. The neighbour said she has observed the tenant going around the house in the upper tenant's area where they smoke on their deck which is not near the tenant's door. She has seen the upper tenant yell at this tenant to leave their property for she disturbs them with her erratic behaviour. The tenant pointed out that erratic behaviour is one of the symptoms of PTSD. The tenant claims compensation for disturbance of her peaceful enjoyment and breach of contract of 7 months rent (1400×7) in the amount of \$9800 less \$50 repayment for a ripped screen. She then lists \$13,810 as the compensation claim including her moving costs and return of the security deposit.

Analysis:

The Notice to End a Residential Tenancy is based on non-payment of rent. The *Residential Tenancy Act* permits a tenant to apply to have the Notice set aside where the tenant disputes that rent is owed. Section 26 of the Act requires a tenant to pay rent on time whether or not the landlord fulfills their obligations under the Act. I find none of the tenant's complaints constitute valid reasons to withhold her rent. I therefore dismiss her application to cancel the Notice to End the Tenancy. Section 55(1) (a) provides that the arbitrator must grant an order of possession of the rental unit at a hearing where an arbitrator has dismissed the tenant's application pursuant to section 46 and has upheld the Notice. I grant the landlord an Order for Possession effective August 15, 2018 as he agreed.

I find the landlord entitled to a monetary order for rent owing to August 15, 2018 in the amount of \$4900 (3x1400 + 700 to Aug. 15). He wishes to keep the security deposit in trust for the tenant so both parties were advised of the 15 day limitation period in section 38 of the Act.

In respect to the tenant's claim for compensation, I find insufficient evidence to support her position. I find she signed a lease and addendum which only provided for no smoking within the residence. I find the addendum specifically noted the landlord could not guarantee a non smoking environment and I find insufficient evidence that the upper tenants are smoking inside. I find the weight of the evidence is that the upper tenants smoke outside the residence. It is unfortunate that this impacts the health of the tenant but I find the landlord is not violating the Act or tenancy agreement by restricting them from smoking outside. It is good that the tenant has found a totally smoke free environment guaranteed in a lease in her next residence.

In respect to the behaviour of the upper tenants that this tenant alleges disturbs her peaceful enjoyment, I find insufficient evidence to support her allegations. The landlord states this is an expensive home in a prestigious neighbourhood on a big property with lake views. If the tenant has lost her peaceful enjoyment, it is not due to the behaviour of him, his wife or the tenants upstairs. He states the tenant's erratic behaviour has been very disruptive to neighbours and to other tenants. The neighbour's testimony supports his position as she has observed the noisy and disruptive behaviour of the tenant and her intrusiveness into the upstairs tenants' garden area.

I find insufficient evidence to reasons why the landlord should compensate the tenant for moving costs. I find insufficient evidence that he has violated the Act or Tenancy

agreement. I dismiss this portion of the tenant's claim. The return of the security deposit is governed by section 38 of the Act and the landlord has the right to retain it until 15 days after the later of the tenant providing her forwarding address in writing and vacating the premises. I dismiss the tenant's claim for premature return of the security deposit.

I dismiss the claim of the tenant for compensation as I find insufficient evidence to support her allegations that the landlord has failed to protect her peaceful enjoyment and provide a smoke free residence as provided in her lease terms.

Conclusion:

I grant the landlord an Order for Possession effective August 15, 2018 and a monetary order as calculated below. I find him entitled to recover the filing fee.

I dismiss the tenant's application in its entirety without leave to reapply. I find she is not entitled to recover the filing fee due to lack of success.

Unpaid rent May, June, July 2018 (3x \$1400)	4200.00
Rent to Aug.15 effective date of Order of Possession	700.00
Filing fee	100.00
Total Monetary Order to Landlord	5000.00

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: July 11, 2018

Residential Tenancy Branch