



Dispute Resolution Services

Page: 1

Residential Tenancy Branch Office of Housing and Construction Standards

A matter regarding David Jang
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNCDT, FFT

Introduction

This hearing dealt with an application by the tenant under the *Residential Tenancy Act* (the *Act*) for the following:

- A monetary order for damage or compensation under Section 67;
- Reimbursement of the filing fee under Section 72.

The tenant appeared with her advocate, TP ("the tenant") and called a witness who provided affirmed testimony. The landlord appeared. Both parties acknowledged receipt of each other's evidentiary materials. The landlord acknowledged receipt of the Notice of Hearing and Application for Dispute Resolution. I find the landlord was served in accordance with Section 89 of the *Act*.

Both parties were given full opportunity to provide affirmed testimony, present evidence, cross examine the other party, call witnesses and make submissions.

Issue(s) to be Decided

Is the tenant entitled to the following:

- A monetary order for damage or compensation under Section 67; and
- Reimbursement of the filing fee under Section 72.

Background and Evidence

The parties agreed they entered into a residential tenancy agreement commencing October 15, 2016 and ending May 31, 2017. Monthly rent was \$850.00 for a non-smoking unit. Included in the tenancy agreement were the Strata By-laws which state the building is non-smoking.

No condition inspection report was conducted on moving in or moving out. No security deposit was held by the landlord.

The tenant's claim for compensation falls under three headings:

1. Compensation for cleaning and painting;
2. Compensation for loss of quiet enjoyment due to second-hand smoke; and

3. Aggravated damages.

Cleaning and Painting

The tenant seeks compensation for cleaning and painting based on the following testimony:

- The parties inspected the unit two weeks before the tenancy began and observed the unit needed repairs and cleaning;
- At that time, the landlord promised the tenant the unit would be cleaned and in good condition when she moved in;
- The tenant relied upon the landlord's promises as the parties had a previous landlord-tenant relationship spanning several years;
- When the tenant moved in, the tenant found the unit in worse condition and described it as:
 - The unit was 'filthy' with mice droppings and dirt;
 - The unit required considerable cleaning;
 - The fridge and stove did not work;
 - There were multiple holes in walls requiring filling and repairs;
 - The unit needed painting; and
 - Baseboards were missing.
- The witness, a friend of the tenant, confirmed the tenant's testimony with respect to the condition of the premises (dirty and in need of repair) and testified she had professional experience with repairs of this nature; the witness expressed the opinion there was one full week's work needed to clean and repair the unit;
- The tenant testified she helped the landlord with the repairs, cleaning and painting without asking at any time for compensation for the following reasons:
 - She believed her only option was to help the landlord to quickly make the unit livable;
 - She had nowhere else to go, having moved out of her previous accommodation;
 - She had already moved all her possessions into the unit; and
 - She believed the landlord's promise that he would make a prompt effort to correct the problems.
- The tenant testified the landlord did not work quickly, but instead only appeared 'every day or two' to work on the unit; it was 4-6 weeks before all the work was finished;
- In the meantime, the tenant painted and cleaned for an estimated 90 hours for which she seeks \$900.00 in compensation at \$10.00 an hour;
- The tenant submitted photographs substantiating her description of the condition of the unit when she moved in and after the subsequent repairs.

The landlord admits the unit was 'not spic 'n span' but denied major cleaning or repairs were necessary or that the tenant did the work she claimed. The landlord stated he replaced the appliances quickly - an assertion contradicted by the tenant - and made the needed repairs as quickly as possible. He testified the repairs took time because of the need to wait for drying of repair and filling compounds.

The parties agree the tenant did not ask for compensation for the work she did during the time of the tenancy (October 15, 2016 until May 31, 2017) or afterward until January 2018 when she filed this application. The landlord denies any obligation to reimburse the tenant.

Compensation for Loss of Enjoyment

The tenant claims second-hand smoke from another unit in the same building affected her quiet enjoyment. The smoke permeated her unit, entering through doors and windows.

The tenant submitted considerable oral and written evidence including copies of correspondence to and from the landlord and the Strata Council, a report concerning presence of particulate matter in the unit, invoices, a witness' statement and photographs.

The key aspects of the tenant's evidence are as follows:

- It was crucial to the tenant's selection of the unit that it be smoke-free because of her extreme sensitivity to smoke, which she had fully informed the landlord about;
- The tenant relied upon the landlord's assurances and on the contractual provisions in the tenancy and strata agreements, that the unit and building were smoke-free;
- The tenant smelled cigarette and marijuana smoke inside her condo shortly after she moved in and the smell worsened over time;
- On March 19, 2017, the tenant notified the landlord in writing that she could smell smoke;
- From March 19, 2017 until June 1, 2017, when she vacated the premises (a 2.5-month period), the tenant testified she repeatedly notified the Strata Council and the landlord of the prevalence of second-hand smoke in her unit and the deleterious effects on her health;
- The tenant testified the second-hand smoke caused nausea, lack of sleep, blurred vision, extreme headaches and stress;
- The tenant submitted copies of many emails to the landlord and Council;
- In one email, dated April 30, 2017, the tenant wrote to the landlord:

"I ask you to get involved urgently. You own more than one suite in this building, and your word counts the most to make any change for a better living for all of your tenants, not just me. Please [landlord] take my request seriously, I need your help."

- The tenant testified the landlord told her there was nothing he could do if she could not identify the smokers and their units; he invited her to contact the Strata Council directly, which she did;
- The tenant testified that smoke entered her unit in cracks around her door, which she sealed with adhesive after notifying the landlord who failed to act;
- The landlord stopped responding to her phone calls;
- To convince the landlord of the extent of the problem and the validity of her complaints, the tenant conducted an Air Test Quality test from a kit showing high particulate (dust, spores, smoke or similar substances) in her unit; the findings were conveyed to the landlord and the final report was submitted in evidence;
- The tenant submitted written evidence dated January 10, 2018 from a friend who visited her during this 2.5-month period and stated she smelled cigarette smoke in the elevator and hallway, as well as in the tenant's unit itself; she writes:

"from my experience visiting [the tenant], both her suite and the premises were in no way non-smoking environments.... I would suggest that the smoking in the building was a regular occurrence."

- On April 3, 2017, the tenant wrote to the Strata Council (copied to the landlord) with detailed description and complaints about the second-hand smoke; in a brief reply, she was told by the property manager:

As with smoking, unless you can identify the unit owner breaching this Bylaw, Strata can only circulate a general notice reminding owners of smoking ban bylaw exists. Enforcement, however, will be limited. Hope this answers your questions.

- The tenant wrote several emails to the Council (copied to the landlord) without concrete action being taken;
- The landlord criticized her efforts to curb smoking in and around the building saying in an email that smokers were smoking even more as revenge for her complaints;
- The tenant's health deteriorated over this 2.5-month period, culminating in an emergency trip to the hospital by ambulance when she had difficulty breathing and requiring the provision of subsequent medical services from a chiropractor to assist her in recovery, medical services for which she seeks compensation;
- The tenant claims she had to vacate the unit because of the smoke and incurred moving expenses, for which she seeks compensation;
- The tenant claims the landlord did not take her complaints seriously, did not advocate her interests with sufficient urgency or at all, failed to take steps to alleviate the second-hand smoke, ignored her phone calls and texts, thereby causing a loss of quiet enjoyment of the rental unit.

The landlord denies he ignored the tenant's complaints about second-hand smoke and testified as follows:

- He was unaware of any other complaints in the building about second-hand smoke;
- He occasionally went through the common areas and did not discover any indication of smoking; and
- He responded reasonably to address the tenant's complaints given the lack of certainty about the source.

The tenant did not submit evidence linking the medical or moving expenses and loss wages with the second-hand smoke.

The tenant claims compensation for loss of quiet enjoyment and for the following expenses for which receipts were submitted:

Loss of use of unit	1/4 x \$850.00 a month (rent) x. 2.5	\$318.75
Loss of use of unit	1/2 x \$850.00 a month (rent) x. 2.5	\$1,062.50
Moving Costs	Car rental	\$118.06
	Assistant – help moving	\$100.00
Air Test Kit		\$366.45
Medical expenses	Ambulance	\$80.00
	Chiropractor	\$552.00
Lost wages	14 hours x \$22.08/hour	\$309.12
	Total	\$2,906.88

Aggravated Damages

The tenant claims the landlord's action in ignoring the second-hand smoke and the effect on her health warrants the imposition of aggravated damages.

Summary of the tenant's claim

The following is a summary of the above claims for compensation by the tenant:

Painting and Cleaning	\$900.00
Loss of Quiet Enjoyment	\$2,906.88
Aggravated Damages	\$1000.00
Filing fee	\$100.00
Total tenant's claim	\$4,906.88

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of damage or loss and order a party to pay compensation to the other. To claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove on a balance of probabilities, that it is more likely than not, that the existence of the damage/loss, resulted directly from a violation of the agreement or a contravention of the *Act* by the other party.

Once that has been established, the claimant must then provide evidence to verify the actual monetary amount of the loss or damage. In this case, the onus is on the tenant to prove entitlement to a monetary award.

Painting and Cleaning

Section 32 of the *Act* states:

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.** (emphasis added)

Residential Tenancy Policy Guideline # 1 Landlord & Tenant – Responsibility for Residential Premises states as follows:

*The Landlord is responsible for ensuring that rental units and property, ... meet "health, safety and housing standards" established by law, and are **reasonably suitable for occupation** given the nature and location of the property. (emphasis added)*

The tenant vacated the premises on May 31, 2017 and did not request reimbursement for painting or cleaning expenses during the tenancy or until she submitted this application in January 2018. I find the

tenant's failure to request reimbursement during this time amounts to an estoppel by conduct. By not requesting reimbursement in a timely manner, the tenant gave the landlord the impression the landlord was not responsible to reimburse the tenant.

I find the tenant is not entitled to reimbursement for her claims for painting and cleaning.

Loss of Quiet Enjoyment

Section 28 of the Act states as follows:

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.

The Residential Tenancy Policy Guideline # 6 - Entitlement to Quiet Enjoyment states as follows:

*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.***

Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.

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.

(emphasis added)

The issue in this case is whether the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.

Based on a review of all the evidence and testimony, I am satisfied the landlord took all reasonable steps to address the tenant's concerns about smoking in the 2.5-month period in which he was aware of her complaints. The tenant could not identify the source of the smoke. The landlord and the Council indicated their willingness to correct the situation if the tenant informed them which unit was the source of the smoke. The landlord and the Council did not have sufficient time to fully investigate the tenant's complaints.

I do not give any weight to the air quality report submitted by the tenant. The report tests the presence of particulate in the air which the report states could be dust, spores or smoke. The report does not establish the presence of smoke in the tenant's unit.

The tenant has provided no evidence linking her health expenses or her decision to vacate the premises and incur moving costs, to the presence of second hand smoke.

I find the tenant has failed to meet the burden of proof with respect to any of her claims for loss of enjoyment, moving costs or medical expenses.

Aggravated damage

Residential Policy Guideline # 16 states as follows:

"Aggravated damages" are for intangible damage or loss. Aggravated damages may be awarded in situations where the wronged party cannot be fully compensated by an award for damage or loss with respect to property, money or services. Aggravated damages may be awarded in situations where significant damage or loss has been caused either deliberately or through negligence. Aggravated damages are rarely awarded and must specifically be asked for in the application.

I find the tenant has not met the burden of proving entitlement on a balance of probabilities to any of her claims including aggravated damages. I therefore decline to make an award under this heading.

Conclusion

The claims are dismissed.

Dated: July 31, 2018

Residential Tenancy Branch