



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, MNSD, FFT

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a Monetary Order for the return of the security deposit, pursuant to sections 38 and 67;
- a Monetary Order for damage or compensation under the *Act*, pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

The landlord did not attend this hearing, although I left the teleconference hearing connection open until 1:40 p.m. in order to enable the landlord to call into this teleconference hearing scheduled for 1:30 p.m. The tenants attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the tenants and I were the only ones who had called into this teleconference.

The tenants testified that they served the landlord with their application for dispute resolution in person at the end of July 2019 but they could not recall the exact date. The landlord uploaded evidence to the dispute resolution website for this file on October 25, 2019. Based on the above, I find that the landlord was served with the tenants' application for dispute resolution in accordance with section 89 of the *Act*.

Issues to be Decided

1. Are the tenants entitled to a Monetary Order for the return of the security deposit, pursuant to sections 38 and 67 of the *Act*?
2. Are the tenants entitled to a Monetary Order for damage or compensation under the *Act*, pursuant to section 67 of the *Act*?
3. Are the tenants entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of the tenants, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenants' claims and my findings are set out below.

The tenants provided the following undisputed testimony. This assigned tenancy began on February 1, 2019 and ended on June 30, 2019. Monthly rent in the amount of \$1,395.00 was payable on the first day of each month. A security deposit of \$697.50 was paid by the tenants to the landlord. The first three pages of the tenancy agreement were entered into evidence. The subject rental property is a studio apartment in a cement high-rise rental building.

The tenants provided the following undisputed testimony. The tenants provided the landlord with their forwarding address in writing on July 2, 2019. A copy of same was entered into evidence. Within 15 days from the end of the tenancy the landlord returned \$217.50 from the tenants' security deposit to the tenants. The tenants did not authorize the landlord to retain any amount from their security deposit. The landlords did not serve them with an application to retain any amount of their deposit. The tenants are seeking double their security deposit less the \$217.50 the landlord returned, in the amount of \$1,177.50. A cheque from the landlords to the tenants in the amount of \$217.50 was entered into evidence.

The tenants provided the following undisputed testimony. When they moved into the subject rental property, they were told it was a non-smoking property. In the middle of February 2019, the tenants began to smell smoke in their apartment coming from their neighbor's unit. Around that time the tenants spoke to the building manager about the smoke and he told them that the issue would need to be escalated and that the tenants should write an e-mail about the smoke to the property manager.

The tenants provided the following undisputed testimony. The tenants e-mailed the landlord about the smoke smell in the subject rental property on March 21, 2019. The March 21, 2019 e-mail was not entered into evidence. The tenants testified that they emailed the landlord about the smoke issue again on April 21, 2019. E-mail communications between the property manager and the tenants between April 21, 2019 and May 23, 2019 were entered into evidence. The property manager responded to the tenants' April 21, 2019 email on April 22, 2019 and stated:

“....As you are aware from your tenancy agreement, this building is transitioning from smoking to non smoking. This means that all new leases since we took over the building (3 years ago) have been signed up with non smoking clauses. However, the remaining tenants who have been there since before we took over the building, have no such clauses included in their lease....

Would you like us to let you know if there are any other units that come available on other floors where there are no grandfather units, or in one of our other buildings where we are almost completely smoke free?”

The tenants responded to the landlord via email on April 23, 2019 which stated in part:

....The smoke on Sunday was unbearable, I could not sleep all night....I would not like to move to another suite after only having moved in a few months ago. When we spoke to [building manager] he informed us that there wasn't anyone around this suite who had been grandfathered into being able to smoke. What does our neighbours tenancy agreement say? Surely it will confirm whether or not they have been granted permission to smoke in their suite....

The property manager responded on April 23, 2019 as follows:

...we ordered new products we found that should help reduce the smoke from transferring to other units. We are trialing it on your floor first, specifically to see if this will help you. It's being installed on Thursday with our tradesman.

The unit next to you is not a grandfathered unit, and per your email yesterday I have sent them a warning letter advising that we will terminate their tenancy if this continues. I'm not sure if they have received it yet but it went out same day.

No one is asking you to vacate your unit. We are offering to provide you with another unit because we want to make sure you know that we are on your side in

this issue and provide you with all available options while we continue to try and solve the problem.

The tenants testified that the new product mentioned in the above email is a carbon filter. The tenants testified that the carbon filter did not reduce the smell of smoke.

The tenants responded on April 26, 2019 in part as follows:

I'm not sure if the tenants have received your letter but the smoke was so bad today I had to leave the window and door open all day and we could still smell the smoke.

....The smoke is causing us headaches, nausea and it makes my morning sickness worse....

Do you know how long it generally takes to rectify this kind of issue?

Can you tell me what our options are?

The tenants testified that they were especially sensitive to the smoke because tenant K.L. was pregnant and it worsened her morning sickness.

On April 30, 2019 the tenants followed up with the above email. The April 30, 2019 email stated in part:

On Sunday we went to speak with [the neighbour] regarding the smoke in our suite as it was overwhelming. The gentleman got quite heated and started yelling and slammed the door in our face. We will avoid him from now on as we are concerned about his aggression.

[a landlord's representative] got someone to fill the cracks along the common wall on Monday am but it hasn't helped.

On May 2, 2019 the property manager responded via email in part as follows:

[The landlord's representative] also had the tech go into [your neighbour's unit] to fill any possible cracks in their unit as well. They have also been informed that I'm going to proceed with the termination of their lease if this ever [sic] happens again. [The landlord's representative] said they seemed very concerned about losing their home, so I'm hoping they got the message. If they haven't and you

smell smoke again, please let me know and I'll happily serve the required paperwork to terminate their tenancy.

The tenants responded via e-mail on May 3, 2019 in part as follows:

....Can we get a carbon filter installed in our suite?...

I understand [the landlord's representative] has filled any cracks along their side of the wall as well as ours but this has not been able to stop the smoke unfortunately. Even when we have all the windows open, the smell is overwhelming. We have obviously tried reasoning with the tenants explaining that I am pregnant and a lot of the smoke is coming into our suite but this hasn't changed anything.

I am, unfortunately off work due to a brain injury and spend a lot of time at home. Obviously, this ongoing disturbance is violating our right for quiet enjoyment....

The tenants testified that the constant infiltration of smoke made them worry about their baby's health.

The property manager responded via email on May 7, 2019 in part as follows:

I have spoken with the owners and they agree to put a \$120.00 credit on your account to cover the cost of the air purifier.

Has the smoke discontinued at this time or is it still coming into your unit?

The tenants responded via email on May 8, 2019 in part as follows:

....Unfortunately the smoking has continued. We have started sleeping on the couch to try and get as far away from it as possible.

I would try to speak to the tenants again but unfortunately, they weren't very receptive the last time we spoke. I don't think it's a good idea to continue to try to work through it with them. The gentleman got quite heated the last time....

The property manager responded via email on May 8, 2019 in part as follows:

We have done all the required warnings and notices to them, so I will be proceeding with the eviction then. Apparently breaking the rules is more

important to them than just going outside to smoke. We are required per the tenancy act to give them a clear calendar month of notice, so that means that their eviction will be for June 30.

We will keep you updated if they try to dispute the notice through a hearing.

On May 17, 2019 the property manager emailed the tenants. The email states in part:

It looks like the neighboring unit is going to challenge the eviction notice through arbitration. Would you and your husband be able to keep a log going forward of dates and times you are smelling it come through your wall? We want to show as much evidence as possible that an eviction is needed to ensure the quiet enjoyment and health of the other residents (aka you) in the building. Arbitrators look at eviction as a very drastic option, so they tend to require very strict and detailed evidence before they will order a tenant to leave.

Please let me know if this is something you are comfortable providing.

On May 17, 2019 the tenants emailed the property manager in part as follows:

The smoking has been continuous and this is unsafe for us and the baby. We are sleeping on a sofa bed and this is seriously affecting our life.

In view of my own pregnancy and that it looks like they won't be evicted soon, if at all, we feel we have little option but to find a new residence.

As this is not a suitable residence for us to continue living in, we feel it's only fair that we will have to look for a smoke free property. We hope you will be agreeable that the early termination fee of one months rent will be null and void.

We are giving you a 6 weeks notice so we would need to leave by July 1st, 2019.

Over the next 6 weeks we are happy to keep a log of the smoking and we can give this info to Lindsay or email you as necessary...

On May 23, 2019 the property manager emailed the tenants in part as follows:

Thank you for your email. We have logged your notice to vacate in our system. Please note that the move out date would technically be June 30th as all leases

end on the last day of a month. I will let [the landlord's representative] know and he will be in touch with you about moving your move out walk through at the end.

Thank you for keeping the log about the smoking while you are still there, this will greatly assist us in our efforts to have the tenancy branch uphold and enforce our eviction notice against them.

The tenants testified that the smoke from their neighbour greatly impacted their lives and resulted in the tenants having to vacate the subject rental property prior to the end of their lease. The tenants testified that they spent many nights at other people's places, to avoid the smoke, for the months of March to June 2019. The tenants testified that they are seeking a monetary award for loss of quiet enjoyment of the subject rental property from the landlord. The tenants testified that they are seeking the landlord to refund their entire rent for the months of February 2019 to June 2019 (\$6,975.00), less the \$120.00 credit for a carbon filter provided by the landlord.

The tenants testified that they decided to move out because tenant K.L. was pregnant and it was not guaranteed that the tenant would be evicted since he disputed the eviction notice with the Residential Tenancy Branch. The tenants testified that they did not want to continue to expose tenant K.L. and their baby to second hand smoke.

Analysis

Loss of Quiet Enjoyment

Section 28 of the *Act* states that 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.

Residential Policy Guideline 6 states that 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.** [emphasis added]

I find that the landlord responded quickly to the tenants' concerns and took reasonable steps to stop the smoke from entering the subject rental property including caulking the cracks in the walls and installing a carbon filter in the offending unit. I find that after the tenants informed the landlord that their neighbor continued to smoke despite the warning letter issued by the landlord, the landlord acted reasonably in starting the eviction process for the neighbor in question. I find that the landlord took reasonable steps to correct the interference suffered by the tenants. I therefore dismiss the tenants' monetary claim for loss of quiet enjoyment.

Security Deposit

Section 38 of the Act requires the landlord to either return the tenants' security deposit or file for dispute resolution for authorization to retain the deposit, within 15 days after the later of the end of a tenancy and the tenants' provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the Act, equivalent to double the value of the security deposit.

However, this provision does not apply if the landlord has obtained the tenants' written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy (section 38(4)(a)) or an amount that the Director has previously ordered the tenants to pay to the landlord, which remains unpaid at the end of the tenancy (section 38(3)(b)).

Section C(3) of Policy Guideline 17 states that unless the tenants have specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit if the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the Act.

I accept the tenants' undisputed testimony that they personally served the landlord with their forwarding address in writing on July 2, 2019. I accept the tenants' undisputed

testimony that the landlord only returned \$217.50 of their security deposit and that the tenants' did not authorize the landlords in writing to retain any amount of their deposit.

In this case the landlord did not file an application to retain the tenants' security deposit or return all of the tenants' security deposit within 15 days of receiving the tenants' forwarding address in writing. Therefore, pursuant to section 38 of the *Act*, the tenants are entitled to receive double their security deposit as per the below calculation:

$$\begin{aligned} &\$697.50.00 \text{ (security deposit)} * 2 \text{ (doubling provision)} = \$1,395.00 - \$217.50 \\ &\text{(portion of security deposit returned to tenants)} = \mathbf{\$1,177.50} \end{aligned}$$

As the tenants were successful in their application, I find that they are entitled to recover the \$100.00 filing fee from the landlord, pursuant to section 72 of the *Act*.

Conclusion

I issue a Monetary Order to the tenants in the amount of \$1,277.50.

The tenants are provided with this Order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

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: November 05, 2019

Residential Tenancy Branch