



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **OLC, MNDCT, CNC**

Introduction

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

- An order for the landlord to comply with the *Act*, Regulations and/or tenancy agreement pursuant to section 62;
- A monetary order for damages or compensation pursuant to section 67; and
- An order to cancel a One Month Notice To End Tenancy for Cause pursuant to sections 47 and 55.

Both the landlord and the tenant attended the hearing. The tenant was accompanied by an advocate and a legal advocate. As both parties were present, service of documents was confirmed. The landlord acknowledged being served with the tenant's Application for Dispute Resolution and first package of evidence; however he did not acknowledge receipt of the tenant's second package of evidence.

The tenant's legal advocate advised that the late evidence package was provided to the landlord and to the Residential Tenancy Branch website due to the fact that the tenancy agreement wasn't provided to the tenant until '*later*'. The legal advocate advised she sent the second package of evidence by email to the landlord last night, however the landlord does not acknowledge having it. I note the second package of evidence was uploaded to the Residential Tenancy Branch site last night, as well. As the evidence was not provided to the respondent/landlord or to the Residential Tenancy Branch at least 14 days before the hearing, the second package of evidence was excluded pursuant to Rule 3.14 of the Residential Tenancy Branch Rules of Procedure.

The tenant acknowledged being served with the landlord's evidence package and did not state any concerns with timely service of documents.

Preliminary Issue

At the commencement of the hearing, the tenant's advocate advised me that the tenant has moved out of the rental unit. The tenant confirmed she is currently in a hotel awaiting placement in a new accommodation. As such, the parties were in agreement that the dispute of the One Month Notice To End Tenancy for Cause could be resolved by settlement in accordance with section 63 of the *Act*.

Both parties agree to the following term:

1. The parties agree to a mutual agreement to end the tenancy.
2. The tenancy will end at 1:00 p.m. on April 30, 2020 by which time the tenant and any other occupant will have vacated the rental unit.
3. The One Month Notice To End Tenancy for Cause is cancelled and of no further force or effect.
4. The parties will conduct a condition inspection report at 1:00 p.m. on April 30, 2020.

Both parties testified at the hearing that they understood and agreed to the above terms, free of any duress or coercion. Both parties testified that they understood and agreed that the above terms are legal, final, binding and enforceable, which settles this aspect of the dispute.

As the tenancy is ending, the tenant's application seeking an order for the landlord to comply with the *Act*, regulations or tenancy agreement is dismissed without leave to reapply.

Issue(s) to be Decided

Is the tenant entitled to a monetary order for damages or compensation pursuant to section 67?

Background and Evidence

At the commencement of the hearing, pursuant to rules 3.6 and 7.4, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony. While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

A copy of the tenancy agreement was provided as evidence by the landlord. The tenancy began on November 1, 2015 with rent originally set at \$750.00 per month. The tenant notes that clause 43 of the tenancy agreement states the following:

Smoking: The tenant agrees to the following material term regarding smoking.

No smoking of any combustible material is permitted on the residential property, including within the rental unit.

The tenant provided the following testimony. She came to the rental unit two earlier times before deciding to rent the unit to determine if there were any smoke smells in the unit. She believes the landlord had asked the neighboring units to refrain from smoking just before she moved in, so that she wouldn't be able to detect their smoke. Immediately after she moved in, she noticed smoke coming into her unit, both from the air vents in her unit and through the hallway vent. In the building, only her unit and one other unit have exhaust vents that go to the roof so the bad odors from the other units are being cycled directly into her unit. Her unit is fifty feet away from the closest bus stop and is twenty feet up, so the smoke is not coming from people waiting for the bus. Her windows are closed all winter, so it's impossible for the smoke to come in then.

The tenant sent messages to the landlord and to the occupants in units 2 and 6, both adjacent to hers, which she believes were the cause of the smoking issue. She was invited into each of those tenants' suites and while there, she could not detect the smell of smoke in either of their suites. For the last year and a half, there has been no smoke coming from unit 2, however in unit 6, the landlord has brought in multiple different tenants in an effort to try and get rid of her. She has been sick every 3 months, triggered by second hand smoke inhalation.

The tenant's Application for Dispute Resolution Proceedings claims for the following monetary order:

All my furniture (bed, couch, upholstered chairs) is saturated with secondhand cigarette smoke and my paintings saved from my art career are now stained yellow from smoke also. I have 21 high end paintings adorning my walls which need to be professionally cleaned.

The tenant testified she estimates the cost to clean 19 paintings is \$200.00 per piece. She was going to get an estimate for the cleaning but was unable to do so because everything is currently closed. The tenant testified that her couch was purchased in 2016 for \$350.00. Her bed was purchased in 2014 for \$800.00.

The landlord provided the following testimony. The building is a non-smoking building, and every tenant has signed the tenancy agreement agreeing to that policy. He has letters from all his tenants saying they do not smoke. He has personally come and checked the building regularly and has not found any trace of smoke in the building.

Referring to the photos presented in his evidence package, the tenant's unit is steps away from a bus stop where people smoke while waiting for the bus to arrive. Evidence of the smoking is the cigarette butts left on the ground which he normally cleans up himself. The tenant has awnings over her windows which catch whatever smoke comes up from the street and bring it into the tenant's unit. The landlord alleges the tenant leaves her windows open, allowing the smoke to get into her unit.

Analysis

Section 7 of the *Act* states: If a landlord or tenant does not comply with this *Act*, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party.

Rule 6.6 of the Residential Tenancy Rules of Procedure indicate the onus to prove their case is on the person making the claim. The standard of proof is on a balance of probabilities. If the applicant is successful in proving it is more likely than not the facts occurred as claimed, the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act*, regulation or tenancy agreement;
3. The value of the damage or loss; and
4. Steps taken, if any, to mitigate the damage or loss.

In this case, the tenant first has to prove the existence of the damage to her possessions caused by a violation of the *Act*, regulations or tenancy agreement by the landlord. Secondly, the tenant must provide sufficient evidence to show the value of that damage.

First, I must determine whether the tenant has successfully proven the existence of the damage. While her testimony holds some weight, the tenant has not supplied me with any photographs of the couch, bed or upholstered furniture she says were '*saturated*

with secondhand smoke'. Likewise, for the paintings she says are '*stained yellow from smoke*'. For me to determine the existence of the damage caused by smoke as alleged by the tenant, I would require at the very least, photographic evidence of the damage to corroborate this claim. The tenant has not supplied any photos of the furniture or the paintings to substantiate her claim. I find that the tenant has provided insufficient evidence to establish point 1 of the 4 point test.

Second, the tenant seeks compensation for the couch, bed and upholstered furniture, but never indicated what compensation she wanted with respect to the furniture. Original invoices for their original purchase, quotes for cleaning the furniture or proof of replacement cost was not provided as evidence. Likewise, the tenant testified that she estimated it cost \$200.00 per piece to have her paintings professionally cleaned. While the tenant claims she was unable to obtain a quote for the cleaning due to the covid-19 pandemic, I note that she filed the monetary claim in February 2020, with ample time to at least make a phone call to obtain a proper quote. I find the tenant has not provided sufficient evidence to satisfy me the value of the damage or loss she claims for.

For the above reasons, I find the tenant has not provided sufficient evidence to prove her claim. The tenant's monetary claim is dismissed without leave to reapply.

Conclusion

To give effect to the settlement reached between the parties and as discussed at the hearing, I issue the attached Order of Possession to be used by the landlord **only** if the tenant fails to vacate the rental unit by 1:00 p.m. on April 30, 2020.

The remainder of the tenant's claim is dismissed without leave to reapply.

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: April 24, 2020

Residential Tenancy Branch