



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Lantern Properties Ltd. and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes **OLC, FFT**

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; and
- Authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The landlord attended the hearing, represented by property manager, SG ("landlord"). Both of the named tenants attended the hearing. As both parties were in attendance, service of documents was confirmed. The landlord confirmed receipt of the tenant's application for dispute resolution and the parties acknowledged the exchange of evidence and stated there were no concerns with timely service of documents. Both parties were prepared to deal with the matters of the application.

Issue(s) to be Decided

Is the tenant entitled to:

- An order for the landlord to comply with the *Act*, Regulations and/or tenancy agreement pursuant to section 62; and
- Authorization to recover the filing fee for this application from the landlord pursuant to section 72?

Preliminary Matters

Section 63 of the *Act* allows an Arbitrator to assist the parties settle their dispute and record the settlement in the form of a decision and order if the parties settle their dispute during the dispute resolution proceeding. Accordingly, I attempted to assist the parties to resolve this dispute by helping them negotiate terms of a settlement. The parties

could not reach consensus on the terms of a settlement; therefore, I heard testimony, considered the evidence, and issued a decision to resolve this dispute.

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.

The tenants provided the following testimony. The tenancy began on May 1, 2014 with co-tenant BM and a different tenant. The tenancy agreement was amended on December 10, 2015 when BM's co-tenant left and MZ took over as co-tenant. Rent is currently set at \$1,139.00 per month payable on the first day of the month. The tenants point out clause 46 to their tenancy agreement which states:

SMOKING. The tenant agrees that no smoking of any combustible material is permitted on or near the residential property, including within the rental unit. This is a material term of this agreement.

The tenants testified that they chose to move into this building because it was advertised as a non-smoking building. They testified that there is a 'no-smoking' sign in the lobby of the building, however no copy of the advertisement or photo of the 'no-smoking' sign were provided as evidence.

The tenants testified that the occupant of the unit below theirs smokes on the balcony of her unit. The tenants acknowledge the occupant below them has a right to smoke in her unit and testified they acknowledged her right to smoke on the patio; however they submit that tenant's rights infringe on their right to quiet enjoyment of the rental unit. The landlord and the property manager refuse to engage in conversation to alleviate the situation. The tenants point to a letter sent to the landlord on March 23rd, and submit that both the landlord and the property manager are unwilling to come up with a solution that works for all parties.

The tenants also state that the property manager not only refuses to deal with the smoke coming from the unit below theirs, but he actively smokes on the residential property, as well. As evidence, the tenants provided photos of the occupant below them smoking cigarettes with the property manager on the patio of her rental unit. The

landlord acknowledges the photos depict him smoking with the occupant living below the tenants.

The landlord provided the following testimony. He and his wife lived in the second floor unit where the tenants now occupy for 4 years right before these tenants moved in. His wife, an avid non-smoker never had any complaints about the smoke from the occupant below.

The occupant below the tenants has lived in the building since 2001. A copy of that tenant's tenancy agreement was provided as evidence. When that tenant moved in, there was no restriction on smoking. When the tenant BM moved in, he advise her that although the building is advertised as non-smoking, there are residents who were there prior to the building becoming non-smoking and that one of them lives directly below her. According to the landlord, the tenant BM did not take issue with that.

In June of 2019, co-tenant, MZ discussed the issue of smoking with him. The landlord told MZ to speak to the tenant below her, as he *'doesn't have time to get involved in every squabble between tenants.'* When he was told he was being unresponsive, he ended the conversation with MZ. Up until this March, he received no complaints about smoking. When the photo of him was taken, he was speaking to the tenant below about a noise complaint, not smoking.

The occupant living below the tenants was called as a witness by the landlord. She testified that she moved in, there was no stipulation about smoking. She told the landlord that she smoked and thought the balcony provided her a perfect solution to continue to smoke without interfering with others in the building. In 19 years of living there, there have been no complaints about her smoke or noise.

The occupant below testified she smokes approximately 15 to 20 cigarettes a day. She readily acknowledges many of the cigarettes are smoked on her balcony as there is nothing preventing her from doing so. She is willing to work with her upstairs neighbours however she cannot be expected to leave the building every time she wants to have a cigarette.

Analysis

The tenants seek an order that the landlord comply with the Act, regulations or tenancy agreement by providing them with quiet enjoyment of the rental unit. Pursuant to section 28 of the Act, quiet enjoyment includes 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 Tenancy Policy Guideline PG-6 sets out the basis for finding a 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.

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.

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.

In this case, the landlord testified that when her tenancy began in 2014, co-tenant BM was made aware that in this 'non-smoking' building, there were existing tenants who smoked, not subject to the 'non-smoking' rule. The tenants did not dispute this testimony during the hearing. The landlord has provided evidence that the occupant living below the tenants is one of those 'grandfathered' tenants, not prohibited from smoking based on the terms of her tenancy agreement signed in 2001. Due to the fact that she has no prohibitions on smoking on the residential premises, that tenant is not violating any terms of a tenancy agreement, the *Act* or the regulations.

If that tenant were in breach of the tenancy agreement, the *Act* or the regulations, the landlord is obligated to take the reasonable steps to correct that tenant's behaviour. While I have no doubt the tenants living above the occupant below are experiencing second-hand cigarette smoke from their neighbour's cigarettes, the landlord cannot force that tenant to comply with terms of a tenancy agreement that don't exist. Further, the Residential Tenancy Act and the Residential Tenancy Regulations do not expressly prohibit a tenant from smoking.

In order to succeed in their application for an order for the landlord to comply with the *Act*, regulations or tenancy agreement, the tenants must be able show the landlord failed to comply with any of the above. In order to provide the tenant/applicants with quiet enjoyment they seek, the landlord would be required to deny another tenant her right to smoke on the residential property. I find the landlord cannot possibly provide the tenants with their preferred solution – to prevent their neighbour from smoking on the residential premises. The only other solution suggested by the tenants, that a physical barrier be erected, I find would be unreasonable due to the potential danger in erecting structures on the exterior of a building.

I find the landlord has complied with the tenancy agreement, the *Act* and the regulations. There has been no breach and I dismiss the tenants' application without leave to reapply.

As the tenants did not succeed in their application, the filing fee will not be recovered.

Conclusion

The tenants' application 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: June 22, 2020

Residential Tenancy Branch