



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OLC, FFT, MNDCT

Introduction

This hearing was convened as a result of the Tenant's Application for Dispute Resolution, made on March 31, 2020 (the "Application"). The Tenant applied for the following relief, pursuant to the *Residential Tenancy Act* (the "Act"):

- an order that the Landlord comply with the Act, tenancy agreement, or regulations;
- a monetary order for damage or compensation; and
- an order granting recovery of the filing fee.

The Tenant, the Tenant's advocate, and the Landlord's Agents B.Y. and M.S. attended the hearing at the appointed date and time.

At the start of the hearing, the Tenant stated that she served the Application to the Landlord by email on April 8, 2020. The Tenant stated that she sent the Landlord her documentary evidence by email on May 10, 2020. B.Y. confirmed receipt of both packages. B.Y. stated that he served the Landlord's evidence to the Tenant by email on May 18, 2020. The Tenant confirmed receipt. pursuant to Section 71 of the Act, I find the Application package and documentary evidence were sufficiently served between the parties for the purposes of the *Act*.

Preliminary Matters

During the hearing, B.Y. stated that he served the Tenant with further evidence, consisting of an air quality report on May 24, 2020. The Tenant stated that she received the evidence, however, has not had sufficient time to consider it and prepare to respond to the evidence given that she received it a day before the hearing.

Rule 3.15 of the Residential Tenancy Branch Rules of Procedure states that the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing. Rule 3.16 Respondent's proof of service states that at the hearing, the respondent must be prepared to demonstrate to the satisfaction of the arbitrator that each applicant was served with all their evidence as required by the Act and these Rules of Procedure.

During the hearing, the Landlord's Agent confirmed that he sent the Tenant a copy of the Landlord's air quality report on May 24, 2020, one day prior to the hearing. I find that the Landlord did serve the Tenant as required by the Rules of Procedure. As such, the Landlord's air quality test results will not be considered during the hearing.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Is the Tenant entitled to an order that the Landlord comply with the Act, tenancy agreement, or regulations, pursuant to Section 62 of the *Act*?
2. Is the Tenant entitled to monetary compensation, pursuant to Section 67 of the *Act*?
3. Is the Tenant entitled to an order granting recovery of the filing fee, pursuant to Section 72 of the *Act*?

Background and Evidence

The parties testified and agreed to the following; the tenancy started on February 1, 2011. Currently, the Tenant is required to pay rent in the amount of \$989.30 to the Landlord on the first day of each month. The Tenant paid a security deposit in the amount of \$435.00 which the Landlord continues to hold.

The Tenant stated that she currently resides in a rental unit that does not permit smoking. The Tenant stated that the rental property is smoke free, however, she is under the impression that there are some occupants in the building who smoke in their rental unit as the Tenant regularly smells cigarette smoke in her rental unit and surrounding common areas.

The Landlord's Agent confirmed that the rental property had previously permitted smoking in the rental units and that currently, there is only one occupant who has been

“grandfathered” into being permitted to continue smoking in his rental unit. The Landlord’s Agent stated that no other occupants are permitted to smoke in the rental property. The Landlord’s Agent stated that since the previous Arbitrators decision dated March 13, 2018, the Landlord has taken action to mitigate the effects the occupant’s smoking has on the others who reside in rental property. The Landlord’s Agent stated that they have installed an air purifier, fans, weather stripping around the door, and have asked that the occupant to keep the windows closed while smoking to reduce the likelihood of smoke being released into common areas.

The Tenant stated that despite the Landlord’s efforts to mitigate the smell of cigarette smoke from travelling through the rental property, the Tenant continues to experience issues relating to the smoking in the rental property. As such the Tenant is seeking an order that the Landlord comply with the Act to ensure that the Tenant’s right to quiet enjoyment of the rental unit is upheld. Furthermore, the Tenant is seeking monetary compensation for direct damages as well as for aggravated damages in the amount of \$15,730.25.

The Tenant provided a copy of a smoke test dated October 29, 2018 which indicates that that there was smoke present in the rental property. The Tenant provided six letters from neighbouring occupants as well as guests that have also experienced the smell of smoke in the rental property. The Tenant stated that she continues smells cigarette smoke daily. The Tenant stated that she maintained a record of smoking observed in the rental property which she reported to the Landlord. The Tenant provided a copy of the log notes she maintained from February 24, 2018 to April 28, 2018.

The Tenant stated that she has made over 60 complaints to the Landlord since the start of her tenancy. The Tenant provided a log of complaints made from January 5, 2014 to July 2, 2018. The Tenant stated that the Landlord has not taken any action as she continues to smell smoke to this day. The Tenant stated that she has taken her own steps to mitigate the smell of smoke in her rental unit. The Tenant purchased a fan, installed weather stripping under her door, as well as installed an air filter in her rental unit.

In response, the Landlord’s Agent stated that he was unaware that the Tenant continues to be impacted by the smell of cigarette smoke at the rental property. The Landlord’s Agent stated that the Landlord has not received any complaints regarding the smell of cigarette smoke from the Tenant since 2018. The Landlord’s Agent stated that the Landlord took action to mitigate the smell of smoke in 2018 after receiving the

previous Arbitrator's decision dated March 13, 2018, and assumed that this was effective in reducing the smell of cigarette smoke in the rental property.

The Tenant stated that her health has been impacted as a result of having to endure the smell of cigarette smoke throughout her tenancy. As such, the Tenant is claiming for monetary compensation relating to the cost of her medications in the amount of \$270.98. The Tenant is claiming monetary compensation in the amount of \$335.99 for the cost of the air purifier and \$113.11 for the fan, which were both installed in the Tenant's rental unit to reduce the smell of cigarette smoke. The Tenant is also seeking to recover the costs associated with the smoke test in the amount of \$205.55 and a 20 percent reduction of her rent from January 1, 2014 to May 25, 2020 in the amount of \$14,704.62.

The Tenant is also claiming for aggravated damages as a result of harmful effects that the second-hand smoke has caused to her health. The Tenant provided several notes from physicians as well as witness statements which indicate that the Tenant has some health conditions which includes, respiratory, skin condition, and allergies that are exacerbated by her exposure to stress and second-hand smoke. If successful, the Tenant is also seeking the return of the filing fee.

Analysis

Based on the affirmed oral testimony and documentary evidence, and on a balance of probabilities, I find:

The Tenant has submitted a claim for an order that the Landlord comply with the regulations, Act, or tenancy agreement. The Tenant stated that she has experience the smell of cigarette smoke in the rental building which has impacted her quiet enjoyment of her rental unit. The Tenant stated that this has also impacted her health as a result.

I accept that the Tenant has brought forward to the Landlord her concerns regarding the smell of cigarette smoke in the rental property. I note that the reported concerns date back between 2014 and 2018. I accept that the Landlord took action to mitigate the smell of cigarette smoke in 2018.

I find that the Tenant has provided insufficient evidence to demonstrate that she notified the Landlord that she continued to be impacted by the smell of smoke since 2018. As such, I find that it is reasonable that the Landlord assumed that their attempts to mitigate the problem was effective given they did not receive any further complaints from the Tenant. As such, I dismiss the Tenant's claim without leave to reapply.

In relation to the monetary compensation sought by the Tenant, Section 67 of the *Act* empowers me to order one party to pay compensation to the other if damage or loss results from a party not complying with the *Act*, regulations or a tenancy agreement.

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided for in sections 7 and 67 of the *Act*. Pursuant to Residential Tenancy Policy Guideline #16 an applicant must prove the following:

1. That the other party violated the *Act*, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and
4. That the party making the application did what was reasonable to minimize the damage or loss.

In this case, the burden of proof is on the Tenant to prove the existence of the damage or loss, and that it stemmed directly from a violation of the *Act*, regulation, or tenancy agreement on the part of the Landlord. Once that has been established, the Tenant must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the Tenant did what was reasonable to minimize the damage or losses that were incurred.

The Tenant is seeking monetary compensation for direct damages, as well as for aggravated damages totalling \$15,630.25 as a result of the cigarette smoke in the rental property.

In this case, I find that the Tenant has provided insufficient evidence to demonstrate that she has mitigated her losses by not reporting any incidents of cigarette smoke to the Landlord since 2018, so that the Landlord could take action to address the issue. As such, I dismiss the Tenant's Application for monetary compensation without leave to reapply.

As the Tenant was not successful with her Application, I find that she is not entitled to the return of the filing fee.

Conclusion

I dismiss the Tenant's application for an order that the Landlord comply with the regulations, *Act*, or agreement, without leave to reapply.

I dismiss the Tenant's Application for monetary compensation without leave to reapply, as the Tenant provided insufficient evidence to demonstrate that she mitigated her loss.

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 16, 2020

Residential Tenancy Branch