Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Prospero International Realty and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes OLC RR MNDC

Introduction

This hearing was convened as a result of the Tenant's Application for Dispute Resolution. A hearing by telephone conference was held on September 10, 2020. The Tenant applied for multiple remedies, pursuant to the *Residential Tenancy Act (*the *Act*).

The Tenant attended the hearing and provided testimony. The Landlord was represented by two agents, and they also brought a witness (resident of the unit below the subject rental unit.) The Tenant served, and the Landlord acknowledged receiving the Tenants application, Notice of Hearing, and the first batch of her evidence in person, around August 12, 2020.

The Tenant was asked how she served her amendment to the Landlord, and was initially unsure about when it was sent, but a few minutes later, she provided a registered mail tracking number for the package she said contained the amendment. As per this tracking number, and the information contained in the Canada post mail system, the package was mailed on July 24, 2020. I note the amendment the Tenant uploaded into evidence was filled out and signed by her on August 18, 2020. It was received by our office on August 19, 2020.

After reviewing the Tenant's statements, and the tracking information she provided, I find the information she presented is not internally consistent such that it can be relied up in order to demonstrate she served her amendment to the Landlord. She stated she sent the Landlord her amendment on July 24, 2020. However, this amendment was not signed and completed until August 18, 2020. It seems unlikely that the registered mail package sent on July 24, 2020, contained the August 18, 2020, amendment. I find there is insufficient evidence to demonstrate the Tenant sufficiently served her amendment in accordance with the Act and the Rules of Procedure (must be received by the

respondent no later than 14 days before the hearing) and in a verifiable method as per section 88 and 89 of the Act. I disallow the Tenant's amendment, as I find she has not sufficiently demonstrated that she served it to the Landlord.

The Tenant's application is limited to the issue she initially selected on the application form, and as listed on the initial Notice of Dispute Resolution from August 3, 2020. The only issue on that application was a request for:

- An order that the Landlord comply with the *Act*, regulations, and/or a tenancy agreement.

Further, the Tenant stated that she continued to send evidence via email leading up to the hearing. The Landlord stated she got some of the emails from the Tenant. However, many of them were received at the last minute, and there was not enough time to properly respond to them.

With respect to the evidence the Tenant uploaded and provided to the Landlord in the days leading up to the hearing via email, I make the following findings:

I find it important to note that during March 2020, the Director of the Residential Tenancy Branch made a directive to allow the service of evidence by email. This was a temporary measure in place to ensure physical distancing protocols were followed in the wake of the global COVID-19 pandemic. However, as of June 24, 2020, the Director rescinded the March 2020 order allowing email service of documents. As such, as of June 24, 2020, email was no longer an approved method of service. Effective June 24, 2020, parties are expected to be able to demonstrate that they have sufficiently served the other party with the application and evidence in a verifiable manner, in accordance with the Act and the Rules of Procedure.

Service provisions are typically laid out in section 88, 89 and 90 of the Act. Email service is not an approved method of service under the Act. If one party is able to provide proof that they attempted to serve the other party in a manner contemplated under section 88 or 89 of the Act, then those documents may be deemed to be received regardless of whether or not they were actually received by the other party. Typically, this requires some proof of service to substantiate that the documents were sent in accordance with the Act and the Rules.

At this point, email is not an acceptable and approved method of service, particularly when one party attempts to provide this evidence outside of the timelines allowed under

the Act. I find there is insufficient evidence that the Tenant sufficiently served her emailed evidence in accordance with the Rules of Procedure and the Act. The Tenant uploaded the evidence she stated she emailed to the Landlord. This was provided on September 1, 2, 3, and 6, 2020. However, I find it is prejudicial to the Landlord to admit evidence that is served in a manner that doesn't allow sufficient time to respond. The Tenant has failed to demonstrate that she sufficiently served the Landlord with her evidence (that she uploaded to RTB on September 1, 2, 3, and 6, 2020). As stated above, this evidence is both late, and it was not served in an approved manner under the Act. As such, this late evidence is not admissible and will not be addressed further.

The only evidence from the Tenant that is admissible is the evidence she submitted with her application/notice of hearing package.

With respect to the Landlord's evidence, the Tenant confirmed that she received a registered mail package on September 2, 2020. As a respondent, the Landlord had to ensure the applicant received their package no later than 7 days before the hearing. I find the Landlord sufficiently served their evidence in accordance with the Rules of Procedure.

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

Issue to be Decided

- Is the Tenant entitled to an order that the Landlord comply with the Act, or the Tenancy Agreement?

Background and Evidence

The Tenant stated that she filed this application to stop the occupant below her from smoking in the building. The Tenant stated that she has found the Landlord unhelpful and dismissive with respect to her complaints of smoke in her rental unit.

Both parties agree that all rental units in the apartment building are non-smoking units, and no smoking is permitted either in the units, on the balconies, or in the common areas. The Tenant stated that she has lived in the rental unit for around 10 years now

and hasn’t had an issue with the smell of smoke until the Tenant below her moved in sometime around April 2020.

The Tenant stated that on June 9, 2020, she complained to the Landlord that the occupant below her was smoking on her balcony, and it was entering her unit through the windows. The Tenant stated she has allergies, and breathing difficulties, so it has impacted her use of the rental unit. The Tenant stated that after her complaint on June 9, 2020, the smoking outside stopped, but since that time, she has smelled smoke “coming through the floorboards”. The Tenant believes this is from the unit below, and is now permeating through the floor, into her rental unit. The Tenant stated that it could only come from below, because it seems like it is permeating the floors, and the only unit below her is unit 201.

The occupant from 201, M.H., attended the hearing, and she stated that the Landlord came to speak to her around June 9, 2020, regarding the smoking on her balcony. M.H. acknowledged that her daughter had been staying with her leading up to that point, and had inadvertently smoked on the balcony, without knowing it was wrong. M.H. stated that this only ever happened once, and has not re-occurred since she was spoken to by the Landlord. M.H. stated that neither she nor any of her guests have ever smoked *inside* her unit.

One of the Landlord’s agents, R. M., stated that she goes to the building around 2 times per week, and has never noticed any smell of smoke in or around the building. R.M. stated she took the complaint seriously in June of 2020, which is why she followed up with M.H. who lived below.

R.M. stated that she got a text message from the Tenant around July 17, 2020, stating that the cigarette smoke was still an issue, and that the Tenant below was still smoking. R.M. stated that she was not onsite at that time, but she immediately contacted M.H.’s neighbour (across the hall) to check the building, the hallways etc, to see if there was smoke present. R.M. stated that no smoke was reported, despite walking around the building, and knocking on doors to investigate the alleged smoke smell. The Landlord provided a letter from this individual who confirmed that he attended M.H.’s unit to see if she was smoking, and he could not detect any smoke.

The property manager, L.T., stated that she became aware of the issues around August 4, 2020, and at that point, she put up signs in the building confirming that no smoking was allowed, and also sent a letter to the Tenant, as well as M.H., to try to prevent the situation from escalating. The Landlord stated she posted this sign to help with the

situation, and not because she had actually confirmed any smoking was occurring regularly. L.T. noted that the relationship between the Tenant and the neighbouring unit below (where M.H. lives) was degrading, due to the smoking allegations. L.T. asked for complaints to be directed to the Landlord, rather than to each other.

L.T. also stated that as a follow up, she went to M.H.'s unit, where the alleged smoking was occurring, and she noted that there was absolutely no smell of fresh or residual smoke in M.H.'s unit.

The Tenant stated she still smells smoke daily, and sometimes multiple times per day.

Analysis

A party that makes an application against another party has the burden to prove their claim.

Based on the documentary evidence and the testimony of the parties provided during the hearing, and on the balance of probabilities, I find the following.

I note the Tenant alleges M.H. (the occupant below the Tenant) has smoked both in her unit, and on her balcony. M.H. was present to confirm that her daughter did in fact smoke once on her balcony, but hasn't since they were made aware it was a problem, sometime in June 2020.

I note the Tenant alleges that the smoke no longer comes from the balcony area, but rather through the floorboards. The Tenant alleges that M.H. now smokes in her unit, daily, rather than on the balcony, and this smoke permeates the floors and enters her unit which is directly above.

In contrast to this, I note M.H. adamantly denies this claim, and states that no smoking has ever occurred inside her rental unit, and there hasn't been any smoking since her daughter smoked on the balcony back in June (while she was visiting). I note the Landlord feels there isn't any evidence to support that M.H. is smoking. The Landlord followed up on multiple occasions to investigate. The Landlord had one of the other Tenant's follow up immediately after the Tenant complained by text message, and he noted no smell in or around M.H.'s apartment. Further, the Landlord also did not detect any smell of fresh or residual smoke when she went to M.H.'s apartment around August 12, 2020.

After weighing the two competing versions of events, I find there is insufficient evidence to demonstrate that there is smoking in the building, and more specifically from M.H.'s

apartment, as the Tenant has alleged. The Tenant asserted that there is an ongoing smoke smell permeating her unit on a daily basis. However, it seems odd that multiple people have attended the immediate area (hallways, M.H.'s apartment) and yet no smoke smell has been detected by anyone other than the Tenant on an ongoing basis. As the applicant, the Tenant bears the burden of proof to demonstrate that the Landlord has failed to comply with the Act, the Tenancy Agreement, or the Regulations. I find there is insufficient evidence to demonstrate that the Landlord has breached any of the above. The Tenant's allegations have not been sufficiently supported by evidence. It appears some amount of follow up has been done by the Landlord and no issue could be detected or confirmed. I decline to issue any orders and I dismiss the Tenant's application in full, without leave.

I encourage the Tenant to put her concerns in writing, and work with the Landlord (agents of) when follow up is required. I discourage the Tenant and M.H. from interacting, and would suggest they direct any concerns to the Landlord, rather than to each other, so that the issues can be monitored, and responded to accordingly.

Conclusion

The Tenant's application is dismissed, in full, 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: September 11, 2020

Residential Tenancy Branch