Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, FFT

Introduction

The tenants filed an Application for Dispute Resolution (the "Application") on December 17, 2020 seeking a monetary order for loss or other money owed. Additionally, they seek compensation of the filing fee they paid for their Application.

The matter proceeded by way of a hearing on April 27, 2021 pursuant to s. 74(2) of the *Residential Tenancy Act* (the "*Act*"). In the conference call hearing I explained the process and provided each party the opportunity to ask questions.

The tenants and the landlord both attended the hearing, and I provided each with the opportunity to present oral testimony. At the start of the hearing, each party advised they received the prepared evidence packages of the other. On this basis, I proceeded with the hearing as scheduled.

Issue(s) to be Decided

Are the tenants entitled to a monetary order for loss or compensation pursuant to s. 67 of the *Act*?

Are the tenants entitled to recover the filing fee for this application pursuant to s. 72 of the *Act*?

Background and Evidence

I have reviewed all written submissions and evidence before me; however, only the evidence and submissions relevant to the issues and findings in this matter are described in this section.

The tenants provided a copy of the Residential Tenancy Agreement. The parties signed the agreement jointly with the landlords on June 17, 2018. The tenancy started on July 1, 2018 for the fixed term ending on June 30, 2019. The rent amount payable on the first of each month was $2,400.

The agreement includes an addendum, and item #1 provides "No smoking inside the home." Also, item #4: "No smoking on the premises by all tenants/guests." In the hearing, the tenants specified that when they first visited the rental unit, the landlord stated that the house was non-smoking. Again, when the tenants signed, the same assurance was made, and the landlords requested that the tenants sign the addendum. Because of one of the tenant's medical conditions – asthma, allergies – the tenants insisted on the inclusion of item #4. They also expressed concern about their 2 children's exposure to second-hand cannabis smoke.

The tenancy ended when the tenant's vacated on June 30, 2019. This was the result of the landlords issuing a two-month notice to end tenancy for their own use of the rental unit.

In the hearing, the tenants provided that a few days before signing, the landlord who they met informed them that the tenant in the below unit had back pain, hence their need for medical marijuana. The tenants claimed they were upset at that point about the house being smoke-free. They again reiterated the one tenant's conditions, and in response to this the landlord stated that the below tenant would cease cannabis use after surgery.

In the hearing, the tenant presented a timeline of events. This is as set out in their 5-page document that outlines their claim. This lists their 7 separate notifications to the landlord about the below tenant's smoking. By October 2018 they provided that the landlord admitted that there was smoking from the unit below. By November 29, they identified to the landlord that they were subject to this for five months, with only promises to rectify from the landlord but no action.

The tenant provided a "loss of quiet enjoyment letter" to the landlord on November 25, 2018, provided in the evidence. This sets out s. 28 of the *Act* to show a tenant's right to quiet enjoyment. They noted that "we have the right to apply for dispute resolution. . . to ask for an order that you comply with section 28, as well as monetary compensation for loss of quiet enjoyment."

After one more reminder in January 2019, the tenants then sent another “loss of quiet enjoyment letter” on March 6, 2019, provided in the evidence. This restates the s. 28 reference and sums up: “The smoking continues to negatively impacts [*sic*] our tenancy and it needs to stop.”

After this, the tenants messaged the landlord two other times before the end of tenancy. One message concerned the below tenants screaming, and the other was about the below tenants turning off their water.

The tenants provided copies of their messages to the landlord throughout 2018 and 2019.

The tenants seek $8,640 in compensation. This is 30% of the monthly rent for the 12 months they resided within the rental unit. In the hearing, the tenants spoke to the one tenant’s medical condition. They also described “all times needing to close the windows” and “being up in the middle of the night when the lower tenant was smoking in their bedroom. . . at 1 or 2 am.”

They also reiterated that the landlord did nothing in response to their claims and queries. They made this conclusion because the smoke continued. The landlord never reported back on their chats with the lower tenants, and never offered to come back into their own apartment to investigate. They did tell the landlord at one point that the landlord had enough evidence to evict the lower tenant.

In the hearing the tenants also presented that they initially spoke to the lower tenants directly; however, they were not comfortable after they became aggressive when certain topics were mentioned. Also, the tenants stated they were just about to pursue a dispute resolution process; however, this was very close to the end of the tenancy after the landlord issued an end-of-tenancy notice in March 2019.

In their response to this, the landlord presented:

- what the tenants provided in their evidence shows only their queries and complaints to the landlord, with none of the landlord’s responses appearing in their own evidence
- the tenants claimed the landlord “never” attended or addressed their concerns, and this is a falsehood – the landlord attended regularly to rectify garbage issues, and made the installation of smoke detectors as shown in their own photos
- the landlord reiterated that they in fact had conversations with the tenants below about the smoking issue, and this resulted in that one tenant smoking outside away from the

property area – this tenant below swears that they went to the curbside area to smoke and a statement from that tenant appears in the landlord's evidence to attest to this
- on more than one occasion they tried to enter the tenants' unit directly to inspect the matter for themselves to observe how pungent the smoke was and how much of a problem it was presenting to the tenants – they were denied entry into the unit to do so
- they similarly needed to enter in a more emergency situation involving water dripping into the unit below and causing damage; however, even in this emergency situation their entry was blocked
- the landlord questioned why the tenants here never made a claim for dispute resolution during the tenancy – if the problem was persisting to the degree claimed, then why not? This leads to the conclusion that the tenants are manipulating the dispute resolution process with this inflated claim.

In their written statement, the landlord presented that their visits to attend to the tenants' concerns began after their first notice. After the second notice, the landlord discussed the issue with both parties, with smoke detectors already installed. They described how "Any complaint about the smell of smoke was dealt with right away." This same level of response came with the two adjacent units' disagreement about garbage cans, and an immediate turning off of water.

The landlord also provided several of their emails to the tenants in response to the complaints. There is the response setting out that smoke alarms have been installed (August 2018), and one providing that a larger garbage bin is being provided (August 2018). The landlord provided comments on how the tenants themselves should be able to work out the issue of taking the garbage cans to the corner, with elderly tenants living below and sharing that duty.

There are also responses from the landlord that set out how they spoke to the below tenant about the smoking issue. On November 30, 2018, the landlord responds to say: "We do not take lightly the loss of your right to quiet enjoyment . . . We have always been fair to both parties and we are doing everything in our power to resolve this issue. [The below tenant] has committed to not smoking in or anywhere on the premises and without sufficient evidence, we cannot evict anyone."

On October 5, 2018, the landlord's response details their addressing the heat level within the tenants' unit, placement of personal items in shared areas, and the shared duty of placing garbage out for collection, and a noise complaint. The landlord also reimbursed the tenants for additional work they did within the unit to place plywood over the fireplace.

Analysis

Under the *Act* s. 7, a party who does not comply with the legislation or their tenancy agreement must compensate the other for damage or loss. Additionally, the party who claims compensation must do whatever is reasonable to minimize the damage or loss. Pursuant to s. 67 of the *Act*, I shall determine the amount of compensation that is due, and order that the responsible party pay compensation to the other party if I determine that the claim is valid.

To be successful in a claim for compensation for damage or loss 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 contrast to what the tenants presented in this hearing, I find the evidence clearly shows the landlord was responsive to the tenants' complaints and queries throughout the tenancy. The landlord provided sufficient evidence in the form of their emailed responses which show timely and detailed replies. In addition, the evidence shows the landlord installed smoke alarms, and reimbursed the tenants for what they deemed necessary modifications to the fireplace.

Progress in the landlord's attempts to rectify the issue was blocked by the tenants themselves. I accept the landlord's account that they were not able to enter the tenants' unit to inspect the degree to which smoke and/or odour became invasive. This would naturally seem to occur where a tenant would complain; however, in this case, the landlord's efforts were stymied.

I find as fact that the below tenants adjusted to accommodate the applicant tenants' own adverse reactions to smoke and/or odour. This is based on the landlord's assertions that they spoke to the below tenants to immediately address the issue and provided information back to the applicant tenants about the below tenants' adjustments. The tenants here have not conclusively proven that one of the below tenants continued smoking unabated.

Further, I am not satisfied the smoke and/or odour proved problematic to the degree that the tenants assert in their claim. They have presented that one tenant has asthma and allergies; however, this is not verified independently with evidence. The tenants did not present sufficient evidence to show that smoke and/or odour was causing legitimate health concerns.

Additionally, I find the evidence shows the landlord took the matter seriously and responded to the tenants' letters that set out their right to quiet enjoyment. With this being the case, the question is left open as to why the tenants did not pursue the matter by way of dispute resolution.

From my review of the landlord's email evidence, I find the issues of garbage placement and water shutoff reveal the tenants to be demanding and uncompromising. The evidence establishes the tenants below are more senior and it follows naturally that garbage placement and the carrying of a full trashcan could believably present a challenge to them. Instead of rectifying the issue in a neighbourly fashion, the tenants here chose to continue to complain. I find this evidence reveals the tenants took no steps on their own to find a solution. This carries over into the allegations by the tenants of smoke and/or odour causing more serious difficulties. By contrast, the landlord's messaging reveals their own action on the issues through dialogue and attempts at resolution.

I make these considerations when reviewing the evidence and submissions of the landlord. The tenants did not present that they undertook or concentrated on actions that show they attempted to lessen the impact of the situation. The circumstances presented challenges; however, I find nothing in the evidence shows the tenants made reasonable efforts and cooperating with the landlord and other tenants.

For loss of quiet enjoyment, the tenants have provided a claim amount for 30% of the monthly rent over the entirety of the tenancy. This amount is not quantified; that is to say, they did not present what this amount represents. I find this amount is arbitrary, not based on assessment of the interruption to time, space, or negative impacts on health or daily living or even day-to-day tasks. Therefore, the value of any impact to quiet enjoyment is not established.

The *Act* s 7 provides that a party who requests compensation "must do whatever is reasonable to minimize the damage or loss." I find if the issue of smoke and/or odour was as prevalent as the tenant claims, they had legal avenues to pursue for rectification of the issue. What they present here does not represent minimizing the damage when the tenants make this claim for compensation after 1 year of the tenancy, ongoing. While the tenants in the hearing presented they did not pursue a claim after they knew about a pending end of tenancy, they nonetheless sent their second letter outlining their right to quiet enjoyment after the notice.

For the reasons outlined above, I find the tenants have not presented a preponderance of evidence to show on a balance of probabilities that they are entitled to the amount of compensation for damages or loss that they claim. This is chiefly due to the lack of mitigation on their part. Additionally, they have not established the value of their loss of quiet enjoyment.

Based on these reasons, I dismiss the tenants' claim in its entirety, without leave to reapply. There is no award for loss of quiet enjoyment.

Because the tenants' claim is dismissed, I find they are not entitled to compensation of the Application filing fee.

Conclusion

For the reasons above, I dismiss the tenants' claim for monetary compensation in its entirety, without leave to reapply.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under s. 9.1(1) of the *Act*.

Dated: April 28, 2021

Residential Tenancy Branch