



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MAINSTREET EQUITY CORP. and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCT, FFT

Introduction

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

- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to recover his filing fee for this application from the landlord pursuant to section 72.

Counsel for the tenants, J.C. attended on behalf of the tenants. The landlord's agents, K.S. and J.S. attended on behalf the landlord.

Both parties were advised that the conference call hearing was scheduled for 60 minutes and pursuant to the Rules of Procedure, Rule 6.11 Recordings Prohibited that recording of this call is prohibited.

Both parties confirmed the tenants served the landlord with the notice of hearing package and the submitted documentary evidence via Canada Post Registered Mail on December 22, 2020. Both parties confirmed the landlord served the tenants with their submitted documentary evidence via Canada Post Registered Mail on March 12, 2021. Neither party raised any service issues. I accept the undisputed evidence of both parties and find that both parties have been properly served as per sections 88 and 89 of the Act.

Issue(s) to be Decided

Are the tenants entitled to a monetary order for compensation and recovery of the filing fee?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the applicant's claim and my findings are set out below.

This tenancy began on July 1, 2020 on a fixed term tenancy ending on December 30, 2020 and then thereafter on a month-to-month basis as per the submitted copy of the signed tenancy agreement dated July 1, 2020. The monthly rent was \$1,450.00 payable on the 1st day of each month. A security deposit of \$725.00 was paid.

Both parties confirmed during the hearing that the tenants have a no smoking condition in clause #22 of their signed tenancy agreement and that the tenant in #115 has no such restriction.

The tenant seeks an amended monetary claim of \$4,887.10 which consists of:

\$4,887.10	Compensation	
	\$327.42	Loss of use, 7 days
	\$4,500.00	Loss of Quiet Enjoyment, 6 months @ 50% (July to December 2020)
\$100.00	Filing Fee	

The tenants seek amended monetary compensation of \$327.42 for the loss of use of the rental unit for 7 days. The tenant stated that at the start of the tenancy the landlord had promised the replacement of the hardwood floors and painting of the ceilings prior to the start of the tenancy on July 1, 2020. The tenant stated that this did not occur and the work did not begin until July 4, 2020 and completed later on July 8, 2020. The tenant stated that during this time the tenants suffered the loss of use of each room because of the work. The tenants stated that they were forced while living in the rental unit to move their items from each room as the work progressed. The tenants were forced to store items on the balcony and live in unsanitary conditions and the paint fumes during this time. The landlord dispute the tenants claims arguing that the tenants made a verbal request not to begin the repair work until July 4, 2020 and that the landlord was complying with their request. The tenants dispute that no such verbal request was made.

The tenants also seek monetary compensation of \$4,500.00 for the loss of quiet enjoyment due to a continuous and consistent smoke ingress. The tenants stated that

they are seeking 50% of the monthly rent for the period of July to December 2020 for this 6 month period. The tenants stated that prior the tenancy beginning the landlord's agent was notified that no smoking was "a big deal" for them. The tenants explained that the tenants have a negative reaction to smoke and had confirmed with the landlord that this was a no smoking building. The tenants stated the smoke was found to be originating around the balcony and windows of the rental unit. The tenants describe the smoke as "strong, constant and continuous". The tenants stated that the source of the smoke was found later to have originated from unit #115 below them. The tenants found the occupants smoking in the unit below and numerous cigarette butts on the lawn outside of #115's window. The tenants have submitted photographs of the found cigarette butts. The tenants have attempted to mitigate the issue by closing their windows and putting up air fresheners. One of the tenants is an ex-smoker and is highly sensitive to the presence of smoke and is distressed when in its presence. The tenants stated that the landlord was notified on July 5, 2020 and was advised that the tenant in #115 would be cautioned to stop smoking. The tenants stated that smoking continued and the landlord was advised again on July 11, 2020 of a smoking complaint. The tenants received no information on any action by the landlord. The tenants stated that they were advised by the landlord's agent to "just move-out" if they did not like it.

The landlord stated that smoking was banned on the rental property on July 2018 and that the no smoking policy change was told to the tenants at the start of the tenancy. The landlord stated that the tenant in #115 was found to be smoking, but because his tenancy began prior to the smoking policy change the landlord was unable to enforce the policy against the tenant in #115 as he was "grandfathered". The tenant in #115 was advised to try and get along with the other occupants of the building by smoking in the designated smoking areas on the property and not in the rental unit. The tenant in #115 refused and the landlord stated they were unable to take further action.

The landlord stated that the tenants had been talking to the wrong person at the landlord's office, H.A. and were advised to speak to only 2 persons responsible for this building complex. The landlord stated no further complaints were ever received from the tenants. The landlord stated that the tenants complaint was made verbally and that no subsequent complaints were ever made in writing, so the landlord made no further efforts as it was assumed that there was no longer an issue. The landlord refers to the tenants' evidence which is an email from the tenants' previous counsel regarding notification of the smoking issue. The landlord stated that the address used was "misspelled" and not received. The tenants argued that the email was received by the landlord according to conversation with the previous counsel. The landlord stated there is no evidence of any further complaints made by the tenants to the landlord. The

landlord also stated when they finally did find that a smoking issue continued the landlord issued a letter warning the tenant that that he could be issued a notice to end tenancy. The tenant in #115 had agreed to close his windows and doors when smoking and to install added weather stripping. The landlord stated that the tenants had failed to give the landlord an opportunity to respond to the issue before ending their tenancy.

The tenants argue that clause #18 of the signed tenancy agreement for the tenant in #115 states in part,

Conduct. In order to promote the convenience, safety, welfare and comfort of the tenants in the building, the tenants and guests shall not disturb, harass, or annoy occupants of the building or neighbors, and shall not cause loud conversation, music, television or other irritating noise to disturb peaceful enjoyment at any time; and shall maintain quiet between 11pm and 9am. Any Tenant who causes other occupant to vacate the premises because of noise, or other disturbance, harassment, or annoyance shall indemnify the Landlord for any reasonable costs and losses caused thereby, and may have the tenancy terminated on short notice pursuant to the Act.

[reproduced as written]

The tenants argue that smoking should apply as to the conduct of the tenant in #115 as a form of disturbing other occupants.

The tenants stated that on July 25, 2020 a complaint was filed by the tenant regarding smoking, but that the landlord did not act. The tenants stated that the landlord had advised the tenants to investigate the matter themselves.

The tenants stated that on August 4, 2020 a letter via email was sent by the tenant's previous counsel to the landlord regarding their smoking complaints. The landlord reiterated that this is the tenant's written notification and that the email address used on the letter is incorrectly spelled. The landlord stated that proper address ends with "st" and not "steet" as shown in the letter. The landlord argues that no such letter was received.

Analysis

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. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove

the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

In this case, I accept the evidence submitted by both parties and find on a balance of probabilities that the tenants did suffer from a loss of use of the rental unit from the period July 4 to 8. Both parties confirmed that hardwood flooring and painting occurred during this time. The tenants provided undisputed evidence that they were forced to store items on the balcony and move their personal belongings from room to room as the work progressed. The tenants also provided undisputed evidence that painting took place during this period of time as well. The tenants provided undisputed affirmed evidence that hardwood flooring and painting was to occur prior to the start of the tenancy, however the landlord has claimed that the tenants made a verbal request to not start this work until July 4, 2020. The tenants disputed this claim and the landlord was unable to provide any supporting evidence. As such, I find that the tenants have provided sufficient evidence of loss of use and that tenants are entitled to compensation of \$327.42 as claimed.

On the tenants claim for compensation for loss of quiet enjoyment of \$4,500.00, I find that the tenants have provided sufficient evidence to satisfy me that they suffered a loss of quiet enjoyment due to an ingress of smoke. The tenants have described the ingress as “strong, constant and continuous”. I find on a balance of probabilities based upon the submissions of both parties that the tenants did inform the landlord through his agents. This was confirmed by the landlord’s agent, during the hearing. However, the landlord has disputed that the tenants had reported the issue to the wrong person and not one of the two designated persons responsible for the rental property. I find nevertheless with such an issue reported to the landlord’s agent, that the landlord’s agent has a responsibility to forward the tenants concerns to the appropriate party. I also note that the landlord has challenged that the tenants had failed to follow up with ongoing smoking concerns in writing. The landlord has noted that the tenant’s letter dated August 4, 2020 sent via email was not received. The landlord noted that the email address on the letter was incorrect. The tenants stated that despite this the tenants gave testimony during the hearing that the previous counsel had assured them that the letter was sent. I find in this case that that is unproven based upon the incorrect email address noted on the letter. On this basis, I find that the tenants have failed to provide sufficient evidence to justify the monetary compensation request for the loss of quiet enjoyment for the 6 month period of 50% of the rent. However, the tenants have

provided sufficient evidence that a loss of quiet enjoyment did occur due to the smoke ingress. As such, I grant the tenants an arbitrary monetary award of \$2,250.00.

The tenants are entitled to recovery of the \$100.00 filing fee.

Conclusion

The tenants are granted a monetary order for \$2,677.42.

The landlord must be served with a copy of this order. Should the landlord fail to comply with this order, the order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

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: May 13, 2021

Residential Tenancy Branch