Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Pemberton Holmes Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OLC, MNDCT, FFT

Introduction

The tenants filed an Application for Dispute Resolution on February 2, 2021 seeking the landlord's compliance with the legislation and/or the tenancy agreement. Additionally, they seek a monetary order for loss or other money owed and compensation of the filing fee they paid for their Application.

The matter proceeded by way of a hearing on May 3, 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 agent for the landlord (hereinafter 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 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 an order compelling the landlord to comply with the *Act*, regulation, and/or the tenancy agreement, pursuant to s. 62 of the *Act*?

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

In the hearing, the tenants presented they were subject to second-hand smoke and odour since the first month of their tenancy. Their notes to the landlord did not receive a response from the landlord to state whether they followed-up with action and the landlord only responded by asking for specifies on dates, times and people involved. They sent three emails outlining the problem and a "letter of demand" dated September 29, 2020.

The tenants provide that they are "very unsure where it is coming from". They experience strong odour in the unit that it sometimes causes them to leave the unit entirely and this causes headaches for one of the tenants, with no other known origin for that.

The tenants presented that there is a Facebook group of other building tenants who all speak of the same experience, both with the smoke/odour, and lack of follow-up from the landlord.

To set the situation out fully, the tenant provided documentation. These separate pieces are:

- google reviews that mention the property management company, and use the landlord's agent's name directly
- weekly reports from a security firm hired by the landlord – the tenants claim the security firm does not report out on detected smoke and/or odour
- a specific date/time reported incident from another tenant to the landlord's agent – the tenants here claim the landlord will not act on complaints that are more general in nature
- photos depicting a lighter and cigarette in a building stairwell area
- a physician report from April 8, 2021 that provides one of the tenants here experiences headaches "since moving into their current unit 1 year ago and they seem to be triggered by exposure to cigarette and or marijuana smoke."
- documentation describing the effects and harms of second-hand smoke
- a tenant log with dates and times from June 8 2020 through to Dec 21 2020 – this describes waking at night, coughing and needing to close windows
- copies of Residential Tenancy Branch policy guidelines that set out 'quiet enjoyment' and the landlord's right to enter a rental unit;
- discussions from a private member-only Facebook group wherein members discuss issues facing them as residents in this property

In the hearing, the landlord responded to the submissions to say they strive to maintain a smoke-free building, even though that is not always attainable. They briefly outlined the complaint process in place where specific information is available to them for follow-up. Where tenants are able to figure out the precise source of something such as smoke or ongoing smoking, the landlord will follow up.

They gave two examples that show their diligence in responding to complaints, and these are "enforcing the neighbouring tenants' quiet enjoyment." In one, a unit resident had moved out 2 days after the problem was identified; in another, the caretaker spoke to other tenants whom they observed preparing to smoke and had them exit off the property entirely before starting that. The landlord submits the issue has diminished since that resident had moved out. The landlord provided detail on these incidents, and in their written statement added a description of another neighbouring unit involving a different kind of waste causing disturbance. For each of these incidents, the landlord provided their correspondence to/from each responsible unit and showed their responses to these Applicant tenants' complaints about neighbouring units.

Additionally, the landlord provided security to the building in order to accurately track down the sources of smoke and/or odour. There are ongoing messages to all building residents (landlord's documents B, C, D, and E) that set out the ramifications for not abiding by the rules, and state there are no exceptions to the no smoking rule.

A document dated May 30, 2020 shows management reminding all tenants in the building that there is no smoking in suites, patios, common areas or on the property itself. It states: "We have exhausted all options to track down the smell without the specifics needed to be able to take the matter further."

In a written statement, the landlord provides their submission that the tenants here are essentially re-arguing a matter that was the subject of a previous hearing, dismissed by the Arbitrator. The same claims by the tenants in this present hearing are those "using a different interpretation of the Residential Tenancy Act." The landlord enclosed a copy of that prior Arbitration decision wherein the Arbitrator relied on the *Act* and the tenancy agreement itself to state there are no obligations or promises conferred by the landlord that promise smoke-free rental units or buildings.

Analysis

The *Act* s. 62(3) provides that an arbitrator has authority to make any determination that is "necessary to give effect to the rights, obligations and prohibitions under the Act, including an order that a landlord or tenant comply with the *Act*, the regulations or a tenancy agreement."

A tenant's right to quiet enjoyment is protected by s. 28 of the *Act*. This includes freedom from unreasonable disturbance. The *Residential Policy Guideline 6: Entitlement to Quiet Enjoyment* gives a statement of the policy intent of the legislation. This provides:

> 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.

In the situation presented by the tenants here, this is a question of whether the landlord was aware of a disturbance that was, in effect, a breach of the tenants' right to quiet enjoyment, and did nothing. In these circumstances, I find the only possible breach would arise from the landlord being aware of the actions of other tenants causing a disturbance, then taking no steps to correct that.

I find there is ample evidence to show the landlord took action when specific information was in place. This is shown in the landlord's evidence for two incidents: that involving a resident clearly breaking on-site rules about smoking, and action about neighbours keeping pet waste on the balcony that caused a disturbance to the tenants here. Additionally, there is evidence of the building caretaker intervening when they observed other residents proceeding to smoke in an area not allowed. This evidence points to the conclusion that this is not a situation where the landlord is aware of breaches – those involving building residents' quiet enjoyment – and did nothing. There is no evidence of other specific instances that were neglected by the landlord. In this way, it cannot be said that the landlord was not complying with the tenancy agreement or the *Act* concerning quiet enjoyment.

Minus any evidence of specifics that the landlord was choosing to disregard, there is no avenue for the landlord to pursue the issue. As stated in their May 30, 2020 message to building residents, they need specifics in order to take warranted action. Any further

action, such as individual unit searches would step over a landlord's legal boundaries and would breach residents' rights in other ways and prove to be illegal.

The evidence of the landlord shows they took the following actions:

- they hired security who will monitor for that specific issue of smoke and/or odour – I am satisfied this is an effort at pinpointing a source of the problem
- they went through an eviction process with a tenant who did not abide by the rules regarding smoking – the evidence of the landlord shows they followed the sanctioned process for doing that
- they posted notice in the building common areas – the content clearly defines smoking/odour as a problem for all residents, and also asks tenants to supply specific information where known (landlord document D)
- they gave letters containing this information and reiterating the need for specifics to all building residents (landlord documents B, C, and E)
- they responded to email queries directly from the tenants here – in other cases this is asking for more specific information.

The tenants' evidence and presentation here does not prove that the landlord failed to take action on specific points when they were aware of disturbances. The tenants presented that there is a Facebook group that is specifically devoted to this discrete topic; however, there is no record of the participants identifying known issues to the landlord or otherwise working with the landlord to tackle the issue. This is not conclusive proof that the landlord here is turning a blind eye to the issues raised. Any concern the residents have about management monitoring the content of their posted comments is trivial and has no link to the landlord following up to ensure tenants' rights are not breached.

The tenants' own log that provides evidence of times and dates does not provide more specific information on a source. I appreciate this illustrates the effects felt by the tenants; however, it does not show that the landlord is not acting on viable information when provided.

The tenants' evidence throughout is non-specific with sources. As the tenants stated in the hearing, they are "very unsure where it is coming from". There are photos showing smoking material in the stairwell; however, this does not prove the landlord is not addressing the situation when specific details are known. Further, there is no record of the tenants attempting to mitigate the impact by requesting inspections of their unit further for possible structural difficulties that impact air quality overall.

Finally, the tenants stated that the problem had alleviated within the last few months. I give weight to this statement because it fits with the landlord's own evidence showing they acted on specific concrete information which lessened the impact.

On this portion of the tenants' Application, I find the evidence shows the landlord took action throughout this tenancy on specific information stemming from tenant complaints. As well, the landlord is acting to alleviate the problem that many residents are aware about and is soliciting all for more information. This is in everyone's best interests in line with their right to quiet enjoyment. I find there is no tangible evidence the landlord failed to act on specific information when known; therefore, there was no breach of the tenants' right to quiet enjoyment – either as it is expressed in the tenancy agreement or in the Act -- by the landlord here.

The landlord presented that there was a previous Arbitrator ruling on their compliance with the *Act* and/or the tenancy agreement. That action was dismissed. I find the tenants here have raised the same dispute with a different distinction by focusing on a specific section of the *Act*. I am dismissing their claim here and doing so without leave to reapply. In both respects, the tenant is barred from re-opening the matter for further arbitration. This means they have no permission granted to amend or refile the same complaint on this discrete issue of smoke and/or odour disturbance. The tenants should also be aware that the legal principle of *res judicata* applies here. To address their concerns, the tenants must work with the landlord and provide specific information for action.

The tenants here also made a claim for monetary compensation. Under s. 7 of the *Act*, a party who does not comply with the legislation or the 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.

As set out above, the tenants did not prove there was a violation of the *Act*, the regulation, or the tenancy agreement. I dismiss the tenants' claim for that reason alone.

In the alternative, and based on the above criteria, I make the following findings with respect to individual items the tenants present on their claim for compensation:

- The security deposit and pet damage deposit returns (at $912.50) are properly the subject of the end of tenancy. There is no provision in the agreement or the *Act* for their return for any reason prior to the end of the tenancy; therefore, there is no award for this amount of the tenant's claim.

- For move-out expenses ($1,000), inconvenience for moving out ($1,000), compensation for prolonged stay ($1,000), reconnection fees (total $145), there is no evidence presented to establish that a damage or loss here exists. Quite simply, these are claims for events that did not transpire, and the value thereof is hypothetical, and not established. The tenants stated this would be their next move should the issue not be rectified, and this represents what it might cost to move should they choose to do so. These amounts are based on *possibilities* of future events and the tenants presented no firm plans to end the tenancy. There is no award for any of these amounts in the tenant's' claim.

- The tenants have provided a claim amount that represents 50% of the monthly rent they have paid for 9 months since the start of the tenancy. The amount of $8,212.50 is not quantified. That is to say, a clear representation of what this amount represents is not in the tenant's submissions or evidence. 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. One of the tenants here presented they continue to suffer headaches from residual smoke or odour; however, they did not present this in terms of more substantial impacts to their life.

- The *Act* does not provide for recovery of other costs associated with serving hearing documents; therefore, the cost of registered mail ($36) is not recoverable.

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. The bulk of the tenants' claims here are based on supposition and there is no evidence they chose to end the tenancy or incurred any costs upon move-out.

Based on these reasons, I dismiss the tenants' monetary claim in its entirety, without leave to reapply.

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.

Additionally, I find the landlord has complied with the *Act*, the regulations and/or the tenancy agreement by investigating claims and providing other resources to address the very issues that the tenants raised here. There is no breach of the tenants' right to quiet enjoyment by the landlord here.

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: May 5, 2021

Residential Tenancy Branch