



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Capreit Limited Partnership
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OLC, MNDCT, FFT

Introduction

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

- an Order directing the landlord to comply with the *Act*, regulation or tenancy agreement, pursuant to section 62; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

The tenants filed an amendment to the above application for dispute resolution seeking a Monetary Order for damage or compensation under the *Act*, pursuant to section 67 of the *Act*.

Tenant A.C. and the landlord's agent (the "agent") attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

Both parties confirmed their email address for service of this decision.

Preliminary Issue- Service

Tenant A.C. testified that she served the landlord with this application for dispute resolution on September 17, 2021 via registered mail. A registered mail receipt stating same was entered into evidence. The agent testified that the tenants' application for

dispute resolution was not delivered to the landlord but was delivered to a different tenant. The agent testified that in early December 2021 a tenant other than the applicants provided the tenants' application for dispute resolution to the agent stating that he did not know who the package was supposed to be delivered to.

The Canada Post website states that H.T. signed for the package on October 25, 2021. The agent testified that H.T. is a former tenant of the landlord. I accept the agent's undisputed testimony that the landlord did not receive the tenants' application for dispute resolution until early December 2021. The agent testified that while they did not receive timely notification of today's hearing, they are prepared to continue with today's hearing and that an adjournment is not necessary. I find that the landlord was sufficiently served for the purposes of this *Act*, pursuant to section 71 of the *Act*, because the agent confirmed receipt and did not object to the continuance of today's hearing.

Both parties agree that the tenants' amendment was personally delivered to an agent of the landlord on December 22, 2021. I find that the landlord was served with the amendment in accordance with section 88 of the *Act*.

Both parties agree that the landlord served the tenants with the landlord's evidence via email on December 31, 2021. Tenant A.C. testified that the landlord's evidence was received on December 31, 2021. I find that the tenants were sufficiently served for the purposes of this *Act*, pursuant to section 71 of the *Act*, with the landlord's evidence on December 31, 2021 because tenant A.C. confirmed receipt on that date. No issue was taken with the method of service at the hearing.

Preliminary Issue- Amendment

Both parties agree that the tenant did not include the entire name of the landlord as stated in the tenancy agreement, in this application for dispute resolution. Both parties agree to amend the tenants' application for dispute resolution to state the full legal name of the landlord as set out in the tenancy agreement. Pursuant to section 64 of the *Act*, I so amend.

Issues to be Decided

1. Are the tenants entitled to an Order directing the landlord to comply with the *Act*, regulation or tenancy agreement, pursuant to section 62 of the *Act*?
2. Are the tenants entitled to recover the filing fee for this application from the landlord, pursuant to section 72 of the *Act*?
3. Are the tenants entitled to a Monetary Order for damage or compensation under the *Act*, pursuant to section 67 of the *Act* of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on October 18, 2019 and is currently ongoing. Monthly rent in the amount of \$1,675.00 is payable on the first day of each month. A security deposit of \$825.00 and a pet damage deposit of \$825.00 were paid by the tenants to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

Tenant A.C. testified that the tenant in the unit below the subject rental property smokes on the balcony of that unit and the smoke wafts into the subject rental property. Tenant A.C. testified that this has negatively affected her health and exacerbated her asthma. The tenant testified that in August of 2020 she spoke with tenant in the unit below about the smoke and he was apologetic; however, he continued to smoke on the balcony.

Both parties agree that the tenant first notified the landlord about the above problem on February 22, 2021 via phone and email. The February 22, 2021 email was entered into evidence. Both parties agree that on February 22, 2021 an agent of the landlord responded via email that they would try to contact the tenants in the lower unit and to contact the landlord again if the balcony smoking continued. Both parties agree that on February 23, 2021 tenant A.C. emailed the landlord to thank them for the rapid response and that the tenants would inform the landlord if the smoking continued.

The agent testified that on or around February 22, 2021 an agent of the landlord called the tenants in the lower unit and instructed them to stop smoking on the balcony.

Both parties agree that the next time the tenants contacted the landlord about the balcony smoking was via email on August 4, 2021. The emails between the parties from August 4-30, 2021 were entered into evidence.

An agent for the landlord responded on August 4, 2021 that the tenants in the lower unit would be contacted again. On August 9, 2021 the tenant A.C. responded that the landlord has already tried talking to them and the problem has only gotten worse and that the tenants were ready to seek legal advice to resolve this.

The agent testified that following the August 9, 2021 email the tenants in the lower unit were sent a warning letter. The August 10, 2021 letter was entered into evidence and states:

Please be advised that after a verbal warning, we have continued to get complaints regarding second hand smoke bothering other Residents.

Please note that the smell of smoke is very strong coming from your suite, and it is causing a disturbance to your neighbours. This is in breach of the Residential Tenancy Act as all tenants are entitled to "quiet enjoyment" of their suite....

We must ask that you smoke outside of the building moving forward. Should you have any further questions, concerns or you would like to discuss this matter in ore detail, please do not hesitate to contact the Rental Office.

On August 19, 2021 Tenant A.C. emailed the landlord asking if head office has responded to the lower tenant's violation of the no smoking clause contained in the tenancy agreement.

Section 16(a) of the tenancy agreement states:

The Tenant promises to comply with any rules concerning the Tenant's use, occupancy or maintenance of the Residential Premises or Building or use of services and facilities provided by the Landlord that the rules are in writing, are reasonable in all circumstances and the Tenant is given a copy of the rules at the time of entering into the Lease and is give a copy of any amendments. The

landlord and tenant promise to comply with the statutory conditions set out in schedule 'A'.

Section 20 of schedule 'A' states:

The tenant(s) or occupant(s) and their guest(s) are prohibited from engaging in the smoking or burning of tobacco, cigarettes, cannabis, or the burning or smoking (including vaping) of any other substance anywhere in the building or on the property, where applicable, other than in their personal suite. References of 'smoking' are deemed to include the smoking or burning of any substance.

On August 19, 2021 an agent for the landlord emailed the tenant A.C. and informed her that the lower tenant was contacted and that if the smoking continues, they will be served with another letter. On August 19, 2021 tenant A.C. emailed the landlord that she would let the landlord know the following week if the smoking has not improved.

On August 24, 2021 tenant A.C. emailed the landlord that the tenant is still smoking on the balcony which is a loss of quiet enjoyment issue. On August 24, 2021 tenant A.C. was sent an out of office message stating the landlord's agent will be back in office on August 30, 2021.

On August 30, 2021 tenant A.C. emailed the landlord asking about what action is being taken and that this process is taking too long and the second hand smoke is affecting her health. On August 30, 2021 an agent of the landlord emailed tenant A.C. apologizing for the delay in responding as the agent was on vacation. The agent went on to say that she would again contact the tenant in the lower unit.

The agent testified that on August 30, 2021, after receiving tenant A.C.'s email, the landlord's agent went outside the subject rental property and personally witnessed the lower tenant smoking on the balcony. The agent testified that the landlord's agent personally knocked on the lower tenant's door and again told him to stop smoking on the balcony.

Attached to some of the emails from Tenant A.C. to the landlord were photographs of the lower tenant smoking on the balcony. On August 30, 2021 an agent for the landlord emailed tenant A.C. asking tenant A.C. not to take anymore pictures anymore because the lower tenants could sue them for breach of privacy.

Both parties agree that the tenants did not make any further complaints after August 30, 2021. The agent testified that from September 2021 forward the lower tenant was frequently seen smoking outside the subject rental building which the landlord's agent thought meant the lower tenant was no longer smoking on his balcony. The agent testified that this in addition to the lack of complaints levied by the tenants lead the landlord to believe that the smoking issue was resolved, so no further steps were taken. The agent testified that they only learned about continued problems when they received this application for dispute resolution in early December 2021.

Tenant A.C. testified that she stopped complaining because it didn't seem to do anything and because she felt threatened by the landlord's last August 30, 2021 email.

The agent testified that the lower tenants are moving out this month and will be gone by the end of this month. Tenant A.C. testified that she has seen a moving van.

Tenant A.C. testified that she is seeking compensation for the loss of use and quiet enjoyment of the balcony due to the lower tenant's smoking. The tenant testified that she is seeking compensation pursuant to the following calculation:

$$\begin{aligned} &84 \text{ (sq ft of balcony)} / 1034 \text{ (sq ft of balcony and apt)} = 8.12\% \\ &8.12\% \text{ of } \$1,675.00 \text{ (rent)} = \$136.07 * 18 \text{ (months balcony unusable due to} \\ &\text{smoke- July 2020 to January 2022)} = \$2,449.26 \end{aligned}$$

The tenants' written submissions state that the tenants are also seeking damages in the amount of \$4,898.52 for pain and suffering; however, no testimony regarding this claim was provided and no evidence regarding this claim was presented.

Analysis

Section 28 of the *Act* states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

- (a) reasonable privacy;
- (b) freedom from unreasonable disturbance;
- (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [*landlord's right to enter rental unit restricted*];

(d) use of common areas for reasonable and lawful purposes, free from significant interference.

Residential Policy Guideline 6 states that a landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. **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.**

[Emphasis Added]

Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.

Both parties agree that the tenant emailed the landlord about the lower tenants smoking on their balcony and the disturbance this caused on February 22, 2021 and that the landlords responded on February 22, 2021. I accept the agent's testimony that the tenants were verbally told not to smoke on the balcony. I find that the landlord acted reasonably to the tenants' complaints. I find that a verbal warning is an appropriate action to take to a single complaint.

Both parties agree that the next time the tenants' complained was on August 4, 2021, over five months later. I find that it was reasonable for the landlord to have taken no further steps between February 23 and August 4, 2021 as it appeared that the issue had been resolved. The landlord can not be held responsible for an ongoing disturbance the landlord was not made aware of.

Both parties agree that on August 4, 2021 tenant A.C. started complaining about the lower tenant's smoking again and when the landlord informed tenant A.C. that the lower tenant would be contacted again, tenant A.C. stated that this was not enough. In response the landlord served the lower tenant with an official warning letter on August 10, 2021. I find that the landlord diligently responded to all of the tenant's emails and acted in an appropriate manner to the tenant's complaints. I find that there is no evidence that the landlord was not taking tenant A.C.'s complaints seriously and was not addressing the issues.

I find that it was reasonable of the landlord to believe the smoking issues were resolved when the tenant stopped complaining and communicating with the landlord. I find that it was not reasonable for the tenants to stop communicating with the landlord after an agent of the landlord asked Tenant A.C. to stop sending pictures. Complaints and concerns can be expressed without photographs.

In these circumstances, I find that the landlord acted reasonably. The landlord was required to balance the rights of both parties. The landlord is not permitted to evict the lower tenant based on two complaints made five months apart. It is possible that the ongoing issues which escalated in the month of August 2021 may have eventually resulted in a One Month Notice to End Tenancy for Cause being issued on the lower tenant if the lower tenant continued to defy the landlord; however, I find that since the tenants stopped communicating their issues with the landlord after August 30, 2021, it was reasonable for the landlord to believe the issues were resolved.

In accordance with Residential Tenancy Policy Guideline #6, I find that the landlord acted reasonably and did not breach section 28 of the *Act*. Pursuant to my above findings, I dismiss the tenants' application without leave to reapply.

Conclusion

The tenants' application for dispute resolution is dismissed 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: January 10, 2022

Residential Tenancy Branch