



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CASCADIA APARTMENT RENTALS
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCT RP RR FFT

Introduction

The tenant applied for various relief under the *Residential Tenancy Act* ("Act").

Both parties attended the hearing on February 8, 2022. No service issues were raised, the parties were affirmed, and Rule 6.11 of the *Rules of Procedure* was explained. It should be noted that while the tenant only submitted his evidence to the Residential Tenancy Branch and did not serve his evidence on the landlord in accordance with the Act or the *Rules of Procedure*, the landlord appeared to nonetheless have copies of the tenant's evidence.

Issues

1. Is the tenant entitled to compensation?
2. Is the tenant entitled to a reduction in rent?
3. Is the tenant entitled to an order against the landlord for repairs?
4. Is the tenant entitled to recover the cost of the application filing fee?

Background and Evidence

The tenant pays monthly rent of \$1,300.00 for the rental unit, which is an apartment located on the third floor of a three-storey multi-rental unit complex. He has lived there since August of 2020.

This application was brought as a result of cigarette smoke entering the rental unit from an occupant who lives in the rental unit below that of the tenant. There was the periodic smell of cigarette smoke in the rental unit since the tenancy began, but the intensity and frequency of smoke entering the rental unit began in earnest in July 2021.

Hoping that the smoke would eventually subside, the tenant did not take any immediate steps to address the problem.

However, the smoke did not eventually subside. It was “really bad” in July, August, September, October (“not as bad”), November, and until the present day. The smoke primarily comes into the bathroom and sink area. While the smoke does not appear to be detected on walls or anything, the tenant mentioned that his fiancé’s friend (or, fiancé) asked about whether the tenant smoked; they smelled smoke on his jacket.

The tenant is positive that the smoke is emanating from rental unit 204, which is the apartment directly below his. He had a brief conversation with the tenant in 204 who said that he would stop smoking inside and instead start smoking outside the building. The tenant noted that the inside of 204 did “not smell pleasant.”

The tenant made several attempts to contact the landlord and have them do something about the problem. The landlord (the former and current property managers) conducted inspections of both the tenant’s rental unit and rental unit 204. They did not find any evidence of cigarette smoke in either rental unit. According to the tenant, the landlord’s maintenance person called the tenant “sensitive.” In any event, the tenant argued that despite repeated requests for assistance there has been no resolution.

The claim for compensation is calculated, the tenant explained, as comprising four months of half rent for a total of \$3,250.00. He is also seeking the landlord’s provision of an air purifier and for someone to clean the walls.

The landlord testified that the tenant’s file indicates that he had previously complained about smoke and that the tenant in 204 was given both verbal and written warnings. (The property manager who attended the hearing began working in November 2021.) However, the landlord never observed the tenant in 204 actually smoking.

The landlord noted that the property is a smoke-free building and there is a reference to that in the addendum to the tenants’ tenancy agreements. Despite the no smoking rule, though, the landlord cannot guarantee the absence of smoke in the building. Last, the landlord testified that she canvassed other residents on the second and third floors, none of whom confirmed that they smelled smoke. (Other than the very rare smell of smoke in the hallways.)

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

Is the tenant entitled to compensation?

Section 7 of the Act states that if a party does not comply with the Act, the regulations or a tenancy agreement, the non-complying party must compensate the other for damage or loss that results. Further, a party claiming compensation for damage or loss that results from the other's non-compliance must do whatever is reasonable to minimize the damage or loss.

Section 28(b) of the Act requires that a tenant is entitled to quiet enjoyment of their rental unit including “freedom from unreasonable disturbance.”

The tenant's evidence, which consisted of both his oral evidence (that is, his testimony during the hearing) and his documentary evidence in the form of multiple written communications with the landlord, persuades me on a balance of probabilities that the tenant did not enjoy freedom from unreasonable disturbance. While the tenant may be “sensitive” as the maintenance person remarked, it is common knowledge that many people, especially those who do not smoke, will easily detect cigarette smoke in the air.

The totality of evidence before me leads me to conclude that the tenant's right to quiet enjoyment under section 28(b) of the Act was breached. And, while it is likely the tenant in 204 who is the source of the cigarette smoke, it is the landlord's responsibility and obligation to ensure that the tenant's right under section 28(b) is not breached. Indeed, that the landlord gave both written and verbal warnings to the tenant in 204 is, I find, indicative of the underlying fact that the tenant in 204 smokes cigarettes.

It is my finding that, while the tenant waited a few weeks in July in the hopes that the smoke issue would subside, he nevertheless made repeated efforts (including fifteen phone calls to the landlord) to minimize his losses.

The tenant's description of the frequency and intensity of the smoke leads me to find that the tenant is entitled to a claim for compensation in the amount of \$3,250.00.

Is the tenant entitled to a reduction in rent?

Section 65(1)(f) of the Act permits an arbitrator to make an order

that past or future rent must be reduced by an amount that is equivalent to a reduction in the value of a tenancy agreement [. . .]

Given that the tenant has been granted the above-noted compensation, and, taking into consideration the fact that the tenant is about to relocate, it is my finding that a reduction in rent is not warranted in the circumstances. This aspect of the tenant's application is therefore dismissed, without leave to reapply.

Is the tenant entitled to an order against the landlord for repairs?

The tenant seeks an order under section 62(2) of the Act which states that an arbitrator "may make any finding of fact or law that is necessary or incidental to making a decision or an order under this Act."

In his application the tenant provided the following written submission in respect of what he seeks (reproduced as written):

I would like the rental unit to be cleaned and air purifier to be supplied or a strong fan. The tenant below is very sick and the landlord acknowledges the smell of the body odor and is aware of the smoking. I gave a deadline for a response but the landlord stated she wouldnt help me with cleaning and refused to provide a fan or air purifier telling me to purchase one myself.

For the same reason given above, namely, that the tenant is intending to move in the near future, I see no reason to make any orders requiring the landlord to provide an air purifier. Further, as the tenant only spoke about his clothes being affected by the smell of smoke, there is in my mind no reason to order that the landlord clean the rental unit. Therefore, with respect, this aspect of the tenant's application must be dismissed.

Is the tenant entitled to recover the cost of the application filing fee?

Section 72 of the Act permits me to order compensation for the cost of the filing fee to a successful applicant. As the tenant succeeded in respect of his claim for compensation, he is granted an additional \$100.00 in compensation to cover the cost of the filing fee.

Conclusion

The tenant's application is granted, in part.

The tenant is granted a monetary order in the amount of \$3,350.00, which must be served on the landlord. If the landlord fails to pay the tenant the amount owed, the tenant may file and enforce the order in the Provincial Court of British Columbia.

At the tenant's discretion, and with the landlord's acceptance, however, the parties are permitted to apply the amount of the monetary award toward future rent.

This decision is final and binding on the parties, and it is made on delegated authority under section 9.1(1) of the Act. A party's right to appeal this decision is limited to the grounds under section 79 of the Act or by way of an application for judicial review under the *Judicial Review Procedure Act*, RSBC 1996, c. 241.

Dated: February 8, 2022

Residential Tenancy Branch