Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MIDDLEGATE DEVELOPMENT LTD and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OLC, MNDCT, FFT

Introduction

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

- an order requiring the landlord to comply with the *Act, Residential Tenancy Regulation ("Regulation")* or tenancy agreement, pursuant to section 62;
- a monetary order of $6,572.00 for compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement, pursuant to section 67; and
- authorization to recover the $100.00 filing fee for this application, pursuant to section 72.

The landlord's two agents, "landlord EG" and "landlord AM," the tenant, and the tenant's friend attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. This hearing lasted approximately 62 minutes.

The landlord's two agents confirmed their names and spelling. The tenant confirmed the names and spelling for her and her friend. Landlord EG and the tenant provided their email addresses for me to send this decision to them after the hearing.

Landlord EG confirmed that she is the field agent and landlord AM confirmed that he is the resident manager for the landlord company ("landlord") named in this application and that they both had permission to speak on its behalf. Landlord EG stated that the landlord owns the rental unit and provided the rental unit address. She identified herself as the primary speaker on behalf of the landlord at this hearing.

The tenant stated that her friend would not participate in this hearing, she was there as a support person, to observe only. The tenant's friend did not testify at this hearing.

Rule 6.11 of the Residential Tenancy Branch ("RTB") *Rules of Procedure ("Rules")* does not permit recording of this hearing by any party. At the outset of this hearing, the landlord's two agents and the tenant all separately affirmed, under oath, that they would not record this hearing.

Landlord EG confirmed receipt of the tenant's application for dispute resolution hearing package and the tenant confirmed receipt of the landlord's evidence. In accordance with sections 88, 89 and 90 of the *Act*, I find that the landlord was duly served with the tenant's application and the tenant was duly served with the landlord's evidence.

I explained the hearing and settlement processes, and the potential outcomes and consequences, to both parties. I informed both parties that I could not act as their agent or advocate. Both parties had an opportunity to ask questions, which I answered. Both parties confirmed that they were ready to proceed with this hearing, they did not want to settle this application, and they wanted me to make a decision. Neither party made any adjournment or accommodation requests.

Preliminary Issue – Severing the Tenant's Monetary Application

The following RTB *Rules* are applicable and state:

> *2.3 Related issues*
> *Claims made in the application must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.*
>
> *6.2 What will be considered at a dispute resolution hearing*
> *The hearing is limited to matters claimed on the application unless the arbitrator allows a party to amend the application.*
>
> *The arbitrator may refuse to consider unrelated issues in accordance with Rule 2.3 [Related issues]. For example, if a party has applied to cancel a Notice to End Tenancy or is seeking an order of possession, the arbitrator may decline to hear other claims that have been included in the application and the arbitrator may dismiss such matters with or without leave to reapply.*

Rule 2.3 of the RTB *Rules* allows me to sever issues that are not related to the tenant's main urgent application. Rule 6.2 states that I can decline to hear unrelated claims in

the application and dismiss them with or without leave to reapply. I informed both parties about the above *Rules* during this hearing.

The tenant applied for three different claims in this application. I notified the tenant that her amendment to add a monetary claim to her application was received by the RTB on May 17, 2022, shortly before this hearing date of June 7, 2022, after her application was initially filed on February 24, 2022. I notified her that she was provided with a priority hearing date, due to the urgent nature of her claim for an order to comply. I informed her that this was the central and most important, urgent issue to be dealt with at this hearing. The tenant confirmed her understanding of same.

At the outset and end of this hearing, I notified the tenant that her monetary application for $6,572.00 was dismissed with leave to reapply. I informed her that this monetary claim was a non-urgent lower priority issue, and it could be severed at this hearing. This is in accordance with Rules 2.3 and 6.2 of the RTB Rules above. The tenant confirmed her understanding of same.

After 62 minutes in this hearing, there was insufficient time to deal with the tenant's monetary application, as I informed both parties that the maximum hearing time was 60 minutes. The tenant confirmed her understanding of same.

Issues to be Decided

Is the tenant entitled to an order requiring the landlord to comply with the *Act, Regulation* or tenancy agreement?

Is the tenant entitled to recover the filing fee paid for this application?

Background and Evidence

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

Both parties agreed to the following facts. This tenancy began on July 1, 2004. Both parties signed a written tenancy agreement. Monthly rent in the current amount of $1,564.00 is payable on the first day of each month. A security deposit of $481.00 was

paid by the tenant and the landlord continues to retain this deposit. The tenant continues to reside in the rental unit.

The tenant stated that she seeks an order requiring the landlord to comply with section 28(b) of the *Act* regarding quiet enjoyment.

The tenant asked landlord EG whether she was related to the previous landlord manager TG ("landlord TG"). Landlord EG stated that this was not relevant to the tenant's application and landlord TG was no longer working for the landlord.

The tenant testified regarding the following facts. On January 11, 2021, the tenant noticed a lot of smoke and told landlord TG about it the next day. She found him in the hallway, told him about the problem, he was dismissive, and he asked people that he thought might be smoking. It was not identified what the issue was at the time. She never heard back, and landlord TG did not follow up with her, so she thought it was due to covid. In the past, the landlord had excellent communication, showed great concern, and followed up when there were complaints from tenants. The tenant suffered with continuous "vape smoke" for hours and it would waver and surge again like a "wall." The smoke was impossible to escape in the rental unit and the only place it didn't reach was the front door of the tenant's rental unit. Even when the tenant opened the windows and laid on the floor, she could smell the smoke. She suffered from headaches, she was tired and not sleeping well, she was sick and not feeling well, and she told landlord TG that it was disrupting her life. She wrote a letter and left it in the office mail slot. In February 2021, the tenant provided text messages. The tenant tried to meet with landlord TG to find a solution because she was working from home, and she was trying to salvage her business because it suffered during covid. She was under a lot of pressure to make money. She walked around on other floors in the rental building to find the cause of the vape smoke. Landlord TG told the tenant that he thought he could solve it, so she thought there was a resolution. She realized that one of the other occupants on the 6th floor was using an air purifier which was wafting up the stairwells, so she asked for this to stop, but landlord TG said that he could not ask the occupant to stop using the air purifier. The tenant asked the occupant to turn off the air purifier as a test and it was "fantastic." The vape smoke was initially mixed with the air purifier, so it was intermingled.

The tenant stated the following facts. She sent letters and text messages and knocked on doors to find the source of the vape smoke. She thought that landlord TG would solve the issue and asked who he spoke to. She had a meeting with landlord TG and he asked her to get an air purifier but she did not think it would help enough and he was

asking her to spend her own money without looking into the problem. If the tenant had to buy her own air purifier, she would have to leave it on for 12 hours and this would cause higher electricity costs for her. Landlord TG was away in August, so the assistant manager took over but she did not know about the issue, so landlord TG was not concerned about it. In November 2021, the vape smoke would be from around 7:00 or 8:00 p.m. and late into the next morning. The tenant could see through the windows of other residents because the leaves had fallen. An apartment on the 9th floor always had its lights turned on during the vaping hours, so the tenant knocked on doors on the 9th floor. Landlord TG previously told her that there was no vaping above the 8th floor. When the tenant knocked on the door of the apartment on the 9th floor, the occupant told her that he smelled smoke and complained to the landlord, but nothing was done. The tenant found another occupant on the 10th floor who complained to the landlord, but nothing was done. The issue continues today, as recently as last night. It is less than what it used to be, but the tenant has no idea where it is coming from, and she thinks the person is going to work now. It is not a 12-hour "marathon" of vaping anymore, as it is about four hours now. Some nights it is back up to the same levels as before. The tenant has been woken up with coughing, which shows how strong the vaping is to wake her up from sleep. This is a non-smoking building, and it is an unreasonable amount of smoke. The landlord does not have a strategy. Landlord AM came into her apartment last month to investigate but not before that. He smelled the vape smoke and saw the lights on at night. The tenant wants an order that the landlord find the source of the vape smoke and make it stop. Landlord AM has taken good steps to investigate, he is learning more about tenants, he has prospects, and he is more thorough. The tenant is not an expert, but the landlord should use an HVAC specialist not an air quality specialist. The *Act* says that smoking should not unreasonably disturb tenants. The tenancy agreement says that the tenant is entitled to quiet enjoyment.

Landlord EG testified regarding the following facts. The landlord provided a one-page evidence package which states that vaping quickly dissipates in air. The tenant refers to vaping but unless it is within a couple feet of her, there are no odours for longer than a few seconds. The landlord does not understand how the smell can be so strong and pervasive. The landlord cannot knock on every occupant's door and tell them not to use vaporizers or incense in their apartments. The previous manager, landlord TG, was not as thorough. The relief manager did not want to get involved. Landlord AM is supportive without being "obnoxious." The landlord used to do suite inspections twice a year to eliminate small issues but since covid, has not been allowed to do so. The landlord has a no-smoking policy, so there is no vaping or smoking allowed on the rental property, including the balconies. Residents have to go to the edge of the rental property to smoke. It is frustrating to track down elusive vaping. The tenant signed her

tenancy agreement in July 2004 and there was no non-smoking clause in that agreement. Some residents have been "grandfathered in" and are allowed to smoke from prior to the new policy, but the landlord has done its best to control the smoking issue.

Landlord AM testified regarding the following facts. He has only been in this job for a couple of months. He is aware of the landlord's policy regarding smoking, vaping, and cannabis. The landlord has been rigorous in enforcing clauses in the agreement. He visited the tenant's rental unit twice in the evening, when she said that she smelled the vaping. During the first time, he went around the tenant's rental unit in detail, looking for ingress, and could not identify the vaping. The second time, the smell was slightly elevated and there was a "leathery, musty odour" like a bookshop. The odour later became fruity. Since then, he has attempted to localize the source of the vaping. He tried to identify the apartments with lights on and looked at the balconies. He went to the floors above and below the tenant's rental unit, to detect similar smell agents. He has been checking "randomly" in the last three to four weeks.

The tenant testified regarding the following facts in response to submissions from the landlord's two agents. Section 28(b) of the *Act* entitles the tenant to quiet enjoyment. The tenant is not an expert but the vape smoke does not dissipate within seconds or minutes, as it is a "constant wall of smoke," as per her letter. It is now lighter and less obvious. The two nights that landlord AM came to her rental unit, it was lighter on the first night, while the second night was stronger. There is no reference in the tenancy agreement regarding no smoking. It is only in the Act, that the tenant is entitled to live in a smoke-free environment.

Analysis

Burden of Proof

At the outset of this hearing and during this hearing, I repeatedly informed the tenant that as the applicant, she had the burden of proof, on a balance of probabilities, to prove her application. The *Act, Regulation*, RTB *Rules*, and Residential Tenancy Policy Guidelines require the tenant to provide evidence of her claims. I informed the tenant that if she was unable to prove her claims on a balance of probabilities at this hearing, her application may be dismissed. The tenant confirmed her understanding of same and stated that she wanted to proceed with this hearing.

During this hearing, the tenant confirmed that she received an application package from the RTB, and she provided copies of these documents to the landlord, as required. During this hearing, the tenant confirmed that she received a "Notice of Dispute Resolution Proceeding" ("NODRP") from the RTB, which she had in front of her during this hearing, and agreed she used it to call into this hearing, as it contains the phone number and access code to do so.

The NODRP states the following at the top of page 2, in part (emphasis in original):

> *The applicant is required to give the Residential Tenancy Branch proof that this notice and copies of all supporting documents were served to the respondent.*
>
> - *It is important to have evidence to support your position with regards to the claim(s) listed on this application. For more information see the Residential Tenancy Branch website on submitting evidence at www.gov.bc.ca/landlordtenant/submit.*
> - *Residential Tenancy Branch Rules of Procedure apply to the dispute resolution proceeding. View the Rules of Procedure at www.gov.bc.ca/landlordtenant/rules.*
> - *Parties (or agents) must participate in the hearing at the date and time assigned.*
> - *The hearing will continue even if one participant or a representative does not attend.*
> - *A final and binding decision will be sent to each party no later than 30 days after the hearing has concluded.*

I informed the tenant during this hearing that the NODRP contains provisions that a legal, binding decision will be made in 30 days and that evidence has to be submitted and presented by her, as the applicant party. The tenant confirmed her understanding of same. The NODRP also contains links to the RTB website and the *Rules*.

The tenant confirmed that she received a detailed application package from the RTB, including the NODRP, with information about the hearing process, notice to provide evidence to support her application, and links to the RTB website. It is up to the tenant to be aware of the *Act, Regulation*, RTB *Rules*, and Residential Tenancy Policy Guidelines. It is up to the tenant, as the applicant, to provide sufficient evidence of her claims, since she chose to file this application on her own accord.

The following Residential Tenancy Branch ("RTB") *Rules of Procedure* are applicable and state the following, in part:

7.4 Evidence must be presented
Evidence must be presented by the party who submitted it, or by the party's agent…
…
7.17 Presentation of evidence
Each party will be given an opportunity to present evidence related to the claim. The arbitrator has the authority to determine the relevance, necessity and appropriateness of evidence…

7.18 Order of presentation
The applicant will present their case and evidence first unless the arbitrator decides otherwise, or when the respondent bears the onus of proof…

I find that the tenant did not properly present her evidence, as required by Rule 7.4 of the RTB *Rules of Procedure*, despite having multiple opportunities to do so, during this hearing, as per Rules 7.17 and 7.18 of the RTB *Rules of Procedure.*

The tenant spoke for the majority of the hearing time, as compared to the landlord's two agents. Therefore, the tenant had ample time to present her claims, submissions, and evidence. The tenant filed this application on February 24, 2022, and this hearing occurred over three months later on June 7, 2022, so the tenant had ample time to prepare for this hearing.

The tenant submitted documents for this hearing, including emails, letters, written submissions, and the tenancy agreement. However, the tenant failed to go through these documents in any detail or to point me to specific provisions or pages, during this hearing. I repeatedly asked the tenant for references to pages and provisions in her evidence, but she was unable to provide them to me. The tenant was given ample and additional time of over 9 minutes during this hearing to look up the *Act* online and to go through her tenancy agreement to find specific provisions and page numbers. The tenant agreed that she did not have the *Act,* or her documents organized in front of her, and that she required additional time to research information during this hearing.

Legislation

Section 28 of the *Act* deals with the right to quiet enjoyment (my emphasis added):

28 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 Tenancy Policy Guideline 6 "Entitlement to Quiet Enjoyment" states the following, in part (my emphasis added):

> *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.*
>
> ***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.*
>
> *In determining whether a breach of quiet enjoyment has occurred, it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises.*

Findings

On a balance of probabilities and for the reasons stated below, I dismiss the tenant's application for an order requiring the landlord to comply with the *Act, Regulation* or tenancy agreement, without leave to reapply.

While the tenant is bothered by "vape smoke" at the rental building, these complaints are not necessarily subject to intervention by the landlord. Residing in a multi-unit building sometimes leads to disputes between tenants. A certain level of disturbance is

to be expected, given the location of the tenant's rental unit neighbouring other units. The occupants living around the tenant are entitled to quiet enjoyment of their units, including completing activities of daily living and using the units for different purposes. The tenant cannot decide how or when the occupants' units are to be used and for what purposes. The rights of both parties must be balanced.

When concerns are raised by one of the tenants, landlords must balance their responsibility to preserve one tenant's right to quiet enjoyment against the rights of other occupants, who are entitled to the same protections, including the right to quiet enjoyment, under the *Act*. Landlords often try to mediate such disputes if they can, but sometimes more formal action is required.

I find that the landlord described an appropriate process that was initiated to address the tenant's complaints regarding the vape smoke. I see insufficient evidence to demonstrate that the landlord failed to take appropriate action to follow up on the tenant's vape smoke complaints.

I accept landlord EG's undisputed affirmed testimony that landlord TG no longer works for the landlord. I accept both parties' testimony that landlord AM is a new resident manager and has attended at the tenant's rental unit twice, since he has been hired. I accept the affirmed testimony of the landlord's two agents, that landlord AM is trying to track down the source of the vape smoke, which can be difficulty in a multi-unit residential building, while balancing the landlord's responsibility to ensure the rights to quiet enjoyment and reasonable privacy of all occupants in the rental building. I accept landlord EG's undisputed, affirmed testimony that the landlord is making best efforts to locate the source of the smoke but has had difficulty completing inspections during the covid-19 pandemic, when they were not permitted by law. I accept landlord AM's undisputed affirmed testimony that he has checked the floors above and below the tenant's rental unit, he tried to identify the apartments with lights on and looked at the balconies, and he has been checking "randomly," to identify similar vaping smells to locate the source of the tenant's complaints.

I accept both parties' testimony that the parties' written tenancy agreement does not include any references to a non-smoking policy. I accept landlord EG's undisputed affirmed testimony that the rental building became non-smoking during this tenancy, after the tenant was already living there and had signed the tenancy agreement. I accept the undisputed affirmed testimony of landlord EG that some occupants have been "grandfathered" to smoke in the rental building because there was no previous non-smoking policy.

I find that the “vape smoke” referenced by the tenant is a temporary inconvenience and not an unreasonable disturbance, as noted in Residential Tenancy Policy Guideline 6, above. I find that the tenant failed to provide sufficient evidence of a loss of quiet enjoyment pursuant to section 28 of the *Act*. The tenant did not indicate specific dates when these smoke violations occurred. She simply stated that they began in January 2021, continued in February and November 2021, and they are still ongoing to date. The tenant testified that she did not know the source of the vape smoke and that it continued after she asked another occupant to turn off their air purifier. As noted above, the tenant did not review any of her documents submitted for this hearing, including letters, emails, and text messages, in any detail with specific page numbers, provisions, references, or content during this hearing.

As the tenant was unsuccessful in this application, regarding the order to comply, I find that she is not entitled to recover the $100.00 filing fee from the landlord. This claim is dismissed without leave to reapply.

Conclusion

The tenant’s application for a monetary order of $6,572.00 for compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement, is dismissed with leave to reapply.

The remainder of the tenant’s application 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: June 07, 2022

Residential Tenancy Branch