Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding METRO VANCOUVER HOUSING CORPORATION
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes:

MNDC, RR, OLC, LA

Introduction

This decision relates to a hearing and reconvened hearing of the tenant's application seeking a Monetary Order for damage or loss under the Actor tenancy agreement, a rent abatement based on loss of quiet enjoyment, an order allowing the tenant to change the locks and finally, an Order compelling the Landlord to comply with the Act or agreement.

The matter had initially been heard on January 14, 2013, but the tenant had lost telephone contact near the end of the hearing due to an apparent power outage. This re-hearing is being convened because the tenant was successful in her application seeking a review. The reconvened hearing is solely to hear and consider any additional testimony and evidence presented by the applicant tenant, that she had been unable to finish presenting at the original hearing when the tenant's contact abruptly ended.

Both parties were present at the hearing. At the start of the original hearing and the start of the re-convened hearing, I introduced myself and the participants. The hearing process was explained. The participants had an opportunity to submit documentary evidence prior to the date originally scheduled for the hearing, which was January 14, 2013. Each party has had and will have the opportunity to present all of their evidence, found to have been properly served and submitted in accordance with the Residential Tenancy Act and Residential Tenancy Rules of Procedure.

Preliminary Matter

The applicant tenant had made an application for dispute resolution on December 7, 2012 and a hearing date was scheduled for January 14, 2013. As the call had prematurely terminated on January 14, 2013, due to circumstances beyond the tenant's control, the applicant's request for Review consideration was granted and a re-hearing is being held today to allow the applicant to finish presenting her evidence and finish giving all of her testimony.

The tenant provided additional documentary evidence which was received subsequent to the scheduled hearing date of January 14, 2013.

Rule 3.1 of the Residential Tenancy Branch Rules of Procedure require that an applicant serve specific documents to the respondent, together with a copy of the Application for Dispute Resolution, including copies of all of the following:

- the notice of dispute resolution proceeding letter provided to the applicant by the Residential Tenancy Branch;
- the dispute resolution proceeding information package provided by the Residential Tenancy Branch;
- the details of any monetary claim being made, and
- any other evidence accepted by the Residential Tenancy Branch with the application

Rule 3.4 requires that, to the extent possible, the applicant must file copies of all available documents, or other evidence at the same time as the application is filed or if that is not possible, at least (5) days before the dispute resolution proceeding.

The "*Definitions*" portion of the Rules of Procedure states that when the number of days is qualified by the term **"*at least*"** then the first and last days must be excluded, and if served on a business, it must be served on the previous business day. Weekends or holidays are excluded in the calculation of days for evidence being served on the Residential Tenancy Branch.

I find that the applicant tenant did comply with this requirement by submitting evidentiary material prior to the January 14, 2013 hearing date.

I find that the additional evidence, which has been submitted after the original hearing date, was not submitted in compliance with the Act or Rules of Procedure because the tenant failed to serve this on the respondent, and submit it to the file, at least 5 days prior to the hearing date of January 14, 2013. Accordingly, the tenant's late evidence will not be accepted will be excluded from consideration.

However, the tenant is still permitted to provide additional verbal testimony and to present any existing evidence on file that was not previously discussed, provided that it is found to be properly served within the required time lines under the Act.

Issue(s) to be Decided

- Is the tenant entitled to compensation in the form of a retro-active rent abatement?

- Should the landlord be ordered to comply with the Act or agreement?
- Is the tenant entitled to an order permitting the tenant to change the locks?

Background and Evidence, Heard on January 14, 2013

The tenancy began December 1, 2010, and market rent is $970.00 per month. However, the tenant's rent is subsidized based on her income and the current rent is now set at $315.00. A security deposit of $485.00 is being held in trust.

Submitted into evidence were copies of communications, photographs, a written chronology of the tenant's observations with respect to cigarette and marijuana smoke and odours, informational material and other documents. The landlord confirmed receipt of the tenant's evidence. No evidentiary material was submitted by the landlord.

The tenant testified that she suspects that the landlord released copies of the master key to the units in the complex to a third party, thereby allowing access to her rental unit. The tenant testified that she has found evidence that somebody had entered her suite. The tenant is requesting an order that she be allowed to change her locks without providing a key to the landlord.

The landlord testified that no unaccounted-for master keys had been circulated to anyone. According to the landlord, a previous contractor had been given keys to the common areas only and these were returned. The landlord testified that nobody representing the landlord had ever entered the tenant's suite without notice and there were no other reports from any other tenants about similar occurrences. The landlord testified that they have no objection to the tenant installing a safety lock and would possibly consider allowing the tenant to install her own lock too, although they have some serious reservations based on safety concerns. The landlord pointed out that the lock may hamper them from responding quickly to an emergency in the suite. The landlord testified that their contractors, who service several buildings containing dozens of units, cannot be expected to carry individual keys that will only fit specific rental suites.

The tenant testified that, beginning at the start of the tenancy, she has been subjected to ongoing exposure to smoke and odours from other residents smoking in nearby suites. According to the tenant, she had asked for intervention by the landlord to seal her unit as a measure to eliminate the smoke filtering in from other units. The tenant alleged that the landlord delayed some of the work and also failed to properly address the problem.

The tenant is requesting an order that the landlord comply with the Act. The tenant is also requesting that she be granted a retroactive rent abatement of $3,335.20 in compensation for the effect on her tenancy.

The landlord disputed the tenant's allegation that they violated the Act and objected to the accusation that they had failed to properly address the tenant's complaints. The landlord stated that they had sealed everything the tenant requested and went "above and beyond" their basic responsibilities under the Act. The landlord testified that they offered the tenant an air purifier, which she declined, and the landlord had gone so far as to ask the resident below to voluntarily use an air purifier and to refrain from smoking on the outside balcony. The landlord testified that this other resident had been living in the complex for many years and her tenancy agreement did permit her to smoke in the unit and on her balcony.

The landlord pointed out that, while the building was moving towards being entirely a "*smoke-free environment*", the existing tenants had a "grandfathered" arrangement permitting them to smoke and this cannot be altered. The landlord's position is that they do not have the authority to ban all smoking and have no control over odours or smoke in that drift in the air.

Additional Evidence Provided by the Applicant on April 4, 2013

At the reconvened portion of the hearing, held on April 4, 2013, the tenant and landlord presented some evidence that had already been discussed during the first part of the hearing held on January 14, 2013. This additional testimony on topics covered, will not be repeated.

However, on April 4, 2013, during the reconvened portion of the hearing, the following additional testimony, which had not yet been heard, was provided by the tenant and responded to by the landlord. This is detailed below.

> The tenant elaborated on her original allegations that the landlord had not complied with the Act by failing to seal her unit as a measure to eliminate the smoke filtering in from other units. The tenant stated that the landlord should be forced to seal all the baseboard areas in the unit, where the floor connects to the wall and also seal the inside of her clothes closet, inside the hall closet, inside the kitchen cupboards and behind her dishwasher.
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> The tenant acknowledged that the landlord had taken previous steps to seal some areas in her unit, including placing foam inserts behind light switches and outlets, but the tenant feels that this is not enough and is convinced that the smoke is still filtering in from adjacent units through gaps. The tenant's complaint

is that her requests for a thorough sealing of all potential air gaps in the unit have been ignored.

The landlord testified that the baseboards abutting the lino floors are already sealed with silicone. However, according to the landlord, it is not practical to place sealant where the wall-to-wall carpets are butting the baseboard. The landlord testified that each unit in the complex is completely self-contained and there are no significant gaps joining the separate units.

The landlord testified that they have attempted to satisfy this tenant and have gone “above and beyond” their responsibilities under the Act. The landlord testified that 5 different agents of the landlord, including their maintenance supervisor/engineer have investigated the tenant’s complaints and none have found smoke infiltration from any adjoining units. According to the landlord, the tenant has made complaints about fumes or smells, but then refused to permit the landlord access when the landlord’s contractors arrive to look into the concerns.

The landlord agreed that they would consider doing some additional sealing in areas such as behind the dishwasher, but only if the tenant allows free access and removes the appliance. However, the landlord does not agree with most of the tenant’s other demands for additional sealant to be applied throughout the unit.

The tenant acknowledged that she did deny access to the landlord's staff, but explained that this was due to a negative experience she had when a staff member of the landlord kicked her sofa while doing some repairs in the unit. This individual, who attended the hearing, denied ever kicking the tenant’s sofa.

The tenant brought up the fact that she was never told, at the time she rented the unit, that a smoker lived in an adjacent suite. The tenant’s position is that the other resident’s freedom and right to smoke unfairly infringed on her rights under the Act to quiet enjoyment of her suite.

The landlord’s position is that they are not in violation of either the Act or the agreement. The landlord pointed out that remedies that can be taken by the landlord are limited. The landlord stated that the tenant was made fully aware that the complex was not fully smoke-free and rented the suite with this knowledge.

The landlord mentioned that the other resident living near the tenant, with whom the tenant has taken issue, has been made to feel bad about her smoking and

even agreed to use an air cleaner in her suite, that was supplied by the landlord. However, this action is not a successful solution, as far as the tenant is concerned.

The landlord pointed out that it appears the tenant has a particular sensitivity or medical aversion to smoke. In such cases, according to the landlord, it is not up to all of the other renters to alter their lifestyles to accommodate the tenant's sensitivities or health restrictions. The landlord stated that the tenant should try to find a residential complex that is completely smoke-free and place her name on a waiting list for one of these BC Housing subsidized units.

The tenant argued that she did prefer a smoke-free complex from the outset but felt forced to take this unit, as the waiting list for smoke-free complexes was too long at the time she needed willing to accept applications for the smoke-free complexes. The landlord challenged the veracity of this statement.

Another issue of concern to the tenant is that there is a ¼" gap around the entry door that the tenant feels is in violation of security standards, based on a conversation she apparently had with a police officer. Also, the tenant objects to the fact that the lock on the tenant's patio door to her balcony is not keyed the same as her entry, and therefore she does not have a key to properly lock it.

The landlord disagreed with the tenant's position that the gap around the entry door does not meet security standards and pointed out that they have had this matter looked into by police and building code experts and it is seen as normal clearance.

With respect to the keyed lock on the tenant's patio doors, the landlord stated that the door is fully lockable from the *inside* to prevent entry from the exterior balcony. The landlord's position is that the tenant should have no valid reason to lock herself out on her balcony from the outside.

Analysis

With respect to the tenant's monetary claim for a rental abatement and compensation for loss of quiet enjoyment, I find that section 7 of the Act states that, if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for any damage or loss that results. Section 67 of the Act grants a Dispute Resolution Officer authority to determine the amount and order payment under the circumstances.

It is important to note that in a claim for damage or loss under the Act, the party making the claim bears the burden of proof and the evidence furnished by the applicant must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent *in violation of the Act, agreement or an order,*
3. Verification of the amount to compensate for the loss or to rectify the damage, and
4. Proof that the claimant took reasonable steps to minimize the loss or damage.

In this instance, the burden of proof is on the tenant; to prove the existence of the damage/loss stemming directly from a contravention of the Act or agreement.

I find that section 32 of the Act imposes responsibilities on the landlord to provide and maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law, having regard to the age, character and location of the rental unit to make it suitable for occupation by a tenant.

I find that insufficient evidence was submitted by the tenant to adequately prove that the landlord failed to maintain the property in a state of repair that complies with the health, safety and legal housing standards.

In regard to the allegation that the act was violated with respect to ensuring the tenant's right to quiet enjoyment, I find that 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]*; and
>
> (d) use of common areas for reasonable and lawful purposes, free from significant interference.

I find that, under the Act and the agreement, *each* tenant is equally entitled to the above and is free to pursue any activity of their choice, within their own suite or common

areas. Of course this freedom is premised on the condition that none of these activities are in violation of the Act or agreement and that each resident must refrain from fringing on the rights of the other residents to their own quiet enjoyment.

In this instance, I find that there was insufficient evidence to verify that there was any violation of the *Act* or tenancy agreement perpetrated by the landlord. The smoking activity of neighbours in the complex in their own suite or on their balconies is not an activity prohibited under the Act or agreement.

Moreover, I find that the landlord had no part in causing the adverse environmental conditions that the tenant feels she is being forced to endure. I find that the landlord could not possibly have taken any tangible measures to control air-borne pollution, beyond what the landlord had done to date. The landlord would have no legal basis under the Act to sanction or evict the smokers. I also find that the landlord's actions in sealing portions of the tenant's suite went above and beyond their obligations under the Act.

Given that the tenant has not succeeded in proving that element 2 of the test for damages has been met, I find that the tenant's monetary claim is not sufficiently supported under the Act.

Based on the above, I find the following:

- The portion of the tenant's application relating to the locks has been tentatively resolved by the landlord's willingness to contemplate allowing a change of locks and this portion of the tenant's application is therefore dismissed.

- The portion of the tenant's application seeking monetary compensation relating to the smoke is dismissed, as the claim failed to meet all elements in the test for damages.

I find that the tenant's other requests that were introduced during the hearing, are all matters that relate to obtaining an order to force the landlord to comply with the Act or terms of the tenancy agreement.

The tenant is apparently seeking orders for the following:

- Additional sealing of the unit to be done by the landlord,
- Repairs by the landlord to physically reduce the gap around the entry door,
- Rekeying or providing a functional exterior lock from the balcony side of the patio doors, and

- Immediate action by the landlord to restrict other tenants from smoking in their units and in the tenant's vicinity.

Although the tenant's original application did not include a request for orders that the landlord be forced to comply with the Act or agreement, I find that section 62) of the Act grants an arbitrator the authority to make any finding of fact or law that is necessary or incidental to making a decision or an order under the Act. This section also permits an arbitrator to make any order 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 and an order that this Act applies.

Therefore, I have given consideration to the tenant's verbal testimony and requests that the landlord be ordered to comply with the Act or agreement, under section 62 of the Act, to address the matters above.

However, I find that the tenant has not sufficiently proven that the landlord is in violation of either the Act or the Agreement with respect to any of the above issues. Therefore, the tenant's requests for orders relating to the above must be dismissed.

Accordingly, based on the evidence before me, I hereby dismiss the tenant's application in its entirety without leave to reapply.

Conclusion

The tenant is not successful in this application and it is dismissed without leave.

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: April 04, 2013

Residential Tenancy Branch