



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

A matter regarding CAPREIT LIMITED PARTNERSHIP and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes OLC, FFT

Introduction

The Tenants (hereinafter the “Tenant”) filed an Application for Dispute Resolution (the “Application”) on November 1, 2022 seeking the Landlord’s compliance with the legislation and/or the tenancy agreement, and reimbursement of the Application filing fee.

The matter proceeded by way of a hearing pursuant to s. 74(2) of the *Residential Tenancy Act* (the “Act”) on March 13, 2023. I explained the process and the attending party had the opportunity to ask questions and present oral testimony during the hearing.

Preliminary Matter – hearing notification to Landlord

The Tenant attended the hearing, and I provided them the opportunity to present oral testimony and make submissions during the hearing. The Landlord did not attend the telephone conference call hearing.

To proceed with this hearing, I must be satisfied that the Tenant made reasonable attempts to serve the Landlord with the Notice of Dispute Resolution Proceeding (the “Notice”) for this hearing. This means the Tenant must provide proof that they served the Notice using a method allowed under s. 89 of the *Act*, and I must accept that evidence.

The Tenant set out that they served this Notice to the Landlord via registered mail on November 18, 2022. They tracked this package and knew that it arrived at its

destination, the Landlord's business address, on November 21. This included the prepared evidence documents they presented in this hearing.

Based on these submissions, I accept they served the Notice in a manner complying with s. 89(1)(c) of the *Act*. The hearing thus proceeded in the Landlord's evidence.

Issue(s) to be Decided

Is the Landlord obligated to comply with the *Act* and/or tenancy agreement, pursuant to s. 62 of the *Act*?

Is the Tenant entitled to reimbursement of the Application filing fee, pursuant to s. 72 of the *Act*?

Background and Evidence

The Tenant provided basic details about the tenancy on their Application: starting August 1, 2017, the Tenant pays \$1,271.33 per month. In the Tenant's description in the hearing, it is "just a standard agreement". The Tenant lives in a single rental unit within a large building that has many separate units, with neighbouring units on either side of them.

The Tenant presented that on issues or problems, they would contact the Landlord by calling them at the local management office. Approximately 2 years ago the Landlord set out an online portal whereby a tenant could submit a ticket for issues. Since that time, the Tenant created about 4 tickets on the individual issue affecting their life in the rental unit. If they call their Landlord, the Landlord asks for an email "to make it official."

The Tenant completed their Application for Dispute Resolution as follows:

Since September 2021, I've been having daily issues with drifting cigarette smoke coming into my unit. I e-mailed the landlord multiple times reporting neighbours smoking close to my window and they were not responsive. I also tried to call them and they told me they couldn't do anything but notify the neighbour, but that didn't work. Currently, the problem became unbearable – harming our quiet enjoyment. I called them back and they advised me to talk with my neighbor, which was not successful.

The Tenant sent records as evidence:

- Emails starting on September 8, 2021 to the Landlord, stating the “major issue” with their neighbour, “smoke inside of our house every day, multiple times a day”. The Landlord responded once on September 15 to ask if the Tenant notified their neighbour, and the Tenant sent another message on September 20 to ask the same of their Landlord.
- On November 12 the Tenant mailed again to state that the problem had returned. The neighbour even leaves a cigarette lit and unattended on the balcony, and the Tenant could smell it even in their living room and kitchen. On November 22 the Tenant mailed again to ask whether the Landlord had notified the neighbour, indicating the neighbour was smoking close to their own balcony. The Tenant made the same request on November 29.
- A fulsome email dated April 27, 2022 has the Tenant explain the whole situation once again. Their other neighbours are also smokers and that doesn’t present a problem to the Tenant. The situation makes it impossible for the Tenant to receive fresh air via the balcony, and the problem exacerbates the Tenant’s health issue.
- On June 29, 2022 the Tenant noted that this message was their 8th email, accompanied by a couple of calls to the Landlord. They describe the issue with their neighbour smoking again, “constantly throughout the entire day CLOSE TO OUR BALCONY”. They plead for their neighbour’s “common sense and some respect for their community”.
- A friend who regularly visits the Tenant provided a written statement, outlining the “very awful cigarette smell coming to [the Tenant’s] apartment.” On one visit this was “more than 10 times in the entire apartment”, on September 15, 2022.
- A friend noted “recurring cigarette smoke inside [the Tenant’s] apartment”, especially during the warmer months when windows are opened. This was “possible to smell all the way into the kitchen” and the only way to manage was to “close the balcony door, which was not an option due to the extremely hot summer.”
- Another friend described their visit of June 25, 2022, with the cigarette smell disturbing the Tenant’s meal with warmer weather and an open balcony door. They witnessed the Tenant ask the neighbour not to smoke close to the balcony; however that “neighbour didn’t seem to care or cooperate.” They noted a separate visit of September 11, 2022, with the smell requiring them to close the balcony door, with permeating their bedroom and kitchen.
- Another friend noted their direct observation of the neighbour smoking on the adjacent balcony, “just a few feet away from where I was.” During this friend’s

two-day visit, “that happened at least a dozen times.” Having to leave windows close during this time made the rental unit “incredibly hot.”

In the hearing, the Tenant described their communication with the Landlord on this issue. The Landlord could not find a way to “enforce” that the neighbour could not smoke next to the Tenant in their own rental unit. The Landlord stated to the Tenant that they couldn’t enforce any rule with the neighbour, and there is no property manager who resides in the building. The Landlord instructed the Tenant to speak to their neighbour. The Tenant tried this approach; however, that neighbour “was not responsive.”

In the hearing, the Tenant proffered that a solution of “no smoking” throughout the building would be ideal. Aside from that, to have the neighbour simply show respect and not smoke close to the Tenant’s own rental unit balcony would be acceptable.

Analysis

The *Act* s. 28 provides for a tenant’s quiet enjoyment in their rental unit; this includes, as per subsection (b) “freedom from unreasonable disturbance.”

The Residential Tenancy Branch’s *Residential Tenancy Policy Guidelines* are in place to outline the policy intent of the legislation. On the concept of quiet enjoyment, Policy Guideline 6 sets out the following:

A landlord is obligated to ensure that the tenant’s entitled 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.

The *Act* s. 32 sets a positive obligation on a landlord to maintain a rental unit property in line with certain standards:

A landlord must provide and maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law.

In line with the Residential Tenancy Branch’s role in ensuring a party’s compliance with the legislation and/or the tenancy agreement, the *Act* s. 62(3) states:

The director may make any order necessary to give effect to the rights, obligations and prohibitions under this Act, including an order that a landlord or tenant comply with this Act, the regulations or a tenancy agreement and an order that this Act applies.

I find that in this current tenancy the Landlord is breaching each section of the *Act* listed above. This means the Landlord is also breaching any terms set out in the tenancy agreement that mirror those of the *Act*. This situation must immediately end: the Landlord must take reasonable steps to correct the situation.

The Tenant's neighbour is causing what I find are grounds for the Landlord to end a tenancy. As per s. 47(1)(d) of the *Act*, I find it more likely than not, based on the Tenant's presentation in this hearing, that the neighbour's actions constitute significant interference or unreasonable disturbance of another occupant (*i.e.*, the Tenant) at the residential property. There is nothing left for the Tenant to do in this situation except to notify their Landlord, which is already complete and well-documented in this situation.

I find the Landlord has been in breach in both not effectively addressing the Tenant's concern, and not adequately responding to the Tenant's complaints. The situation is unreasonable in these circumstances, particularly where the Tenant feels they cannot open their windows or their balcony door in the warmer months. That causes significant discomfort and ill effects, aside from the disturbance of smoke odour and/or second-hand smoke entering the rental unit. This is a further breach of s. 32: the provision of residential property that complies with health, safety, and housing standards.

By the authority granted by s. 62(3) of the *Act*, I order the Landlord to take reasonable steps to correct the situation, :

- The Landlord must communicate to the Tenant's neighbour that the issue of cigarettes and smoking is causing unreasonable disturbance and significant interference to another occupant of the residential property.
- The Landlord must also communicate their plan of action to the Tenant by email.
- This communication must be in place as soon as possible and in any event by April 22, 2023.
- The Landlord must report this communication to the Tenant, providing them a copy of the communication they delivered in writing to the Tenant's neighbour, as a simple measure of the Tenant's certainty in this matter.

- Should the situation continue for the Tenant, the Landlord must take the next effective step, seeking to end the tenancy with the neighbour should the issue continue. I note the *Act* does not require the Landlord to serve three warnings about issues of cause to a resident or other tenant before serving a one-month notice to end tenancy for cause.
- Should the Landlord not take these steps by April 22, 2023, the Tenant may apply to the Residential Tenancy Branch for a reduction in their rent, as a measure of compensation for the breach of their right to quiet enjoyment in the rental unit. The Tenant may choose to apply for retroactive rent reduction, in addition to a reduced rent going forward until the Landlord completely and effectively addresses the issue with the disturbance and interference to the Tenant here.

Based on the Tenant's convincing and detailed testimony, as well as the record of their communication with the Landlord, I find the Tenant proved, on a balance of probabilities, that their neighbour's smoking is an unreasonable disturbance and significant interference to them. I find the Landlord is breaching s. 28 of the *Act* by not sufficiently addressing the Tenant's complaints related to smoke pollution. I find the Landlord is breaching s. 32(1) of the *Act* by not providing and maintaining the rental unit in a health state.

Because the Tenant was successful in this Application, I find they are entitled to recover the \$100 filing fee they paid for this Application. I authorize the Tenant to withhold the amount of \$100 from one future rent payment.

Conclusion

I order the Landlord to stop breaching s. 28(b) and 32(1) of the *Act* by protecting the Tenant from unreasonable disturbance and significant interference with their quiet enjoyment in the rental unit. The Landlord must rectify the situation by addressing the issue with the Tenant's neighbour forthwith, and report on the situation to the Tenant on a regular basis. The Landlord must address the situation and provide communication to the Tenant by April 22, 2023.

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: April 10, 2023