

Order under Section 31
Residential Tenancies Act, 2006

File Number: SWT-33315-12/SWT-32243-12

In SWT-33315-12, SBE (the 'Tenant') applied for an order determining that SR (the 'Landlord') substantially interfered with the reasonable enjoyment of the rental unit or residential complex by the Tenant or by a member of her household.

In SWT-32243-12, the Tenant also applied for an order determining that the Landlord had failed to provide or maintain the rental unit or residential complex in a good state of repair, fit for habitation and in compliance with health, safety and housing maintenance standards.

These applications were heard in London on May 1, 2012. The Tenant and the Landlord's agent, KS, attended the hearing.

Determinations:

1. I do not find that the Landlord failed to maintain the rental unit in a good state of repair, fit for habitation and in compliance with health, safety and housing maintenance standards.
2. Nor do I find that the Landlord, the Landlord's agent or superintendent substantially interfered with the Tenant's reasonable use and enjoyment of the rental unit or residential complex for all usual purposes under the Act.
3. The standard of proof in proceedings before this Board is "proof on a balance of probabilities." By that standard, the party bearing the burden of proof must show with evidence that, "more likely than not", their assertions are true. Where, the evidence of the opposing party is as believable as that of the party bearing the burden of proof, that burden cannot be said to have been discharged.
4. While there was a roof leak in or about January or February 2011 which caused water damage to stairway carpeting immediately below the site of the leak, I was not satisfied that the Landlord's decision to remove that affected carpeting and paint the flooring beneath it amounted to a breach of maintenance obligation contrary to section 20 of the Act. While the stairway was no longer carpeted and, therefore, not in the state it was in at the commencement of the tenancy, this did not amount to a state of disrepair contrary to the Act. The stairway remained completely functional and, based on the evidence of the Landlord (which was as believable as the Tenant's), was not at all unsightly. Nor was there any proof on a balance of probabilities that the condition of the stairway was in breach of any specific housing maintenance standard.
5. Nor did I find that the Tenant's evidence had discharged the burden of proof that, more likely than not, the handrail in the stairwell from the second to the third floor was not in a good state of repair or contravened any specific housing maintenance standard. While admitting that the railing may have been somewhat loose, the Landlord's evidence that the railing was securely fastened to the wall and successfully held his full weight of 285

pounds – also that bylaw inspector had viewed the railing and determined that it was by-law compliant – was as credible and cogent as the Tenant’s evidence to the contrary.

6. The last and most pressing issue in these proceedings from the Tenant’s standpoint – the alleged infiltration of second-hand smoke into the rental unit through the ventilation system and plumbing – was also the thorniest from legal and public policy perspectives.
7. It was an agreed fact in evidence that this building was at no time held out to the Tenant as a “smoke free” property.
8. In recent years, the Government of Ontario has enacted the *Smoke-free Ontario Act* (which prohibits tobacco use in the common elements of residential complexes, including enclosed exterior common elements), together with legislation prohibiting tobacco use in motor vehicles where children are among the passengers. These developments, in conjunction with stiffer federal regulation of tobacco product packaging and advertising, may signal an evolution in public policy toward greater legal recognition of the health effects of first-hand, as well as second-hand, tobacco smoke.
9. That being said, parties who come before this tribunal are entitled to trust that its Members will apply the law as it is. At present, there is no statute, regulation or by-law prohibiting tobacco consumption within a tenant’s rental unit. Accordingly, the fact that other tenants in this complex are smoking in their rental units does not amount to unlawful or illegitimate activity on their part that triggers any obligation by the Landlord to investigate or remedy. Regardless of that fact, the Landlord’s agent, KS took more than reasonable measures to investigate the Tenant’s complaints, speaking with other tenants of the complex to ascertain who among them smoked and at what frequency. The Landlord also inspected the building’s ventilation system and plumbing and found that, due to the vent system’s construction, it would be very difficult for odours from one unit to enter another, let alone for cigarette smoke to enter this Tenant’s unit for the nearest unit containing a regular smoker at the opposite end of the complex. On inspection, the plumbing in and around this rental unit was found to have been properly sealed. Even lacking any obligation to do so, the Landlord investigated the Tenant’s concerns and determined there was nothing that could be done.
10. Part of the Tenant’s evidence was a towel, purportedly saturated with the odour of tobacco smoke, tendered as proof of the extent of the smell throughout the unit but especially concentrated in the bathroom. I smelled the towel which the Tenant presented inside a re-sealable plastic bag and could detect no palpable odour of tobacco smoke or any other scent except the smell of the plastic bag. While I at no point believed that the Tenant – any more than the Landlord’s agent – was telling anything more than the whole truth as she knew it, the inconsistency in this part of the Tenant’s evidence did not aid in discharging her burden of proof.
11. The Tenant testified to an inspection by the Middlesex-London Health Unit, following which the inspector, LB, reportedly spoke to the Landlord, explaining that in his view the unit smelled heavily of tobacco smoke and that this may be entering through the

bathroom sink. But, there was no report filed in evidence (if one was produced) nor was Mr. B ever summonsed to appear and give oral testimony at this hearing. This was not this matter's first appearance before the Board. It was previously adjourned. While the Board's rules of practice – and, occasionally certain rules of evidence – are applied broadly to secure just results where parties are seldom represented by counsel and often lack training or experience in the legal system, the seriousness of legal proceedings cannot be minimized and the responsibility of parties to marshal all of the available evidence for their scheduled hearing date – especially where an adjournment has already been granted for a procedural defect – is no less serious. For that reason and because Mr. Bailey's evidence could not have changed the underlying fact that smoking inside a rental unit in a building that has never been specifically held out as "smoke free", an adjournment was not granted for the purposes of summonsing that witness.

12. While acknowledging the concerns of the Tenant – whom I believe is sincerely affected by the smell of cigarette smoke making its way into her rental unit – the evidence before me did not support the finding that, by act or omission to act, the Landlord had substantially interfered with her reasonable use and enjoyment of these premises.
13. Even had I found a breach of the Act in this case, the Tenant sought no specific remedy within the authority of the Board to order which, on a balance of probabilities, could have resolved this issue.

It is ordered that:

1. The Tenant's application is dismissed.

May 2, 2012
Date Issued

Brad Wallace
Member, Landlord and Tenant Board

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If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.