

Order under Section 31
Residential Tenancies Act, 2006

File Number: TST-25266-12

N.P. and A.P. (the 'Tenants') applied for:

- (a) an order determining that the 'Landlord' or the Landlord's superintendent or the Landlord's agent substantially interfered with the reasonable enjoyment of the rental unit or residential complex by the Tenants or by a member of their household; and
- (b) an order determining that the Landlord failed to meet the Landlord's maintenance obligations under the *Residential Tenancies Act, 2006* (the 'Act') or failed to comply with health, safety, housing or maintenance standards.

This application was heard in Toronto on May 31, 2012.

The Tenant A.P. and the Landlord attended the hearing. The Landlord's witnesses J.P. and E.B. also attended and were excluded from the hearing prior to giving their evidence.

The following are my reasons and no other reasons will issue.

Determinations:

Form T-6 Application for Maintenance

1. The Tenants' T-6 maintenance application was brought on two grounds. The Tenants' first issue was that there had been water penetration from the roof of the residential complex through the ceiling of one of the bedrooms in the rental unit early in the tenancy. The Tenants did not lead any evidence with respect to this claim. Accordingly the Tenants' T-6 maintenance application fails with respect to this issue.
2. The Tenants' second maintenance issue related to the absence of insulation between the rental units which, the Tenant submitted, resulted in the infiltration of cigarette smoke from an adjacent rental unit. The Tenants did not produce any independent evidence in support of this claim nor did they make any specific claim for damages. The Tenants' case with respect to the Landlord's alleged breach of its obligations under section 20 of the Act with respect to insulation between the rental units did not rise above the level of a bald allegation. Accordingly the Tenants' T-6 maintenance application also fails with respect to this second issue.
3. Therefore, I find that the Landlord did not fail to meet the Landlord's obligations under subsection 20(1) of the Act to repair or maintain the rental unit and did not fail to comply with health, safety, housing or maintenance standards.

Form T-2 Tenants' Rights Application

4. The Tenants' essential Tenants' Rights complaint was that the basement tenant, E.B., was a smoker and that cigarette smoke from his basement unit infiltrated into the Tenants' rental unit on a continuing basis from the onset of the tenancy until May 1st, 2012, the date the Tenants moved out of the rental unit.
5. The uncontradicted evidence of the Tenant A.P. was that he communicated to the Landlord his need for non-smoking premises at the time he entered into the tenancy.
6. The evidence of the Landlord was that whereas the Tenants' lease provided that there was to be no smoking in the rental unit, the tenancy agreement with E.B., the downstairs tenant, did not contain such a term.
7. That seems to me to be irrelevant insofar as the Tenants communicated their needs to the Landlord at the time they entered into the lease and insofar as the Landlord never took the position at any time during the tenancy that the Tenants had no right to complain about the infiltration of smoke. By that conduct and by its conduct hereinafter described the Landlord must be deemed to have confirmed the Tenant's right to a living environment which was smoke-free.
8. I am satisfied on the basis of the available evidence that the Tenants promptly complained about the conditions to the Landlord after taking possession of the rental unit. I am also satisfied on the basis of the testimony of the parties and on the basis of various emails filed in evidence that the Tenants consistently complained of the infiltration of cigarette smoke into the rental unit throughout their tenancy.
9. The evidence of the Landlord and of the witness E.B. was that the Landlord communicated with E.B. and that thereafter E.B. smoked outside the residential complex.
10. The witness J.P., a friend and neighbour of E.B., testified that he could see E.B. smoking outdoors from time to time from his own apartment window.
11. The Tenant A.P. credibly testified that the problem continued.
12. The Landlord's case fails on credibility. The Board is satisfied on the basis of the testimony of E.B. and J.P. that the witness E.B. sometimes or even often smoked outdoors after the Landlord asked him to do so. The Board is not satisfied, however, that E.B. was truthful in his testimony that he never smoked indoors after the Landlord raised the issue with him. I am not persuaded that a committed smoker such as E.B. resisted smoking in his unit in the early morning before work or in the final hours before bedtime in mid-winter or early spring or that he invariably did so on weekends. The clipped and careful manner in which E.B. gave his denials about smoking in his apartment was, for instance, at some variance with his more expansive testimony in other areas. His testimony did not, in the last analysis "hang together."
13. The Landlord chose not to serve any formal notice or bring any application before this Board with respect to the conduct of E.B. at any time during the subject tenancy in response to the complaints of the Tenants. By failing to respond conclusively to the admitted and consistent complaints of the Tenants about the effect of cigarette smoke

upon the Tenants and their children, the Landlord substantially interfered with the reasonable enjoyment of the rental unit or residential complex by the Tenants or by a member of their household.

14. The Tenants did not prove any facts at the hearing that would assist the Board in assessing or awarding an abatement of rent.
15. The Board finds that the Tenants were justified in moving out of the rental unit effective May 1st, 2012 and that their notice to the Landlord was reasonable in the circumstances.

It is ordered that:

1. The tenancy between the Landlord and the Tenants was terminated as of May 1, 2012.
2. The remainder of the Tenants' claims are dismissed.
3. The Landlord shall pay to the Tenants \$45.00 for the cost of filing the application.
4. The Landlord shall pay the Tenants the full amount owing by July 17, 2012.
5. If the Landlord does not pay the Tenants the full amount owing by July 17, 2012, the Tenant will owe interest. This will be simple interest calculated from July 18, 2012 at 3.00% annually on the balance outstanding.

July 6, 2012
Date Issued

James Robinson
Member, Landlord and Tenant Board

Toronto South-RO
79 St. Clair Avenue East, Suite 212, 2nd Floor
Toronto ON M4T1M6

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