

Order under Section 68
Residential Tenancies Act, 2006

File Number: TEL-34032-13

In the matter of: [Address name removed]

Between: [Landlords' names removed]

Landlords

and

[Tenants' names removed]

Tenants

2013 CanLII 51059 (ON LTB)

(‘SF’) and (‘HD’) (the ‘Landlords’) applied for an order to terminate the tenancy and evict (‘MG’) and (‘LW’) (the ‘Tenants’) because they, another occupant of the rental unit or someone they permitted in the residential complex have substantially interfered with the reasonable enjoyment or lawful right, privilege or interest of the Landlords or another tenant.

This application was heard in Toronto on March 18, 2013.

The Landlord SF and the Tenants attended the hearing.

(‘SW’) and (‘KY’) testified on behalf of the Tenants

Determinations:

1. The Tenants acknowledged that they used to regularly smoke inside the rental unit despite indicating on their rental application that they do not smoke and signing a lease on December 22, 2009 which prohibits smoking in the rental unit.
2. For the first several years of their tenancy, there were no complaints about smoke from the residents of the other two units in the residential complex. New tenants moved into the second floor unit in May 2012. Starting in the fall of 2012, the Landlord has received multiple complaints from the second floor tenants about smoke and excessive noise and music coming from the rental unit. This conduct has substantially interfered with their reasonable enjoyment of the residential complex.
3. The Tenants were given a first Notice of Termination under section 64 of the *Residential Tenancies Act, 2006* (‘Act’). This notice was void because the Tenants corrected the problem within the time period set out in the notice. Serving a second Notice of Termination was permissible pursuant to Section 67 of the Act. The Tenants smoked inside their rental unit on one occasion after they were served with the second notice of termination.

4. The Landlord has not provided sufficient evidence to establish, on the balance of probabilities, that the Tenants have disturbed other tenants in the residential complex by making excessive noise late a night.
5. The Tenant has Multiple Sclerosis and it may be difficult for her to find another place to live that will accommodate her physical challenges.
6. I have considered all of the disclosed circumstances in accordance with subsection 83(2) of the *Residential Tenancies Act, 2006* (the 'Act'), and find that it would not be unfair to grant relief from eviction subject to the condition(s) set out in this order pursuant to subsection 83(1)(a) and 204(1) of the Act.

It is ordered that:

1. As per the terms of their written tenancy agreement, the Tenants may not smoke cigarettes or any other items inside the rental unit or the residential complex at any time. All smoking must take place outside, and the Tenants must exercise care so as to prevent smoke from entering the residential complex.
2. If the Tenants breach the conditions contained in paragraph one above, the Landlord may apply under section 78 of the *Residential Tenancies Act*, within 30 days of the breach, without notice to the Tenants, for an order terminating the tenancy and evicting the Tenants.
3. The Tenants shall pay to the Landlords \$170.00 for the cost of filing the application.
4. If the Tenants do not pay the Landlords the full amount owing on or before April 2, 2013, they will start to owe interest. This will be simple interest calculated from April 3, 2013 at 3.00% annually on the balance outstanding.

March 22, 2013
Date Issued

Eli Fellman
Vice Chair, Landlord and Tenant Board

Toronto East-RO
2275 Midland Avenue, Unit 2
Toronto ON M1P3E7

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

REASONS

In the matter of: [Address name removed]

Between: [Landlords' names removed]

Landlords

and

[Tenants' names removed]

Tenants

Reasons to Order TEL-34032-13 issued on March 22, 2013 by Eli Fellman.

1. The Tenants testified that before they were served with the first notice of termination by the Landlords they used to regularly smoke inside the rental unit, but they now smoke outside on their patio. LW testified that since they were served with the notice of termination she had only smoked inside the rental unit on occasion in January 2013 when she was in pain and unable to go outside to smoke. LW apologized to the second floor tenants in writing on this occasion.
2. SW, a tenant living in the basement unit in the residential complex, testified that the Tenants do not smoke inside the house and she does not hear excessive noise coming from the rental unit. SW noted that the residential complex is a single family house that has been divided into three units and it is normal to hear the sounds of everyday life coming from the other units. KY, who lives in a house that directly adjoins the residential complex, testified that she sees the Tenants smoke outside and does not hear excessive noise coming from the rental unit.
3. The Landlords do not live in the residential complex and have not personally seen any smoking inside the rental unit or heard any excessive noise since the notices of termination were served upon the Tenants. With the exception of the single incident in January 2013, the sole evidence before the Board that such conduct has occurred after the notices of termination were served are the email complaints from the tenants living on the second floor. The second floor tenants did not come to the Board to offer testimony. These emails are admissible as evidence before the Board despite the fact that they are hearsay. However, it is a well established legal principle that hearsay evidence is considered less reliable than oral testimony from a witness who appears before the Board and is subject to cross-examination by the other side. Therefore, the oral testimony from the Tenants and the Tenants' two witnesses that the Tenants no longer smoke inside the rental unit (with the exception of one occasion in January 2013) and do not make excessive noise is more compelling and reliable than the Landlord's entirely hearsay evidence that the Tenants continue to smoke inside the rental unit and regularly make excessive noise.

4. Pursuant to subsection 83(2) of the *Residential Tenancies Act, 2006* (the 'Act'), the Board may refuse to terminate the tenancy unless satisfied, having regard to all of the circumstances, that it would be unfair to refuse. As the evidence available to the Board establishes that the Tenants have smoked inside the rental unit on just one occasion since being served with the notices of termination and do not make excessive noise, denying termination of the tenancy in these circumstances would not be unfair. Also relevant to this consideration is LW's health condition as described above. However, the Tenants must continue to respect both the terms of their tenancy agreement and the health and well-being of the other tenants of the residential complex by refraining from smoking inside the rental unit. Failure to respect this obligation can result in the issuance of a Board order terminating the tenancy without another hearing being held.

March 22, 2013

Date Issued

Eli Fellman

Vice Chair, Landlord and Tenant Board

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