

Order under Section 31
Residential Tenancies Act, 2006

File Number: TST-14498-11

RM("RM")and IB ("IB")(the 'Tenants') applied for an order determining that SKPM (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.

This application was heard in Toronto on May 12, 2011.

The Tenants and the Landlord attended the hearing. The Landlord was represented by L. C.

Both Tenants testified.

ML ("MS"), a member of the Landlord's cleaning crew, and MX ("MX"), the Landlord's property manager, testified on behalf of the Landlord.

This order contains all my reasons. No further reasons shall follow.

Preliminary Issue:

1. The application was amended to delete the Tenants' request for last month rent deposit and that the Landlord stop the activity. The Tenants' situation had been resolved at the end of March 2011, and the Tenants no longer wished to move.

Determinations:

1. The Tenants submitted that their reasonable enjoyment of the premises was seriously interfered with because the Landlord failed to take measures to address their concerns about second hand smoke infiltrating their rental unit from the common stairwell.
2. The Tenants' rental unit is a corner unit located on the seventeenth floor of the residential complex. There is a common stairwell across from the Tenants' unit.

The Tenants' evidence:

3. The Tenant's evidence was that upon moving into the rental unit they were assured by the Landlord that the environment was smoke free. Smoke free environment is especially important to the Tenants because one the Tenant, IB, suffers from lupus. This condition may be severely exacerbated by cigarette smoke.
4. The Tenants testified that some time after they moved into the rental unit, smoke from the common stairwell entered their rental unit approximately 4 to 6 times a day. The Tenants complained to the Landlord in writing on January 5, 2011 and then several times

thereafter in person to the staff in the administrative office and to security personnel. The Tenants requested that no smoking signs be posted in the common areas.

5. The Tenants also kept a log recording the dates and times the smoke entered their rental unit. This log covers the time period between January 15, 2011 and March 23, 2011. The Tenants filed their application on March 22, 2011.
6. Sometime in March 2011, the Tenants called the Landlord's VP of Operations and were offered a different rental unit, where they would not be affected by the smoke. The Tenants refused, as their unit is a corner unit and they wished to retain it.
7. The Tenants also filed a complaint with the Toronto Public Health Department and the Tobacco Board on or about February 14, 2010 and then again on or about March 9, 2011. It was the Tenants' position, that these agencies, in turn, contacted the Landlord and non-smoking signs were subsequently put up in the common areas of the residential complex.
8. The Tenants testified that RM works from home, and as such, he was affected by the smoke 50% of the time. The Tenant IB suffers from lupus and her condition was affected by the smoke to such a degree that she had to stay home sick on at least two occasions.

The Landlord's Evidence:

9. The property manager, whose office is located in the residential complex, testified that she was not advised by the Tenants of the problem, nor was she informed by anyone else of it. Had she been so informed, she would have investigated the problem. The property manager testified that she only became aware of the complaint after the Tenants filed the within application. When the property manager became aware of the application she had originally thought that it concerned a heating issue, because the Tenants have complained to her about heating before. That issue however had been resolved. She had not received, or seen, the Tenants' letter dated January 5, 2011, nor was it in the Tenants' file.
10. The Landlord's position was that it was not aware of the Tenants' complaints. Moreover, the Landlord periodically posts non-smoking notices on all the floors, however, some tenants tear these signs off.
11. On or about March 15, 2011 the Landlord delivered notices to all the tenants residing in the residential complex advising them that smoking was not permitted in the common areas. The Landlord also posted these notices in the common areas. Shortly thereafter non smoking decals were posted in the hallways of all floors of the residential complex.
12. The postage of the signs seemed to have solved the Tenant's complaint.

Findings:

13. The issue is whether and when did the Tenants inform the Landlord of the smoke problem. Based on the evidence presented, I am satisfied that the Tenants informed the

Landlord on January 5, 2011. I base my finding on the Tenants' testimony. The Tenants' evidence was that they gave the complaint letter to the administrator, who was not present at the hearing to provide evidence. The Landlord's witnesses did not have first hand knowledge of the situation. The Tenants were the only ones with first hand knowledge of the situation. As such, I find the best evidence to be the evidence of the Tenants.

14. In the result, I find that the fact that the Landlord failed to take timely steps to address the Tenants' concerns with respect to the second hand smoke entering their rental unit, after it had been informed of the problem by the Tenants, seriously interfered with the Tenants' reasonable enjoyment of the rental unit. Accordingly, the Tenants will be entitled to a rent abatement.

Remedy:

15. The Tenants requested a rent abatement of 50% for three months, the duration of the interference.
16. Abatement of rent is a contractual remedy. It is based on the idea that if one pays 100% of the rent one should receive 100% of the goods and services one is paying for. If one is not, then one should be granted an abatement that is equal to the difference in value between what one is paying for and what one is receiving.
17. The Tenants testified that the rental unit was affected by the second hand smoke 50% of the time. However, after considering the log presented by the Tenants, the fact that one of the Tenants worked outside of the home, and in light of the fact that the Tenants presented no evidence of attempting to mitigate the situation, for example by purchasing an air purifier, I find that a lump sum abatement of rent in the amount of \$500.00 is appropriate. This amount reflects a rent abatement of approximately 14% for the affected period (January 05, 2011 to March 23, 2011).
18. The Tenants also requested that the Landlord pay an administrative fine to the Board. I am not satisfied that the circumstances warrant the imposition of an administrative fine. It seems to me, that the Landlord's failure to address the Tenants concerns was caused more by a breakdown of communication between the parties rather than by the Landlord's deliberate action or inaction.

It is ordered that:

1. The Landlord shall pay to the Tenants \$500.00 which represents an abatement of rent.
2. The Landlord shall pay the Tenants the full amount owing by August 2, 2011.
3. If the Landlord does not pay the Tenants the full amount owing by August 2, 2011, the Tenant will owe interest. This will be simple interest calculated from August 3, 2011 at 3.00% annually on the balance outstanding.

4. If the Landlord does not pay the Tenants the full amount owing by August 2, 2011, the Tenants may recover this amount by deducting \$500.00 from the rent for September 2011.
5. The Tenants have the right, at any time, to collect the full amount owing or any balance outstanding under this order.

July 22, 2011
Date Issued

Jana Rozehnal
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.