Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OLC, RR

Introduction

This hearing was conducted by way of conference call in response to two applications filed by two separate sets of tenants naming the landlord as the Respondent. The first set of tenants have filed their application for an Order for the landlord to comply with the *Residential Tenancy Act (Act*), regulations or tenancy agreement and to be allowed to reduce their rent for repairs, services or facilities agreed upon but not provided. The second set of tenants have also applied for an Order for the landlord to comply with the *Act,* regulations or tenancy agreement and to be allowed to reduce their rent for repairs, services or facilities agreed upon but not provided. These tenants had also applied for a Monetary Order for money owed or compensation for damage or loss; however, they withdrew this request at the outset of the hearing.

Service of the hearing document for both tenants was done in accordance with section 89 of the *Act*, and were sent by registered mail to the landlord on August 18, 2011. The landlord was deemed to be served the hearing documents the fifth day after they were mailed as per section 90(a) of the *Act*.

All three of the Parties appeared, gave sworn testimony, were provided the opportunity to present their evidence orally, in written form, documentary form, to cross-examine the other party, and make submissions to me. On the basis of the solemnly sworn evidence presented at the hearing I have determined:

Issue(s) to be Decided

- Are the tenants entitled to an Order for the landlord to comply with the *Act*, Regulations and tenancy agreements?

- Are the tenants entitled to reduce their rent for services or facilities agreed upon but not provided?

Background and Evidence

The tenants for file number 778820 moved into the rental unit on November 15, 2009. There rent for this unit is $1,235.00 per month due on the first of each month. The tenants for file number 778821 moved into their rental unit on May 01, 2001. Their rent is $1,345.00 due on the first of each month.

The tenants collectively feel that the landlord is attempting to breach a material term of their tenancy agreements by removing their right to plant a fruit and vegetable garden. The tenants testify that the landlord wants to pull all their planting out and cover the garden in grass. The tenants testify they have always had the use of the garden to plant fruit and vegetables as it is a common area for the tenants living in the property. The tenant NI states she has lived at the property for over 10 years and was told she could use the garden to plant and store personal items. She states both sets of tenants are gardeners and enjoy tending the garden. The tenant JP testifies they agreed to rent this unit in the property because they could have access to the garden to grow produce for their own consumption.

The tenants also testify they have always had the use of bike storage space. And have used the bike storage area on the north west corner of the house. The tenants state they are all bike commuters and need easy access to their bikes. The tenants state the landlord has now told them they can no longer park their bikes in this area and must use an alternative area which does not have the same ease of access.

The tenant NI testifies that about five years ago she purchased a freezer which she was told by the landlords' agent she could store in the laundry room. The tenant states as this is a common area she talked to the other tenants living there and agreed the freezer could be

shared between them. The tenant testifies that on November 16, 2009 she got a letter from the landlord asking her to move any personal items except the freezer. Now the landlord has told her she must remove the freezer and at present it is stored with a neighbour.

The tenants state they were shocked to get a letter from the landlord stating they want the planted garden removed and to store their bikes in a dirty, unlit, crawl space. The tenant's state as these items have been collectively enjoyed by the tenants the landlord is not entitled to now remove these facilities. The tenant JP states the landlord has also told them they must remove their tomato plants from their deck and their greenhouse from their parking bay. NI states the planted garden has enhanced the garden space for all tenants and is very well maintained.

The tenants testify that they have tried to meet with the landlord to discuss these unreasonable requests but she has refused to meet with them and told them to file an application for Dispute Resolution.

The tenant JP testifies they have an addendum to their tenancy agreement which has been written for another of the landlords' properties and many aspects of it do not apply to this building. For example it refers to balconies whereas they have a deck and states no Bar-B-Que whereas they are allowed to use one. The tenant states the landlords agent went through this with them when they decided to rent their unit and verbal agreements were made. The tenants state that the landlord has asked them to remove furniture on the back deck and front porch. JP also states the landlord has always known about their greenhouse since February, 2010 and has never raised any issues with it with the exception of the power cord. Therefore the landlord has implied acceptance of it.

The landlord testifies they use a standard tenancy agreement for all their properties and states the tenants are trying to play on words when they say they do not have a balcony but rather a deck. The landlord states the same things applies to both areas that no plants are permitted on the deck or balcony and no storage is allowed on the decks or balconies as stated in the addendum to the tenancy agreement.

The landlord testifies that when tenants alter the common areas they should get permission in writing before making any changes. The landlord testifies the tenants have taken over part of the lawn area with a planting bed and the garden is not well maintained. The landlord testifies the sidewalks in the garden are old and starting to break up she wishes to upgrade these and the garden returning it to a safe common space to be enjoyed by all tenants. The landlord states this would involve removing the areas planted by the tenants. The landlord testifies she is not aware that tenants have grown things in the garden for 10 years and states the landlords maintain the garden with grass cutting and snow clearance.

The landlord testifies the tenants have contravened the tenancy agreement by selling their produce and one of the tenants teaches a gardening class and has brought students in to look at the garden. The landlord states there is a clause in the tenancy agreement that states the rental unit must not be used for commercial or business purposes. The landlord states if there was an accident she could be held libel as it is a common area. The landlord testifies the agreement also states that there must be no structural changes to the rental property however the tenants have removed a door, removed part of the lawn area and erected a green house. The landlord states she did not take any action when the greenhouse was first put in place in the tenants parking bay as the tenants told her agent that it was a temporary structure. They asked them in November, 2010 to remove it but as they wanted to harvest their produce the landlord states she gave them some extra time to remove this structure. The landlord states the parking spot is for vehicles not greenhouses.

The landlord testifies s. 24 of their agreement states common areas must not be damaged however the tenants have damaged an area of grass and this must be replaced. The landlord testifies that s. 24 states nothing must be fixed to the outside of the property but two tenants have fixed frames for their tomato plants on the deck. The deck was previously damaged as previous tenants had planters on the deck causing water damage resulting in the deck having to be replaced. The deck has now been replaced and the tenants were made aware that they must not plant things on the deck to prevent it rotting again.

The landlord testifies the tenants have always been aware the bike parking area is under the stairs. She states she is not required to provide this but has allocated a space for the

tenant's bikes in a storage area under the stairs. This area will have a different door fitted which will make it more accessible but the tenants cannot continue to park their bikes where they have been as it is an entrance to one of the suites and must be kept clear as an emergency exit.

The landlord states the tenants were sent a letter out of curtsey to remove any items from the yard so it can be renovated, a letter was sent to the tenant concerning the fridge and stating the laundry room is a common area and must not be used for storage. The landlord states the back yard is not maintained to their standards. The landlord states she has a right to improve the property and over $85,000.00 has been spent on the interior of the property in the last three years. Now it is the turn of the exterior of the property. The landlord states she has a reasonability to ensure the house is maintained to protect their investment.

The tenants argue that if it is the landlords position that they must get written permission before doing any gardening or planting they the landlord and her agent have misled the tenants as only verbal permission has ever been given and the landlord and her agents have led the tenants to believe that they are happy to have the garden planted. The tenants states when they put soil on a grassy area if they landlord was unhappy about this they could have just raked it off again as the grass had not been dug up. The tenants also argue that there has been a long standing history during their tenancy for the tenants to maintain the garden. The tenants also built a patio with the landlords' agent verbal permission and the landlord reimbursed them for the cost of the materials. This was done to enhance the tenants' enjoyment of the garden. The tenants also argue that the landlord does little to maintain the garden and does not even cut the grass regularly.

The tenants dispute that they sell their produce; once they sold some baby tomato plants at a garage sale but that is not a commercial enterprise. The tenant states that she teaches at a local collage and brought some of her students on a field trip to visit backyard gardens. The tenants state the landlord has never spoken to them about any liability concerns she may have.

Analysis

I have carefully considered all the evidence before me, including the sworn testimony of all the parties. With regard to the tenants claim seeking an Order for the landlord to comply with the Act, regulations or tenancy agreement; I have broken the tenants concerns down into three sections. Section one deals with their right to keep the garden for their enjoyment and to be able to plant produce in the garden for their own consumption. I have considered the arguments brought forward by both Parties and find the tenants have enjoyed the use of this garden for the length of their tenancies without the landlord raising any objections until now about them planting fruit and vegetables in the garden. Whether or not this was written into the tenancy agreements for these tenants is irrelevant as the garden has been used in this manner for a considerable time the landlord has implied this term of the tenancy.

A landlord must not terminate or restrict a service or facility if the service or facility is essential to the tenant's use of the rental unit as living accommodation, or terminate or restrict a service or facility if providing the service or facility is a material term of the tenancy agreement. Even if a service or facility is not essential to the tenant's use of the rental unit as living accommodation, provision of that service or facility may be a material term of the tenancy agreement. The tenants argue that they rented this property because of the garden and their ability to use the garden to grow produce. If the landlord had made them aware at the outset of their tenancy that this facility would be restricted they would not have rented the unit. Consequently it is my decision that the landlord is not entitled to restrict the tenant's use of the garden or their ability to grow produce there. However, the tenants must not encroach their planting areas onto any previously designated lawn areas and must return that portion of the garden to its original state. The tenants may continue to use the garden in this manner and ensure it is well maintained at all times.

With regard to the use of the decks and front porch; in this matter the landlord has established her argument that the tenants were aware that they must not have planters on the deck as they were informed of this at the start of their tenancy when the deck had to be

replaced due to damage caused by previous tenants. Consequently, the tenants must remove their tomato plants to another part of the garden. The landlord has also asked the tenant to remove garden furniture from the deck and porch however the addendum simply states no stored items allowed on the balconies. As I would not deem garden furniture to be stored items but rather items in use, the landlord is not entitled to ask the tenants to remove these items from their deck or front porch.

With regard to the tenants greenhouse; in this matter I find the landlord has established her argument that the greenhouse has been built in a parking bay meant for a vehicle and that this was not meant to be a permanent structure. Therefore, the landlord is entitled to ask the tenants to remove the greenhouse from their parking bay.

With regard to the second section of the tenants claim that the landlord has restricted their storage areas; I can see nothing in the tenancy agreement in which the landlord provided storage for bikes but again an area has been provided by the landlord which the tenants have enjoyed the use of for a number of years. The tenants argue that the area the landlord now wants them to use is not suitable and they seek an Order for the landlord to comply with the Act to allow them to continue to use the area to store their bikes that they have always used.

I have considered both arguments in this matter and find this is a facility the landlord has allowed the tenants to use for a number of years and is not a material term of their tenancy agreement. However, the landlord is not removing this facility but simply changing it to another area. While this area may not be as convenient for the tenants to use it is still a storage area and the present storage area would not comply with fire regulations for the bottom unit if it was occupied, I find therefore the landlord is entitled to move the bike storage area to a new location with no subsequent rent reduction.

With regard to the third section of the tenants claim regarding the storage of a freezer in the laundry room; In this matter the landlord or her agent have allowed the tenants to keep the freezer in this common area for a number of years without compliant. The landlord has now requested that the tenant removes the freezer from this area as the common area is not

meant for personal storage. The tenants argue that the freezer was in use for all the tenants and by making her remove it the landlord now restrict the tenant's use of this freezer.

I have considered the arguments in this matter and find the freezer was not a facility provided by the landlord and she is therefore entitled to ask the tenants to remove it from the common area. The tenants would not be entitled to a rent reduction as it was not a service or facility provided by the landlord.

The tenants have applied to reduce their rent for repairs services or facilities agreed upon but not provided. As mentioned above the tenants are entitled to continue to use the garden for planting and as this facility has not been removed at this time the tenants are not entitled to a rent reduction. The remainder of their claim has been dealt with above and no rent reduction is required at this time. If the landlord does remove a facility at a later date other than the one mentioned above then the tenants are entitled to file an application for a rent reduction at that time.

Conclusion

The tenants are successful in part of their claims. I HEARBY ORDER the landlord to comply with the *Act* with regard to the continued use of the garden space for planting and for the use of the deck and front porch for garden furniture. The remainder of the tenant's claims in these matters are dismissed without leave to reapply.

The tenants application for a rent reduction has no merit at this time but they are at liberty to reapply for a rent reduction if the landlord removes any further services or facilities not dealt with at the hearing today.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: October 11, 2011.

Residential Tenancy Branch