Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **FFT, LRE, MNDCT**

Introduction
This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the "*Act*") for:

- Authorization to recover the filing fees from the landlord pursuant to section 72;
- An order to suspend a landlord's right to enter the rental unit pursuant to section 70; and
- A monetary order for damages or compensation pursuant to section 67.

Both parties attended the hearing. The tenants were represented by their primary applicant, CN, hereinafter referred to as ("tenant"). The landlord did not attend the hearing but was represented by his legal counsel, CW. As both parties were present, service of documents was determined. The landlord acknowledged receipt of the tenant's Application for Dispute Resolution Proceedings Package on January 2, 2020, however sought to have the claim dismissed without leave to reapply pursuant to Rule 3.1 of the Residential Tenancy Branch Rules of Procedure ("Rules") as it was not served within 3 days of being made available by the Residential Tenancy Branch. The tenant testified that counsel's outgoing voice mail indicated the office would be closed until January 6, 2020 and that they were directed by counsel not to serve the landlord directly.

There is no prescribed penalty for breaching rule 3.1 of the Rules. The arbitrator may grant an adjournment for the opposing party to review the applicant's evidence if requested or grant the application to dismiss as requested. I asked counsel if she was seeking an adjournment to better acquaint herself with the tenant's application and evidence and counsel declined an adjournment. I denied the landlord's request to dismiss the tenant's claim as the landlord's counsel stated she was prepared to have the merits of the tenant's application heard and because the landlord did not raise any objection to any evidence being served outside the time frame as set out in Rule 3.

During the hearing, the tenant's primary applicant CN advised that the tenant application is actually for a reduction in rent from mid-August 2019 to date. She was unable to recall why the original application filed by the tenants sought $3,000.00 in compensation for monetary loss pursuant to section 67. The landlord's counsel did not raise an objection to the applicant changing the nature of her application to an

application for an order to reduce rent for service or facilities agreed upon but not provided pursuant to section 65.

Secondly, the tenant filed two amendments to the original application. The first amendment seeks an order for the landlord reimburse her for water utilities. During the hearing, the parties mediated a settlement of this issue which will be addressed further in this decision.

The second amendment dealt with a plumber's bill, not invoiced to the tenants that the tenants want paid by the landlord. This bill was provided as evidence by the tenants. The landlord's counsel contended that the bill was invoiced to the landlord, that it had been paid and that the tenants had no standing to collect payment for a third party, the plumber. At the commencement of the hearing, I found the landlord's stance to be reasonable and I dismissed this portion of the tenant's claim with leave to reapply if the plumber chooses to seek payment directly from the tenants in the future.

Settlement Reached

Pursuant to section 63 of the *Act,* the Arbitrator may assist the parties to settle their dispute and if the parties settle their dispute during the dispute resolution proceedings, the settlement may be recorded in the form of a decision or an order. During the hearing the parties discussed the issue of the water utility between them, turned their minds to compromise and achieved a resolution of this aspect of the dispute.

The parties agree to the following term:
The landlord agrees to forthwith reimburse the tenants with all payments they've made towards the water utility since the commencement of the tenancy upon receiving statements from the city.

Both parties testified that they understood and agreed to the above term, free of any duress or coercion. Both parties testified that they understood and agreed that the above term is legal, final, binding and enforceable, which settles this aspect of the dispute.

Issue(s) to be Decided

Is the tenant entitled to a rent reduction for services paid for but not received pursuant to section 65 of the *Act*?
Can the tenant recover the filing fee?

Background and Evidence

At the commencement of the hearing, pursuant to rules 3.6 and 7.4, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony. While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced

here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

The parties agree on the following facts. The rental unit is a single-family home situated on a double lot. A copy of the tenancy agreement was provided as evidence. The tenancy agreement is a standard form RTB-1 form with no additional terms or addendums. The tenancy began on June 1, 2016 for an original one-year term, becoming month to month at the end of the fixed term. Rent was set at $3,000.00 per month paid on the first day of each month. The landlord is in the process of building a second home on the oversized lot and construction for that home started in mid-August 2019.

The tenant provided the following testimony. In 2017, the landlord showed her plans for what the intended house next door would look like. When building began, it didn't look like the plans shown to her in 2017. In order to accommodate the building of the new house, the tenants had to move a garden shed and rebuild the base for it. She also had to move a clothes line and a portable outdoor pool she had purchased. When the house got built, it went right up to the shed that was moved. The tenant has lost use of the yard space that was part of the original tenancy agreement.

The landlord told her she would have at least 20 feet of yard space throughout her tenancy. Since the beginning of the tenancy, the landlord has paid for grass seed, weed killer and fertilizer so the tenants could maintain the yard. The tenant cared for the lawn and yard in the oversize lot since they moved in. The tenant testified the outdoor pool they erected in the yard had to be taken down and moved to accommodate the new house, as well.

The tenant submits that they were only given 2 weeks notice that the construction of the new house next door was commencing. When they were told about the building about to commence, they were also advised that the size of their outdoor space wouldn't be the 20 foot perimeter as promised by the landlord, but much smaller. When construction began, the outdoor space they were given turned out to be much smaller.

The tenant also testified that due to the construction, there is noise emanating from compressors running all the time. The whole house vibrates from the running of the compressors. One of the tenants has started sleeping outside her bedroom due to the noise. The tenant indicated she had a witness she wanted to testify to this, however the witness was unavailable due to illness.

The landlord's counsel provided the following submissions. The property had been rezoned for 2 houses in 2012. The reason the landlord signed a one-year tenancy agreement with the tenants was because the landlord intended on developing the land after the one year ended. Counsel directed my attention to the affidavit of the landlord sworn on February 12, 2020 and I note the following statements in the landlord's affidavit: *6. Prior to the tenancy commencing, I advised the Tenants verbally that the*

property was slated for construction of a second home, and construction would be occurring in the near future. 7. Prior to the tenancy commencing, I verbally advised the Tenants that their use of the full yard was only on a temporary basis, until construction commenced. The yard area in its entirety was never included as part of the rental portion of the property, as it was slated for the development and construction of second single, family home.

Counsel submits that the tenant's extended use of the yard was a benefit to them due to the delay in building the second house. The landlord has been generous in providing the tenants with family passes to the recreation center in the city as a courtesy to the tenants. Counsel submits that the tenants are paying fair market value for the rental unit and provided sample listings from the neighbourhood as evidence of this. Construction of the second home meets industry standards and is subject to regular inspections from relevant authorities. None of the neighbours in the 'upscale' neighbourhood have complained about noise from the construction.

Analysis

Residential Tenancy Policy Guideline 22 provides guidance to landlords and tenants regarding termination or restriction of a service or facility. Parts of the guideline are reprinted below:

A. LEGISLATIVE FRAMEWORK

Under section 27 of the RTA 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;
- providing the service or facility is a material term of the tenancy agreement.

A landlord may restrict or terminate a service or facility other than one referred to above, if the landlord:

- gives the tenant 30 days written notice in the approved form, and
- reduces the rent to compensate the tenant for loss of the service or facility.

B. ESSENTIAL OR PROVIDED AS A MATERIAL TERM

A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the 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. When considering if a term is a material term and goes to the root of the agreement, an arbitrator will consider the facts and circumstances surrounding the creation of the tenancy agreement. It is entirely possible that the same term may be material in one agreement and not material in another. In determining whether a service or facility is essential, or whether provision of that service or facility is a material term of a tenancy agreement, an arbitrator will also consider whether the tenant can obtain a reasonable substitute for that service or facility.

C. RENT REDUCTION
Where it is found there has been a substantial reduction of a service or facility, without an equivalent reduction in rent, an arbitrator may make an order that past or future rent be reduced to compensate the tenant.

D. BURDEN OF PROOF
Where the tenant claims that the landlord has restricted or terminated a service or facility without reducing the rent by an appropriate amount, the burden of proof is on the tenant.

There are six issues which must be addressed by the landlord and tenant.

1. whether it is a service or facility as set out in Section 1 of the Legislation;
2. whether the service or facility has been terminated or restricted;
3. whether the provision of the service or facility is a material term of the tenancy agreement;
4. whether the service or facility is essential to the use of the rental unit as living accommodation or the use of the manufactured home site as a site for a manufactured home;
5. whether the landlord gave notice in the approved form; and
6. whether the rent reduction reflects the reduction in the value of the tenancy.

Each issue will be addressed below.

1. Common recreational facilities are included in the definition of a '*service or facility'* under section 1 of the *Act*. I find the outdoor living space, (the yard) to be a recreational facility provided to the tenant as part of the tenancy agreement and is therefore a service or facility.
2. At the commencement of the tenancy, the tenants enjoyed the use of the full backyard. Nothing in the tenancy agreement indicated the use of the backyard would be terminated or restricted. I am satisfied the loss of usage of the full backyard is a restriction of the recreational facility as described above.
3. The tenant provided testimony about caring for the yard, weeding it, fertilizing it and growing vegetables and flowers. The tenant has also purchased a swimming pool for the tenants' use. The back yard is clearly an important contributor to the well being of the tenant and her family. I find the use of the yard to be a material term of the tenancy.
4. The facility is not essential to the use of the rental unit as a living accommodation. As stated above, the restricted use of the yard is a material term of the tenancy.
5. Evidence about giving formal notice to terminate or restrict the tenants' use of the yard space was not provided. I must therefore find that the landlord did not give notice in the approved form.

6. The landlord has not reduced rent for the restriction of the yard space previously enjoyed by the tenants.

I find the tenancy agreement to be silent with respect to the projected future development of the yard. I am not convinced by the landlord's assertion that the reason for fixing the original tenancy agreement to one year was related to the development of the property at a later date. Until recently, one year fixed term tenancies were common and had been used for a multitude of reasons by landlords and tenants.

While the landlord affirms that he 'verbally' told the tenants that the yard area in its entirety was never included as part of the rental portion of the property, such an assertion is not enough to satisfy me that the tenants agreed to this arrangement. At the very least, the landlord ought to have included such a clause in an addendum to the tenancy agreement to clarify both the landlord's and the tenants' rights and obligations for when construction began. Without such a predetermined arrangement in place, I find that the tenants agreed to a tenancy with use of the full back yard or at least with a yard extending at least 20 feet from their rental unit. I am satisfied from the evidence presented that the size of the yard provided for the tenants after the construction of the second house began diminished beyond what was expected by the tenants and that the landlord has therefore restricted the service or facility contrary to section 27 of the *Act*. I find the tenant is entitled to a reduction of rent in accordance with section 65.

The tenants applied for a 50 percent reduction in rent from August 15, 2019 to present. They have not provided me with any reasoning for how they arrived at this amount, other that stating that they believed it is the maximum they could seek pursuant to the *Act*.

Residential Tenancy Policy Guideline PG-16 [Compensation for Damage or Loss] states:

AMOUNT OF COMPENSATION
In order to determine the amount of compensation that is due, the arbitrator may consider the value of the damage or loss that resulted from a party's non-compliance with the Act, regulation or tenancy agreement or (if applicable) the amount of money the Act says the non-compliant party has to pay. The amount arrived at must be for compensation only and must not include any punitive element. A party seeking compensation should present compelling evidence of the value of the damage or loss in question. For example, if a landlord is claiming for carpet cleaning, a receipt from the carpet cleaning company should be provided in evidence.
…

An arbitrator may also award compensation in situations where establishing the value of the damage or loss is not as straightforward:

"Nominal damages" are a minimal award. Nominal damages may be awarded where there has been no significant loss or no significant loss has been proven, but it has been proven that there has been an infraction of a legal right.

As the tenants have proven the landlord has restricted their use of the yard but have not provided me with any substantial reasoning for a drastic rent reduction, I find the tenants are entitled to nominal damages. I find the tenants are entitled to compensation of $200.00 per month from September 1, 2019 to the end of February, 2020. As the tenants were not subjected to restricted use of the yard for half of August, the compensation for August is $100.00.

The tenants were successful in their claim and I order the landlord reimburse their filing fee of $100.00.

Item	**Amount**
August 2019	$100.00
September 2019	$200.00
October 2019	$200.00
November 2019	$200.00
December 2019	$200.00
January 2020	$200.00
February 2020	$200.00
Filing fee	$100.00
Total	**$1,400.00**

The tenants are entitled to a monetary order in the amount of $1,400.00 pursuant to section 67 of the *Act*.

Pursuant to section 65(1)(f) of the *Act*, future rent is reduced by $200.00 per month, as an equivalent to the reduction in the value of the tenancy agreement.

The tenant did not provide sufficient evidence to satisfy me that they should be entitled to an order that the landlord's right to enter the rental unit or site be restricted. This portion of the tenant's claim is dismissed.

Conclusion

The tenants are entitled to a monetary order in the amount of $1,400.00 pursuant to section 67 of the *Act*. Pursuant to section 65 of the *Act*, the tenants may deduct $1,400.00 from a single rent payment

Pursuant to section 65(1)(f) of the *Act*, future rent is reduced by $200.00 per month, as an equivalent to the reduction in the value of the tenancy agreement.

As agreed by the parties, the landlord agrees to forthwith reimburse the tenants with all payments they've made towards the water utility since the commencement of the tenancy upon receiving statements from the city.

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: February 24, 2020

Residential Tenancy Branch