Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes PSF, FFT

Introduction

This hearing was convened as a result of the Tenants' Applications for Dispute Resolution, (the "Applications"). The Tenants applied for the following relief, pursuant to the *Residential Tenancy Act* (the "*Act*"):

- an order for the Landlord to provide services or facilities required by tenancy agreement or law; and
- an order granting recovery of the filing fee.

Preliminary Matters

According to the Residential Tenancy Branch Rules of Procedure 2.10 Joining applications;

> Applications for Dispute Resolution may be joined and heard at the same hearing so that the dispute resolution process will be fair, efficient and consistent. In considering whether to join applications, the Residential Tenancy Branch will consider the following criteria:
>
> a) whether the applications pertain to the same residential property or residential properties which appear to be managed as one unit;
> b) whether all applications name the same landlord;
> c) whether the remedies sought in each application are similar; or
> d) whether it appears that the arbitrator will have to consider the same facts and make the same or similar findings of fact or law in resolving each application.

The Tenants have submitted six different Applications to the Residential Tenancy Branch each seeking that the Landlord provide a service or a facility required by

tenancy agreement or law, as well as for the return of the filing fee. I find that each of the Tenant's Applications pertain to the same residential rental property and name the same Landlord as the respondent to their Applications. The Tenants appointed a lead Application, A.P., to represent the Tenants during the hearing, who indicated that the documentary evidence submitted by each party is the same in each Application. As such, I find that it is reasonable to consider the same facts and make the same or similar findings of fact or law in resolving each Application.

In light of the above, I find that it is appropriate in the circumstance to join the Tenants' Applications to be heard at the same hearing so that the dispute resolution process can be fair, efficient and consistent.

During the hearing, A.P. stated that the Applicants M.A. and A.R. have since ended their tenancy. As such, I dismiss their Application in its entirety, without leave to reapply.

At the beginning of the hearing, the parties acknowledged receipt of their respective application package and documentary evidence packages. No issues were raised with respect to service or receipt of these documents during the hearing. Pursuant to section 71 of the *Act*, I find the above documents were sufficiently served for the purposes of the *Act*.

The parties were given an opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

1. Are the Tenants entitled to an order that the Landlord provide services or facilities required by tenancy agreement or law, pursuant to Section 62 of the *Act*?
2. Are the Tenants entitled to the recovery of the filing fee, pursuant to Section 72 of the *Act*?

Background and Evidence

At the start of the hearing, the parties acknowledged that the Tenants who attended the hearing each formed a tenancy with the Landlord at the same rental property. The parties acknowledged that the Tenants are permitted to use the common areas at the rental property, which is included in their agreements. The lead Tenant A.P. stated that the Tenants received a notice on June 3, 2020 advising all occupants in the rental property that the Landlord will be restricting access to common areas, which includes a 2nd floor playground as well as an 11th floor patio area, Monday to Friday from 9:00am to 12:00pm, and from 2:00pm to 5:00pm. A.P stated that during these times, the common areas will be restricted from occupants' use, allowing exclusive use of the common areas to a daycare provider who has commenced a tenancy with the Landlord. The parties provided a copy of the notice in support.

A.P stated that the Tenants are opposed to the daycare making use of the common areas and that they should be restricted to the commercial space located on the 1st floor of the rental property. A.P stated that the daily operations of having a daycare using the common areas will breach the Tenants' quiet enjoyment and restrict the use of common areas. A.P. stated that the Tenants have not been offered any form of compensation from the Landlord in relation to the proposed changes which were meant to take effect sometime in mid July 2020.

The Landlord confirmed that he has formed a new tenancy with a daycare provider who is considered a tenant at the rental property. The Landlord stated that the daycare will require use of the common areas during the dates and times described above. The Landlord stated that he is willing to work with the Tenants to try and resolve their concerns and has offered some potential solutions.

The Landlord stated that the daycare provider has made some alterations and improvements to the common areas, which in fact could be viewed as adding value to the Tenants' tenancies. The Landlord stated that the common areas are rarely used by the Tenants and doesn't feel as though the restrictions to these areas merits compensation. The Landlord also stated that the daycare has not yet commenced operations, therefore, there has been no breach and that the Tenants' Applications are premature.

Analysis

Based on the documentary evidence and oral testimony provided during the hearing, and on a balance of probabilities, I find;

Section 1 of the Act defines that a **"service or facility"** includes any of the following that are provided or agreed to be provided by the landlord to the tenant of a rental unit:

(a) appliances and furnishings;
(b) utilities and related services;
(c) cleaning and maintenance services;
(d) parking spaces and related facilities;
(e) cablevision facilities;
(f) laundry facilities;
(g) storage facilities;
(h) elevator;
(i) common recreational facilities;
(j) intercom systems;
(k) garbage facilities and related services;
(l) heating facilities or services;
(m) housekeeping services;

According to Section 27 of the Act;

(1) a landlord must not terminate or restrict a service or facility if; (a) the service or facility is essential to the tenant's use of the rental unit as living accommodation, or (b) providing the service or facility is a material term of the tenancy agreement.

(2) a landlord may terminate or restrict a service or facility, other than one referred to in subsection (1), if the landlord (a) gives 30 days' written notice, in the approved form, of the termination or restriction, and (b) reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

According to the Residential Tenancy Policy Guideline #22 (the “Policy Guideline”);

An essential service or facility is one which is necessary, indispensable, or fundamental. In considering whether a service or facility is essential to the tenant's use of the rental unit as living accommodation, the arbitrator will hear

> evidence as to the importance of the service or facility and will determine whether a reasonable person in similar circumstances would find that the loss of the service or facility has made it impossible or impractical for the tenant to use the rental unit as living accommodation.

Section 22 of the Policy Guidelines also describes a material term as;

> 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.
>
> 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;
>
> • whether it is a service or facility as set out in Section 1 of the Legislation;
> • whether the service or facility has been terminated or restricted;
> • whether the provision of the service or facility is a material term of the tenancy agreement;
> • 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;
> • whether the landlord gave notice in the approved form; and
> • whether the rent reduction reflects the reduction in the value of the tenancy.

In this case, I find that the common area playground located in the 2nd floor as well as the patio area located on the 11th floor of the rental property can be defined as common area facilities. I accept that the parties agreed that the Landlord provided a notice to Tenants on June 3, 2020 which indicated that the Tenants' access to the facilities described above would be restricted Monday to Friday from 9:00am to 12:00pm and from 3:00pm to 5:00pm. I am satisfied that the Tenants continue to have access to the facilities outside of the above-mentioned dates and times.

I find that the Tenants have provided insufficient evidence to demonstrate that the restricted use of the play ground facility on the 2nd floor and the patio area on the 11th floor is necessary, indispensable, or fundamental to the Tenants' tenancies. I find that the Landlord's restriction on the Tenants' access to these common areas does not make it impossible or impractical for the Tenants to use their rental units as a living accommodation. I find that these facilities are not a material term of the tenancy agreement. As such, I find that the Section 27(2) *Act* applies in this situation.

During the hearing, A.P. stated that the Tenants were served with a notice that would restrict facilities dated June 3, 2020. A.P. stated that the notice served by the Landlord was not in the approved form.

Section 10 of the *Act* states that the director may approve forms;

> The director may approve forms for the purposes of this Act. (2) Deviations from an approved form that do not affect its substance and are not intended to mislead do not invalidate the form used.

Furthermore, according to the Policy Guideline 18;

> Using a form that is not approved by the Director may be valid if it contains the required information and is not intended to mislead. If an application is made on an old form, an arbitrator may amend the form or accept the application as validly filed. The arbitrator may refuse to amend the current form if a respondent proves prejudice that is attributable to the use of the old form. An arbitrator may not amend a form which does not contain the required information.

I find that the Landlord provided the Tenants with a notice that they created, which provided information to the Tenants about any questions they may have regarding the daily operations of the daycare provider, including restrictions to the facilities. While this notice provided the Tenants with 30 days notice of the restrictions to the facilities, I find that it is not in the approved form (RTB-24) and does not offer the Tenants a rent reduction in an amount equivalent to the value of the reduction in the service or facility, which is a requirement on the approved form.

In light of the above, I decline to amend or approve the notice provided to the Tenants by the Landlord dated June 3, 2020 as the notice is not in the approved form and does not contain the required information.

As a result, I find that the Landlord has not complied with Section 27(2) of the *Act* and therefore find that the notice served to the Tenants dated June 3, 2020 is cancelled and is of no force or effect. The Tenants are cautioned that should the Landlord comply with the requirement set out in Section 27 of the Act, the Landlord may be allowed to restrict the facilities in the manner described. Should the Landlord wish to continue with their intent to restrict the facilities, they are still required to ensure that the Tenants' right to quiet enjoyment is not impacted.

As the Tenants were successful, I find that they are entitled to the recovery of the filing fee paid to make their Applications. I authorize the Tenants a one-time rent reduction in the amount of $100.00 from a future month's rent in full satisfaction of the recovery of the cost of the filing fee.

Conclusion

The Tenants' Applications were successful. The Landlord's Notice dated June 3, 2020 restricting facilities was not in the approved form, breaching Section 27(2) of the Act. The Notice is therefore cancelled and is of no force or effect.

The Tenants are granted a one-time rent reduction in the amount of $100.00 for the recovery of their filing fee.

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: July 30, 2020

Residential Tenancy Branch