Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes DRI PSF OLC

Introduction

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

- a determination regarding their dispute of an additional rent increase by the landlord pursuant to section 43;
- an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62; and
- an order to the landlord to provide services or facilities required by the tenancy agreement or law pursuant to section 65.

This hearing was reconvened from a prior hearing on June 15, 2020, following which I issued an interim decision.

Both parties attended both hearings and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The landlord was assisted by her husband ("**GG**"). The tenant was assisted by an agent ("**SP**").

In the interim decision, I ordered, in the interest of time, for the tenant to provide a written statement setting out further evidence he wanted to provide in advance of the reconvened hearing. He did not do this. At the reconvened hearing, SP stated that that upon further consideration, he did not need to provide any further evidence. As such, the reconvened hearing started with submissions from the landlord.

Issues to be Decided

Is the tenant entitled to orders that:

1) the addition increase in rent be set aside;
2) the landlord comply with the Act;
3) the landlord provide the facilities as required by the tenancy agreement?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties and their representatives, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The main issue to be determined at this hearing is whether a garage located on the residential property which the tenant uses (the "**Garage**") forms part of the rental unit for the purposes of the Act. The residential property is a multi-unit apartment building. The tenant rents a unit in the residential property (the "**Apartment**"). He also pays for the use of the Garage.

The tenant currently pays $1,075 per month for use of the Apartment and $200 per month for use of the Garage. The tenant characterized his monthly rent as $1,275; the landlord characterized the monthly rent as $1,075, and plus $200 due under a separate agreement for the Garage. The tenant currently pays both amounts at the same time, by a single cheque. The landlord testified that up until 2008, the tenant paid for the Garage and the Apartment using separate cheques.

The tenant and the previous owner of the residential property entered into an oral tenancy agreement to rent the Apartment in 1998. In August 2002, the previous owner and the tenant entered into a written agreement to rent the Apartment (which was entered into evidence). At some point in either 2004 or 2006 (the parties disagreed on this point), the tenant and previous owner entered into an oral agreement whereby the tenant would rent the Garage for $25 a month.

In 2007, the landlord and her partners purchased the residential property. The parties did not enter into any new written agreement regarding the Apartment or the Garage.

The landlord testified that, upon purchasing the residential property, she discovered that the Garage was rented to the tenant and another occupant of a different unit of the residential property ("**KC**"). KC advised her that she and the tenant were each paying $35 per month for use of the Garage.

SP stated that KC and a third tenant ("**AC**") rented the Garage from the landlord. He stated that, at some point in 2009, KC and AC each paid $20 per month for use of the Garage, and the tenant paid $60 per month. However, in October 2009, KC and AC ceased paying any portion of rent for use of the Garage, and that the tenant assumed the full payment owing of $100.

The tenant submitted a letter into evidence from the landlord dated October 30, 2009, in which she wrote:

> Hi [tenant] there appears to be a mistake with the [Garage] rental.

> The price is $100 month. We are no longer receiving $ from [AC or KC]. We are only receiving $60. from you which means we are receiving less now then before. If you have someone you would like to share this cost with or if you choose to rent it on your own that is great, but we do need the total amount to be paid.
>
> If you do not want to continue using this space we definitely can put it to use. Just let us know
>
> [sic throughout]

SP acknowledged that the tenant started paying $100 per month for use of the Garage in 2009 but stated that the tenant now takes the position that the increase from $60 to $100 per month represents an improper increase in rent.

Since 2009, the tenant has had exclusive use of the Garage. He uses it to store his motorcycles and tools. Additionally, he uses it to host guests and entertain, and SP described it as the tenant's "second living room". The tenant spends much of his free time in the Garage.

On April 30, 2013, the landlord delivered a letter to the tenant in which she notifies him of her intention to convert the Garage into a bike room for use of all the occupants of the residential property. She wrote that this was to due to the inability to obtain a permit to build a bike shelter elsewhere on the residential property.

On May 1, 2013, the tenant responded in a letter in which he stated that section 27 of the Act prohibits the termination or restriction of a service or facility if it is a material term of the tenancy agreement. He wrote that the provision of the Garage was a material term of the tenancy agreement, and as such could not be terminated. The landlord denied ever receiving this letter.

In any event, nothing became of the landlord's April 30, 2013 letter, and the tenant continued to use the Garage.

In September 2019, the landlord increased the amount due for the use the Garage from $100 to $200. One month prior, the landlord served the tenant with a notice of rent increase which purported to increase the rent for the Apartment from $1,050 to $1,075. It contained no notice of any increase in rent for the Garage. Nevertheless, the tenant paid the increased amount for both the Apartment and Garage. He now seeks the return of $100 for each month subsequent to September 2019, due to the alleged improper increase in rent.

On April 15, 2020, the landlord delivered a letter to the tenant which stated:

> We are giving you notice to vacate [the Garage] by May 31, 2020.

> The Fire department has indicated they need access to the furnace room and the Fire alarm box in the basement [of the residential property]. With the overcrowding of the bikes we have decided to use the Garage for bike storage.

On April 23, 2020, the tenant responded writing that he did not recognize the April 15, 2020 notice "as being of no force or effect" and that he would not be vacating the Garage. He stated, "that the use of the Garage is a material term of [his] tenancy agreement." He demanded that the landlord cite statutory authority upon which she relied to justify the notice to vacate.

On April 24, 2020, the landlord replied that the notice to vacate "still stands" and that the tenancy agreement makes no mention of the Garage.

On April 27, 2020, the tenant re-iterated his position that notice to vacate is of no effect.

On May 18, 2020, the tenant filed this application.

Tenant's Position

At the hearing, SP stated that, contrary to tenant's letter of May 1, 2013, the Garage is not a service or facility, the provision of which is a material term to the tenancy. Rather, he stated that the Garage is a part of the rental unit itself. He argued that the tenant provides a single cheque to the landlord for use of both the Apartment and the Garage, and he currently has exclusive use of both. He further argued that the tenant uses the Garage as an extension of the Apartment: he hosts company in it and spends much of his time there.

SP argued that the increase in monthly rent for the Garage in September 2019 was a breach of the Act, as it represented a 100% increase in rent, rather than the 2.5% permitted by the Act and its regulations.

SP argued that, as the Garage is part of the rental unit, the landlord cannot unilaterally terminate the tenant's use of it, any more than they could terminate the use of a room of the Apartment.

SP also argued that the landlord's attempts to end the tenant's use of the Garage constitute a loss of quiet enjoyment under the Act. The tenant seeks an order that the landlord comply with the Act and provide him with quiet enjoyment of the rental unit by halting attempts to end his use of the Garage.

Landlord's Position

The landlord denied that the Garage forms part of the rental unit. Additionally, she denied that it is an essential service or facility the provision of which is material to the

tenancy agreement. She argued that the agreement under which the tenant rents the Garage is separate and apart from the tenancy agreement, and not subject to the Act.

Accordingly, she takes the position that she may unilaterally terminate the agreement to provide Garage to the tenant at any time.

The landlord provided evidence as to the reason why she wanted to terminate the agreement to rent the Garage to the tenant (the existing bike room in the residential property was insufficient and she wants to convert the Garage to bike storage for the entire building). However, I will not provide any further details as to the landlord's motives as, respectfully, they are not relevant to this application.

Analysis

In order to properly address the relief sought by the tenant regarding the rent increase, the provision of use of the Garage, and the loss of quiet enjoyment, I must first determine the nature of the Garage as it relates to the tenancy. At the hearing, the SP argued that it was an extension of the rental unit. In his application, he applied for an order that the landlord provide him with the services or facilities required by the tenancy agreement, which suggest that he takes the alternate position that it is a facility that the landlord is obligated to provide him with pursuant to the tenancy agreement. I will address both of these issues.

1. Is the Garage part of the rental unit

Section 1 of the Act defines rental unit:

> "**rental unit**" means living accommodation rented or intended to be rented to a tenant;

I should first note that I have no evidence before me regarding what the zoning restrictions (if any) on the Garage. As such, I base my findings solely to the various agreements (express or implied, written, or oral) made between the parties and the prior owner, the Act, and the actions of the parties.

The tenant takes the position that the Garage is an extension of his living accommodation. However, the written tenancy agreement by which the tenant rents the rental unit, entered into in 2002, does not mention the Garage. Indeed, it specifies the "Rental Unit to be Rented" as "Suite No. 2".

So, if the Garage is to form part of the rental unit, the tenant must show that subsequent agreement to rent the Garage functions to amend the tenancy agreement to change the definition of the rental unit. No such agreement exists in writing. The tenant alleged that an oral amendment to the tenancy agreement was made between himself and the prior owner.

However, the facts of this case would seem to preclude such an amendment from existing.

At some point after the tenant started using the Garage (either starting in 2009 or starting sometime before the landlord purchased the residential property, depending on which parties' evidence I accept), the tenant shared use of the Garage with the other individuals (either KC and AC, or KC alone, again depending on whose evidence is to be accepted). It is not disputed, however, that those using the Garage paid the landlord directly for its use. AC and/or KC did not pay the tenant for its use, and then the tenant pay the landlord solely for the use of the Garage (as would be the case in a sub-lease agreement).

This arrangement indicates that AC and/or KC & the tenant had equal rights of usage of the Garage from the landlord. As AC and KC were both tenants of the residential property, this would suggest that, if the tenant's argument is to be accepted (that by renting the Garage, his tenancy agreement was amended to include the Garage as part of the rental unit), the Garage also formed part of AC and/or KC's rental unit as well. Clearly this cannot be. An area cannot simultaneous be the part of more than one rental unit.

If the Garage formed part of the tenant's rental unit, then the landlord would not have any right to rent it out to AC and/or KC. As such, I find that the prior to AC and/or KC ceasing to use the Garage, the Garage could not have been part of the tenant's rental unit. Therefore, the oral agreement between the prior owner of the residential property and the tenant whereby the tenant rented the Garage could not have functioned to amend the tenancy agreement to expand the rental unit to include the Garage. If it did, AC and/or KC could not have rented it.

I must now examine whether the landlord and the tenant agreed to amend the tenancy agreement to expand the scope of the rental unit to include the Garage after AC and/or KC ceased using it. As with the initial agreement to use the Garage, the circumstances by which the tenant continued to use the Garage following AC and/or KC's departure is poorly documented. There is no agreement in writing regarding the tenant's continued use of the Garage. The only document submitted into evidence on this issue is the landlord's letter of October 30, 2009 (full text above).

In this letter, the landlord permits the tenant to continue using the Garage for the total combine amount paid by himself, AC, and KC ($100) and grants the tenant an opportunity to bring in another individual to share the cost of the Garage. The landlord also states that if the tenant does not want to continue using the Garage, she could put it to use.

The tenant opted to bear the full cost of the Garage himself.

I do not understand the October 30, 2009 letter to contain an offer to the tenant to amend the tenancy agreement to include the Garage as part of the rental unit. Rather, I understand it to be an offer to allow the tenant to continue using the Garage on the same terms as before (that is, not as part of the rental unit). In coming to this understanding, I rely on the fact the landlord offered to allow the tenant to share the cost of the Garage with someone else and offered to allow him to stop using it so that she could use it herself. Such offers are not consistent with the tenant's position that the Garage was or became part of the rental unit.

As such, I find that there was no amendment (oral or written) to the tenancy agreement which caused the scope of the rental unit to be widened so as to include the Garage.

I place little weight on the fact that the tenant paid rent for the Apartment and the Garage with a single cheque. Such a practice is common when a tenant is required make multiple payments to a landlord (for example, paying for a parking spot, or paying the fees for the use of a fitness facility in the residential property) and are done for the sake of simplicity and efficiency. I am not persuaded that such a practice indicates that the scope of the rental unit widened to include the Garage. Rather, I find it more likely that such an arrangement was simply more convenient for both parties.

Additionally, I do not find that the tenant, simply by the manner in which he used the Garage, unilaterally broaden the scope of what is included in the definition of "rental unit" under the tenancy agreement. In order to modify the tenancy agreement, both the landlord and the tenant must intend to do so. In this case, the tenant has failed to show that either the landlord or the prior owner of the residential property had any such intent.

As such, I find that the Garage is not part of the rental unit.

2. Is the Garage a Service or Facility?

Section 1 of the Act defines service or facility:

> "**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;

I find that the Garage can be considered either as a “storage facility” or a “parking space and related facility”.

Section 7(1) of the *Residential Tenancy Regulation* (the “**Regulation**”) states:

> **Non-refundable fees charged by landlord**
> **7**(1) A landlord may charge any of the following non-refundable fees:
> […]
> (g) a fee for services or facilities requested by the tenant, if those services or facilities are not required to be provided under the tenancy agreement.

Based on the testimony of the parties, I find that an oral agreement exists between the parties whereby the landlord agreed to provide use of the Garage to the tenant. As the use of the Garage was not provided for under the tenancy agreement, I find that the amount charged for the Garage’s use is a monthly “non-refundable fee” as permitted by the Regulations.

I find that the agreement allowing the tenant use of the Garage is an agreement to provide a facility not provided for under the tenancy agreement, and not, as argued by the landlord, an agreement completely independent of the tenancy. I come to this conclusion upon consider the relationship of the parties (landlord/tenant), the fact that the Garage is located on the residential property, and that, at one point, the Garage was rented to other occupants of the residential property.

Section 27 of the Act addresses the termination of use of facilities. It states:

> **Terminating or restricting services or facilities**
> **27**(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.

So, in order for the landlord to be prohibited from terminating the tenant's use, he must prove that the Garage is essential to his use of the rental unit as a living accommodation, or that its provision is a material term of the tenancy.

Policy Guideline 22 states:

> **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 or use of the manufactured home site as a site for a manufactured home, 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. For example, an elevator in a multi-storey apartment building would be considered an essential service.
>
> **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.

I find that the Garage is neither essential to the use of the rental unit as a living accommodation nor is its provision a material term to the tenancy agreement. I come to this conclusion based on the simple fact that the tenant resided in the Apartment for either 6 or 8 years (the parties disagree on the exact date the Garage was rented to the tenant) before he started renting the Garage. As such, its provision cannot be considered essential. The rental unit functioned well-enough as living accommodation prior to renting the Garage.

Similarly, I cannot see how the rental of the Garage is material term to the tenancy agreement, as its provision is not a term of the tenancy agreement. A material term must go to the "root of the agreement". As agreement that governs this tenancy was entered into in 2002, and the tenant did not start renting the Garage unit either 2004 or 2006, I find that the provision of the Garage does not go to the root of the tenancy agreement.

Accordingly, I find that the use of the Garage is neither a material term of the tenancy agreement, nor is the Garage an essential facility, as defined by the Act.

Accordingly, the landlord is entitled to terminate the tenant's use of the Garage in accordance with section 27(2) of the Act. I find that the landlord has not yet done so, as the notice to vacate the Garage served on April 15, 2020 is not in the approved form (Form RTB-24).

3. Improper Rent Increase

Section 1 of the Act defines rent:

> "**rent**" means money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of a tenant to a landlord in return for the right to possess a rental unit, for the use of common areas and for services or facilities, but does not include any of the following:
>
> (a) a security deposit;
>
> (b) a pet damage deposit;
>
> (c) a fee prescribed under section 97 (2) (k);

Section 97(2)(k) of the Act states:

> **Power to make regulations**
>
> **97**(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:
>
> (k) respecting refundable and non-refundable fees that a landlord may or may not impose on a tenant and limiting the amount of a fee that may be imposed;

As stated above, I find that the amount paid by the tenant for use of the Garage is a non-refundable fee as defined in the Regulation. As such, it does not fit the definition of "rent" as set out in section 1 of the Act.

Accordingly, the restrictions on rent increase at sections 40 to 43 of the Act do not apply to the increase in the fee charged for the tenant's use of the Garage. There is nothing in the Act which places a limit on the amount a landlord can increase a non-refundable fee for a service or facility.

I dismiss this portion of the tenant's application.

4. Order that the landlord provide the tenant with use of Garage

As stated above, the landlord is entitled to terminate the tenant's use of the Garage in accordance with section 27(2) of the Act. I have found that the landlord has not yet taken the necessary steps to have done so.

Accordingly, I order that the landlord permit the tenant to use the Garage without impediment, until such time that the landlord is entitled to terminate the tenant's use of it in accordance with the Act.

5. Loss of Quiet Enjoyment

I do not find that the landlord has deprived the tenant of his right to quiet enjoyment, as guaranteed by section 28 of the Act. The landlord is entitled to serve the tenant with correspondence related to his use of the Garage and the landlord's right to terminate it. The position the landlord was taken, while not entirely correct, was a reasonable one, and generally in accordance with her legal rights. The landlord erred by not serving a notice to terminate in the correct form, but not by taking the position that that they are entitled to terminate the tenant's use of the Garage.

I do not find that the landlord's assertion of her rights regarding the Garage amounted to harassment of the tenant or a deprivation of the tenant's right of quiet enjoyment. Quiet enjoyment does not entitle a tenant to freedom from all communication or disturbance of a landlord. Rather, it entitled a tenant to freedom from *unreasonable* disturbances. I do not find that the landlord has acted in an unreasonable manner regarding the tenant's use of the Garage or unreasonably disturbed the tenant.

I dismiss this portion of the tenant's application.

Conclusion

The landlord has not given notice to terminate the tenant's use of the Garage in accordance with section 27(2) of the Act. As such, the landlord has no statutory authority to restrict or terminate the its use. Should the landlord wish to gain the statutory authority to do so, she must provide proper notice in accordance with the Act.

As such, pursuant to section 65 of the Act, I order that the landlord provide the tenant unimpeded use of the Garage.

I dismiss all other portions of the tenant's application.

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: August 11, 2020

Residential Tenancy Branch