Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, FFT

Introduction

On September 17, 2020, the Tenant made an application for Dispute Resolution seeking a Monetary Order in the amount of $3,080.00 for compensation pursuant to section 67 of the *Residential Tenancy Act* (the "*Act*") and seeking to recover the filing fee pursuant to section 72 of the *Act*.

Tenant MJ.H attended the hearing as did Landlords K.G and J.G, with J.G making representations for both Landlords. All parties in attendance provided a solemn affirmation.

All parties acknowledged the evidence submitted and were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

- Is the Tenant entitled to a Monetary Order for compensation?
- Is the Tenant entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

The signed tenancy agreement shows, and the parties agree that the tenancy commenced on July 23, 2018; the Tenant vacated the rental on or about September 30, 2019. Rent was established in the amount of $1,600.00 per month and was due on the twenty third day of each month. The rental, described as a rural property, included a house and a substantial amount of outdoor space, inclusive of ¼ acre of pasture (the "¼ acre").

The Tenant testified that she found the rental desirable because she would be able to let her dog out off leash and use the substantial outdoor space. She testified that when she initially viewed the rental, she walked the property including the ¼ acre where she noticed animal droppings but noted "there were no animals in sight". The Tenant stated she went into the house to speak with Landlord K.G to ask, "does this include the entire property, including the back pasture", and recalls Landlord K.G saying "yeh there's been sheep on there in the past and you can keep some if you want." The Tenant stated that on or about August 22, 2018 the Landlord asked for access through the rental property to get their sheep onto the back field, and from then on, the Landlord's sheep regularly occupied the back ¼ acre of the rental. The Tenant also testified that sometime between August 22, 2018 and December 08, 2018 chickens and ducks (the "birds") also arrived on the back ¼ acre where the Landlord kept and tended to them. The Tenant provided photographs taken on various dates in July and August 2019 of the sheep and birds. The Tenant also provided two screen shots of text messages between herself and Landlord K.G., dated December 8, 2018 as evidence that she began tethering her dog to ensure it would not go after the Landlord's birds; the Tenant acknowledged her dog may have attacked the Landlord's birds prior to the decision to begin tethering.

The Tenant affirms she did not raise any concerns about the Landlord's use of the back ¼ acre until she wrote a letter, which was submitted in evidence, to the Landlord on July 22, 2019 ("the letter"), stating "It has come to my attention that the loss of use of the rear field and the resulting restrictions to our use of the property are, and have been all along, a violation of the rental agreement that we signed... this is an illegal restriction of a material term of the tenancy agreement." While the Tenant raises her concerns in the letter, the remedy requested was for compensation as evidenced by the Landlord's response letter of July 28, 2019, which was also submitted in evidence, stating "Your request for compensation is not understood as your access has not been limited and the Landlord has made no requested changes to the original tenancy agreement. Any perception that the Tenant has in regards to the material use of the property is assumed and has been without conversation. The Landlord would invite the Tenant to continue to use the property as discussed when the original tenancy agreement took effect."

The Tenant stated she did not bring her concerns to the attention of the Landlord sooner as she did not know her rights under the *Act*. The Tenant denied the existence of a verbal agreement, stating “there’s a lot of assuming agreement because I didn’t ask them to remove them, but that was due to my own ignorance and didn’t know my rights, and I just assumed I had no rights to ask for that to be gone.” The Tenant argues the Landlord’s use of the ¼ acre constitutes a material breach of the tenancy agreement. The Tenant provided a Monetary Order Worksheet for “Request to Provide Facilities” in the amount of $3,080.00; the Tenant informed me the amount claimed was based on her personal valuation of the loss of use of the ¼ acre.

The Landlord affirmed the rental address listed on the tenancy agreement is 0.53 acres in total and stated in reference to the ¼ acre: “legally speaking it was part of the tenancy”. The Landlord testified that, when the Tenant initially viewed the rental, animals (referencing the sheep and birds) were present on the property, and further that they described the “nature of the property” to the Tenant. The Landlord further testified that they had a conversation with the Tenant prior to July 23, 2018 in which it was made clear the animals were going to be on the property throughout the tenancy. The Landlord testified there was a verbal agreement with the Tenant stipulating the Landlord would be on the rental property daily to feed the animals. The Landlord described the ¼ acre as shared property, stating “we saw that as shared property and we would’ve been happy to move the animals had she requested.” The Landlord notes they did not ask the Tenant to tether her dog and stated they invited her to continue to let the dog off leash after the above noted text message exchange on December 8, 2018. The Landlord stated they “didn’t see any monetary value to a quarter acre of the property because it was just a muddy field… it’s regrettable she didn’t see animals on the property. She could’ve asked if there were animals on the property… we saw no value in that field, we had a verbal agreement that we could use it.”

Analysis

As the Tenant argued the Landlord’s use of the ¼ acre was a material term of the tenancy agreement, I turn to *Residential Tenancy Policy Guideline* gl08, which states 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.”

To determine the materiality of a term during a dispute resolution hearing, I must focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. In this case, the burden falls to the Tenant

to present evidence and argument supporting her proposition that the use of the ¼ acre pasture was a material term of the agreement.

The Tenant focused her argument on the consequence of the breach, being that she no longer had exclusive use of the ¼ acre pasture and as such could not let her dog run free without being tethered. The Landlord argued the pasture was without value. I find the Tenant did not present sufficient evidence to establish the use of ¼ acre pasture was of such significant import to the agreement that the most trivial breach would have given her the right to end the agreement. In the overall scheme of the tenancy agreement, loss of use of the ¼ acre pasture did not undermine the main purpose of the agreement, which was primarily for the use of the house. Further, I accept the evidence of the Landlord, in so far as I accept that the Landlord truly believed the ¼ acre pasture was for common purpose from the outset of the tenancy; accordingly I find both parties did not agree the term – being the Tenants exclusive use of the ¼ acre pasture – was of sufficient import as to be a material term of the agreement.

While the Tenant's exclusive use of the ¼ acre cannot be said to be a material term of the tenancy, section 28 of the *Act* nevertheless protects a Tenant's right to quiet enjoyment, inclusive of exclusive possession of the rental unit:

> 28 A Tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:
>
> (a) reasonable privacy;
> (b) freedom from unreasonable disturbance;
> (c) exclusive possession of the rental unit subject only to the Landlord's right to enter the rental unit in accordance with section 29 [Landlord's right to enter rental unit restricted];
> (d) use of common areas for reasonable and lawful purposes, free from significant interference.

As the Tenant has made no claim with respect to her privacy or use of common areas subsections (a) and (d) do not apply on the facts before me. For ease of analysis, I will address subsection (c) prior to addressing subsection (b).

Section 28 (c)

While the Landlord testified that an oral agreement existed between the Landlord and the Tenant for common use of the ¼ acre, the Tenant disputed the existence of such an agreement. Despite the assertion of an oral agreement, the Landlord also affirmed that "legally speaking [the ¼ acre] was part of the tenancy". I find the written residential

tenancy agreement to be the best evidence of what the parties agreed to at the time they entered into the agreement. As the tenancy agreement contained an addendum with bespoke terms, but nevertheless fails to mention to the ¼ acre, I do not accept the Landlord's testimony that an oral agreement existed as to the use of the ¼ acre; the Landlord could have easily reflected any oral agreement in writing, as they did with the terms reflected in the addendum. I accept the Tenant's testimony that on the part of the Landlord there was "a lot of assuming agreement because I didn't ask [the Landlords] to remove [the animals]. Accordingly, I accept that the Landlord believed an unspoken assumed agreement existed between them and the Tenant. As the law does not recognize unspoken assumed agreements, I find the ¼ acre did form part of the rental unit to which the Tenant was entitled exclusive possession under section 28 (c) of the *Act*. Further, I find the Landlord's daily use of the ¼ acre breached the Tenant's section 28 entitlement to quite enjoyment, as the daily use sufficiently undermined the Tenant's right to exclusive possession.

In accordance with section 28 (c) of the *Act* the Tenant's right to exclusive possession is subject to the Landlord's rights under section 29. Under section 29 (1) of the *Act* a Landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:

> (a) the Tenant gives permission at the time of the entry or not more than 30 days before the entry;
> (b) at least 24 hours and not more than 30 days before the entry, the Landlord gives the Tenant written notice that includes the following information:
> (i) the purpose for entering, which must be reasonable;
> (ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the Tenant otherwise agrees;
> (c) the Landlord provides housekeeping or related services under the terms of a written tenancy agreement and the entry is for that purpose and in accordance with those terms;
> (d) the Landlord has an order of the director authorizing the entry;
> (e) the Tenant has abandoned the rental unit;
> (f) an emergency exists and the entry is necessary to protect life or property.

On the facts before me, subsections 29 (1)(d) to (f) inclusive, are not applicable. In respect of section 29 (1)(a), the uncontroverted evidence is that the Landlord would keep and tend to animals daily on the ¼ acre without the Tenant furnishing permission at the time of entry. In respect of section 29 (1)(b), the uncontroverted evidence is that the Landlord did not give notice to the Tenant in respect of their use of the ¼ acre as they believed the ¼ acre was "shared property" that they were entitled to use. In respect

of section 29 (1)(c), the uncontroverted evidence is that the written tenancy agreement is silent in respect of housekeeping or related services. By the Landlord's own testimony, the Landlord entered the rental daily. Based on the foregoing, I find that the Landlord was required to, but did not comply with section 29 (1) of the *Act.*

Section 28 (b)

Based upon my foregoing analysis and findings pertaining to subsection (c) of section 28, I find that the Landlord unreasonable disturbed the Tenant with their daily presence on the ¼ acre, and by keeping sheep and birds on the ¼ acre. The Tenant was not able to use the rental unit as she desired or intended, as the Landlord's use of the ¼ acre required the Tenant to tether her dog so as to keep it from attacking the Landlord's sheep and birds, which effectively disrupted her daily conduct and use of her rental unit. I find the disruption unreasonable because it was ongoing with regular consequences for the Tenant and her family. Accordingly, I find the Landlord breached the Tenant's section 28 entitlement to quite enjoyment by infringing upon the Tenant's right to freedom from unreasonable disturbance

Liability

Under section 7 (1) of the *Act* a Landlord is liable for non-compliance with the *Act*:

> (1) If a Landlord or Tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying Landlord or Tenant must compensate the other for damage or loss that results.

However, section 7 also requires the party claiming compensation resulting from non-compliance to minimize the damage or loss:

> (2) A Landlord or Tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Given that the uncontroverted evidence is that the Tenant did not raise any concerns about the Landlord's use of the back ¼ acre until she wrote the letter, in which she makes no request for the Landlord to cease their use of the ¼ acre, I find the Tenant failed to do anything to minimize the loss.

I accept the Tenant's testimony that she did not know her rights under the *Act*, however I do not accept that her lack of knowledge in this regard is a sufficient reason to have never raised her concerns with the Landlord. Given the Tenant's failure to do anything to minimize her loss, I find that the Tenant effectively acquiesced to the Landlord's use of the ¼ acre. Accordingly, I dismiss the Tenant's application for a Monetary Order in

the amount of $3,080.00 without leave to reapply. As the Tenant was unsuccessful in her application, I also dismiss her application to recover the filing fee pursuant to Section 72 of the *Act*.

Conclusion

The Tenant's application is dismissed without leave to reapply.

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: September 24, 2020

Residential Tenancy Branch