Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **PSF, OLC**

Introduction

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

1. An Order for the Landlord to provide services or facilities required by the tenancy agreement or law pursuant to Section 62(3) of the Act; and,
2. An Order for the Landlord to comply with the Act, regulations and tenancy agreement pursuant to Section 62(3) of the Act.

The hearing was conducted via teleconference. The Landlord, AN, her support person, RP, her Legal Counsel, FM, and Property Manager, JW, attended the hearing at the appointed date and time. Both Tenants, DH and MH, attended the hearing at the appointed date and time. Both parties were each given a full opportunity to be heard, to present affirmed testimony, to call witnesses, and make submissions.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they were not recording this dispute resolution hearing.

The Tenants served the Notice of Dispute Resolution Proceeding package for this hearing to the Landlord via Canada Post registered mail on November 5, 2021 (the "NoDRP package"). The Tenants referred me to the Canada Post registered mail tracking number as proof of service. I have noted the registered mail tracking number on the cover sheet of this decision. The Landlord confirmed receipt of the NoDRP package. I find that the Landlord was deemed served with the documents for this

hearing five days after mailing them, on November 10, 2021, in accordance with Sections 89(1)(c) and 90(a) of the Act.

Issues to be Decided

1. Are the Tenants entitled to an Order for the Landlord to provide services or facilities required by the tenancy agreement or law?
2. Are the Tenants entitled to an Order for the Landlord to comply with the Act, regulations and tenancy agreement?

Background and Evidence

I have reviewed all written and oral evidence and submissions before me; however, only the evidence and submissions relevant to the issues and findings in this matter are described in this decision.

The parties agreed that this periodic tenancy began in May 2008. Monthly rent is $1,116.00 payable on the first day of each month. A security deposit of $600.00 was collected at the start of the tenancy and is still held by the Landlord. The Tenant DH believed he paid a pet damage deposit because he had two dogs when he moved in. The Landlord stated that no pet damage deposit was collected.

Tenant DH testified that he did not have a copy of the original tenancy agreement and that it was slightly different than the current tenancy agreement he signed in August 2020. DH stated his original tenancy agreement said he had full use of the backyard. In May 2020, DH said that he struck a verbal agreement with the Landlord asking if it was okay to put up a gazebo in the back corner of the backyard. He said it was a substantial investment and he wanted to ensure that the Landlord agreed it was fine. DH further stated that the neighbour above them walks through the yard on a pathway to go out, and he lets his dog out to use the backyard, but that no one else uses the backyard for BBQs or parties. DH testified that the Landlord gave him the green light and DH purchased the gazebo, a fire table, and some chairs.

In May 2020, the Landlord testified that she agreed DH could put up the gazebo to help alleviate tensions between DH and a previous tenant in another unit of the residential property. The gazebo only relieved the tension briefly. Police had been called out about 15 times in 4.5 years due to heated exchanges between DH and this previous tenant. The Landlord also raised the fence between the yards and built a dedicated entrance for

the previous tenant directly off the driveway to enter and exit her unit without having to cross paths with DH. That previous tenant moved out in June 2021, and the Landlord states the reasons for the verbal permission to put up the gazebo no longer exist.

The Landlord testified that there never was a written tenancy agreement until the agreement signed in 2020. Section 4 of the tenancy agreement lists the following as included in the rent: fridge, stove, dishwasher, washer and dryer in rental unit, electricity, heat, hot water, water supply, sewer supply, sewage disposal, cablevision, internet, window coverings and one parking stall.

The Landlord relies on Sections 26 and 28 in the tenancy agreement which state:

> ***26. COMMON AREAS AND OUTSIDE.*** *The tenant and the tenant's guests will act safely in, and ensure there is no misuse of or damage to, common areas of the residential property. The tenant will comply with all notices, rules, or regulations given to the tenant or posted on the residential property, including those restricting access to or use of common areas by guests and/or children. All such use will be at the sole risk of the tenant or the tenant's guests. The tenant must not leave or store any possessions or refuse in common areas. Nothing, including cleaning implements or materials, is to be shaken or thrown from windows, doors, balconies, or into common areas. Nothing is to be place on or fastened to the inside or outside of doors, windows or the exterior of the residential property, including cables, wires, awnings, antennas or satellite dishes. The landlord may require excessive or unsightly items to be removed from a balcony. Barbecues or other solid, liquid or gas burning appliances must not be used in the rental unit; such devices may be used or stored on balconies or the residential property only with the landlord's written consent and in areas designated by the landlord. The tenant will not encourage birds, wild or stray animals on to the residential property nor feed them on or near the residential property.*
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> ***28. STORAGE.*** *The tenant's possessions kept on the residential property must be maintained in safe condition within the rental unit or designated storage or parking areas and is at the tenant's sole risk for theft, damage or loss from any cause. Potentially dangerous or hazardous items or materials must not be brought into or kept in the rental unit or on the residential property. It is a material term of this Agreement that items or materials stored in the rental unit must be limited in quantity to avoid and prevent a potential*

> *fire or health hazard, or impede access to, exit from, or normal movement within any area of the rental unit.*

The Landlord maintains all the common areas of the residential property. The Landlord says common areas around the residential property include: main gate off the driveway, the 300 square foot backyard which people walk through (and where the gazebo is situated) and the east side yard where students store their bicycles. The Landlord stated that the Tenants' tenancy agreement was not amended to include the 10' X 12' gazebo as a term of the rental agreement. The Landlord stated the gazebo is used as storage area and as extension of the Tenants' living space, although the backyard area is a common area on the property.

In October 2021, the Landlord contracted with a tree work company to complete some garden work on large plants on the property. Specifically, the tree work company was to:

- *Trim Oak tree on West side of house growing out of control onto the roof.*
- *Removal of three Trees of Heaven growing out of control in the driveway area.*
- *Trim two Fig trees in East side back yard.*
- *Prune large Cherry tree in distress, and possible diseased, also located in the middle of East side back yard.*

Further instructions in the tree work company's letter states:

> *As well, we discussed with the Owner what must be done in East side yard prior to November 15 they are the following:*
>
> 1) *A complete dismantling of the structure, gazebo, and everything inside must be removed and stored elsewhere other than in the yard.*
> 2) *All lights, electrical wires and miscellaneous items must be removed from the Fig trees and Cherry tree and stored elsewhere other than in the yard.*

October 22, 2021, the Landlord provided notice to the Tenants about removing the gazebo and its contents prior to this tree work commencing. Again, on November 15, 2021, the Tenants were notified in writing that the tree company would be arriving on November 22, 2021 to begin the work. The Tenants did not comply with the removal

instructions and complete work on the Cherry tree was not done. The tree work company provided an update email about the work completed, it said:

> *The tent structure we had requested to be removed from underneath the Cherry tree had not been done. As such we were not able to work on the lower canopy which extended over this structure as the potential for damage was high. We opted to be cautious as we did not want to create any loss to the owner. In addition the time spent working on the Cherry was longer than anticipated due to the additional obstacle in the way. … Should this situation occur on future visits, we will have to add additional charges for the delays caused due to working around items not moved from our work area.*

The Landlord's future plan includes contracting with the tree work company again to complete the work on the Cherry tree in anticipation to saving it. For these reasons, the Landlord wants the gazebo dismantled so that she may carry out all the property maintenance that is planned.

The Tenants object to the Landlord's statement that the gazebo is used for storage. It houses tables, and four chairs. The only item in the gazebo that could be classified as storage is a small aluminum ladder. The Tenants say that the gazebo is a material term in their tenancy agreement.

The Landlord's counsel states that the Tenants cannot appropriate common area as it is part of the residential area that is shared. The common area is entirely maintained by the Landlord, or her contractors, and there is no permission to the Tenants to have exclusive use of any of that space.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

A service or facility defined under Section 1 of the Act includes any such service or facility that is provided or agreed to be provided by the landlord to the tenant of a rental unit. Section 4 of the tenancy agreement covers all the items included in the rent for this unit. None of these items include the gazebo. I find that the gazebo put up by the Tenants in 2020 is neither a service nor facility provided by the Landlord in the tenancy

agreement and is not a material term of the tenancy agreement. The Landlord's reliance on Sections 26 and 28 of the tenancy agreement is enforceable.

Residential Tenancy Policy Guideline #22 deals with termination or restriction of a service or facility. The policy talks about "essential" services or facilities which are those that are necessary, indispensable, or fundamental. The gazebo may have previously been an escape from a difficult tenant but seems to have become a desired item for the Tenants to keep and use. However, the loss of the gazebo will not make it impossible or impractical for the Tenants to use the rental unit as living accommodation, and the Tenants have not proven that it is an essential service or facility under the tenancy agreement. I dismiss the Tenants' claim to Order the Landlord to provide services or facilities required by the tenancy agreement or law without leave to re-apply.

I Order the Tenants to dismantle and remove the gazebo and all its contents from the back yard common area by January 28, 2022. Should the Tenants fail to comply with this Order, the Landlord is at liberty to apply for dispute resolution and request financial compensation for their losses.

As the Landlord has not violated the Act, Residential Tenancy Regulation (the "regulation") or the tenancy agreement, I do not Order the Landlord to comply with the Act, regulation or tenancy agreement.

Conclusion

The Tenants are Ordered to dismantle and remove the gazebo and all its contents from the back yard common area by January 28, 2022.

The Tenants' claims are dismissed in their entirety.

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

Dated: January 15, 2022

Residential Tenancy Branch