Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding JOVI REALTY INC
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes RR, RP, FFT

Introduction

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

- an order allowing the tenant to reduce rent of $379.00 total, for repairs, services, or facilities agreed upon but not provided, pursuant to section 65;
- an order requiring the landlord to complete repairs to the rental unit, pursuant to section 32; and
- authorization to recover the $100.00 filing fee paid for this application, pursuant to section 72.

The landlord's agent and the tenant attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. This hearing lasted approximately 31 minutes.

This hearing began at 9:30 a.m. with me, the landlord's agent, and the tenant present. The tenant left the hearing from 9:40 a.m. to 9:41 a.m. I did not discuss any evidence with the landlord's agent in the absence of the tenant. This hearing ended at 10:01 a.m.

Both hearing participants confirmed their names and spelling. They both provided their email addresses for me to send this decision to both parties after the hearing.

The landlord's agent confirmed that he is the licensed rental agent for the landlord company ("landlord") named in this application. He said that the landlord is an agent for the owner. He stated that he had permission to represent the landlord and the owner at this hearing. He provided the rental unit address.

Rule 6.11 of the Residential Tenancy Branch ("RTB") *Rules of Procedure* ("*Rules*") does not permit recordings of any RTB hearings by any participants. At the outset of this hearing, the landlord's agent and the tenant both separately affirmed, under oath, that they would not record this hearing.

I explained the hearing and settlement processes, and the potential outcomes and consequences, to both parties. I informed them that I could not provide legal advice to them or act as their agent or advocate. Both parties had an opportunity to ask questions. Neither party made any adjournment or accommodation requests.

Both parties confirmed that they were ready to proceed with this hearing, they wanted me to make a decision, and they did not want to settle this application. Both parties were given multiple opportunities to settle this application at the beginning and end of this hearing, and declined to do so.

I cautioned the tenant that if I dismissed his application without leave to reapply, he would receive $0. He affirmed that he was prepared for the above consequences if that was my decision.

I cautioned the landlord's agent that if I granted the tenant's application, the landlord would be required to complete repairs and pay the tenant $479.00 total. He affirmed that the landlord was prepared for the above consequences if that was my decision.

The landlord's agent confirmed receipt of the tenant's application for dispute resolution hearing package. In accordance with sections 89 of the *Act*, I find that the landlord was duly served with the tenant's application.

The landlord's agent stated that he did not serve the tenant with the landlord's evidence. The tenant stated that he did not receive evidence from the landlord. The landlord's agent said that the tenant already provided him with the same documents, including the parties' written tenancy agreement, the parties' move-in condition inspection report, and a copy of Residential Tenancy Policy Guideline 1. The tenant confirmed that he already had the above documents and provided them to the landlord.

I informed both parties that I would consider the landlord's evidence at the hearing and in my decision. I notified them that the tenant had copies of the above evidence, provided it to the landlord, and provided the tenancy agreement and move-in condition inspection report as evidence for this hearing with his own application. Both parties confirmed their understanding of same.

Further, I am entitled to consider all applicable Residential Tenancy Policy Guidelines in this decision, regardless of whether parties provided copies of them or not, to the RTB and/or the other party.

Issues to be Decided

Is the tenant entitled to an order allowing him to reduce rent for repairs, services or facilities agreed upon but not provided?

Is the tenant entitled to an order requiring the landlord to complete repairs to the rental unit?

Is the tenant entitled to recover the filing fee for this application?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties at this hearing, not all details of the respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on November 1, 2020. Both parties signed a written tenancy agreement. Monthly rent in the current amount of $2,142.00 is payable on the first day of each month, effective January 1, 2023, pursuant to a rent increase of 2%, from the former rent of $2,100.00, issued by the landlord. A security deposit of $1,050.00 was paid by the tenant and the landlord continues to retain this deposit in full. The tenant continues to reside in the rental unit.

The tenant testified regarding the following facts. The air conditioner is broken. There was no inspection person sent by the landlord. The tenant used the air conditioner in the summer, it caused a leak, and there was a smoke smell, so he stopped using it. The tenant asked the landlord to provide a "repairman" for the air conditioner. The tenant wants either a repair of the air conditioner or a one-time rent reduction to replace the air conditioner of $379.00. That amount is based on the tenant looking up the same model of air conditioner in a store and providing a photo of the online price, as of August 28, 2022. The air conditioner is included in the rental unit. The tenant does not know the age of the air conditioner, but the landlord told him it was old, and was there before his tenancy. The air conditioner is not listed in the tenancy agreement, but it is listed in

the move-in condition inspection report, which says that it was “checked” by the landlord. The air conditioner is included because it is mentioned in the move-in condition inspection report.

The landlord’s agent testified regarding the following facts. The tenant does not own the portable air conditioning unit in the rental unit, as the landlord owns it. The tenant is renting and could use the air conditioner. There was brown water leaking on the chair from the air conditioner. The portable air conditioner cannot be used on a chair, and it should have been on the ground. It was a long summer, and the tenant was using the air conditioner a lot. The air conditioner is not included on the tenancy agreement. The move-in condition inspection report said that everything was “checked” in the rental unit and the portable air conditioner was checked as part of the living room. The owner of the rental unit does not agree to pay for the tenant. The landlord will charge back the tenant for the damage to the air conditioner and the chair. The landlord disputes the tenant's entire application. The tenant has to pay for the repair or replacement of the air conditioner. The air conditioner is not part of the tenancy, so the landlord is not obligated to pay for it or replace it.

The tenant stated the following in response. The landlord told the tenant to pay for the air conditioner and said that it would not be replaced or repaired.

Analysis

Rules and Burden of Proof

At the outset of this hearing, I informed the tenant that, as the applicant, he had the burden of proof, on a balance of probabilities, to prove his application and evidence. The tenant affirmed his understanding of same.

The tenant was provided with an application package from the RTB, including a four-page document entitled “Notice of Dispute Resolution Proceeding” (“NODRP”), when he filed this application.

The NODRP, which contains the phone number and access code to call into this hearing, states the following at the top of page 2 (my emphasis added):

> *The applicant is required to give the Residential Tenancy Branch proof that this notice and copies of all supporting documents were served to the respondent.*

- ***It is important to have evidence to support your position with regards to the claim(s) listed on this application. For more information see the Residential Tenancy Branch website on submitting evidence at www.gov.bc.ca/landlordtenant/submit.***
- *Residential Tenancy Branch Rules of Procedure apply to the dispute resolution proceeding. View the Rules of Procedure at www.gov.bc.ca/landlordtenant/rules.*
- *Parties (or agents) must participate in the hearing at the date and time assigned.*
- *The hearing will continue even if one participant or a representative does not attend.*
- *A final and binding decision will be sent to each party no later than 30 days after the hearing has concluded.*

The NODRP states that a legal, binding decision will be made in 30 days and links to the RTB website and the *Rules* are provided in the same document. During this hearing, I informed both parties that I had 30 days after this hearing to issue a written decision.

The tenant received a detailed application package from the RTB, including the NODRP documents, with information about the hearing process, notice to provide evidence to support his application, and links to the RTB website. It is up to the tenant to be aware of the *Act, Regulation*, RTB *Rules*, and Residential Tenancy Policy Guidelines. It is up to the tenant to provide sufficient evidence of his claims, since he chose to file this application on his own accord.

The following RTB *Rules* state, in part:

> *7.4 Evidence must be presented*
> *Evidence must be presented by the party who submitted it, or by the party's agent…*
> …
> *7.17 Presentation of evidence*
> *Each party will be given an opportunity to present evidence related to the claim. The arbitrator has the authority to determine the relevance, necessity and appropriateness of evidence…*
>
> *7.18 Order of presentation*

> *The applicant will present their case and evidence first unless the arbitrator decides otherwise, or when the respondent bears the onus of proof…*

I find that the tenant did not properly present his application and evidence, as required by Rule 7.4 of the RTB *Rules*, despite having multiple opportunities to do so, during this hearing, as per Rules 7.17 and 7.18 of the RTB *Rules.*

During this hearing, the tenant failed to sufficiently present and explain his claims and evidence submitted in support of his application. The tenant mentioned submitting documents but did not review them in sufficient detail during this hearing.

This hearing lasted 31 minutes, so the tenant had ample opportunity to present his application and respond to the landlord's testimony. I repeatedly asked the tenant if he had any other information or evidence to present, during this hearing.

Repairs

Section 32 of the *Act* states the following:

> *Landlord and tenant obligations to repair and maintain*
> *32 (1) A landlord must provide and maintain residential property in a state of decoration and repair that*
> *(a) complies with the health, safety and housing standards required by law, and*
> *(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.*
> *(2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.*
> *(3) A tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.*
> *(4) A tenant is not required to make repairs for reasonable wear and tear.*
> *(5) A landlord's obligations under subsection (1) (a) apply whether or not a tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement.*

Residential Tenancy Policy Guideline 1 states the following, in part, at page 1:

The Landlord is responsible for ensuring that rental units and property, or manufactured home sites and parks, meet "health, safety and housing standards" established by law, and are reasonably suitable for occupation given the nature and location of the property. The tenant must maintain "reasonable health, cleanliness and sanitary standards" throughout the rental unit or site, and property or park. The tenant is generally responsible for paying cleaning costs where the property is left at the end of the tenancy in a condition that does not comply with that standard. The tenant is also generally required to pay for repairs where damages are caused, either deliberately or as a result of neglect, by the tenant or his or her guest. The tenant is not responsible for reasonable wear and tear to the rental unit or site (the premises), or for cleaning to bring the premises to a higher standard than that set out in the Residential Tenancy Act or Manufactured Home Park Tenancy Act (the Legislation).

Reasonable wear and tear refers to natural deterioration that occurs due to aging and other natural forces, where the tenant has used the premises in a reasonable fashion. An arbitrator may determine whether or not repairs or maintenance are required due to reasonable wear and tear or due to deliberate damage or neglect by the tenant. An arbitrator may also determine whether or not the condition of premises meets reasonable health, cleanliness and sanitary standards, which are not necessarily the standards of the arbitrator, the landlord or the tenant.

On a balance of probabilities and for the reasons stated below, I dismiss the tenant's application for the landlord to complete repairs to the portable air conditioning unit ("AC") at the rental unit, without leave to reapply.

Both parties agreed at this hearing, that the AC is not listed as a service or facility included in the monthly rent on page 2, section 3 of the parties' written tenancy agreement. AC is not listed under "other," where there is a space to include a description, in the above section. Electricity is not included in the monthly rent, as per the above section. I find that the AC is not a service or facility in the rental unit, that the landlord is obligated to provide to the tenant.

The AC is not an individual mechanical system that is built into the rental unit, as referenced in Residential Tenancy Policy Guideline 40. It is a portable and removal unit. It is not listed as a major appliance, that the landlord is required to repair, as per Residential Tenancy Policy Guideline 1.

It is undisputed that the AC is owned by the landlord, not the tenant. I find that the AC was provided in the rental unit, for the tenant's optional use, as a courtesy, added benefit and for extra comfort. The tenant agreed that the landlord told him that the AC was old, used, and pre-existed the tenant's tenancy. The AC was not specifically purchased by the landlord for the tenant's use during this tenancy, as it was already located inside the rental unit, when the tenant began his tenancy.

The tenant did not provide any expert evidence, nor did he tender any expert witnesses, such as a certified, licensed AC professional, to testify at this hearing, to indicate the cause of the broken AC, the resulting leak, or the smoke smell.

During this hearing, I find that the tenant failed to provide sufficient testimonial evidence of when he notified the landlord about the broken AC and the leak, whether he notified the landlord that it was an essential service or facility or a material term of the tenancy agreement, how much time he provided the landlord to repair the AC, or other such information.

I find that the landlord fulfilled its obligation, pursuant to section 32 of the *Act,* to provide and maintain the rental unit in a state of decoration and repair that (a) complies with the health, safety and housing standards required by law, and (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by the tenant.

I find that the rental unit is still suitable for occupation by the tenant, even if the AC does not work. The tenant agreed that he used the AC in the summer during the hot weather. I find that the AC is not essential or material to the rental unit, and it is usually only used during hot summer weather, not all year-round, but is not required for the tenant to live at the rental unit, in any event.

Rent Reduction

Section 1 of the *Act* defines a "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;

Residential Tenancy Policy Guideline 22, states the following, in part at pages 1 and 2 (bold emphasis in original):

A. LEGISLATIVE FRAMEWORK
In a tenancy agreement, a landlord may provide or agree to provide services or facilities in addition to the premises which are rented. For example, an intercom entry system or shared laundry facilities may be provided as part of the tenancy agreement. A definition of services and facilities is included in Section 1 of the Residential Tenancy Act (RTA) and the Manufactured Home Park Tenancy Act (MHPTA).

Under section 27 of the RTA and section 21 of the MHPTA 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
***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.*

• See also Policy Guideline 8: Unconscionable and Material Terms

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. For example, if the landlord has been providing basic cablevision as part of a tenancy agreement, it may not be considered essential, and the landlord may not have breached a material term of the agreement, if the tenant can obtain a comparable service.

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.

If the tenancy agreement doesn't state who is responsible for any added service or facility, not provided by the tenant, after the commencement of the tenancy, and there is a cost involved in obtaining the service or facility, the landlord is responsible for the cost, unless the landlord has obtained the written agreement of the tenant to be responsible for the cost.

Where there is a termination or restriction of a service or facility for quite some time, through no fault of the landlord or tenant, an arbitrator may find there has been a breach of contract and award a reduction in rent.

Where there is a termination or restriction of a service or facility due to the negligence of the landlord, and the tenant suffers damage or loss as a result of the negligence, an arbitrator may also find that the tenant is eligible for compensation for the damage or loss.

- *See also Policy Guideline 16: Compensation for Damage or Loss*

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.

- *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.*

As per Residential Tenancy Policy Guideline 22 above, it is the tenant's burden of proof, and I find that the tenant failed to provide sufficient evidence to address the above 6 issues.

I find that the AC at the rental unit is not a service or facility that is provided or agreed to be provided by the landlord to the tenant at the rental unit, as per section 1 of the *Act* above. As noted above, I found that the AC is not included as a service or facility included in the monthly rent of the parties' written tenancy agreement. As noted above, I found that the AC is not an essential service or facility, nor it is a material term of the tenancy agreement (as it is not even indicated at all in the tenancy agreement).

I find that the AC is not a service or facility that is essential to the use of the rental unit as living accommodation. As per Residential Tenancy Policy Guideline 22 above, I find that the AC is not necessary, indispensable, or fundamental, and a reasonable person in similar circumstances would not find that the loss of the AC has made it impossible or impractical for the tenant to use the rental unit as living accommodation. The example used in Residential Tenancy Policy Guideline 22 above, is an elevator in a multi-storey

apartment building, which is considered an essential service. I find that the AC is an added luxury that is not comparable or essential.

As per Residential Tenancy Policy Guideline 22 above, I find that the AC is not a material term that both parties agree is so important that the most trivial breach of that term gives the other party the right to end the agreement. The tenant is still residing at the rental unit and testified at this hearing, that he had no plans to move out. I find that the tenant did not provide sufficient evidence of wanting to end the tenancy agreement with the landlord.

As per Residential Tenancy Policy Guideline 22 above, I find that the tenant can obtain a reasonable substitute for the portable AC, as he can purchase another one. The example used in Residential Tenancy Policy Guideline 22 above, is if the landlord has been providing basic cablevision as part of a tenancy agreement, it may not be considered essential, and the landlord may not have breached a material term of the agreement, if the tenant can obtain a comparable service. I find that the AC is not comparable, and the landlord did not even agree to provide the AC as part of the tenancy agreement.

I also note that the tenant failed to provide sufficient evidence of the cost to replace the AC. The tenant provided a photograph of an online store advertisement for sale of a new AC of $379.00, claiming that it was the same model as the one in the rental unit. I find that the tenant did not provide sufficient evidence of the model of the AC in the rental unit. The tenant did not provide an estimate, quote, invoice, or receipt from a certified, licensed professional or store. He provided a cost for a new unit, rather than a used or comparable unit. Further, the cost to replace the AC, is not the same as the reduction in the value of the tenancy, as required for a rent reduction, as per Residential Tenancy Policy Guideline 22, above. However, I find that the tenant is not entitled to replacement of or the cost of replacement for the AC at the rental unit, including for the $379.00.

As the tenant was unsuccessful in this application, I find that he is not entitled to recover the $100.00 filing fee from the landlord.

Conclusion

The tenant’s entire 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: January 17, 2023

Residential Tenancy Branch