Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

A matter regarding BONAVISTA MANAGEMENT LTD and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes RR, RP, PSF, OLC, FFT

Introduction

On October 12, 2022, the Tenants applied for a Dispute Resolution proceeding seeking a rent reduction pursuant to Section 65 of the *Residential Tenancy Act* (the "*Act*"), seeking a repair Order pursuant to Section 32 of the *Act*, seeking the provision of services or facilities pursuant to Section 62 of the *Act*, seeking an Order to comply pursuant to Section 62 of the *Act*, and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

Tenant N.S. attended the hearing, with S.S. attending as an advocate for the Tenants. L.M., I.I., and A.W. attended the hearing as agents for the Landlord. At the outset of the hearing, I explained to the parties that as the hearing was a teleconference, none of the parties could see each other, so to ensure an efficient, respectful hearing, this would rely on each party taking a turn to have their say. As such, when one party is talking, I asked that the other party not interrupt or respond unless prompted by myself. Furthermore, if a party had an issue with what had been said, they were advised to make a note of it and when it was their turn, they would have an opportunity to address these concerns. The parties were also informed that recording of the hearing was prohibited, and they were reminded to refrain from doing so. As well, all parties in attendance provided a solemn affirmation.

S.S. advised that the Tenants' Notice of Hearing and evidence package was served to the Landlord by Xpresspost on October 26, 2022, and L.M. confirmed that this package was received. As such, I am satisfied that the Landlord was duly served the Tenants' Notice of Hearing and evidence package. Furthermore, as this evidence was served in accordance with the timeframe requirements of Rule 3.14 of the Rules of Procedure

(the “Rules”), I have accepted this evidence and will consider it when rendering this Decision.

L.M. advised that the Landlord’s evidence was served to the Tenants by registered mail on February 2, 2023, and S.S. confirmed that this was received. As this evidence was served in accordance with the timeframe requirements of Rule 3.15 of the Rules, I have accepted this evidence and will consider it when rendering this Decision.

As per Rule 2.3 of the Rules of Procedure, claims made in an Application must be related to each other, and I have the discretion to sever and dismiss unrelated claims. As such, the Tenant and S.S. were advised to prioritize their claims to make the most efficient use of the one-hour hearing time. S.S. chose to address the issue with respect to the restriction of a service or a facility. The Tenants are at liberty to apply for any other severed claims under a new and separate Application.

All parties 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.

Issue(s) to be Decided

- Is the Landlord entitled to terminate or restrict a service or a facility?
- Are the Tenants 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.

All parties agreed that the tenancy started on March 1, 2005, that rent was established at $1,650.00 per month, and that it was due on the first day of each month. A security deposit of $535.00 was also paid. Moreover, they stated that a garage was later provided to the Tenants for $60.00 per month, and that this was a separate contract that

was not part of the tenancy agreement. A copy of the signed tenancy agreement was entered into evidence for consideration.

S.S. advised that approximately 16 years ago, the Tenants were provided with use of the garage for $60.00 per month. While he indicated that this was a separate contract from the tenancy agreement, he confirmed that there was no written document created to confirm this arrangement. However, he testified that the Landlord served the Tenants with a Notice Terminating or Restricting a Service or Facility (the "Notice") on September 20, 2022, to terminate the Tenants' use of the garage as of October 31, 2022.

He stated that the Tenants disagreed with the Landlord's Notice, and he made submissions with respect to the Tenants' belief that the Landlord will not be using the garage for the reasons stated. He submitted that while there is nothing in writing indicating that the provision of the garage was a material term of the tenancy, it is their belief that it still is. In addition, he advised that the garage is essential for the Tenants because there is limited street parking, and the available outdoor stalls are too narrow for the Tenants to access. He stated that it would be detrimental to the Tenants not to have this garage as the Tenants have a vehicle, and terminating access to the garage would "very negatively affect their ability to live there". However, he minimally elaborated on this impact more specifically. He stated that the Tenants have tires stored in the garage and that paying to store these, in addition to paying for a different parking spot, would cause a financial burden on the Tenants. The Tenants did not submit any documentary evidence to demonstrate how the garage was an essential service or facility for them.

L.M. confirmed that there was no written contract regarding the provision of this garage to the Tenants; however, despite this, it was the Landlord's position that the garage contract was a completely separate contract from the tenancy agreement. She confirmed that the Notice was served to the Tenants on September 20, 2022, with an effective date of October 31, 2022. As well, she stated that the reduction of $60.00 per month reflects the reduction in the value of the tenancy. She acknowledged that the Tenants still maintain possession of the garage.

I.I. advised that after the Notice was served, the Tenants asked her if the termination date could be postponed until the new year so that they could move their vehicle to a relative's home. Other than this, she stated that the Tenants did not raise any other issues with the Notice, and the Tenants were "willing and able" to move from the

garage, but this became a point of contention only when the Tenants had concerns with a different matter. As well, she testified that she has never observed the Tenants access the garage.

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

Section 27 of the *Act* outlines the following regarding 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.*

Furthermore, Policy Guideline # 22 states the following pertaining to this issue:

> **B. ESSENTIAL OR PROVIDED AS A MATERIAL TERM**
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> **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.

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.

When reviewing the totality of the evidence before me, the consistent and undisputed evidence is that there was no written contract regarding the provision of this garage. Despite this, while both parties believe that this was an entirely separate contract from the tenancy agreement, I reject their positions. Firstly, if it was the Tenants' belief that

this was a separate contract that was not part of the tenancy agreement, then disputing this Notice through the Residential Tenancy Branch would not be logical as this would represent a separate contractual agreement that was agreed to outside of the jurisdiction of the *Act*. By virtue of them disputing this Notice, I find it reasonable to conclude that it is their belief that this matter fell under the purview of the *Act*.

Moreover, if it was the Landlord's belief that this was a separate contract that was not part of the tenancy agreement, then it makes little sense that they would then serve the Notice, which is clearly required to be done to terminate or restrict a service or facility under the *Act*. As such, I am satisfied that the provision of this garage was a service or facility granted to the Tenants after the tenancy began, and that this was included as part of their tenancy.

As such, with respect to the six issues which must be addressed above, I find that the provision of the garage was a service or facility as set out in Section 1 of the *Act*, and that the service or facility has been terminated or restricted by way of service of the Notice.

Regarding the third point about whether the provision of the service or facility is a material term of the tenancy agreement, as both parties failed to document this agreement in writing, it would be impossible then for this to be a material term of the tenancy agreement. Moreover, there is no evidence before me that both parties verbally agreed that the provision of the garage was a material term of the tenancy, and that this term was so important that the most trivial breach of that term gave the other party the right to end the agreement. As such, I reject that the provision of the garage was a material term of the tenancy.

Furthermore, with respect to the fourth point of whether the service or facility is essential to the use of the rental unit as living accommodation, I find it important to note that the burden of proof rests with the Tenants to establish that the garage met the definition of essential. I find that S.S. failed to present any evidence that demonstrated that the loss of the garage would make it impossible or impractical for the Tenants to use the rental unit as living accommodation. As such, I am satisfied that his submissions were not compelling or persuasive in proving that the garage was an essential facility. In addition, there was no documentary evidence submitted to corroborate this position either.

Based on these last two points, and given that the Landlord used the approved form to

terminate or restrict a service or facility, I reject the Tenants' claim that the Landlord has not met the requirements of the *Act* to terminate the use of the garage.

Moreover, as the Tenants did not make any submissions that the amount of the rent reduction of $60.00 per month did not accurately reflect the reduction in the value of the tenancy, I am satisfied that the Landlord has met all the requirements of the *Act* to comply properly with the *Act* in terminating or restricting a service or facility. As such, I dismiss the Tenants' Application with respect to this issue in its entirety. The Tenants should give up vacant possession of the garage by February 28, 2023, and the rent reduction should take effect as of March 1, 2023.

As the Tenants were unsuccessful in their Application, I find that the Tenants are not entitled to recover the $100.00 filing fee paid for this Application.

Conclusion

Based on the above, the Tenants' Application, with exception to the matters that have been severed, 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: February 24, 2023

Residential Tenancy Branch