Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes MT, CNC, MNDC, OLC, LRE, FF

Introduction

This hearing was scheduled to hear the tenants' application for more time to make this application to cancel a Notice to End Tenancy; to cancel a Notice to End Tenancy for cause; for a Monetary Order for damage or loss under the Act, regulations or tenancy agreement; for Orders for the landlord to comply with the Act, regulations or tenancy agreement; to set conditions or suspend the landlord's right to enter the rental unit; and, to recover the filing fee paid for this application.

Procedural record

The tenants filed their application on July 29, 2009 subsequent to receiving a Notice to End Tenancy posted on the tenants' door on July 24, 2009. A binder of submissions and evidence was provided to the Residential Tenancy Branch by the tenants on September 8, 2009. The landlord's representative confirmed that the tenants' submission was served upon the landlord's representative on September 9, 2009. On September 9, 2009 the landlord provided the Residential Tenancy Branch with the landlord's submissions and evidence. At the commencement of the September 16, 2009 teleconference call the landlord's representative requested an adjournment in order to be provided more time to respond to the tenants' voluminous submission. The tenants requested this matter be held face-to-face and had provided evidence that their telephone service had been intermittent. Discussion ensued concerning time limits for the teleconference call and since the tenants did not experience telephone difficulties at the time of the teleconference call, the hearing proceeded by way of the teleconference call.

The teleconference call held on September 16, 2009 lasted 1 hour and 45 minutes. The tenants confirmed that they would be vacating the rental unit by September 30, 2009 and I determined that the only remaining issue to resolve was the tenants' claim for compensation for loss of quiet enjoyment. During this teleconference call the tenants were provided the opportunity to present their claims and the landlord's representative was provided the opportunity to question the tenants. The landlord was not provided the opportunity to make arguments or submissions due to time constraints of the teleconference call and scheduling of the hearing. At the end of the teleconference call I informed the parties that I would provide further instruction to the parties with respect to proceeding with this application.

After the teleconference call ended and upon further consideration of the matter before me, I determined the landlord's submissions and arguments would be heard by written submission. On September 25, 2009 I contacted both parties in writing. I instructed the landlord to make written submissions to the tenants and the Residential Tenancy Branch no later than October 9, 2009 and I instructed the tenants to respond to the landlord's submissions in writing no later than October 23, 2009. As I had heard that the tenants were about to vacate the rental unit, I instructed the tenants to provide a service address in writing to the landlord, in order to receive the landlord's written response and arguments, and the Residential Tenancy Branch no later than October 2, 2009.

On October 5, 2009 the tenants submitted a service address in writing to the Residential Tenancy Branch with the request it not be shared with the landlord. The tenants provided evidence as to the reason for not providing the Residential Tenancy Branch with their service address by October 2, 2009 which I accepted as reasonable. The tenants also provided additional submissions with respect to the statements made by the landlord's representative during the teleconference call.

On October 9, 2009 the landlord's representative provided written submissions to the Residential Tenancy Branch. On October 22, 2009 the tenant provided a binder to the

Residential Tenancy Branch in response to the landlord's submissions of October 9, 2009.

Upon review of the submissions of the parties, I determined it was necessary to reconvene the hearing to a participatory hearing in order to obtain clarification on certain issues and confirm service of the documents upon the other party.

During the reconvened hearing of January 15, 2010, the tenant confirmed that the additional submissions he had made on October 5, 2009 were not served upon the landlord or landlord's representative. I did not accept or consider those submissions. The tenant was asked to confirm service of the tenant's October 22, 2009 submissions upon the landlord or landlord's representative. The tenant could not recall the submissions he made on October 22, 2009 and claimed he could not respond to enquiries about his submissions without seeing them. I explained to the tenant it is upon the person who serves documents to prove service of the documents they intend to rely upon. The landlord's representative confirmed that he had received 14 pages from the tenant. Accordingly, I only accepted the tenant's 14 pages of submissions in the front section of the binder and refused to excerpt the remainder of the documents in the binder. The teleconference call of January 15, 2010 proceeded and both parties were provided the opportunity to be heard. I subsequently determined that the additional 66 pages submitted by the tenant in the binder received October 22, 2009 are copies of the landlord's submission with certain portions highlighted.

During the reconvened hearing, the tenant expressed great dissatisfaction at having this matter reconvened and providing the landlord with an opportunity to be heard. I explained to the parties that dispute resolution proceedings are based on the principals of natural justice, including the right of the respondent to be heard before a decision is given.

The parties were provided an opportunity to reach a mutual resolution to this dispute during the January 15, 2010 teleconference call. The parties did not reach a settlement.

Issues(s) to be Decided

Have the tenants established an entitlement to monetary compensation for loss of quiet enjoyment of the rental unit, and if so, the amount?

Background and Evidence

The written tenancy agreement provided as evidence by the tenants indicates the following terms of tenancy:

- The tenancy was to commence October 31, 2008.
- The tenants were required to pay rent of $1,300.00 on the 1st day of each month.
- The length of the tenancy is not properly completed in the section that provides for the length of the tenancy. Rather, the space that provides that a fixed term tenancy is to continue on a month to month basis after the fixed term ends is ticked with the notation “minimum 6 months” beside it.
- The landlord and the female tenant signed the tenancy agreement on “2008-11-10”.
- Included in the rent was: water, 2 stoves and ovens, dishwasher, 2 refrigerators, window coverings, laundry, garbage, parking, antique bench, hot tub and 2 sets of patio furniture.

I heard undisputed testimony as follows. The rental unit is a house located on approximately three acres of land with approximately 1.5 acres of forest, extensive gardens, a greenhouse, two attached garages and one detached garage that stores gardening equipment. The landlord resided at the adjacent property which is a house on approximately 2 acres of land and had used the greenhouse on the rental property to grow bamboo. The landlord’s house had been undergoing extensive renovations including exterior sandblasting and refinishing. The distance between the rental house and the landlord’s house is approximately 50 - 100 feet. The female tenant often works night shift and when she is sleeping during the day a sign is posted on the front door

that states “do not disturb”. The landlord and a gardener tended to the extensive gardens and retrieved garden equipment stored in the detached garage. After the tenancy commenced the landlord communicated to the tenants in writing that they were not renting all of the house and acreage but were renting a house on acreage. In May 2009 the rental property was listed for sale. On July 23, 2009 the landlord issued a *1 Month Notice to End Tenancy for Cause*.

In making this application, the tenants requested compensation for loss of quiet enjoyment of the property in the amount of $4,000.00 calculated as $125 per month for the months of November 2008 through April 2009 and $650.00 per month for the months of May 2009 onwards. The tenants explained during the hearing that the landlord’s outbursts between November 2008 and April 2009 entitled them to compensation and when the house was listed for sale in May 2009 their loss of quiet enjoyment entitled them to compensation equivalent to one-half of the month’s rent.

The tenants provided a large volume of submissions and evidence in support of their claim. In order to provide this decision in a timely manner, the respective parties’ positions have been summarized below.

The tenants submitted that their right to quiet enjoyment was breached by the following activities:

- November 3, 2008 the landlord demanding the rent.
- November/December 2008 the landlord accusing the tenants of damaging the hot tub after they contacted a hot tub installer.
- March 2009 the landlord accused the tenants of ruining the house with mould.
- Lewd behaviour by landlord, threats to take away hot tub, threats to increase rent.
- Frequent presence of gardener and landlord on rental property.
- Frequent showings and open houses, including a false showing.

- Excessive noise from created by renovations at landlord's home, gardening, power washing the driveway, and a loud car being removed from the rental property.
- Pounding on the tenants' door and aggressive behaviour from landlord, landlord's boyfriend and prospective purchaser of rental unit.
- Attempted illegal entry by someone with a key.
- The police were called by the tenants five times.

The tenants also submitted that they initially wanted to rent the landlord's house as it was a smaller house with a smaller yard but that the landlord offered them the rental unit with a promise that they would have a 4 to 5 year tenancy. The tenant claimed that the landlord was renovating the landlord's house just to spite the tenants and that the landlord was only interested in making money off the tenants.

The landlord provided the following statements in response to the allegations made by the tenants:

- The landlord acknowledged that the tenants initially viewed the landlord's house but the landlord did not offer to rent it to them as it was still undergoing extensive renovations. The parties entered into a tenancy for the rental unit but that it was not to be rented for a 4 to 5 year duration, as indicated by the tenancy agreement.
- The rental property requires extensive watering and maintenance efforts which were performed by the landlord and a gardener two days of the week but that the landlord tried to be respectful of the female tenant trying to sleep during the day.
- The tenants were given written notice of real estate showings.
- The first showing was June 11, 2009, the next showing was July 17, 2009 and the last showing was August 1, 2009.
- Security guards were provided for a showing where 18 people showed up to view the house.

- The landlord denied any involvement in an alleged assault from a prospective purchaser or that there were false showings set up.
- The landlord denied lewd or aggressive behaviour by her or her boyfriend. Rather, the landlord explained that she referred to the male tenant as a twitter on one occasion which means to be a joker in her culture.
- The landlord denied trying to enter the rental unit and explained that the realtor had been given a key to the rental unit.
- It was within the landlord's rights to maintain her own house which is located on a separate property and that renovations at the landlord's house were costly and had to be completed in accordance with schedules that worked for the contractors.
- No action was taken by the police in response to the five calls made by the tenants.
- The landlord acknowledged power washing the driveway to remove driveway chalk with the understanding it was acceptable for her to go on the property, just not the house.
- The landlord's godson stored his old car on the rental property for quite some time and he was asked to remove it from the property.

As evidence for the hearing, the tenants provided various photographs of the rental property, including a man seen in the yard, the godson starting the car parked on the property. The tenants included a disc containing footage of the alleged false showing that took place at the rental unit.

Analysis

The Act defines a rental unit as "living accommodation rented or intended to be rented to a tenant". Generally, where a house on land is rented the land on which the house is sited would be part of the rental unit. I find that a tenant would have a reasonable expectation that all of the parcel of land would form part of the rental unit unless otherwise agreed between the parties. In this case the rental house is located on a

sizeable piece of property and, in the absence of evidence that the parties had agreed otherwise, I find the rental unit included the three acres on which the house was situated. Rather, I find that if the landlord intended to only rent the house and a smaller portion of the property, the tenancy agreement should have indicated such. Ultimately, it is the landlord's responsibility to draft the tenancy agreement; thus, the tenants cannot be found to be remiss in this aspect. I do not find the landlord's subsequent correspondence to the tenants that they were renting the house and not the acreage to constitute an amendment to the tenancy agreement as amendments must be in writing and indicate both parties consent to the change. Therefore, in referring to the rental unit I am referring to the rental house and the approximate three acres on which it is sited.

Section 28 of the Act provides for the tenants' right to quiet enjoyment of the rental unit and common areas.

> **Protection of tenant's right to quiet enjoyment**
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> **28** A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:
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> (a) reasonable privacy;
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> (b) freedom from unreasonable disturbance;
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> (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]*;
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> (d) use of common areas for reasonable and lawful purposes, free from significant interference.

A landlord has a restricted right to enter a rental unit in accordance with section 29 of the Act, which provides:

Landlord's right to enter rental unit restricted

29 (1) 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.

(2) A landlord may inspect a rental unit monthly in accordance with subsection (1) (b).

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. That being said, where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim

and the claim fails. Awards for compensation are provided in section 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

The tenants claim that the landlord breached their right to quiet enjoyment. Residential Tenancy Policy Guideline 6 provides guidelines for establishing a breach of the covenant of quiet enjoyment to which I have referred. The policy guideline provides, in part, that

> "Frequent and ongoing interference by the landlord, or, if preventable by the landlord and he stands idly by while others engage in such conduct, may form a basis for a claim of a breach of the covenant of quiet enjoyment. Such interference might include serious examples of:
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> · entering the rental premises frequently, or without notice or permission;
> · unreasonable and ongoing noise;
> · persecution and intimidation;
> · refusing the tenant access to parts of the rental premises;
> · preventing the tenant from having guests without cause;
> · intentionally removing or restricting services, or failing to pay bills so that services are cut off;
> · forcing or coercing the tenant to sign an agreement which reduces the tenant's rights; or,
> · allowing the property to fall into disrepair so the tenant cannot safely continue to live there.

> Temporary discomfort or inconvenience does not constitute a basis for a breach of the covenant of quiet enjoyment.
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> It is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises, however a tenant may be entitled to reimbursement for loss of use of a portion of the property even if the landlord has made every effort to minimize disruption to the tenant in making repairs or completing renovations."

Upon consideration of all of the evidence before me, I make the following findings.

As the landlord did not remove the hot tub I do not find there to be a violation of the tenancy agreement. Upon review of the police reports, I find the status of the complaints was recorded as "unsubstantiated"; thus, I do not find the existence of police reports substantiates the tenants' claims. Rather, my decision is based upon the other evidence provided in support of their claims.

It is not in dispute that the landlord and a gardener were regularly on the property maintaining the gardens at the rental unit during the spring and summer months. The parties were in dispute as to how frequent the landlord or gardener were on the property; however, I did not find that the tenants provided sufficient detail that would establish the intense frequency of gardening activities beyond that acknowledged by the landlord. I find the landlord did not obtain the tenants' consent for a mutually agreeable gardening schedule or serve notices to enter for this purpose; and that this constitutes a violation of section 29 of the Act. I am satisfied that this violation was sufficiently frequent and ongoing during the spring and summer months that the tenants would have lost some of their privacy and quiet enjoyment of the rental unit as provided under section 28 of the Act. In awarding compensation to the tenants I have considered that the tenants had clearly communicated that they were not going to maintain the gardens. Accordingly, if the tenants would not be maintaining the rental property, it is reasonable to expect that the landlord and/or a gardener would have to do so. Therefore, I find an

award of 10% of their rent paid in May through September 2009 to be reasonable for the loss of privacy and quiet enjoyment due the landlord's frequent entry on the rental property to perform gardening activities. The tenants are awarded $650.00 ($1,300.00 x 10% x 5 months).

I further find the landlord did not have the right to enter the rental property to power wash the chalk from the driveway without proper notice or consent and notice should have been provided that the landlord's godson would be on the property to remove a vehicle. I award the tenants $50.00 for loss of quiet enjoyment related to the power washing incident and $50.00 for the vehicle removal incident.

I find the disputed evidence concerning an attempted entry to the rental unit, aggressive and lewd behaviour not sufficient to establish that the landlord, or persons acting on behalf of the landlord, attempted to enter the house or act in an aggressive or lewd behaviour towards the tenants. I do not find that a prospective purchaser or a real estate agent attending the property in an attempt to show the property for sale to qualify as a person acting on behalf of a landlord for the purpose of carrying out landlord activities; thus, the landlord is not responsible for that person's behaviour. I find the video provided by the tenants does not establish that the showing was a false showing as alleged by the tenants. Rather, an equally probable explanation of that showing is that the realtor and prospective purchasers were taken aback by the tenant video taping them.

Further, I find the landlord had the right to renovate and maintain her personal residence and I find the tenant's argument that renovations on the landlord's personal residence were made only to spite the tenant to be an unreasonable explanation of events. Finally, even if I accepted that the landlord made outbursts about rent, the hot tub and mould, I do not find this to have been more than temporary discomfort which is not a basis to find a breach of quiet enjoyment.

In summary, I find the tenants established that a breach of quiet enjoyment occurred with respect to gardening activities, car removal and driveway power washing without proper notice or consent of the tenants. I found the remainder of the tenants' claims to be unsubstantiated or unreasonable. The tenants have been awarded $750.00 for their loss of quiet enjoyment plus one-half of the filing fee for a total Monetary Order in the amount of $775.00.

The tenants must serve the Monetary Order upon the landlord and may file it in Provincial Court (Small Claims) to enforce as an Order of that court.

Conclusion

The tenants have been partially successful in their application and have been provided a Monetary Order in the total amount of $775.00 to serve upon the landlord.

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 12, 2010.

Dispute Resolution Officer