



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes MNDC, OLC, PSF, OPT, RR, FF

Introduction

This hearing dealt with the tenant's Application for Dispute Resolution seeking a monetary order; an order of possession; and an order to have the landlord comply with the *Residential Tenancy Act (Act)*, regulation or tenancy agreement.

The hearing was conducted via teleconference and was attended by the tenant and the landlord's agent.

During the hearing, I ask the landlord to submit a copy of his lease agreement with the person leasing the store front to determine if there were any relevant considerations in that agreement related to this matter. The landlord submitted a copy of the lease before the end of business on September 16, 2010.

Issues(s) to be Decided

The issues to be decided are whether the tenant is entitled to an order of possession for use of the yard and garden on the residential property; for an order to have the landlord comply with the *Act*, regulation or tenancy agreement; to a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement; for an order to reduce the rent for services or facilities agreed upon but not provided; and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to sections 1, 27, 28, 54, 67, and 72 of the *Act*.

Background and Evidence

The tenancy began in May of 1997 as a month to month tenancy for a current monthly rent of \$525.00 due on the 1st of the month. A security deposit and a pet damage deposit were not required by the landlord. No written tenancy agreement was created.

The residential property includes two rental units on the upper level; a store on the main level; a yard divided into a parking area and a garden area.

The tenant testified that through the duration of the tenancy she has had full and exclusive use of the garden area on the residential property with the caveat that the person or persons who ran the store had use of a shed in the garden area and therefore required ingress and egress to the shed.

The tenant provided submission and testimony that the family now running the store has informed her that they now have the right to use the garden area for him and his family. The tenant asserts the store family has begun removing plants, cutting and pruning trees and cutting down a portion of the fence.

The tenant submits that over the years she had put in at her own expense a small lawn; garden flowers and a playhouse. She also notes that when the small fence needed replacement a couple of years ago she, again at her own expense, built a new fence.

The landlord contends that the growth from the trees on the property have the potential to cause damage to the property and the building and that the tenant never had exclusive use of the garden area. The landlord contends that the tenant never obtained approval from the landlord to do any of the work, in particular the fence.

The landlord's position is that tenant had no right to landscape; fence the yard; or have exclusive use of the yard and despite the fact the landlord has done nothing to stop the tenant over the years from investing into the landscaping and fencing or to inform the tenant that the yard was not hers to use as she has been the tenant still has no right to exclusive use to the garden area.

The lease the landlord has with the store operator has three specific clauses that may be related to this matter that commercial tenancy. These clauses state:

- "The tenant wishes to lease from the landlord that part of the building known as the grocery and deemed to contain approx 1,500 square feet, more or less (such rentable area includes an applicable proportionate share of building common areas, including an electrical room)";
- "The tenant shall not do or permit to be done upon the premises anything which might be deemed a nuisance, annoyance, inconvenience or damage to the landlord, the other tenants for the time being of the lands and building or owners and occupiers of neighbouring premises"; and
- "The tenant shall have a non-exclusive license to use the ingresses, egresses and other common areas of the lands and building".

The tenant testified that she was not seeking monetary compensation, if this decision found that she had use and occupancy of the garden area. She noted that she only seeks compensation in the event that it is determined that the garden area is not part of her tenancy.

Analysis

As I have no jurisdiction over the commercial lease submitted, I find only that the lease does not specifically identify any areas as being “common” area or a granting of use to any specific area, other than an electrical room, outside of the store itself. I see no specific reference in this agreement regarding the parking area or garden area, which are the only land areas related to either tenancy.

In the case of verbal agreements, I find that where verbal terms are clear and both the landlord and tenant agree on the interpretation, there is no reason why such terms cannot be enforced. However when the parties disagree with what was agreed-upon, the verbal terms, by their nature, are virtually impossible for a third party to interpret when trying to resolve disputes as they arise. In addition, when the parties in an agreement change it is often difficult to know what the terms of the original verbal agreement were.

Despite this verbal agreement, I find that by the landlord's acceptance over a 13 year period of the tenant's landscaping and fencing of the garden area of the property, the landlord has in fact rendered the yard to be a facility provided to the tenant as a part of this tenancy.

I accept that the tenant has been accommodating to the store operators during her tenancy to provide them access to the shed that is attributed to the store, however, not explicit in the commercial lease provided by the landlord. I see no reason why this arrangement should not continue.

Having found the above to be fact I note, Section 27 the *Act* allows a landlord to terminate or restrict services or facilities by providing adequate notice of 30 days, in the approved form, and reduces the rent in an amount equivalent to the reduction in the value of the tenancy agreement resulting from the termination of the service or facility.

Based on the above, I find this tenancy includes the use and occupancy of the garden area of the residential property with the caveat that should the shed in the yard be

required by the store operator that ingress and egress be granted to the store operator for this required access only.

Conclusion

I therefore order the landlord to instruct the commercial tenant to cease and desist from any further use and/or alteration to the property, structures or plantings related to the tenant's garden area.

As per the tenant's closing remarks, I dismiss her claim for financial compensation, except for the recovery of the filing fee for this dispute for which I order that she may deduct \$50.00 from a future rent payment in accordance with Section 72(2)(a) of the *Act*.

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 20, 2010.

Dispute Resolution Officer