

DECISION

Dispute Codes OLC, RR, FF

Introduction

This hearing dealt with an application from the tenant to order the landlord to comply with the Act, allow a tenant to reduce rent for repairs and recovery of the filing fee. Both parties participated in the conference call hearing.

Issues to be Decided

Are the tenants entitled to any of the above under the Act.

Summary of Background and Evidence

The tenancy in unit 113 started in November 2002 and the tenants currently pay a monthly rent of \$1532.00.

On August 16, 2010 the property management company advised the tenants in writing, that they were being given 6 months notice that all fencing would be removed. The fencing in question is the wood fence that defines the yards for the 16 ground floor units.

The tenants testified that the yard is not common property and that removal of the fence will greatly impact their privacy, use and quiet enjoyment of the yard and take away the tenant's ability to allow their young son to be in the yard. The tenants stated the reason that they moved from an upper unit to the lower unit was because the lower unit had a private fenced yard for the tenant's personal use.

The tenants stated that when they took possession of unit 113, the resident manager advised the tenants that the yard was for the tenant's use only and that the tenants were responsible for the upkeep of the yard area. The tenant testified that the yard had never been used by or accessed by any other tenants in the building and that generally only utility company employees require access to the seven yards that have gates (reading meters, cable boxes etc.). The tenants stated that the resident manager has always provided notice per the Act before entering the tenant's yard. The tenants stated that the fence has been in place for the entire length of their tenancy which is 16 years and may have been there longer.

The tenants stated that the fence is a facility that is essential to their use of the rental unit and living accommodation as the tenants 5 year old son has serious medical conditions that prevent him from understanding boundaries, dangers and safety and the

tenants are extremely concerned that without the fence their young son will be a great risk. The tenants testified that the privately fenced yard is also used for their son's physical therapy and removing the fence would eliminate the tenant's ability to provide the much needed physical therapy for their son.

The landlord's agent testified that the yards are not common area and that removal of the fence would not be a hardship to the tenants as the tenants will still have the space available to them for their use. The landlord's agent stated that 7 of the 16 yards have a gate which other tenants could access these seven yards by.

The landlord's agent contends that as the yard space is not specifically noted on the tenancy agreement or addendum it therefore is not a material term of the tenancy agreement and the landlord has the right to remove the fence and replace it or not.

Law

Residential Tenancy Act **Definitions; "residential property"** means

- (a) a building, a part of a building or a related group of buildings, in which one or more rental units or common areas are located,*
- (b) the parcel or parcels on which the building, related group of buildings or common areas are located,*
- (c) the rental unit and common areas, and*
- (d) any other structure located on the parcel or parcels;*

Residential Tenancy Act **Definitions; "tenancy agreement"** means

an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a license to occupy a rental unit;

Residential Tenancy Act **Section 27** Terminating or restricting services or facilities

- (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.*

Residential Tenancy Act **Section 28 Protection of tenant's right to quiet enjoyment**

A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

- (a) reasonable privacy;*
- (b) freedom from unreasonable disturbance;*
- (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];*
- (d) use of common areas for reasonable and lawful purposes, free from significant interference.*

Residential Tenancy Policy **Guideline 22 Termination or Restriction of a Service or Facility**

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 the Residential Tenancy Act and the Manufactured Home Park Tenancy Act 1 (the Legislation).

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*
- *terminate or restrict a service or facility*

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.

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.

Analysis

Based on the documentary evidence and undisputed testimony of both parties, I find on a balance of probabilities that the tenant has met the burden of proving that the fence is a facility that is essential IE: *necessary, indispensable, or fundamental*, to the tenant's use of the rental unit as living accommodation. As I have determined the fence to be a facility that is essential, the tenant's request for a rent reduction for services or facilities not provided is hereby dismissed.

Therefore should the landlord remove this essential facility IE the fence, it would be in direct contravention of the Act.

As the tenant's have been successful in their application they are entitled to recovery of the \$50.00 filing fee.

Conclusion

The fence has been determined to be an essential facility and removal of this essential facility would be in direct contravention of the Act.

I further find that the tenant's are entitled to recovery of the \$50.00 filing fee and the tenant's may recover this amount by withholding \$50.00 from the February 2011 rent. The tenant's request for a rent reduction for services or facilities not provided is dismissed.

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 19, 2011

Residential Tenancy Branch