



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, PSF, RR, FF

Introduction

This hearing dealt with a tenants' application for a Monetary Order for damage or loss under the Act, regulations or tenancy agreement; Orders for the landlord to provide services or facilities required by law; and, authorization to reduce rent payable. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary and Procedural Matters

At the commencement of the hearing I determined the tenants had not served their documentary evidence upon the landlord. Therefore, I informed the parties that I would not accept the documents that the tenants had served upon the Branch in reaching this decision.

I also determined that the landlord had served his documentary evidence upon the tenants via email. Although email is not a recognized method of serving documents I confirmed with the tenants that they were in receipt or familiar with the landlord's documents. I was satisfied the tenants would not be prejudiced by accepting the landlord's documentation. Therefore, I informed the parties that I would accept and consider the documents served by the landlord in reaching this decision.

Issue(s) to be Decided

1. Have the tenants established an entitlement to compensation and a future rent reduction for loss of use of the swimming pool?
2. Is it necessary or appropriate to issue orders to the landlord to repair the swimming pool?

Background and Evidence

The tenancy commenced November 1, 2011 for a fixed term of 1.5 years. The tenants are required to pay rent of \$2,350.00 on the 1st day of every month. The residential property consists of a single family dwelling with a large in-ground swimming pool in the back yard for the tenants' exclusive use.

The tenancy agreement requires the tenants to maintain the swimming pool. Both parties provided consistent testimony that they are of the understanding this term meant that the tenants would be responsible for cleaning the pool and adding chemicals so that it is suitable for swimming. Major repairs would be the responsibility of the landlord.

The pool was not used during the winter of 2011/2012. In May 2012 the tenants drained, cleaned and filled the pool in preparation for use. The tenants also purchased chemicals and began using the pool in early June 2012. Shortly thereafter the tenants determined the pool was not operating properly. The tenants contacted the landlord and the landlord responded by contacting a pool contractor. The pool contractor attended the property on a number of occasions.

It is undisputed that it was initially determined that the pool water was not circulating or filtering properly and that certain repairs were made at the landlord's expense. It was later determined that the pool membrane was leaking. Due to the large expense associated to fixing the membrane the landlord has postponed the necessary repairs until a later date.

The landlord issued the tenants a "Notice Terminating or Restricting a Service or Facility" (the Notice) authorizing the tenants to deduct a one-time payment of \$100.00 from the rent payable for September 2012.

Tenants' position

The tenants submit that the pool was a major factor in deciding to rent the unit and agree to a 1.5 year fixed term tenancy the landlord required. Due to the problems with the pool the tenants had use of the pool for only 9 days in early June 2012 and those days were problematic as they had to keep adding more water and chemicals to the water.

The tenants are of the position the landlord's one-time rent abatement of \$100.00 is insufficient to compensate them for the loss of use of the pool. Nor were the tenants agreeable that use of the pool was to be for the summer months only as indicated by the landlord on the Notice. The tenants submit that the pool is capable of being heated

to 38 degrees and may be used in colder weather but the tenants chose not to use it the first winter they rented the home.

The tenants are seeking a rent reduction of 15% for loss of the pool in future months and compensation retroactive to the beginning of the tenancy.

The tenants also submitted that they are paying approximately \$150.00 per month for the pool as compared to a neighbouring property that is rented for \$2,200.00 per month. Also of consideration is the fact that the non-operational pool takes up a significant portion of the back yard, leaving it much less useable by the tenants and their child.

The tenants also submit that they spent at least 50 hours draining, cleaning and filling the pool, plus \$38.40 for rental equipment to drain the pool, and \$116.42 for the initial chemicals. The tenants seek to recover these costs plus their labour at the minimum wage of \$10.25 per hour.

The tenants acknowledged that subsequent chemical purchases were paid for by the landlord but contend there were lengthy gaps in communication during which time the tenants did not know what was happening with the pool repairs.

Landlord's position

The landlord submitted that prior to the tenancy commencing the landlord was unaware that the pool was leaking or had a circulation/filtration problem. Upon notification of the problems the landlord took sufficient action to make repairs to the filtration system, pay for service calls, and purchase additional chemicals. The landlord was of the position that he stayed in regular contact with the tenants about the status of the pool but acknowledged there were times when he was waiting to hear from the pool contractor.

The landlord acknowledged that the high cost to repair the membrane resulted in the landlord terminating the pool service and giving a one-time rent abatement of \$100.00.

The landlord was of the position the tenants' request for compensation is excessive given:

- The pool is useable in the summer months only;
- The landlord offered to purchase a family pass for the local recreation centre in lieu of providing the pool service but the tenants refused the offer;
- Houses in the area rent for \$2,600.00 to \$3,000.00 per month without a pool; and,

- The nearby rental house referred to by the tenants is not comparable as the rental unit is larger and has undergone more renovations.

Analysis

Upon consideration of the evidence before me I provide the following findings and reasons.

I find that the swimming pool is a service or facility provided or agreed to be provided by the landlord when the tenancy formed. Section 27 of the Act provides for the termination of a service or facility by the landlord. Below I have reproduced section 27 of the Act:

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.

[my emphasis added]

According to section 27(1) a landlord cannot terminate a service or facility if it is essential to use of the rental unit as living accommodation or if the service or facility is a material term of the tenancy agreement. I find that a swimming pool is not an essential service or facility. I have also considered whether the provision of a swimming pool was a material term of the tenancy agreement. A material term is a term that is so important that the slightest breach would be grounds for ending the tenancy. Upon review of the

tenancy agreement I find insufficient indications that the provision of a swimming pool is a material term of the tenancy agreement. Therefore, I find the landlord entitled to terminate the provision of the swimming pool by complying with the requirements of section 27(2).

The landlord did issue written notice to terminate the swimming pool in the approved form (the Notice); however, I find its content non-compliant with the Act and the tenancy agreement in the following ways:

1. The Notice was issued September 1, 2012 with an effective date of September 1, 2012 which is less than 30 days of advance notice.
2. The landlord described the service or facility as “the outdoor swimming pool for the summer months from June 21 to September 21.”

The tenancy agreement does not limit use of the swimming pool to the summer months only. The tenants took action to ready the pool in May 2012 and began using the pool in early June 2012. Therefore, I accept the tenant’s position that the pool was to be provided for their use at any time.

I also find the Notice lacked sufficient detail as to the length of time the pool would be closed for inspection. Nor did the landlord issue a Notice indicating the pool would be out of service until such time the membrane is repaired.

As the tenants have lost use of the swimming pool I find them entitled to a reduction in rent pursuant to section 27(2)(b) of the Act. I find the one-time rent abatement given to the tenants by the landlord to be inadequate and unsupported especially when a monthly family pass at the recreation centre costs \$150.00 and would require the tenants to travel to the recreation centre.

I find the landlord’s submission that houses in the area rent for \$2,600.00 to \$3,000.00 per month without a pool to be unsupported by other evidence. Rather, I accept that the rent of \$2,350.00 is the market rent of the property with a pool as the parties were acting at arm’s length and negotiated the rent in the open market which is the best indicator of market value. Therefore, I find the market rent for the rental unit to be \$2,350.00 with a functional swimming pool and I find it reasonable that the non-working swimming pool diminishes the value of the tenancy.

The tenants have provided two positions with respect to compensation and a rent reduction:

1. 15% of the rent (which is \$352.50 per month)
2. \$150.00 per month

I find the request for 15% to be excessive and unsupported by evidence. However, I find the request for \$150.00 per month is at least supported by: (1) the amount of rent payable for a neighbouring house and (2) the cost of a monthly family pass at the recreation centre. Therefore, in the absence of other supporting evidence I find the best evidence presented to me of the value associated to the pool to be \$150.00 per month.

In recognition that the tenants do not have use of the pool, or the backyard space where the pool is situated, I find the tenants entitled and **I authorize the tenants to reduce future rent payments by \$150.00 per month, starting December 2012, until such time the pool is functioning properly.**

I further award the tenants' compensation for loss of use of the pool retroactive to June 2012 in recognition of the inability to use the pool for any significant length of time and without problems associated to the functionality of the pool. Therefore, I find the tenants are entitled and **I authorize the tenants to further reduce a subsequent month's rent by \$800.00** which I calculate as follows: \$150.00/month for June through November 2012 equals \$900.00 less \$100.00 reduction already provided by the landlord.

I have not made an award for compensation for the months prior to May 2012 as the tenants stated they chose not to use the pool prior to this time; therefore, I find little evidence the tenants suffered a loss for the months prior to May 2012.

I make no award for recovery of the time and costs the tenants incurred to drain, clean and purchase the initial set of chemicals for the pool for the following reasons:

- Actual expenditures were not supported by admissible documentation
- The tenants did obtain the benefit of the pool for 9 days
- I find insufficient evidence the landlord had prior knowledge that there were problems with the operation of the pool or that the landlord was negligent in allowing the tenants to proceed to prepare the pool for use
- I am satisfied that both parties lost time and money trying to get the pool operational through no fault of either party

I award the \$50.00 filing fee to the tenants as I am satisfied the one-time rent reduction provided by the landlord was woefully inadequate and resulted in the filing of this

application. Therefore, **the tenants are also authorized to reduce a subsequent month's rent by \$50.00 in satisfaction of this award.**

Having found the swimming pool is not an essential service I make no order for the landlord to repair the swimming pool. The landlord is at liberty to repair the swimming pool at the landlord's discretion. Should the landlord make the necessary repairs the rent reduction of \$150.00 per month shall cease upon written notification from the landlord that the repairs are complete. I further order that if the landlord makes the repairs during this tenancy the landlord shall be responsible for draining, filling and adding the initial chemicals in order to determine the pool is functioning properly.

Conclusion

The rent shall be reduced by \$150.00 per month starting December 2012 until such time the pool is repaired and functioning properly. The landlord must provide the tenants written notice when the repairs are complete and prepare the pool for use at the landlord's expense in order to end the rent reduction.

The tenants are authorized to further reduce a subsequent month's rent by \$850.00 as compensation for the loss of the pool for the months of June 2012 through November 2012 and recovery of the filing fee paid for this application.

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: November 20, 2012.

Residential Tenancy Branch