Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes: MNDC, RR, FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the tenant for monetary compensation for loss of value of the rental suite due to the landlord's alleged restriction or removal of services and facilities and loss of quiet enjoyment.

Both parties appeared and gave testimony.

Issue(s) to be Decided

Is the tenant entitled to monetary compensation under section 67 of the Act for damages or loss, a retro-active rent abatement, and a continuing rent abatement?

The burden of proof is on the applicant to prove all of the claims and requests contained in the tenant's application.

Background and Evidence

The tenancy began in 1994 and the monthly rent is $1,060.00, plus parking.

The tenant testified that in 2009 the landlord removed the pool and hot tub that was previously located in a common area of the complex. The tenant testified that he used these facilities on a regular basis. The tenant feels that he is entitled to be compensated for the loss of these amenities.

The landlord testified that the pool was ordered to be removed because of condition issues that made it unsafe. The landlord stated that it was not possible to address the leakage problems in the pool due to significant infrastructure concerns. The landlord pointed out that this facility was replaced by an enhanced weight and exercise room which was expanded to 1,700 square feet and is utilized by the substantially more of the residents living in the complex.

The tenant also feels entitled to compensation for the removal of a pre-fabricated enclosed structure that was formerly part of his living space on the balcony since 1990. The tenant stated that he utilized this fully carpeted space as an interior room, complete with furnishings, and the landlord's removal of the enclosure had the effect of reducing the usable floor space in his suite. According to the tenant, this has had significantly

affected the value of his tenancy as he is not able to utilize the outdoor balcony for the same activities that the previous structure allowed.

The landlord testified that the balconies in the building had to be refurbished as a maintenance concern to meet current building codes. The landlord testified that the improved balconies were generally considered by the landlord and other residents as an enhancement. However, according to the landlord, this costly work was initiated as a necessity and for the benefit of all residents living in the complex.

The landlord testified that it was not possible to retain the tenant's structure that had been placed in that location before the tenant took possession. The landlord stated that the owners will not permit another enclosed structure to be located on any of the balconies, including this tenant's. The landlord pointed out that the square footage of the tenant's balcony, for his private use as part of his suite, has not been reduced in any amount and considers the impact to be minimal in terms of value, exchanging the tenant's exclusive use of a private enclosed space for a private outdoor space.

The tenant is also seeking compensation for the landlord's actions in replacing a wrought iron railing on the roof-top patio which is a common area shared by occupants of the complex. The tenant stated that the solid fencing, taller and more solid than the previous railing, was substituted for the former materials and the tenant complained that this does not allow residents in this common area to enjoy the view without standing up and peering over the fence. The tenant testified that this would be more difficult for him due to his medical restrictions and he is unfairly deprived of the ability to lounge in this common area and still see the view it provided.

The landlord stated that the replacement of the old railing was necessary for maintenance, security, safety and privacy reasons. The landlord testified that the original railing was not secure and was too low to meet building codes. The landlord pointed out that the residents who consider this area ideal for sunbathing also welcome the privacy as the new structure shields them from being observed by others who live in nearby complexes. Moreover, according to the landlord, the new fence acts as a wind break to temper the impact of weather. The landlord's position is that the new fence is an enhancement in all respects and considered as superior by the majority of the residents in the complex.

The tenant is seeking compensation for the loss of quiet enjoyment due to balcony remediation activities that had relentlessly produced noise during daylight hours. The tenant stated that, during this period, he was somewhat house-bound while recovering from medical intervention during the construction phase. The tenant stated that he was forced to endure ongoing noise and construction activity over several weeks. The

tenant’s position is that the racket interfered with his quiet enjoyment and ability to rest and relax in his home while recovering.

The landlord acknowledged that the construction work did occur and that it may have been perceived as disruptive, but stated that all of the other residents were willing to tolerate the temporary inconvenience in the interest of gaining safer and more attractive balconies to use. The landlord pointed out that there was no way to get the work done without any disturbance.

The tenant was claiming $700.00 for the loss of quiet enjoyment and a rent abatement of $150.00 per month for the loss of the balcony enclosure, pool, hot tub and non-obstructive railing on the roof.

Analysis - Monetary Compensation

With respect to the landlord’s restriction or elimination of the enclosure on the balcony, pool, hot-tub, and roof-top railing, I find that sections 27(1)(a) and 27(1)(b) of the Act state that a landlord must not terminate or restrict a service or facility if it is essential to the tenant's use of the rental unit as living accommodation, or if providing the service or facility is a material term of the tenancy agreement.

I do not find that the use of the enclosed balcony, pool, hot tub or open-view railing on the roof qualified as essential services or facilities under section 27(1)(a) or (b).

Section 27(2) states that a service or facility, other than an essential or material one may be restricted or terminated provided that 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.

In this instance, both parties agree that the balcony enclosure was removed and both parties acknowledge that the over-all space of the rental unit was not decreased in terms of the square footage. However, the tenant has assigned a high value to the change of use that is inherent in converting a sheltered balcony to an open-air space.

Both parties also agree that the pool and hot-tub were removed from the common area shared by all residents and that it was replaced with an expanded fitness facility. Again, the tenant feels that the impact of this alteration significantly devalued his tenancy, because he had apparently used the old facilities and has less use for the common space after it was transformed.

Both parties agree that the roof-top fencing was changed but differ in opinion as to whether the change enhanced this common area or was detrimental.

I find that all of the above changes were carried out by the landlord out of necessity for safety, security and maintenance reasons.

With respect to the restrictions and losses affecting the common areas relating to the pool, hot tub and new roof-top fence, I find that, although the landlord did alter these common facilities and although the tenant considers the changes inferior for his own use and purpose, the replacements are equivalent, if not superior, for the greater good of all residents, particularly in terms of safety. Therefore it follows that no compensation would be warranted under section 27(2)(b) for the changes affecting these areas.

On the question of the removal of the existing structure sheltering the tenant's balcony, I find that, although the tenancy agreement may have included a term that did not allow the tenant to affix structures to the balcony, the tenant did not violate this term as the balcony was enclosed when the tenant took possession of the unit. I acknowledge that the enclosure was not supplied by the landlord, but was an existing fixture at the time the tenant agreed to this tenancy and agreed to take possession of the unit. As such, I find that the enclosed balcony was an amenity or feature that comprised part of the rental unit for the tenant's private use. I find that the landlord not only removed the enclosure, but invoked the restriction in the tenancy agreement forbidding any such structure to be rebuilt. While the landlord is at liberty to do this under both the Act and the tenancy agreement, I find that it must be done in strict compliance with the Act. For this reason, I find that the landlord would be required under section 27(2)(b) of the Act to compensate the tenant for the value of that amenity through a rent reduction.

Section 7 of the Act states that if a landlord or tenant does not comply with this Act, or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

I find that in order to justify payment of damages under section 67 of the Act, the Applicant has a burden of proof to establish that the other party did not comply with the agreement or Act and that this non-compliance resulted in costs or losses to the Applicant, pursuant to section 7. The evidence must satisfy each component of the test below:

<u>Test For Damage and Loss Claims</u>

1. Proof that the damage or loss exists,

2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement

3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.

4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage.

In this instance, the burden of proof is on the tenant to prove a violation of the Act and a corresponding loss.

As I have found that the landlord was not compliant with the Act in failing to follow the correct process for eliminating or restricting the facility described above, given that there was no rent abatement granted to reflect the restriction, I find that the tenant's claim for compensation does have some merit.

I find that, given the fact that the total square footage of the rental unit was not reduced, but that the usage was altered in a manner that the tenant felt was detrimental to his lifestyle, the tenant is entitled to retroactive compensation for 30 months since this altered usage occurred. I set the compensation at $1,500.00 for the removal of the tenant's shelter and the restriction on replacing any such a shelter. Going forward, I set the rent abatement at 4% of the tenant's monthly rent, not including the charges for parking, and I order the landlord to adjust the rent accordingly.

With respect to the tenant's claim for loss of quiet enjoyment during the balcony renovation I find that the tenants in the complex would normally expect to suffer some inconvenience while a building is undergoing remedial work. The question is whether or not the extent of the disruption would entitle the tenant to compensation.

Section 28 of the Act protects a tenant's right to quiet enjoyment and states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

> (a) reasonable privacy.
>
> (b) freedom from unreasonable disturbance. (my emphasis)
>
> (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29.
>
> (d) use of common areas for reasonable and lawful purposes, free from significant interference.

I find that, under the Act and the agreement, a disturbance could be considered unreasonable if it persisted over a prolonged duration. I also accept the tenant's testimony that he was house-bound due to his medical condition.

I find that construction dust, commotion and noise would likely devalue a tenancy for each hour that it was present. In this case, I find that the work went on for 8 hours each day and therefore the tenant's quiet enjoyment was compromised for 1/3 of each day. The daily rent for this tenancy was approximately $34.59 per day, one third of the value representing 8 hours, would amount to $11.52 per day. I find that a reduction of 40% of the tenancy value during the active period is warranted, which is approximately $4.60 per day. I find that this applies for a period of 7 weeks, or 49 days. Therefore, over the 49-day period, the total rent abatement would equal $225.40.

Based on the testimony and evidence discussed above, I hereby grant the tenant's request for monetary compensation in the amount of $1,775.40 comprised of $1,500.00 retroactive rent abatement for devalued tenancy, $225.40 for loss of quiet enjoyment for 7 weeks and $50.00 for the cost of this application. The tenant is ordered to reduce the rent payable to the landlord over the next two months until the compensation of $1,775.40 is satisfied.

I further order that the landlord reduce the tenant's current rental rate by 4% in recognition of the restrictions against keeping or replacing the enclosure that was originally present on the balcony when the tenancy began.

Conclusion

The tenant is partially successful in his application and is awarded monetary compensation, a retro-active rent abatement and a rent reduction of 4% going forward.

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*.

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Dated: November 05, 2012.

Residential Tenancy Branch