



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Devon Properties Ltd. and Starlight Investments
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes:

MNDC, OLC, PSF

Introduction

This hearing was convened in response to the Tenant's Application for Dispute Resolution, in which the Tenant applied for a monetary Order for money owed or compensation for damage or loss; for an Order requiring the Landlord to comply with the tenancy agreement or the *Residential Tenancy Act (Act)*; and for an Order requiring the Landlord to provide services or facilities. At the hearing the Tenant withdrew the application for an Order requiring the Landlord to provide services or facilities.

The Tenant stated that on March 08, 2017 the Application for Dispute Resolution and the Notice of Hearing were sent to the Landlord, via registered mail. Legal Counsel for the Landlord acknowledged receipt of these documents.

On March 16, 2017 the Landlord submitted 18 pages of evidence to the Residential Tenancy Branch. Legal Counsel stated that this evidence was served to the Tenant, via registered mail, on March 16, 2017. The Tenant acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

On March 17, 2017 the Tenant submitted 33 pages of evidence and 9 photographs to the Residential Tenancy Branch. The Tenant Counsel stated that this evidence was served to the Landlord, via registered mail, on March 16, 2017. Legal Counsel acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

The parties were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions.

Issue(s) to be Decided

Is the Tenant entitled to compensation for being denied use of her balcony, the pool, and the hot tub?

Background and Evidence

The Landlord and the Tenant agree that:

- this tenancy began on May 01, 2014;
- in June and July of 2016 the rent was \$1,010.00;
- the current monthly rent is \$1,039.29;
- when this tenancy began the Tenant had the private use of a balcony;
- the Tenant was given written notice that the exterior of the building is being renovated and she must remove all of her personal property from the balcony;
- the Tenant has not had the use of her balcony since June 06, 2016;
- the Tenant will not have the use of her balcony until the exterior renovations are complete; and
- when this tenancy began the Tenant had the use of a common pool and hot tub.

The Tenant submits that the use of the balcony is very important to her and was one of the reasons she selected this rental unit.

The Tenant is seeking compensation for being unable to use her balcony in an amount that is equivalent to 12.5% of her monthly rent. Legal Counsel stated that this percentage was calculated by deducting the square footage of the balcony (88) from the total square footage of the rental unit and the balcony (617 + 88).

The Tenant submits that

- after renovations to the exterior of the building began in June of 2016 she was unable to use the pool and hot tub while workers were working on the exterior of the complex;
- she was able to use the pool between June 01, 2016 and October 01, 2016 when workers were not working on the exterior of the complex;
- workers were on site at various times during the week;
- she could typically access the pool and hot tub during the evenings and on weekends between June 01, 2016 and October 01, 2016;
- the pool and hot tub have been permanently closed on October 01, 2016;
- she was not served with notice that access to the pool/hot tub would be limited or terminated;
- use of the pool/hot tub was very important to her and was one of the reasons she selected this rental unit; and
- she typically used the pool/hot tub 3 or 4 times per week.

The Agent for the Landlord stated that he thinks work ended at 3:30 p.m. on most work days; his company did not manage the residential complex until October 01, 2016; and he does not know if the Tenant was provided notice that access to the pool/hot tub would be limited or terminated.

During the hearing the Agent for the Landlord checked the web site for a local pool in this community and stated that the monthly fee for accessing a nearby pool and fitness centre is \$25.00 per month.

The Advocate for the Tenant thinks the monthly fee is low, given her experience with fitness passes in the area. She estimates that a day pass to a local pool is \$4.00 to \$5.00. She argued that even if the monthly fee for the nearby pool is \$25.00, attending an off-site pool is significantly less convenient than using an on-site pool.

The Tenant is seeking compensation for being unable to use the pool and hot tub, in an amount that is equivalent to 12.5% of her monthly rent.

Analysis

Section 28 of the *Act* entitles tenants to the quiet enjoyment of their rental unit including, but not limited to, exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 of the *Act*.

Residential Tenancy Branch Policy #6, with which I concur, reads, in part:

Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.

In determining whether a breach of quiet enjoyment has occurred, it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises.

A breach of the entitlement to quiet enjoyment may form the basis for a claim for compensation for damage or loss under section 67 of the RTA and section 60 of the MHPTA (see Policy Guideline 16). In determining the amount by which the value of the tenancy has been reduced, the arbitrator will take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use or has been deprived of the right to quiet enjoyment of the premises, and the length of time over which the situation has existed.

A tenant may be entitled to compensation for loss of use of a portion of the property that constitutes loss of quiet enjoyment even if the landlord has made reasonable efforts to minimize disruption to the tenant in making repairs or completing renovations.

On the basis of the undisputed evidence that the Tenant has not had access to her balcony since June 06, 2016, I find that her right to the quiet enjoyment of the rental unit has been breached. On the basis of the testimony of the Tenant I find that the balcony was important to her when she opted to enter into this tenancy.

I find that the Landlord has both a right and an obligation to maintain the residential complex. I therefore find that the Landlord had the right to embark on renovations to the exterior of the residential complex in June of 2016. I note that these renovations will

likely benefit the Tenant, who will have access to a renovated balcony if she continues with this tenancy.

Although there is no evidence that the renovations have caused disruptions that could not be reasonably expected for a renovation of this nature, I find that the Tenant is still entitled to compensation for being without a balcony for the period between June 06, 2016 and April 30, 2017, which is approximately 11 months.

It is left to me to assess how the loss of the balcony has reduced the value of the tenancy, which is highly subjective. I cannot agree with the Tenant's submission that the reduced value of the tenancy can be calculated by deducting the square footage of the balcony (88) from the total square footage of the rental unit and the balcony (617 + 88). I find that indoor space is significantly more valuable than outdoor space in terms of rent.

I find that outdoor space is at least 50% less valuable than interior space in terms of rent and I therefore find that the reduced value of the tenancy should be calculated by deducting the 50% of square footage of the balcony (44) from the total square footage of the rental unit and the balcony (617 + 88). I therefore find that the value of this tenancy has been reduced by 4.7% as a result of the Tenant being unable to use the balcony.

I therefore find that being unable to use the balcony in June and July, when rent was \$1,010.00, reduced the value of the tenancy in June and July by \$47.47 per month. I therefore find that the Tenant is entitled to a rent refund of \$94.94 for these 2 months.

I further find that being unable to use the balcony between August 01, 2016 and April 30, 2017, when rent was \$1,039.29, reduced the value of the tenancy by \$48.85 per month. I therefore find that the Tenant is entitled to a rent refund of \$439.65 for these 9 months.

To provide some clarity and consistency to this tenancy, I authorize the Tenant to reduce each monthly rent payment by 4.7% of her monthly rent, beginning in May of 2017 and continuing until such time as the Landlord serves her with written notice that she may use her balcony.

Section 27(2) of the *Act* authorizes a landlord to terminate or restrict a non-material service or facility if the landlord gives 30 days' written notice, in the approved form, of the termination or restriction and 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.

I find that a pool and a hot tub are common recreational facilities that were provided with this tenancy and that, as such, they meet the definition of "service or facility" as that term is defined by section 1 of the *Act*.

While I accept that the use of the pool and hot tub was very important to the Tenant, I cannot conclude that it was a material term of the tenancy. A material term of a tenancy is typically considered a term that both parties agree is so important that the most trivial breach of the term gives the other party the right to end the tenancy. As the Tenant does not wish to end the tenancy as a result of the withdrawal/restriction of the right to use the pool and hot tub, I cannot conclude that she considers it to be a material term of the tenancy. I therefore find that the Landlord has the right to withdraw or restrict this service, pursuant to section 27(2) of the *Act*.

On the basis of the testimony of the Tenant and the absence of evidence to the contrary, I find that the Landlord did not give the Tenant written notice that access to the pool or hot tub was going to be restricted or terminated.

As neither party submitted documentary evidence to establish the cost of using a community pool, I find it reasonable to rely on the testimony provided regarding those costs. The Agent for the Landlord testified that it costs \$25.00 for a monthly membership at a local pool but did not specify whether there was an initial membership fee.

The Tenant estimated that it costs \$4.00 or \$5.00 for a day pass at a pool, which I will average to be \$4.50. On the basis of the Tenant's submission that she uses the pool 3 or 4 times per week, which I will average to be times per week, I calculate that the Tenant would pay \$63.00 per month if she paid the estimated per diem rate for each visit.

On the basis of the information of both parties I find that the Tenant could likely access an off-site pool and hot tub for \$25.00 per month. I find that using an off-site pool is significantly more inconvenient than using an on-site pool, which must be considered when determining the reduced value of the tenancy. When the cost of using a pool and the inconvenience and both considered, I find that the value of this tenancy was reduced by \$40.00 per month.

On the basis of the undisputed evidence I find that the Tenant was denied access to the pool and hot tub during working hours on Monday to Friday between June 06, 2016 and October 01, 2016. I therefore find that she is entitled to compensation in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the restriction of the service or facility.

As the Tenant was able to use the pool and hot tub on evenings and weekends between June 06, 2016 and October 01, 2016, I find that she is only entitled to 50% of the \$40.00 rent reduction, which is \$20.00 per month. I therefore find that she is entitled to compensation of \$100.00 for the period between June 06, 2016 and October 01, 2016 when her access to the pool/hot tub was restricted.

On the basis of the undisputed evidence I find that the Tenant has been denied access to the pool and hot tub on a full time basis since October 01, 2016. I therefore find that

she is entitled to compensation of \$40.00 per month for the period between October 01, 2016 and April 30, 2017, which is \$280.00.

To provide some clarity and consistency to this tenancy, I authorize the Tenant to reduce each monthly rent payment by 65.00, beginning in May of 2017 and continuing until such time as the Landlord serves her with written notice that she can use the pool and hot tub.

Conclusion

The Tenant has established a monetary claim, in the amount of \$914.59, which includes \$534.59 in compensation for being without a balcony for 11 months and \$380.00 for having no/restricted access to the pool and hot tub.

Based on these determinations I grant the Tenant a monetary Order for \$914.59. In the event the Landlord does not comply with this Order, it may be served on the Landlord, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

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: April 06, 2017

Residential Tenancy Branch