Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OLC

Introduction

This is an application by the tenants for an order that the landlord comply with the *Act*, regulation and/or tenancy agreement pursuant to section 62 of the *Residential Tenancy* Act ("the *Act*").

The agent GM appeared with the property manager MT ("the landlord"). Both tenants appeared. Both parties had full opportunity to provide affirmed testimony, present evidence, cross examine the other party, and make submissions.

The landlord acknowledged receipt of the tenant's Notice of Hearing and Application for Dispute Resolution. The tenants acknowledged receipt of the landlord's evidence. Neither party raised issues of service. I find the tenants served the landlord in accordance with section 89 of the *Act*.

At the outset of the hearing, landlord requested that the landlord's name be amended to reflect the correct name of the landlord. I granted this request and the landlord's name has been changed accordingly.

The tenants amended their claim on March 19, 2019 to provide an additional monetary worksheet and to provide copies of updated hydro utility statements.

The landlord filed a document titled "Amendment" dated March 27, 2019 consisting of a 1-page submission and several hydro accounts.

Issue(s) to be Decided

At the tenants entitled to an order that the landlord comply with the *Act,* regulation and/or tenancy agreement pursuant to section 62 of the *Residential Tenancy* Act ("the *Act*").

Background and Evidence

The parties agreed they entered into a tenancy agreement on a month-to-month basis starting March 1, 2012. The tenancy is ongoing. The tenants provided a copy of the tenancy agreement as evidence.

The unit is a 2-bedroom apartment in a multi-storey apartment building. The tenants currently pay $1,020.00 for rent on the first of each month. At the beginning of the tenancy, the tenants provided a security deposit in the amount of $432.50 which is held by the landlord.

The tenancy agreement provided that the rent included hydro. Accordingly, the landlord provided hydro to the unit throughout the tenancy until recently.

On November 28, 2019, the landlord posted a Notice Terminating or Restricting a Service or Facility in the standard RTB form # 24. The Notice stated that effective February 28, 2019, the provision of hydro to the unit would be stopped and the landlord would reduce the rent by $80.00 a month.

The landlord explained that approximately half the units in the building had tenancy agreements which required the landlord to pay the hydro. In the remainder of the units, each unit had a separate meter and the tenants were responsible for the payment of the account. The landlord intended to convert all units to individual meters with responsibility placed on the tenants to pay the hydro bills.

The landlord stated that starting in October 2018, the landlord was updating the baseboard heaters in all units with power efficiency models. During the hearing, the landlord undertook to replace the tenants' heaters in a timely manner with power efficiency models.

At the hearing, the landlord offered to reduce the tenants' rent by $90.00 a month. The landlord submitted evidence that the hydro consumption varied by unit and that the

average electricity cost was about $80.00. The landlord submitted evidence that the cost of hydro in some selected units was below $90.00 a month in 2017-2018; the landlord stated the tenants' unit exceeded electricity consumption in all other units and the average monthly cost was $147.00. From his analysis of the hydro costs in comparable units, the landlord testified that reducing the tenants' rent by $90.00 a month was adequate and fair compensation.

The tenants objected to paying their own hydro account in return for compensation for two main reasons. Firstly, the tenants stated that the provision of hydro in their tenancy is an *essential* or *material* term of the tenancy agreement; therefore, terminating the service is a violation of section 27 of the Act.

Secondly, the tenants state that the compensation proposed by the landlord is inadequate and unfair. They state that their average monthly consumption of electricity in their unit is $145.00. Therefore, any compensation should be $145.00 a month, not $90.00.

In reply, the landlord testified that the tenants had the highest consumption of electricity in any unit in the building. The landlord stated it would be unfair to compensate the tenants for their actual consumption because it was so out of keeping with electricity costs in every other unit. Also, the landlord submitted that the tenants themselves were the only people who could limit or reduce their electricity consumption. In other words, just because tenants consume higher than average electricity, does not mean that the landlord must compensate them for what he saw as excessive, unrestrained and inexplicable electricity consumption.

The tenants countered that they were cautious and prudent consumers of electricity and that the landlord's evidence was false and inaccurate concerning hydro consumption in other units. They stated the evidence submitted by the landlord was not representative of electricity consumption and costs for two-bedroom units such as theirs. They also stated they were unable to obtain information from the utility company about electricity consumption/costs in other comparable units because of privacy considerations and the landlord refused to share the information with any transparency.

On March 18, 2019, the tenants reluctantly placed the hydro account in their names effective March 21, 2019 as they believed information provided by the utility company that electricity to their unit was scheduled to be discontinued at the direction of the

landlord. The landlord denied that he had instructed the utility to discontinue electricity to the tenants' unit and stated he was waiting for the outcome of this hearing.

The tenants claim reimbursement of registered mail and printing costs, the hydro start up fee and deposit, and loss of quiet enjoyment.

Analysis

The Act provides that a landlord must not terminate or restrict a service of facility if it is essential to the tenants' use of the unit as living accommodation of if the provision of the service or facility is material term of the tenancy agreement.

Section 27 of the Act states as follows:

> ***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.*

In section 1 of the *Act* "service or facility" is defined to included utilities. Therefore, the provision of the hydro, a utility, is a "service or facility".

The issue then arises whether the provision of hydro by the landlord is, first, *essential to the tenant's use of the rental unit as living accommodation* or, secondly, a *material term of the tenancy agreement.*

Policy Guideline 22: Termination or Restriction of a Service or Facility provides guidance on determining these issues.

The Guideline states in part as follows:

> *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.*

The landlord is requesting that the tenants pay for the hydro for their unit in return for compensation in the form of a rent reduction.

In considering if a service or facility is essential, the Guidelines state that, a consideration is whether the tenant "can obtain a reasonable substitute for that service or facility". Electricity has been in continuous supply to the unit. While the parties are in dispute over whether the landlord instructed the utility company to discontinue service to the unit, the parties agreed that the provision of hydro has been uninterrupted. In other words, the tenants have "obtained a reasonable substitute".

Therefore, in considering the evidence of the parties, the *Act* and the Guidelines, I find the tenants have *not* met the burden of proof on a balance of probabilities that landlord has *terminated or restricted a service or facility that is essential to the tenant's use of the rental unit as living accommodation* or that he intends to, pursuant to section 27(1)(b).

The next issue is whether the provision of hydro by the landlord is a *material term of the tenancy agreement.*

The Guidelines provide guidance on this question and state in part as follows:

> *A material term is a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement. Even if a service or facility is not essential to the tenant's use of the rental unit as living accommodation, provision of that service or facility may be a material term of the tenancy agreement. When considering if a term is a material term and goes to the root of the agreement, an arbitrator will consider the facts and circumstances surrounding the creation of the tenancy agreement. It is entirely possible that the same term may be material in one agreement and not material in another*.

Again, the Guideline states that a consideration is whether the tenant "can obtain a reasonable substitute". I have considered that the landlord is not proposing that the tenants go without electricity. The landlord is merely proposing that the tenants assume responsibility for the hydro bill for their unit in return for compensation.

Therefore, in considering the evidence of the parties, the *Act* and the Guidelines, I find the tenants have *not* met the burden of proof on a balance of probabilities that landlord has terminated or restricted providing the service or facility that is *a material term of the tenancy agreement* or that he intends to do so, pursuant to section 27(1)(b).

A landlord may restrict or terminate a service or facility as long it is not in violation of section 27. The landlord must give the tenants 30 days written notice in the approved form and reduce the rent to compensate the tenants for loss of the service or facility.

I have reviewed the Notice provided by the landlord and find it is in the approved form; I find the landlord provided the tenants with more than the 30 days notice required under the *Act*.

As discussed, the tenants claim that the compensation offered by the landlord at the hearing ($90.00 rent reduction monthly) falls short of their actual average monthly electricity costs of $145.00 for their unit, and, they suspect, for comparable units. Considerable evidence was submitted by the landlord in support of his claim that $90.00 a month rent reduction reflected a reasonable reduction in the value of the tenancy.

The tenants disbelieved the figures presented by the landlord; they stated they had 'heard' of different monthly hydro bills for their neighbours. They stated that they were

familiar with the units for which the landlord submitted electricity costs and they were not comparable units; they were, in the main, single bedroom units.

The tenants stated they were unable to refute the landlord's assessment of compensation as the landlord refused to provide them with information as to the electricity costs in other units despite multiple requests.

Based on the evidence of the parties, the failure of the landlord to provide evidence of electricity costs in comparable units for equivalent periods of time, I find that I cannot determine what constitutes a reasonable reduction in the value of the tenancy.

The only party who can provide the evidence leading to a fair assessment of compensation is the landlord. I find the landlord has failed to do so. I find the landlord has not provided evidence meeting the level of proof on a balance of probabilities that would permit me to evaluate the loss to the tenants of having the landlord remove the provision of hydro from their tenancy agreement.

I therefore find that the tenants succeed in their application under section 62(3). I direct the landlord to forthwith assume responsibility for the hydro retroactively to March 21, 2019, the date the tenants' put the account in their name. the landlord is to return the hydro account to the landlord's name. The landlord is to compensate the tenants for the cost of the hydro paid by them from March 21, 2019 until the landlord again resumes payment of the hydro account.

The landlord's Notice Terminating or Restricting a Service or Facility is set aside and of no effect. I direct that the tenancy shall continue as set out in the agreement until changed in accordance with the *Act* and regulations.

The tenants' requested reimbursement of the start up fee and the required deposit by the utility company when they opened an account in their name. I find the tenants incurred the start-up fee based on their reasonable belief that the landlord planned to cut off their hydro. In consideration of the evidence and the balance of probabilities, I find that the tenants have met the burden of proof with respect to this aspect of their claim and I direct the tenants may deduct the cost of the start-up fee of $13.02 from their rent on a one-time basis.

I find the deposit is a reimbursable cost, the sum being kept in trust by the utility company to assure payment of the account. When the account is restored to the

landlord's name, the amount of the deposit will be repaid to the tenants. In consideration of the evidence and the balance of probabilities, I find that the tenants have not met the burden of proof with respect to this aspect of their claim which is dismissed without leave to reapply.

The tenants requested reimbursement of the costs of registered mail and printing with respect to this application which are not compensable expenses.

The tenants submitted a claim for a monetary award in the amount of $100.00 for loss of quiet enjoyment pursuant to section 28 of the *Act*. That section provides in part:

> *28. A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:*
>
> *(a) reasonable privacy;*
>
> *(b) freedom from unreasonable disturbance;*

Residential Tenancy Policy Guideline 6 further discusses quiet enjoyment and provides that:

> *A landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means a substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance but failed to take reasonable steps to correct these.*
>
> *Temporary discomfort or inconvenience does not constitute a basis for a breach of the covenant of 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.*

The onus is on the party making the claim to show on a balance of probabilities that there has been a loss of quiet enjoyment because of the action or negligence of the landlords.

In this case, I find the tenants have established a claim for loss of quiet enjoyment. I found the tenants to be credible. I believed their claim that the sudden loss of hydro as an included service in their agreement was distressing. I accept their evidence of

frequent contact with the landlord to assure the electricity was not cut off and their anxiety that it would be disconnected suddenly. I find plausible their belief that the landlord intended to summarily disconnect the hydro a few weeks before the hearing. I find enough evidence that the landlord failed to provide the tenants with the information of hydro expenses in other units to allow them to evaluate appropriate rent reduction. In short, in consideration of the evidence and the standard of proof of a balance of probabilities, I find the tenants have established a claim for loss of quiet enjoyment and I grant them a monetary award in the amount of $100.00 as claimed to be deducted from rent on a one-time basis only.

In summary, the tenants are granted an order pursuant section 62(3) that the landlord comply with the tenancy agreement, provide hydro to the unit, and reimburse the tenants for the cost of the provision of hydro incurred by them within thirty days of the date of this Decision. The tenants may deduct the cost of the hydro start-up fee of $13.02 and the monetary award of $100.00 for loss of quiet enjoyment for a total of $113.02 from rent on a one-time basis.

Conclusion

The tenants are granted an order pursuant section 62(3) that the landlord comply with the tenancy agreement, provide hydro to the unit, and reimburse the tenants for the cost of the provision of hydro incurred by them within thirty days of the date of this Decision.

The tenants may deduct the cost of the hydro start-up fee of $13.02 and the monetary award of $100.00 for loss of quiet enjoyment for a total of $113.02 from rent on a one-time basis.

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 12, 2019

Residential Tenancy Branch