



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OLC, PSF, RP, RR, MNDCT, FFT

Introduction

This hearing was scheduled pursuant to a tenant's application for multiple remedies, including: orders for the landlord to comply with the Act, regulations or tenancy agreement; orders for the landlord to provides services or facilities required by the tenancy agreement or the law; orders for the landlord to make repairs; authorization to reduce rent payable; and, a Monetary Order for damages or loss under the Act, regulations or tenancy agreement. Both parties appeared or were represented at the hearing and had the opportunity to be make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

At the outset of the hearing, I confirmed that the parties exchanged their respective hearing documents and evidence. Accordingly, I admitted the documents into evidence.

I noted that the tenant raised multiple issues and sought multiple remedies in a single application. Rule 2.3 of the Rules of Procedure afford me discretion to sever claims that are not sufficiently related. Given the limited hearing time, I confirmed with the tenant that the issue of most importance is her ability to use the backyard. As such, I proceeded to fully hear that matter and I severed all other issues with leave to reapply.

On another procedural note, I heard that the rental unit is one of three living units on the property. I have amended the style of cause to indicate the tenant does not rent the entire property but that she rents one of two basement suites on the property.

Issue(s) to be Decided

1. Is the fenced backyard common property or exclusive use property for the landlord?
2. If the fenced back yard is determined to be common property, does the landlord have the right to terminate or retrain the tenant's use of the fenced back yard?
3. Should the Notice Terminating or Restricting a Service or Facility issued on May 15, 2019 be upheld or set aside?

Background and Evidence

Prior to April 2015 the tenant had been occupying the rental unit with the former tenant of that unit. Starting April 1, 2015 the landlord and the tenant entered into a written tenancy agreement for the rental unit. In April 2016 another written tenancy agreement was executed by the parties (herein referred to as the tenancy agreement). The rent was set at \$800.00, plus \$20.00 for additional cable services the tenant requested. A Notice of Rent Increase to increase the monthly rent by \$20.00 took effect September 1, 2017. A Notice of Rent Increase to increase the rent by another \$20.00 took effect on July 1, 2019 bringing the monthly rent to \$840.00 plus the additional cable services.

The rental unit is one of two basement suites on the property. The landlord resides in the main living unit above the basement suites. The property has a fenced front yard and side yards. The backyard is also fenced and there had been a gate leading to the back yard; however, the gate broke in recent months and was removed.

The parties were in dispute as to whether the fenced backyard is common property, as submitted by the tenant, or set aside for the exclusive use of the landlord when the tenancy formed.

The tenant submitted that when her tenancy formed there was a verbal discussion concerning her ability to use the entire yard and since the beginning of her tenancy she has used the backyard multiple times per day, often in the accompaniment of her pet dog. The tenant submitted statements of witnesses and text messages from the landlord to demonstrate the tenant used the backyard frequently and the landlord was aware of this. The tenant submitted that the landlord not only is aware of the tenant's use of the backyard but had even suggested it at times when the tenant was walking her dog to the park. The tenant explained that she prefers to use the backyard over the other portions of the yard because it has trees and is shady. The tenant often sits under a large tree in the backyard and relaxes, reads and spends time outdoors with her dog.

The tenant stated that the front yard is fenced but is not secure as there are several holes in it and it is much sunnier and the tenant needs more shade than the front and side yards provide.

The tenant was also of the position her right to use the entire yard, including the backyard, is reflected in the tenancy agreement since "landscaping" is included in the monthly rent.

The tenant submitted that the landlord only started taking the position that the backyard was the landlord's exclusive use area in April 2019 when the gate to the backyard broke and the tenant sought to have it repaired. The tenant disagreed with the landlord's position and then on May 15, 2019 the landlord issued a Notice Terminating or Restricting a Service or Facility set to take effect July 1, 2019 (herein referred to as "the Notice"). The Notice indicates the service or facility subject to the Notice is the fenced backyard and that the tenant was restricted from accessing, entering or using the fenced backyard. The Notice provides that the rent would decrease by \$70.00 to \$770.00 per month starting July 1, 2019. The tenant stated that she paid the full rent for July 2019 as she does not accept the Notice but that she had not been using the backyard to avoid a dispute, pending the outcome of this proceeding.

The landlord was of the position that the backyard has always been for her exclusive use but acknowledged there was no discussion concerning use of the yard when the tenancy agreement formed. Nevertheless, the landlord does not dispute that the tenant had been using the backyard frequently but the landlord permitted this because of their friendly relationship and the landlord did not mind; however, the landlord takes issue with the tenant's dog relieving itself in the backyard because she has fruit trees in the backyard and the tenant was demanding repair of the gate because of her dog.

The landlord submitted that providing "landscaping" in the tenancy agreement refers to the task of maintaining the yard but tenant's interpretation of "landscaping" is far reaching and does not mean the tenant was given access to all the land.

The landlord acknowledged that the fencing around the property requires repairs and that she is expecting to commence a larger project to repair or replace all of the fencing when her landscaper returns in July 2019.

The landlord submitted that with the Notice in effect the tenant still has use of the front and side yards that she may use with her dog and that is reasonable. During the hearing, the landlord stated that she is willing to permit the tenant to use the backyard

going forward; however, she does not want the tenant's dog in the back yard mostly because she has fruit trees in the back yard and fruit droops to the ground where the dog may relieve itself. The landlord would be agreeable to a different rent reduction that reflects the tenant's inability to bring her dog in the backyard and continuing to allow the tenant to have use of the backyard and the tenant would remain entitled to have her dog in the side and front yard.

The tenant was of the position she has the right under section 28 of the Act to use the common areas for lawful purposes free from significant interference and that includes using the backyard with her dog. The tenant was of the position that one time the landlord commented on dog feces in the yard, which was last year, the feces was not from her dog and there have been no other instances of dog feces in the backyard.

The landlord was of the position she had the right to determine the use and activities on the property and that it is not unreasonable to retract the areas of the yard where the tenant's dog may go where it affects other occupants use and enjoyment of the yard, including the landlord.

Analysis

Upon consideration of everything before me, I provide the following findings and reasons with respect to the tenant's use of the backyard.

The parties were in dispute as to whether the entire property was common property, including the backyard, or whether the fenced backyard was for the exclusive use of the landlord. The first issue I shall determine is whether the backyard was to be a common use area or exclusive use by the landlord only.

The tenant pointed to the provision of "landscaping" in the tenancy agreement as evidence the yard was common property but the landlord refuted the tenant's interpretation. The word "landscaping" is not defined in the Act or in the tenancy agreement. Accordingly, I give ordinary meaning to the word "landscaping" which is: any activity that modifies the visible features of an area of land, including: living elements, such as flora or fauna; or what is commonly called gardening. I further find that a reasonable person would interpret this provision in the tenancy agreement to mean the landlord is responsible for maintaining the yard, including mowing the lawn, weeding garden beds, planting plants, pruning shrubs and trees, maintaining pathways and the like. I find the use of the word "landscaping" does not serve to set out boundary or use of the property as either common property or exclusive use area. Therefore, I do

not rely upon the provision of “landscaping” in the tenancy agreement to support the respective positions of either party as to whether the backyard is common use area or an exclusive use area.

Nowhere else in the written tenancy agreement is there any indication as to whether the tenant had use of all areas of the yard or was restricted to use certain areas and the parties were in dispute as to whether this was discussed when the tenancy formed. Accordingly, I turn the actual use of the property over the duration of the tenancy as being an indication as to what was agreed upon, either expressly or implicitly.

It was undisputed that the tenant has been using the backyard frequently and the landlord has had knowledge of this and up until recently the landlord has not taken any issue with the tenant’s use of the area. As such, I am of view that the parties’ actions and conduct are consistent with the backyard being for common use.

Further supporting the finding that the backyard was for common use is the fact the landlord issued a Notice Terminating or Restricting a Service or Facility. If the backyard was in fact exclusive use for the landlord only, such a Notice would serve no purpose. Accordingly, I find the landlord’s issuance of a Notice Terminating or Restricting a Service or Facility is further indication that the backyard was for common use by the tenant and the landlord.

Having been satisfied the backyard was to be for common use of the tenant and the landlord, I consider whether the landlord may terminate or restrict the tenant’s use of the area.

Section 27 of the Act provides a mechanism for a landlord to terminate or restrict a service or facility and the landlord issued the Notice under section 27 of the Act. I proceed to consider whether a Notice issued under section 27 may be used to terminate a tenant’s ability to use a portion of a yard.

Section 1 of the Act defines “residential property” to include buildings and common property on the parcel of land where the rental unit is located. Accordingly, I find the backyard would be considered “common property”.

Section 1 of the Act also defines a “service or facility” as:

"Service or facility" includes any of the following that are provided or agreed to be provided by the landlord to the tenant of a rental unit:

- (a) appliances and furnishings;
- (b) utilities and related services;
- (c) cleaning and maintenance services;
- (d) parking spaces and related facilities;
- (e) cablevision facilities;
- (f) laundry facilities;
- (g) storage facilities;
- (h) elevator;
- (i) common recreational facilities;
- (j) intercom systems;
- (k) garbage facilities and related services;
- (l) heating facilities or services;
- (m) housekeeping services;

[My emphasis underlined]

The definition of “service or facility” is inclusive and the list above is not exhaustive. However, I am of the view that a yard space used to lounge, relax or garden may be considered “common recreational facilities”.

Upon review of the list of amenities that are “services or facilities” I find that common property and a “service or facility” are not mutually exclusive and it is not uncommon for a service or facility to be located on common property. For example: a common laundry room in an apartment building is almost always located on common property and is also a “service or facility”. As such, I find the backyard is both common property and a service or facility. Therefore, I am of the view that the landlord may terminate or restrict the tenant’s use of a portion of the yard under section 27.

To terminate or restrict a service or facility under section 27 of the Act, subsection 27(1) provides that the service or facility must not be essential to the tenant's use of the rental unit as living accommodation, or a material term of the tenancy agreement. The tenant’s use of the rental unit is not impacted by termination of the tenant’s ability to use

the backyard since the tenant's entrance is not located in the backyard. Nor, do I find the tenant's use of the yard space to be a material term of the tenancy agreement since I have found the tenancy agreement was silent with respect to the tenant's use of the yard and I expect a material term would be a term in a written tenancy agreement where there is one. Therefore, I find section 27(1) does not apply and the landlord may terminate or restrict the tenant's use of a portion of the yard in accordance with section 27(2) by giving the tenant a Notice in the approved form and providing a rent reduction equivalent to the devaluation of the tenancy.

In this case, the landlord used the approved form and gave the tenant at least 30 days of advance notice before the Notice was to take effect. As for the rent reduction, the tenant did not provide any submissions for me to consider that would demonstrate a \$70.00 per month reduction is not reasonable.

As to the tenant's argument that she is permitted to use the residential property, which includes common areas of the property, for reasonable and lawful purposes under section 28 of the Act, I find the landlord is at liberty to manage the use of common areas for use and enjoyment by all occupants and the landlord may terminate or restrict a tenant's use of services or facilities even if they are in common areas. Similar examples for the tenant to consider would be where a landlord provides a "lounge room" in an apartment building or a "roof top patio" on top of an apartment building that is accessible by tenants of the property. Such amenities may be managed by the landlord to preserve the quiet enjoyment of the occupants of the building, such as imposing hours of use and limiting the activities that take place in these areas; or, the landlord may terminate these services and facilities altogether with the appropriate. The landlord has done something similar in this case and I find it is permissible for the landlord to do so.

Considering the above, I find:

- The fenced back yard was a service or facility provided to the tenant on common property;
- The landlord may terminate or restrict the tenant's use of the backyard in accordance with section 27(2) of the Act; and,
- The Notice Terminating or Restricting a Service or Facility dated May 15, 2019 and set to take effect July 1, 2019 is valid and enforceable.

In keeping with the above, I dismiss the tenant's requests for orders for compliance and orders for the landlord to provide services or facilities as requested with respect to the tenant's use of the backyard.

I make no award for recovery of the filing fee.

With a view to assist the parties in mending any discord in their tenancy relationship and having heard the landlord state she was willing to permit the tenant to use the backyard provided she not bring her dog in the backyard I suggest to the parties that the Notice Terminating or Restricting a Service or Facility may be withdrawn by mutual consent and the landlord may issue a new Notice so as to merely restrict the tenant's ability to bring her dog into the back yard. I also strongly encourage the landlord to repair or replace the fencing around the front and side yards in a timely manner.

Conclusion

The Notice Terminating or Restricting a Service or Facility dated May 15, 2019 is upheld. The tenant's requests for orders for compliance and to provide services or facilities with respect to her use of the backyard are dismissed.

The balance of the issues raised by the tenant were severed from this application and dismissed with leave to reapply.

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: July 24, 2019

Residential Tenancy Branch