Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, DRI, OLC, PSF, RR, FFT

Introduction

This teleconference hearing was scheduled in response to an application by the Tenants on June 13, 2019 under the *Residential Tenancy Act* (the "*Act*") for an Order for the Landlord to comply with the *Act, Residential Tenancy Regulation,* and/or tenancy agreement, for services and/or facilities to be provided as required by the tenancy agreement or law, for a reduction in rent, and for the recovery of the filing fee paid for the Application for Dispute Resolution. On July 3, 2019 the Tenants filed an amendment to add a claim to dispute a Two Month Notice to End Tenancy for Landlord's Use of Property (the "Two Month Notice") and to dispute a rent increase.

Both Tenants and a witness for the Tenants were present for the teleconference hearing. The witness was asked to exit the hearing until the Tenants requested he join to provide witness testimony. The Landlord was also present along with legal counsel who made submissions on behalf of the Landlord (collectively the "Landlord").

The Landlord confirmed receipt of the Notice of Dispute Resolution Proceeding package and a copy of the Tenants' evidence. The Tenant confirmed receipt of a copy of the Landlord's evidence. The Landlord noted that the Tenants' evidence was disorganized and a bit unclear. The parties were advised to notify me during the hearing if any clarification on evidence was needed or if any evidence was referenced that the other party did not have in front of them. However, neither party brought up any issues regarding service during the hearing.

The parties were affirmed to be truthful in their testimony and were provided with the opportunity to present evidence, make submissions and question the other party.

I have considered all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure.* However, only the evidence relevant to the issues and findings in this matter are described in this decision.

Preliminary Matters

The Application for Dispute Resolution named three tenants who were all present at the start of the hearing. However, the parties confirmed that the three tenants were under two separate tenancy agreements. It was clarified that the rent increase and the Two Month Notice in dispute were both addressed to Tenants AD and MR who live in the upstairs rental unit.

Parties in separate tenancies must apply separately and file to have their applications joined to be heard together in accordance with rule 2.10 of the *Rules of Procedure.* The parties were informed of this and Tenant SB was asked to leave the hearing. However, the Tenants advised that SB would participate as a witness. As such, SB left the hearing and rejoined when the Tenants asked for him to present witness testimony.

At the outset of the hearing, legal counsel for the Landlord stated that the Landlord is withdrawing the Two Month Notice. As such, I find that there is no longer a dispute over the Two Month Notice and the Two Month Notice is not in effect. Therefore, I remove the Tenants' claim to dispute a Two Month Notice from the application.

The Tenants applied for a reduction in rent which was a claim for monetary compensation in the amount of $1,100.00 as stated on the application. It was noted during the hearing that the Tenants had submitted a Monetary Order Worksheet in which they claimed more than double the amount stated on the application and which also contained monetary claims regarding both tenancies.

As the hearing regarding the additional claims took more than the scheduled time, the Tenants were provided with the option to adjourn the hearing to reconvene regarding their monetary claims or to withdraw and reapply. The Tenants withdrew their monetary claim at the hearing and stated their intent to reapply. As such, I remove the monetary claim from the Tenants' application and it will not be considered in this decision.

Following the hearing it was noticed that the Tenants had amended their application to increase their monetary claim and through an internal error this was not noted on their file. Regardless, as the monetary claims involved both tenancies of the upstairs and

downstairs rental units and the files were not joined to be heard together, I still find that the monetary claim could not proceed as listed on the application and amendment. The tenants in both rental units are at liberty to file their own separate applications for each of their monetary claims.

These amendments were made pursuant to Section 64(3)(c) of the *Act.*

Issues to be Decided

Were the Tenants issued an illegal rent increase?

Should the Landlord be ordered to comply with the *Act, Regulation* and/or tenancy agreement?

Should the Landlord be ordered to provide services or facilities as required by the tenancy agreement or law?

Should the Tenants be awarded the recovery of the filing fee paid for the Application for Dispute Resolution?

Background and Evidence

The parties were in agreement as to the details of the tenancy which were confirmed by the tenancy agreement submitted into evidence. The tenancy began on August 27, 2018. Rent in the amount of $2,200.00 is due on the first day of each month. A security deposit of $1,100.00 and a pet damage deposit of $1,100.00 were paid at the start of the tenancy.

The Tenants provided testimony regarding why they are disputing a notice of rent increase. A copy of the rent increase notice was submitted into evidence. The notice dated May 31, 2019 states that rent will be raised from $2,200.00 to $2,255.00 beginning September 1, 2019.

The Tenants stated that the Landlord took away the use of the pool that was to be open from April 1 to September 30 as per a previous dispute resolution decision. The Tenants referenced the decision that was submitted in their evidence. In the decision dated March 28, 2019, the arbitrator wrote the following in the conclusion:

> *I order the landlord to have the pool ready to be used for the summer season, defined as April 1 to September 30 for so long as the tenancy continues. The landlord shall not restrict the use of the pool to the tenants or their guests during this period, pursuant to section 30.*

The Tenants stated that the Landlord has taken away use of the pool several times, despite it being included in their tenancy agreement. As such, the Tenants stated that they have had full facilities as stated in the tenancy agreement for only 1.5 months since the tenancy started. A copy of the tenancy agreement was submitted into evidence and states that pool maintenance is included in the rent. The Tenants stated that they disagreed with the rent increase as the services as stated in the tenancy agreement are not being provided.

The Tenants also expressed their concern regarding the Landlord's lack of maintenance of the pool and noted that he stopped maintenance of the pool on June 3, 2019 which was a month prior to restricting access. They also noted that he was having maintenance on the pool twice per month at the most when maintenance should be four times per month. The Tenants stated that there were many times when they had to conduct pool maintenance on their own despite the tenancy agreement stating that pool maintenance was included.

The Tenants referenced the notice terminating or restricting a service or facility dated May 31, 2019. A copy of this notice was submitted into evidence and indicates that as of July 2, 2019 access to the outdoor swimming pool would be terminated. The notice states that the facility will be terminated/restricted as follows:

> *Neither serviceable nor operating during "summer months" (see interim RTB decision in this matter).*

The notice also indicates that as of July 1, 2019 the rent will be reduced by $50.00 and will therefore be $2,150.00 due to the termination of the service. The Tenants noted that the rent increase was based on the original rent amount and that access to the pool had already been restricted many times throughout the tenancy with no reduction in rent previously granted.

The Landlord submitted that they are unsure as to the issue with the rent increase as it was issued in accordance with the *Act* and *Regulation.* They also stated their understanding of the order in the previous arbitration decision to provide access to the

pool but stated that they also have a right under the *Act* to restrict a service or facility. The Landlord stated that the pool is a non-material term of the tenancy and referenced the previous decision of March 28, 2019 in which the arbitrator wrote the following:

> *I do not find that year-round use of a heated outdoor swimming pool is a term of the tenancy agreement.*

The Landlord stated that the rent increase was issued prior to the notice restricting services. They noted that they are willing to cancel the notice to restrict a service and re-issue it.

The Landlord further submitted that the term of the tenancy regarding the pool has been frustrated due to a letter form the city. The letter was submitted in the Landlord's evidence. In the letter, dated July 15, 2019, the Landlord was cautioned regarding drainage of water from the pool into a storm sewer which is against a city bylaw.

The Tenants stated their position that the term of the tenancy has not been frustrated. They referenced an email to the property manager at the start of the tenancy in which they ask for the pool to be a material term and stated their position that they would like the pool to be determined as such.

The Tenants stated that due to a health condition use of the pool is essential and referenced a doctor's note submitted in their evidence. In the letter, dated October 11, 2018, the doctor writes that one of the Tenants would benefit from continued access to the pool and that using a public pool is challenging due to the medical circumstances of the Tenant.

The Tenants stated that they want unrestricted access to an operational pool during the summer months as previously ordered, and that the pool be maintained as recommended. They suggested that should the Landlord not be able to properly maintain the pool that he could hire someone to do so.

The Landlord stated that there was no discussion as to how often the pool was to be maintained and that the pool cannot unilaterally be made a material term by the Tenants. The Landlord also referenced a letter from a contracting company provided in their evidence. The letter dated July 23, 2019 notes in part the following:

> *We have to be very careful before we start any excavation or digging to make pool water drainage towards sanitary sewer we must close old lines that goes to storm sewer.*

In the letter it is also noted that the cost to the Landlord could be quite high and that there is risk to damage of the foundation of the home.

The Landlord stated that they are willing to enter into an agreement with the Tenants for them to conduct maintenance of the pool.

The Tenants stated that the pool was restricted for no reason as there is nothing wrong with the pool and it is still functioning, just not being properly maintained.

The Tenants' witness, SB attended the hearing. He lives in the lower level rental unit on the residential property. The witness stated that it was his understanding that use of the pool was included in the rent but that the Landlord has been back and forth regarding use of the pool. He noted that he also received a notice restricting use of the pool. The witness further stated that the Landlord was doing a poor job of maintaining the pool and that the water was disgusting as a result. He noted that it was being maintained twice a month when it should be should be approximately four times per month.

Analysis

Regarding the Tenants' application to dispute a rent increase, I refer to Section 41, 42 and 43 of the *Act* which states restrictions regarding the timing and amount of a rent increase. As the tenancy started in August 2018, I find that increasing the rent as of September 1, 2019 complies with Section 42 of the *Act* as it is at least 12 months since the tenancy started.

I also find that the amount of the rent increase was calculated in accordance with the regulations as required by Section 43 of the *Act.* As the current allowable amount to increase is 2.5%, I find that an increase of $55.00 is within the allowable percentage and therefore in compliance with the *Act* and *Regulation.*

While the rent was increased based on the original rent amount and not the reduction of rent as noted in the notice to restrict a service or facility, this will be addressed separately below.

The Tenants testified that they should not receive a rent increase due to the amount of time that they have not had access to the pool. However, I find this to be a separate matter from the rent increase. Instead, I find that the Landlord increased the rent in accordance with the *Act* and therefore that the rent increase notice is valid and enforceable and as of September 1, 2019 rent will be $2,255.00 as stated on the notice of rent increase.

Should the Tenants feel that they are entitled to monetary compensation due to a denial of access to services or facilities, they are at liberty to file an application/re-apply for monetary compensation. However, I find this to be a separate matter from a Landlord's right under the *Act* to increase rent.

Regarding the Tenants' application for an order for the Landlord to comply and for services or facilities to be provided, I find the previous dispute resolution decision dated March 28, 2019 to be compelling evidence regarding the Tenants' right for access to the pool.

The parties were not in agreement as to whether the pool is a material term of the tenancy agreement or whether it should be a material term. However, I do not find that access to the pool is a material term. I refer to *Residential Tenancy Policy Guideline 8,* which provides a definition of a material term 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.*

This policy guideline further outlines the process for determining whether a term is material. However, upon review of the evidence before me and based on the testimony of both parties, I do not find access to the pool to be a material term. As both parties do not agree as to the importance of this term and due to insufficient evidence that would establish it as such, I do not find it to be material. I also note that while the tenancy agreement states that the Landlord is responsible for pool maintenance, there is no further information provided on the agreement that would outline the Tenants' right to access to the pool as a material term of the tenancy.

However, regardless of whether the pool is a material term or not, I do find that the Landlord was previously ordered to keep the pool serviced and open each year between April 1 and September 30. While the Landlord provided a notice to terminate access to the pool in accordance with Section 27 of the *Act,* I find that this is a direct

contravention of the decision dated March 28, 2019 which was issued pursuant to the *Act.*

I also do not find sufficient evidence before me to establish that the pool is unusable due to damage or safety concerns. While the Landlord provided two letters into evidence, both were issued after the restriction notice was provided and both relate to issues with draining the pool, not with usability or safety of the pool. There is no evidence that would establish that the pool is unable to be maintained and remain open. As such, I find that the order in the decision dated March 28, 2019 stands as follows (emphasis added):

> *I order the landlord to have the pool ready to be used for the summer season, defined as April 1 to September 30 for so long as the tenancy continues.* ***The landlord shall not restrict the use of the pool*** *to the tenants or their guests during this period, pursuant to section 30.*

Therefore, the notice restricting service is not enforceable and as such is cancelled. There is no need for the Landlord to withdraw the notice following this decision as the notice has been cancelled.

As the Tenants were partially successful with their application, I find that the Tenants are entitled to the recovery of the filing fee in the amount of $100.00, pursuant to Section 72 of the *Act.* The Tenants may deduct $100.00 from their next monthly rent payment as recovery of this fee.

Conclusion

The rent increase was issued in accordance with the *Act* and therefore effective September 1, 2019 monthly rent will be $2,255.00 as stated on the notice dated May 31, 2019.

Pursuant to Section 62 of the *Act,* the Landlord is ordered to follow the previous decision dated March 28, 2019 and not restrict the use of the pool between April 1 and September 30 for so long as the tenancy continues. The notice to terminate or restrict services dated May 31, 2019 is cancelled and of no force or effect.

Pursuant to Section 72 of the *Act,* the Tenants may deduct $100.00 from their next monthly rent payment to recover the filing fee paid for the 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: August 14, 2019

Residential Tenancy Branch