Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding TPM
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OLC, PSF, FFT

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- an order to the landlord to provide services or facilities required by law pursuant to section 65; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. As the landlord confirmed that on or about July 13, 2019, they received a copy of the tenants' dispute resolution hearing package sent by the tenants by registered mail, I find that the landlord was duly served with this package in accordance with section 89 of the *Act.* Since both parties confirmed that they had received one another's written evidence, I find that the written evidence was served in accordance with section 88 of the *Act*.

Issues(s) to be Decided

Should any orders be issued with respect to this tenancy with respect to a parking space that the tenants maintain is being removed from part of the services and facilities that they have been receiving? Are the tenant(s) entitled to recover the filing fee for this application from the landlord?

Background and Evidence

The landlord and Tenant SJ (the tenant) signed a one year fixed term Residential Tenancy Agreement (the Agreement) for a unit in this 26 unit rental building on November 7, 2016, for a tenancy that was to run from December 1, 2016 until November 30, 2017. When the Agreement expired, the tenancy continued as a month-to-month tenancy. According to the terms of the Agreement, a copy of which was entered into written evidence for this hearing, monthly rent was set at $1,100.00, payable in advance on the first of each month, plus $50.00 for parking. Although the Agreement did not specify how many parking spaces the tenant was entitled to receive, at that time the tenant's only vehicle was a work vehicle and not for personal use.

Although the landlord appears to have failed to properly implement rent and charges that were available to the landlord during the course of this tenancy, the parties are now in agreement that the base monthly rent as established by the landlord as of September 1, 2019 was set at $1,172.00 less $50.00 for the landlord's withdrawal of the second parking space. The tenants are also responsible for the other charges of $50.00 for parking, $35.00 for a storage locker and $75.00 for an additional occupant charge, the latter of which was pursuant to the Agreement for Occupant HG's (the occupant's) residency within the rental unit.

At this point, the parties' dispute has narrowed to the tenants' assertion that the landlord's withdrawal of the second parking space constituted a service or facility that is essential to this tenancy. The tenants maintained that Residential Tenancy Branch (RTB) Policy Guideline 22 applies to this situation as they cannot locate a replacement of the parking space authorized by the landlord's caretaker for the past 2 1/2 years at a monthly rate that is affordable within one kilometer of the rental unit. The occupant gave undisputed sworn testimony that parking spaces within that distance of the rental unit are currently being rented for between $225.00 and $350.00 per month. The occupant also cited other decisions of arbitrators appointed pursuant to the *Act*, who found that in the situations before them that a parking space could be considered a material term of a tenancy agreement. They maintained that the following portion of Policy Guideline 22 provided guidance enabling arbitrators to find that the parking space is essential to this tenancy as there is no reasonable substitute for that service or facility:

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....*

In determining whether a service or facility is essential, or whether provision of that service or facility is a material term of a tenancy agreement, ***an arbitrator will also consider whether the tenant can obtain a reasonable substitute for that service or facility.****..*

The landlord gave sworn testimony that their then caretaker made a mistake in allowing the tenant to use the second parking space, and never alerted the landlord's office that this had happened. The landlord explained that parking is limited in this building as they have only 18 parking spaces for the 26 rental units and that no one else in this building has more than one space.

In February 2019, the landlord obtained information from the tenant and others in this building about the circumstances surrounding their use of various services and facilities in this rental property, including parking. Although the landlord sent the tenant a letter on July 5, 2019, citing incorrect amounts for the base rent for this tenancy, that letter did advise the tenant that they would no longer be able to use the second parking space. The tenants entered into written evidence a copy of that letter and the attached Notice Terminating or Restricting a Service or Facility on the RTB's approved form for doing so. A second letter of August 24, 2019 advised the tenant of the revised base rent for this tenancy, confirming that as of September 1, 2019, the base rent would be reduced by $50.00 for the landlord's withdrawal of the second parking space that the tenant had been using.

Although it was not part of the tenants' application, the tenant also expressed concern over the landlord's alleged attempt to recover $2,320.00 in payments that the landlord maintained were not charged or collected by the landlord since May 2017 for services provided to the tenant. As this issue was not included in the tenants' application, and this issue had not arisen at the time the tenants filed their application on July 5, 2019, I advised the parties that this issue was not properly before me and could not be considered as part of the tenants' application.

Analysis

Section 27 of the Act reads 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 considering this matter, I have also taken into account RTB Policy Guideline 22, which reads in part as follows:

B. ESSENTIAL OR PROVIDED AS A MATERIAL TERM

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.*

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.*

• See also Policy Guideline 8: Unconscionable and Material Terms

In determining whether a service or facility is essential, or whether provision of that service or facility is a material term of a tenancy agreement, an arbitrator will also consider whether the tenant can obtain a reasonable substitute for that service or facility. For example, if the landlord has been providing basic cablevision as part of a tenancy agreement, it may not be considered essential, and the landlord may not have breached a material term of the agreement, if the tenant can obtain a comparable service...

This Policy Guideline also establishes the following burden of proof on the tenants to demonstrate their claim:

D. BURDEN OF PROOF

Where the tenant claims that the landlord has restricted or terminated a service or facility without reducing the rent by an appropriate amount, the burden of proof is on the tenant. There are six issues which must be addressed by the landlord and tenant.
• whether it is a service or facility as set out in Section 1 of the Legislation;
• whether the service or facility has been terminated or restricted;
• whether the provision of the service or facility is a material term of the tenancy agreement;
• whether the service or facility is essential to the use of the rental unit as living accommodation or the use of the manufactured home site as a site for a manufactured home;
• whether the landlord gave notice in the approved form; and
• whether the rent reduction reflects the reduction in the value of the tenancy...

The relevant portions of RTB Policy Guideline 8 are as follows:

Material Terms

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. To determine the materiality of a term during a dispute resolution hearing, the Residential Tenancy Branch will focus upon the importance of the term in the overall scheme of the tenancy agreement, as opposed to the consequences of the breach. It falls to the person relying on the term to present evidence and argument supporting the proposition that the term

was a material term. The question of whether or not a term is material is determined by the facts and circumstances surrounding the creation of the tenancy agreement in question. It is possible that the same term may be material in one agreement and not material in another...

At the hearing, I advised the parties that dispute resolution decisions are not reliant on precedents in the same way as would be followed in more formal judicial proceedings. While it is always interesting to hear what other arbitrators have decided, the *Act* recognizes that each situation is based on different facts, policy and sections of the legislation, which necessitate a determination based on the unique aspects of each dispute.

I should first note that when this Agreement was first entered into between the landlord and the tenant, the tenant had only the one vehicle. They used that vehicle for work purposes, and not for personal use. While the Agreement does not specify the number of parking spaces provided to the tenant in exchange for the $50.00 monthly parking fee that was to be added to the tenant's base rent for this tenancy, there is no evidence that the landlord was conveying use of an indeterminate number of parking spaces in this rental building as part of the Agreement. Rather, it would seem reasonable to interpret the Agreement as permitting the tenant to keep the one vehicle they had at that time in the parking lot in exchange for the $50.00 set out in this rental contract.

As noted above, RTB Policy Guideline 22 provides guidance as to how to evaluate whether a service or facility is essential to the tenant's use of the rental unit as living accommodation. The landlord is not attempting to remove the tenant's contractual right established in the Agreement to park a single vehicle in the lot for this rental building; it is the tenant's right to park a second vehicle that is in dispute. Although I recognize that the tenant did take the measures that they believed were required to obtain approval to park the second vehicle in this lot before they committed to accept the second vehicle for personal use, I do not find that the landlord's withdrawal of permission to use the lot for the tenant's second vehicle is essential to the tenant's use of the rental unit as living accommodation.

RTB Policy Guideline 22 also establishes that even if a service is not essential to the tenant's use of the rental unit as living accommodation that the provision of the second parking space could still be considered to be a material term of this tenancy agreement. Were the landlord now attempting to remove the single parking space that the tenant obtained from the initial Agreement, the tenant would be in a much improved position to

assert that their loss of that single parking space constituted either a material term of their Agreement or the loss of an essential service that they could not otherwise replace with a reasonable and nearby substitute. The circumstances as presented in this case do not involve the single parking space that the tenant needed when the tenant entered into this Agreement. Instead, the dispute centers around the second parking space that the tenant has been using since May 2017, with the permission of the landlord's caretaker. Whether or not the landlord's caretaker was truly authorized to grant this permission to the tenant or whether or not the landlord's office was ever alerted about this arrangement by their then caretaker, there is undisputed evidence that the tenant has been using the second parking space since May 2017. Regardless of whether the tenant was charged for this service, the tenant did rely on the oral agreement with the landlord's representative, the caretaker, to obtain a second vehicle for personal use in May 2017.

Since this tenancy was entered into at a time that the tenant only possessed the one vehicle, I do not accept that the caretaker's subsequent authorization to let the tenant keep a second vehicle in the parking lot in any way constituted a material term of the Agreement. In May 2017, the initial fixed term of the Agreement was in place and the tenant was contractually bound to continuing the tenancy until at least November 30, 2017 under the terms agreed to on November 7, 2016, when the landlord and the tenant signed the Agreement. I do not find that these terms allowed the tenant to park any more than the single vehicle that they possessed in this rental building's parking lot when they signed the Agreement. While it was certainly beneficial to the tenant to enter into an oral agreement whereby the tenant could keep a second vehicle in the parking lot, this oral agreement did not establish the parking of a second vehicle in the lot as a material term of the fixed term Agreement that the tenant had signed and which had seven more months to run its course. Based on RTB Policy Guidelines 8 and 22, I find that the tenant has not met the burden of proof required to demonstrate that parking of the tenant's second vehicle in the parking lot of the rental building constituted a material term of the Agreement that was in place at the time the tenant commenced parking a second vehicle there. Since this was not even a provision of the Agreement, I find that there was no agreement between the parties that the right to park a second vehicle in the parking lot was such an important provision of their Agreement (or even subsequent oral agreement between the tenant and the landlord's caretaker) that the most trivial breach of that term could give rise to ending these agreements.

As the occupant correctly noted, RTB Policy Guideline 22 also requires arbitrators to consider situations where "an arbitrator will also consider whether the tenant can obtain

a reasonable substitute for that service or facility." With respect to this issue, the occupant gave undisputed sworn testimony that there are parking spaces available within one kilometer of the rental building, but that these spaces are much more expensive than the tenant is paying for their existing parking in this rental building. In essence, the tenants have questioned whether paying between four and seven times the current cost of parking to replace the service lost is a reasonable substitute for the parking that they have been receiving.

The reasonableness of the substitute for the service or facility can be viewed a number of ways. For example, reasonableness could be as simple as determining whether it were reasonably possible to replace a service that was being provided in the past by the landlord. For example, it might be possible for a tenant to obtain heat or even power from some other source than was previously being provided by a landlord, but such remedies might be unreasonable and or even unfeasible. Alternatively, an assessment of reasonableness could also rely almost solely on the financial implications for the tenant in replacing the service that had previously been provided by the landlord. It would seem that the tenants have asked for the latter of these perspectives on considering the reasonableness of replacing the parking space previously provided by the landlord. Were I to use this standard to consider reasonableness, it would seem necessary to consider the extent to which the tenant was receiving a favourable rate for parking based on market comparators. Using solely a financial perspective to define reasonableness, perhaps it might be necessary to consider the extent to which a landlord has factored into the monthly rent tenant's needs in a particular location to have monthly parking available at an affordable rate. In this case, since the tenant has not actually been charged anything for the extra parking space since May 2017, should the benefit that the tenant has received be factored into an assessment of the monetary reasonableness of removing a parking space that the tenant has never paid anything to obtain?

It is not at all clear how the guidance provided in RTB Policy Guideline 22 with respect to assessing the reasonableness of the substitute for a parking space that was never charged to the tenant would be applied in this instance. I do not believe that it is the intention of RTB Policy Guideline 22 to ask arbitrators to establish grounds that extend beyond those provided in section 27 of the *Act* itself. Thus, I return to the wording of section 27 of the *Act*. As I find that the landlord has not terminated a service or facility that is essential to the tenants' use of the rental unit as living accommodation and that the parking space in question is not a material term of this tenancy agreement, I dismiss

the tenants' application to overturn the landlord's Notice Terminating or Restricting a Service or Facility of July 5, 2019.

Since the value attached to monthly parking in this Agreement is $50.00, this is the amount that the parties agreed that a parking space would cost the tenant during this tenancy. As such, I find that the landlord's reduction of rent by $50.00 per month is the appropriate reduction resulting from the landlord's withdrawal of a parking space from the services and facilities that the tenant has been receiving during this tenancy.

For these reasons, I dismiss the tenants' application. As the tenants have not been successful in this application, I make no order with respect to their filing fee.

Conclusion

The tenants' application is dismissed without 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: September 16, 2019

Residential Tenancy Branch