Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

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

DECISION

Dispute Codes **FFT MNDCT**

Introduction

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

- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $1,535.42 pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

The tenant attended the hearing. The landlord was represented at the hearing by its manager ("**RW**"). Both were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenant testified, and RW confirmed, that the tenant served the landlord with the notice of dispute resolution form and supporting evidence package. RW testified, and the tenant confirmed, that the landlord served the tenant with its evidence package. I find that all parties have been served with the required documents in accordance with the Act.

Issues to be Decided

Is the tenant entitled to:

1) a monetary order for $1,535.42; and
2) recover his filing fee?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into a written tenancy agreement starting May 1, 2016. Monthly rent was $1,450 plus $65 for parking ($1,515 total). The tenant paid the landlord a security deposit of $725. After making deductions (which the tenant agreed to) the landlord returned the balance of the deposit to the tenant at the end of the tenancy.

The residential property is a multi-unit, multi-story building (the "**Building**"). The rental unit is located on the sixth floor of the Building. The Building is serviced by a single elevator. In the past, the elevator has broken down or stopped working on multiple occasions. On one such occasion the tenant became trapped in the elevator car.

The parties agree that the elevator, being in the condition that it was, required modernization. At some point in 2018, the landlord decided to modernize the elevator. This process would require the temporary ending of elevator service for several months. At the hearing, the tenant did not take issue with the length of time required to modernize the elevator.

On July 11, 2018, the landlord posted a notice (which was submitted into evidence) stating that technicians will attend the building on July 13, 2018 "to do some elevator work in preparation for the elevator modernization which will happen in 2019."

At some point following this visit, the landlord set the date to start modernizing the elevator as June 1, 2019. On February 26, 2019, the landlord posted a notice (which was submitted into evidence) stating:

> [The landlord] would like to inform all the tenants at [the Building] that we will be modernization the elevator starting around June 1st, 2019. The elevator modernization will take around 3 to 4 months to complete.
>
> Since there is only 1 elevator, all residents will have to walk up and down the elevators. We apologize about that, but in return tenants will be getting a new elevator. Modernization of an elevator is complicated and expensive.

> We are giving tenants this much notice, so that they have a chance to plan and to leave [the Building] before the elevator modernization begins (before June 1, 2019).
> If you have a 1-year lease, we will let you end your tenancy earlier, and vacate your unit. This offer to break your lease is only good till vacate day (move out date) of May 31st, 2019. All tenants will have to give at least a month's written notice to [the landlord] no later than April 30th, 2019. Please note that: "A written notice given the day before the rent is due in a given month ends the tenancy at the end of the following month."
>
> WE APOLOGIZE FOR THE INCOVENIENCE, & WE WOULD LIKE TO THANK YOU FOR YOUR PATIENCE & UNDERSTANDING.

The landlord posted similar notices in April and May 2019 reminding Building occupants of the impending elevator shutdown. Additionally, these notices advised Building occupants of services the landlord would provide them during the shutdown which included:

- staff available to assist Building occupants carry laundry or groceries up the stairs, and garbage down the stairs; and
- folding chairs on the second to ninth floor hallways that could be used as rest stops.

The tenant testified that he saw the aforementioned notices and understood that the elevator would be inoperable starting in June 2019.

The tenant does not dispute that these services were provided by the landlord.

The landlord did not provide any rent reduction during the time the elevator was being modernized, although RW testified that after the modernization was completed, the landlord gave the Building occupants gift cards to a grocery store as a gesture of good will. By this time, however, the tenant had vacated the rental unit and did not receive any gift card from the landlord.

As part of the “modernization” efforts, the elevator was shut down on June 7, 2019.

On June 26, 2019, the tenant gave written notice that he was ending his tenancy effective July 31, 2019. He testified that he did so due to “unforeseen circumstances”, and that he did not anticipate having to end his tenancy prior to the elevator modernization starting.

The tenant testified that he carried many of his possessions down the stairs in the weeks leading up to the end of the tenancy and stored them in his parking spot located in the Building's garage. He testified that he requested the landlord provide him with a storage locker so that he could bring larger items down the stairs before the end of tenancy, but that the landlord refused this request.

The tenant testified that, prior to moving out, he advised the landlord that he would need to hire movers because he could not carry his furniture down six flights of stairs. He testified that he did not explicitly ask for the landlord to hire movers for him. However, he testified that when he told RW of his need for movers, RW responded that he had been provided ample notice of the elevator shut down and should have planned his move out accordingly.

RW testified that the landlord would not have hired movers to assist the tenant, had the tenant asked, as the landlord provided over a year's notice to the tenant of the shutdown.

The tenant testified that he hired movers to assist him in the move out, and that this cost him $1,379.88. He provided a copy of an invoice supporting this amount. He testified that he had to contact several moving companies before he found one that was willing to take a job in a building without elevator access.

The tenant also testified that as a result of having to do the entire move in one day he had to buy many moving boxes to store his possessions in for the move that he would not have otherwise had to buy. (He testified he would have moved his possessions over the course of several days and reused boxes). He submitted two receipts showing the purchase of over moving 60 boxes with a combined cost of $155.54.

The landlord argued that the tenant was sufficiently notified of the elevator shut down, and that the tenant's failure to heed the notices caused him to incur these costs.

The tenant argued that the landlord must reimburse him these costs ($1,535.42 total) as he only incurred them as the result of the landlord shutting down the elevator. He argued that the amount of notice he was given about the elevator shutdown is not relevant, as he only discovered his need to move after the elevator had already been shut down.

Analysis

Section 45 of the Act allows a tenant to end a periodic tenancy by providing at least one month's written notice to the landlord. I find that the tenant's letter dated June 26, 2019 advising the landlord that he intends to end the tenancy on July 31, 2019 satisfies the requirements of this section. As such, I find the tenant validly ended the tenancy on July 31, 2019.

1. Did the Landlord Breach the Act?

Section 27 of the Act states:

> **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.

Section 1 of the Act defines "service or facility" to include an elevator. As such, it must be determined whether an elevator is essential to the tenant's use of the rental unit (an "essential service") or if it is not (a "non-essential service").

Policy Guideline 22 addresses essential services. It states:

> 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.

[emphasis added]

As such, I find that the elevator is an essential service. As such, per section 27(1) of the Act, the landlord must not terminate or restrict it. I find that elevator services were not terminated. Once the elevator modernization was complete, the elevator was available for regular use.

Mirriam-Webster's Dictionary defines "restrict" as:

> to place under restrictions as to use or distribution

It defines "restriction" as:

> a limitation on the use or enjoyment of property or a facility

I find that by temporarily shutting down the elevator, the landlord limited the tenant's use of it. As such, the landlord restricted use of the elevator, in contravention of section 27(1) of the Act.

However, section 32 of the Act states:

> **Landlord and tenant obligations to repair and maintain**
>
> **32**(1) A landlord must provide and maintain residential property in a state of decoration and repair that
>
> (a)complies with the health, safety and housing standards required by law, and
>
> (b)having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

This section of the Act places positive obligations on the landlord to repair and maintain the Building. This positive obligation extends to the condition of the elevator. There is no dispute between the parties that the elevator required repairs in order to operate at a suitable level, or that it was necessary to shut down the elevator to repair the elevator.

As such, the landlord was obligated to repair the elevator, and had to shut it down to be able to make such repairs.

This obligation placed the landlord in a difficult position. If the landlord failed to repair the elevator, it would be in breach of section 32(1) of the Act, but if it undertook repairs, it would be in breach of section 27(1) of the Act. Neither of these were good options.

Accordingly, these competing obligations must be balanced.

I cannot accept that the drafters of the Act intended to create an obligation of a landlord under the Act that would require a landlord to breach another of its obligations. Landlords and tenants are expected to conduct themselves in manner that complies with the Act. It would be absurd to find that the Act requires a landlord to Act in a non-compliant manner.

Plainly, the elevator needed repair. It is undisputed that the elevator must be shut down to do this. As such, I do not find that by so doing, the landlord breached the Act. If find that the obligation to repair and maintain the Building created by section 32(1) of the Act implicitly allows for essential service to be temporarily and reasonably restricted to allow for repairs and maintenance. If this were not the case, every time a landlord would have to shut a rental property's water off to make plumbing repairs, or turn electricity off to do electrical work, would amount to a breach of the Act. Such an interpretation of the Act would be unduly onerous to a landlord and would discourage landlords from making such repairs. It is not in the public interest to discourage landlords from repairing or maintaining essential services.

For the reasons stated above, I find that the landlord did not breach section 27 of the Act by temporarily shutting down the elevator.

However, this does not mean that the tenant is not entitled to any compensation resulting from the elevator shut down.

Section 32(2) of the Act permits a landlord to terminate non-essential services, provided that the landlord gives 30 days-notice of the restriction and reduces a tenant's rent in an amount equivalent to the reduction in value of the tenancy resulting from the termination.

I find that, in circumstances where an essential service or facility has been *reasonably* and *temporarily* restricted for the purpose of maintaining or repairing the essential service, a tenant is entitled to similar compensation. Essential services are, by their very nature, more important to a tenancy that non-essential services. To allow for compensation for the less important service, while denying compensation for the more important service makes little sense.

I find that the temporary restriction of elevator services by the landlord in order to repair it was reasonable.

As such, I find that the tenant is entitled to a retroactive rent reduction for the time he resided in the rental unit and did not have use of the elevator (that is, for the months of June and July 2019).

I find that by not reducing the tenant's rent for the months his access to the elevator was restricted (June and July 2019), the landlord breached the Act.

2. Tenant's Entitlement to Damages

Residential Tenancy Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

> The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:
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> - a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
> - loss or damage has resulted from this non-compliance;
> - the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
> - the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.
>
> (the "**Four-Part Test**")

Rule of Procedure 6.6 states:

> **6.6 The standard of proof and onus of proof**
>
> The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.
>
> The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application.

So, the tenant has the onus to prove that each of the steps in the Four-Part Test have been satisfied in order to receive a monetary award.

I will address each of these steps in turn.

As I have stated above, the landlord breached the Act by failing to provide a rent reduction for June and July 2019 but did not breach the Act by temporarily restricting the tenant's access to the elevator.

I find that the tenant suffered loss as the result of this breach, namely he was deprived of the rent reduction to which he was entitled. I do not find that any of the tenant's moving expenses resulted from the landlord's failure to provide a rent reduction, as even if the landlord had provided the rent reduction, the tenant would still have had to incur the moving costs.

Neither party provided evidence or arguments as to the amount of damage the tenant suffered as a result of the landlord's breach (specifically, as to what the appropriate amount of a monthly rent reduction would be for the restriction of elevator services to a rental unit located on the sixth floor). As such, I find that the tenant has failed to discharge his onus to prove the amount of damage.

I find that there is little the tenant could have done to minimize the damage he suffered as a result of the landlord failing to reduce his rent. Whether or not the landlord provides a rent reduction was entirely in the hands of the landlord. I note that as I have found that the tenant is not entitled to any compensation flowing from the landlord restricting the tenant's use of the elevator, I do not need to consider whether or not the tenant adequately minimized his damages relating to hiring movers or timing his ending of the tenancy. These factors are not relevant to the issue of the rent reduction.

Policy Guideline 16 considers the matter of monetary awards when the amount of damage suffered by a party caused by another's breach of the Act has not been provide. It states:

> An arbitrator may also award compensation in situations where establishing the value of the damage or loss is not as straightforward:
>
> - "Nominal damages" are a minimal award. Nominal damages may be awarded where there has been no significant loss or no significant loss has been proven, but it has been proven that there has been an infraction of a legal right.

I find that nominal damages equal to 10% of the monthly rent for June and July 2019 are appropriate in the circumstance.

Accordingly, I order that the landlord pay the tenant $303.00 (10% of $1,515.00 = $151.50; $151.50 x 2 months = $303.00).

I note that I have included to cost of monthly parking in this calculation. Section 1 of the Act defines “rent” as follows:

> "rent" means money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of a tenant to a landlord in return for the right to possess a rental unit, for the use of common areas and for services or facilities, but does not include any of the following:
> (a) a security deposit;
> (b) a pet damage deposit;
> (c) a fee prescribed under section 97 (2) (k)

Section 97(2)(k) of the Act grants the Lieutenant Governor to make regulations regarding fees. The *Residential Tenancy Regulations* do not prescribe fees for parking.

As the tenancy agreement explicitly lists “parking” as a provided facility, I find that the fee agreed to be paid for parking constitutes part of “rent” as defined by section 1 of the Act.

As the tenant has been successful in his application, I order that the landlord reimburse him his filing fee ($100).

Conclusion

Pursuant to sections 67 and 72 of the Act, I order that the landlord pay the tenant $403.

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: February 5, 2020

Residential Tenancy Branch