Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Reliance Properties Ltd. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes RR, FFT

Introduction

On January 8, 2020, the Tenant applied for a Dispute Resolution proceeding seeking a rent reduction pursuant to Section 65 of the *Residential Tenancy Act* (the "*Act*") and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

The Tenant attended the hearing with A.D. attending as his advocate. B.S. and L.L. attended the hearing as agents for the Landlord. All in attendance provided a solemn affirmation.

A.D. advised that the Landlord was served the Notice of Hearing package by registered mail on January 12, 2020 and B.S. confirmed that this was received. Based on this undisputed testimony, and in accordance with Sections 89 and 90 of the *Act*, I am satisfied that the Landlord was served the Tenant's Notice of Hearing package.

A.D. also advised that the Tenant's evidence package was served to the Landlord in person on February 24, 2020 and B.S. confirmed that this was received. She advised that the Landlord's evidence was served to the Tenant by registered mail on February 21, 2020 and A.D. confirmed that the Tenant received this evidence. As the service time frames of both parties' evidence complies with Rules 3.14 and 3.15 of the Rules of Procedure, I am satisfied that all of the evidence can be accepted and will be considered when rendering this decision.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

- Is the Tenant entitled to a rent reduction?
- Is the Tenant entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

Both parties agreed that the tenancy started on August 1, 2010. Rent was currently established at $2,414.00 per month and is due on the first day of each month. A security deposit of $975.00 was also paid.

The nine-floor property has two elevators for the use of all the residents and a flood on September 9, 2019 was responsible for damage to these elevators where they only operated intermittently or not at all for a considerable amount of time. A.D. advised that the amount of compensation the Tenant is seeking is difficult to quantify, but the Tenant is requesting compensation in the amount of **$2,414.00** for the loss of this essential service from the period of September 9, 2019 to January 23, 2020, pursuant to Section 27 of the *Act*. He stated that there were approximately two months with no elevators in operation, and approximately six months where there was intermittent operation of one or both elevators.

He submitted that the Tenant organized a group of affected tenants of the building and they requested a rent reduction from the Landlord, in writing on September 25, 2019, due to loss of access to the elevators. The Landlord responded 36 hours later with their own letter declining compensation as this was due to an “act of god”, not the Landlord’s negligence. He cited the legal principle of force majeure to describe this response. He referenced Policy Guideline # 22 which describes what could be considered an essential service. He also cited the case of *Gates v. Sahota*, 2018 BCCA 375 to support his position that the Tenant should be awarded compensation for this loss.

A.D. had the Tenant confirm that the spreadsheet submitted as documentary evidence accurately reflected the dates that either one or both elevators were out of service and the Tenant confirmed this information, “to the best of his recollection.” The Tenant advised that the description of the intermittent service of the elevators would be a

“generous” term, that the elevators would sometimes lurch up and down, and that there were times where people would get stuck. He submitted that for 50% of the time, one elevator would be available for a day or so and then one or both would be out of service again; however, he cannot recall the exact number of times this happened. He stated that there was no communication or explanation from the Landlord about this disruption when the flood happened. The Landlord later notified the tenants that this issue would be corrected but provided no timeframe or updates.

He advised that he works from home and stressed the importance of leaving the rental unit frequently for his mental and social health. He estimated that he would leave his rental unit eight times per day and he compared the requirement of taking the 70’ climb of the stairs each time to be the equivalent of hiking a local mountain twice a week. He stated that his mother has medical challenges and he was unable to have her over because taking her up and down the stairs was not a feasible option. He stated that no one visited him anymore because of this issue and without updates from the Landlord, he lost the ability to plan any activities or his life. He stated that compensation in the amount of $30.00 per day is not comparable to the loss that he endured.

B.S. advised that they were all surprised by the flood and she referenced news articles, submitted as documentary evidence, to illustrate that there was major rainfall in September 2019 that caused the elevator shafts to flood within 45 minutes on September 9, 2019. She stated that the Landlord took action immediately, made overtime calls to their elevator maintenance company, and approved any required overtime work. She stated that this company attended the next day to address the issue, that significant damage was discovered, that a significant amount of parts were required to be ordered, and that temporary service could be restored eventually. She stated that one elevator was temporarily repaired on September 23, 2019 but the service was intermittent as the repair company had to check this twice a day, for a total of an hour per day, and to repair parts. As the damage was extensive, the repair company could not provide an exact deadline for repair and consequently, the Landlord could not inform the tenants of this timeline.

She referenced the emails to the elevator repair company to demonstrate that approvals for any repair work were authorized and she drew my attention to the invoices that demonstrate all the work that was completed. This shows that there was not neglect on the part of the Landlord. She reiterated that the Landlord’s cost to repair this damage has exceeded $300,000.00 and the Landlord had approved all repair costs. She advised that the building contains 58 units and the two elevators service these; however, the adjoining building is owned by the same Landlord and access was opened

between the buildings so that residents could use the available elevators of the neighbouring building. She stated that the Tenant would be aware of this as the adjacent building had a shared gym and outdoor patio. To access these elevators, the Tenant would have had to take four additional flights of stairs only. Furthermore, she speculated that as the Tenant was always home, this disruption of elevator service would not have affected him as much.

A.D. questioned how much further the Tenant would have had to walk to access the adjoining building's elevators and B.S. was unsure but stated that it was four flights of stairs and "maybe six metres" or 60 feet. A.D. questioned if the Landlord asked the Tenant to empty his storage locker due to the flood and implied that the loss of the elevators would have further impacted the Tenant's ability to deal with his stored personal items. B.S. advised that the Landlord provided all the tenants with the contact number of a restoration company that would help the tenants move their property and the Landlord even offered loading dock space for the tenants to temporarily store their belongings.

A.D. questioned when the first updates to the tenants about this issue was and B.S. stated that the tenants were first advised on September 11, 2019 by email, but she does not recall if the Tenant was specifically advised. The Tenant stated that he never received an email update from the Landlord and that the uncertainty of the timeline for repairs is not an excuse for the Landlord not communicating with him. He reiterated that there was a complete absence of communication. B.S. reiterated that there was communication to the tenants; however, the building manager is a senior and did not save any documentation of notices he posted. She testified that he created at least six notices in pen and posted them on each floor. The Tenant advised that he had pictures of these notices, but he did not submit them as documentary evidence. However, the building manager may have posted notices, but they were insufficient in informing the tenants of the situation.

A.D. advised that the Tenant's position is not that the Landlord acted imprudently, but that the Landlord is contractually obligated to provide two elevators. The elevators are an essential service in this situation, as defined by the *Act*, and they are a necessity as the Tenant needed it to bring heavy items up to his rental unit and to live ordinary life. He stated that the burden is on the Landlord to prove that they communicated to the tenants, and as the Landlord has not submitted this evidence, the Tenant's evidence that there was no communication and that he was in the dark should be preferred. As the Tenant did not have access to two elevators for a significant amount of time, he must be compensated for this loss, to be made whole.

B.S. advised that the elevators are part of the building but were not part of the tenancy agreement. To support this, she referred to section three of the tenancy agreement which does not indicate that elevators were included in the tenancy. As such, any loss of use of elevators is not considered a breach of contract by the Landlord. Furthermore, the disruption in elevator service was due to an act of god. She stated that the Landlord provided updates to the tenants but could not have provided exact timelines as this was a fluid situation. The Landlord went above and beyond to spend the money and have this problem fixed in as timely a manner as possible. She referenced a number of past decisions of the Residential Tenancy Branch to support the Landlord's position that the Tenant should not be awarded compensation for this issue.

A.D. questioned if items like a toilet, shower, or electricity were specifically noted in the tenancy agreement as items that were provided by the Landlord to the Tenant. B.S. stated that she preferred not to answer this question.

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this decision are below.

Section 27 of the *Act* states that a service or facility essential to the Tenant's use of the rental unit must not be terminated or restricted by the Landlord.

Section 67 of the *Act* allows for an Arbitrator to determine the amount of compensation to be awarded to a party if a party has not complied with the *Act*.

Policy Guideline # 22 outlines what would be considered an essential service and states the following:

> 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.

With respect to the Tenant's claims for compensation for loss, when establishing if monetary compensation is warranted, I find it important to note that Policy Guideline # 16 outlines that when a party is claiming for compensation, "It is up to the party who is claiming compensation to provide evidence to establish that compensation is due", that "the party who suffered the damage or loss can prove the amount of or value of the damage or loss", and that "the value of the damage or loss is established by the evidence provided."

Furthermore, regarding A.D.'s reference to the BC Court of Appeal decision and the Landlord's reference to past decisions of the Residential Tenancy Branch, while I have considered these decisions, I find it important to note that I am not bound by these decisions when rendering this decision.

The first issue I will address pertains to whether the elevators are an essential service. While B.S. advised that the elevators are part of the building but were not part of the tenancy agreement, I find it important to note that Section 1(h) of the *Act* outlines that an elevator would be considered a service or a facility when provided or agreed to be provided by the Landlord to the Tenant. In my view, despite the Landlord's assertion that elevators were not specifically included in the tenancy agreement, it is clear that all parties understood that this was a service or facility that was included as part of this tenancy.

According to Policy Guideline # 22, there are considerations regarding the determination of whether or not a service or facility is considered essential. However, in this particular case, I find that those considerations do not necessarily pertain to this determination because it specifically states that "an elevator in a multi-storey apartment building would be considered an essential service." In my view, this is a multi-storey apartment building where elevators were provided to the Tenant as part of the residential complex and I am satisfied these are clearly an essential service or facility as contemplated under the *Act*.

As such, the second issue I will consider is whether the Tenant is entitled to a rent reduction for a loss of this essential service or facility. Regarding the Tenant's claims for compensation, there is no dispute that from the time period of September 9, 2019 to January 23, 2020 there were varying disruptions in the availability of one or both elevators. While it is evident that the Landlord understood their requirement of Section

32 of the *Act* to repair and maintain the property and that the Landlord did immediately take steps to mitigate this issue, and made every effort to repair it in a timely manner, the undisputed evidence is that there were varying disruptions to this essential service or facility during this time period. Despite the Landlord's assertion that they should not be responsible for compensation as this was an "act of god", I am satisfied that an essential service that was provided to the Tenant by the Landlord was disrupted for a period of time and therefore, the Tenant should be entitled to compensation.

As noted above, when establishing the amount of compensation owed, the onus is on the Applicant to provide evidence that substantiates the amount of compensation claimed. I find it important to note that some considerations in this determination could come from Policy Guideline # 22 that would help establish justification for said compensation. Factors such as whether this essential service was "necessary, indispensable, or fundamental" and 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."

When reviewing the totality of the evidence, there was no dispute of the Tenant's spreadsheet recording of the complete elevator outages noted. As such, by my calculation, there were a total of 34 days where neither elevator was available for use. Furthermore, there was no dispute of the Tenant's spreadsheet recording of only one elevator being available. Therefore, by my calculation, there were a total of 63 days where only elevator was available for use. There was however, a dispute over the level of intermittent service of one elevator for 16 days.

In considering the amount of compensation awarded to the Tenant for the 34 days where neither elevator was available for use, I accept that because he worked from home and that he left the rental unit an estimated eight times per day, this disruption would have been an inconvenience, making ordinary tasks such as getting groceries and leaving daily to be more onerous. Furthermore, I accept that his reduced ability to have guests and family over was a significant loss. However, I find that his statement that compensation in the amount of $30.00 per day is not comparable to the loss that he actually endured does not make sense as the amount he is actually claiming for of $2,414.00 is substantially less than $30.00 per day for in excess of four months of loss of this service or facility. As such, I find that his statement belies the true loss suffered as a result of having limited or no access to elevators for this period of time.

While B.S. advised that the Tenant had access to the elevators in the adjoining building, apart from the extra distance that the Tenant would have had to cover to access these

elevators, neither party made specific submissions on whether the Tenant was or was not made aware that this alternative was available as opposed to taking the stairs. As the onus is on the Tenant to provide evidence to corroborate his loss, I find that this impacts the amount of compensation awarded.

Consequently, based on the evidence submitted, I am satisfied that the Tenant has substantiated a claim for compensation, broken down as follows. Due to both the elevators being unavailable for 34 days, I grant the Tenant a monetary award of 15% of the monthly rent of $2,414.00 for those days ($2,414.00 / 30 days per month X 15% X 34 = **$410.38**).

In considering the amount of compensation awarded to the Tenant for the 63 days where only one elevator was available for use, for the same reasons as above, I accept that the Tenant suffered a loss. However, as there was one elevator available, I am satisfied that the Tenant's loss would be broken down as follows. Due to one elevator being unavailable for 63 days, I grant the Tenant a monetary award of 8% of the monthly rent of $2,414.00 for those days ($2,414.00 / 30 days per month X 8% X 63 = **$405.55**).

Finally, in considering the amount of compensation awarded to the Tenant for the 16 days where there was only intermittent use of one elevator, as the Tenant worked from home for the majority of the day, I accept his submissions that he would frequently leave the rental unit for breaks. However, neither party provided much evidence outlining the specific intermittent availability. As such, I am satisfied on a balance of probabilities that there was intermittent service and would have impacted the Tenant more as he would frequently leave the rental unit. As there was at least one elevator available, and as the evidence is limited with how much this affected the Tenant, I grant him a monetary award in a nominal amount of **$50.00**.

As the Tenant was successful in these claims, I find that the Tenant is entitled to recover the $100.00 filing fee paid for this application.

Pursuant to Sections 67 and 72 of the *Act*, I grant the Tenant a monetary award as follows:

Calculation of Monetary Award Payable by the Landlord to the Tenant

Loss of service or facility	$865.93
Recovery of filing fee	$100.00

TOTAL MONETARY AWARD	**$965.93**

Conclusion

The Tenant is provided with a monetary award in the amount of **$965.93** in satisfaction of these claims. Accordingly, the Tenant may deduct this amount from the next month's rent.

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: March 29, 2020

Residential Tenancy Branch