



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Duke Limited Partnership and  
[tenant name suppressed to protect privacy]

## **DECISION**

**Dispute Codes:** MNDC, FF

### **Introduction**

This hearing dealt with an application by the tenant, pursuant to the *Residential Tenancy Act*. The tenant applied for compensation for loss under the *Act* pursuant to s.67 and for the recovery of the filing fee pursuant to s.72.

Both parties attended this hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The tenant attended the hearing accompanied by legal counsel. The corporate landlord was represented by their legal counsel. As both parties were in attendance, I confirmed service of documents. The parties confirmed receipt of each other's evidence. I find that the parties were served with evidentiary materials in accordance with sections 88 and 89 of the *Act*.

Both parties provided extensive documentary evidence. I have considered all the written evidence and oral testimony provided by the parties but have not necessarily alluded to all the evidence and testimony in this decision.

### **Issues to be decided**

Was the landlord negligent in responding to the tenant's requests for repair and restoration of the elevators? Did the tenant suffer a loss of enjoyment of the tenancy due to inefficient elevator service? Is the tenant entitled to the return of parking fees, "pet rent" and to the recovery of the filing fee?

### **Background and Evidence**

The background facts are generally undisputed. The tenancy started in April 2018. The rental unit is located on the seventh floor of a 14-storey building that houses 202 rental units. The building was new at the start of tenancy.

A copy of the tenancy agreement was filed into evidence. The monthly rent at the start of tenancy was \$1,758.00. The tenant stated that from the start of tenancy he was required to pay \$25.00 per month for “pet rent “and \$150.00 for a parking fee. The landlord testified that as of March 2020, which is 23 months into the tenancy, the management of this property, changed hands.

The tenant is claiming \$575.00 towards the return of the amount paid for pet rent in first 23 months of tenancy, to this landlord who managed the property and collected pet rent until March 2020. The tenant is also claiming the return of parking fees paid for the same term.

The landlord testified that the tenant was made aware of the pet fee right at the start of tenancy and agreed to pay it by signing the addendum to the tenancy agreement.

The tenant testified that the parking addendum states that:

*If no amount is filled in parking shall be free for properly registered and authorized vehicles.*

The parking addendum did not have an amount filled in the section that addresses “cost of parking”. The tenant submitted that since there was no amount in writing he was not required to pay for parking. The tenant is claiming the return of parking fees paid to this landlord for the first 23 months of tenancy in the amount of \$3,450.00.

The landlord drew my attention to the section in the parking addendum that deals with registration of the vehicle. This section is also blank. The landlord stated that the tenant’s vehicle information was not recorded in the agreement and therefore the amount of the parking fee was not filled in. The landlord believes that since the tenant availed himself of the parking spot, he is not entitled to the return of fees paid for parking.

The bulk of the tenant’s claim for compensation was to do with the lack of efficient elevator service right from the start of tenancy. A service elevator transports residents of the building from the ground floor to the third floor. Two elevators are available for use from the third floor to the top of the building.

The tenant agreed that the elevator from the ground floor to the third floor was in operation through out the tenancy. The unreliable and intermittent elevator service was from the third floor up to the tenant’s apartment on the 7<sup>th</sup> floor.

The tenant claimed that the landlord did not adequately provide the essential service of an elevator. The tenant stated his tenancy started in a new residential property where in addition to the service elevator, there were two elevators that serviced 202 units. The tenant said that the troubles with the elevators began at the beginning of his tenancy and there were almost daily outages where, at times, both elevators would be out of service or one of the elevators was out of service, which would cause extensive delays.

The tenant acknowledged that there was a separate service elevator that was available from the lobby to the 3<sup>rd</sup> floor and when used, would mean three flights of stairs to the tenant's apartment on the 7<sup>th</sup> floor, if the elevators on the 3<sup>rd</sup> floor were out of service. The landlord indicated that there was no 4<sup>th</sup> floor in this building.

In an email dated October 4, 2018, the management of the building acknowledged ongoing problems with the elevators, that they were inefficient, and that management would be moving forward with a different elevator contractor if a fix was not provided.

The tenant is claiming an amount of \$6,329.00, as compensation for the lack of access and poor service of the elevators for the period of April 2018 to September 2019. The amount of compensation is calculated as 20% of rent paid for this period. The tenant agreed that he has no physical limitations.

The landlord testified that there were only ten days during the tenant's tenancy when both elevators were not working. The landlord stated that for five of the ten days, the landlord hired someone to manually operate one of the elevators and hired personnel to provide assistance to tenants when they had to climb the stairs.

The landlord provided testimony and/or evidence to support the following:

- Landlord took reasonable steps to try and fix the elevators
- Landlord eventually switched elevator repair companies
- An elevator to the 3<sup>rd</sup> floor was available, which meant there were only three flights of stairs to climb
- There were many days when the elevators worked, and the landlord should not have to compensate the tenant for those days

The landlord submitted that the tenant has already been compensated on July 17, 2020, in the total amount of \$1,001.00 which consists of half a month rent plus a gift certificate of \$100.00.

The tenant also testified about excessive noise and partying from other tenants on the roof-top common area and claimed that management did not respond to the concerns in a timely or effective manner. The landlord replied that the tenant did not make any noise complaints directly to the landlord and therefore the landlord could not address issues it was not made aware of. The tenant also noted concerns with security and safety in the building. The landlord stated that 24-hour on-site security was provided on a daily basis.

The landlord stated that they did address the noise and security issues by responding to complaints, issuing fines, putting up signs and hiring security.

### **Analysis**

Section 7(1) of the *Act* establishes that a party who does not comply with the *Act*, the Regulations or the Tenancy Agreement must compensate the other party for damage or loss that results from that failure to comply.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order the responsible party to pay compensation to the other party.

It must be emphasized that in order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. Moreover, the applicant must satisfy each component of the test below:

### **Test For Damage and Loss Claims**

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the other party in violation of the *Act* or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage.

The claimant bears the burden of establishing each claim on the balance of probabilities. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party.

Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally, the claimant must show that reasonable steps were taken to address the situation and to mitigate the damage or losses that were incurred.

### **Noise Complaints and Security Breaches**

Based on the testimony and evidence of both parties, I do not find that the tenant provided sufficient evidence of any significant issues of noise or security breaches that affected the tenant in such a way that compensation is due.

### **Pet Fee**

Black's Law Dictionary defines the "doctrine of laches" in part, as follows:

[The doctrine] is based upon maxim that equity aids the vigilant and not those who slumber on their rights.

...neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity.

Following from the tenant's agreement to pay the pet fee at the time he entered into a tenancy agreement, his payment of the fee through the tenancy and his failure to object to the fee in a timely fashion, or shortly after each of the occasions when it became due, pursuant to the doctrine of laches, I find that this aspect of the tenant's application must hereby be dismissed.

### **Parking Fee**

Also pursuant to the doctrine of Laches, I find that the tenant's claim for the return of parking fees is dismissed.

### **Elevators**

Section 27 of the *Act* examines the issue of services which may or may not be terminated or restricted by a landlord. It states in section 27(1) as follows, "A landlord must not terminate or restrict a service or facility if the service or facility is essential to the tenant's use of the rental unit as living accommodation, or providing the service is a material term of the tenancy agreement."

I accept the tenant's testimony that when he signed the tenancy agreement for a rental unit in the new residential property, he expected to have the services of two working elevators. I find that having access to an elevator service is essential for the tenant to enjoy his tenancy.

I accept the landlord's testimony that Management of the residential property was diligent with their attempts to service the elevators. However, based on the combined testimony and evidence of both parties, I find that there were 5 days when no elevators were working; a significant amount of days when only one elevator was working; acknowledgements from Management that the elevator service was inefficient; and that the problems continued. As a result, I find that the landlord failed to provide the service of reliable, consistently working elevators, a service that was essential for the tenant to access his rental unit on the 7<sup>th</sup> floor.

Based on the testimony of both parties, I find that the use of elevators was a service provided with the tenancy and that the tenant was without the use of one or both elevators multiple times during the period of April 2018 to September 2019. I find that this is a temporary termination of a service and, pursuant to section 27(2)(b) of the *Act* the tenant is entitled to a rent reduction for the loss of the service.

I acknowledge that there is no specific formula for compensation for this situation; therefore, I will consider to what extent the tenancy was compromised by the lack of a reliable and consistent elevator service.

Based on the testimony and evidence, I accept the following:

- Disruptions to the elevator service occurred regularly during the period of April 2018 to September 2019
- The tenant paid \$1,758.00 rent per month for the first year of tenancy and then \$1,802.00 for the next 6 months of his tenancy.
- The tenant agreed that he has no physical limitations.
- When no elevators were working or when the waits were too long, the tenant was required to walk a minimum of three floors
- The tenant had full use of the rental unit
- At least one elevator was operational through out the tenancy except for 5 days

When considering compensation for the tenant's losses, I accept the landlord's report that the tenant had full use of his rental unit throughout the periods of disrupted elevator service. However, I do find that the lack of a reliable elevator service regularly devalued the tenant's ability to fully enjoy his tenancy.

In addition, *Residential Tenancy Policy Guideline# 22* states that where there is a termination or restriction of a service or facility for quite some time, through no fault of the landlord or tenant, an arbitrator may find there has been a breach of contract and award compensation. In this case I find that a breach of contract occurred resulting in a reduction of the value of the tenancy and therefore I find that the tenant is entitled to compensation for the days that he suffered the loss of use of the elevator.

Determining the reduced value of a tenancy as a result of the elevator not working is highly subjective and is dependent on a variety of variables, including the rent payable for the rental unit, physical ability and lifestyle of the tenant, the number of floors the tenant had to climb and the duration of the disruption in service.

I find that the absence of the elevator had a significant impact on the tenancy because the unit is on the 7<sup>th</sup> floor and would involve at least three flights of stairs. I also take into account the physical abilities of the tenant impacted by the lack of this service and the fact that there were days when the elevators were functional. The tenant testified that he is employed and has no physical disabilities.

In determining the amount of compensation due to the tenant I was influenced by the fact that the landlord offered assistance to anyone in need of it and provided compensation in the amount of half a month's rent plus a \$100.00 gift certificate.

I find that the tenants' claims for compensation in the amounts of \$6,329.00 for the loss of elevator service is excessive and given that the tenant had full use of the suite during the period of limited or no elevator service, I find that the claims for compensation are not reasonable.

*Residential Tenancy Policy Guideline #16* states that an arbitrator may award "nominal damages" which are a minimal award. These damages may be awarded where there has been no significant loss, but they are an affirmation that there has been an infraction of a legal right.

In these circumstances and based on the above findings, I find that the temporary absence of an elevator reduced the value of this tenancy and I award nominal damages to the tenant in the amount of 5% of the rent paid for the period when the elevator service was unreliable or unavailable. This period also includes days that the elevators were in operation.

The tenant has already received compensation in the total amount of \$1,001.00 which will be deducted off the established claim of 5% of rent paid. Since the tenant has proven his case, I grant him the recovery of the filing fee of \$100.00.

Overall the tenant has established a claim as follows:

Rent for April 2018 to March 2019	\$21,096.00
Rent for April 2019 to September 2019	\$10,812.00
Total rent	<b>\$31,908.00</b>
5% of rent paid	\$1,595.40
Minus compensation received July 17, 2019	\$1,001.00
Balance	<b>\$594.40</b>
Filing Fee	\$100.00
Total	<b>\$694.40</b>

I grant the tenant a monetary order under section 67 of the *Residential Tenancy Act*, for \$694.40. This order may be filed in the Small Claims Court and enforced as an order of that Court.

### **Conclusion**

I grant the tenant a monetary order for the amount of **\$694.40**.

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 27, 2020

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Residential Tenancy Branch