Dispute Resolution Services

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 was convened as a result of the Tenants' Application for Dispute Resolution, made on February 12, 2020 (the "Application"). The Tenants applied for the following relief, pursuant to the *Residential Tenancy Act* (the "*Act*"):

- a monetary order for money owed or compensation for damage or loss; and
- an order granting recovery of the filing fee.

The Tenants N.R. and B.R. attended the hearing and were accompanied by A.D., legal counsel. A.D. was incorrectly named as a party to the proceeding whereas B.R. was not. Therefore, pursuant to section 64 of the *Act*, I amend the Application to remove A.D. as a party and add B.R. as a party. The Landlord was represented at the hearing by L.P., legal counsel. The Tenants provided affirmed testimony.

No issues were raised during the hearing concerning service and receipt of the Notice of Dispute Resolution Proceeding package or the documentary evidence being relied upon. The parties were in attendance and/or were represented by legal counsel and were prepared to proceed. Pursuant to section 71 of the *Act*, I find these documents were sufficiently served for the purposes of the *Act*.

The parties were given an opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Are the Tenants entitled to a monetary order for money owed or compensation for damage or loss?
2. Are the Tenants entitled to recover the filing fee?

Background and Evidence

The parties agreed the tenancy began on May 30, 2018 and continues on a month-to-month basis. Rent is due in the amount $2,863.73 per month. This amount includes a parking fee and "pet rent", which is discussed in greater detail below. The Tenants paid a security deposit in the amount of $1,294.50 and a pet damage deposit in the amount of $250.00, which the Landlord holds.

The Application describers a claim for monetary relief in the amount of $16,296.00; A.D. indicated that this amount was determined arbitrarily. The Tenants described several issues they submit have not been adequately addressed by the Landlord.

Elevator issues

The Tenants testified there are two elevators in the rental property and that there have been a number of service disruptions relating to one or both of the elevators during the tenancy. For the period from September 1, 2018 to December 31, 2019, the Tenants testified there were 20 days when one of the elevators was unavailable and 29 days when both elevators were unavailable. Although the Tenants testified there had been some intermittent disruptions earlier in the tenancy, the number was not provided.

The Tenants testified the Landlord did not respond adequately to the Tenants' concerns. Although the Tenants' concerns were communicated verbally, they testified that other tenants in the rental property complained in writing. The Tenants referred to an email to K.M. dated October 4, 2018 in which the Landlord apologized and advised that if the current contractor could not provide a permanent fix a new contractor would be engaged.

The Tenants testified that the disruptions impacted their enjoyment of the rental property. The Tenants testified that the disruptions resulted in delays of 15-30 minutes each time they left the rental unit. The Tenants testified these delays occasionally made it difficult to get to work on time. In addition, both Tenants reported mobility issues related to their knees suggesting climbing stairs presented difficulties.

In response, L.P. submitted that the Landlord responded reasonably to the Tenants' concerns and that there was no breach of the *Act* or the tenancy agreement. As noted in the email dated October 4, 2018, the Landlord had taken steps to remedy the issue and promised to engage a new elevator contractor if a permanent fix was not successful. L.P. also referred to a communication from the Landlord to all tenants describing a shutdown of both elevators and offering "additional security and maintenance staff…to assist with any and all needs." The Tenants acknowledged they did not make use of the Landlord's offer. As a result, L.P. submitted the Tenants did not mitigate their loss.

In addition, L.P. advised the Tenants have already been compensated for the elevator disruption. She advised that on July 17, 2019 the Tenants were offered and accepted compensation in the amount of half a month's' rent ($1,326.87) and a $100.00 gift card. A.D. acknowledged that the Tenants accepted the compensation but submitted that it did not represent a full and final release of claims related to the service disruptions.

L.P. also submitted the Tenants' claim is excessive and unreasonable and suggested the evidence submitted relates to other occupants of the rental property and not the Tenants.

Garage/Security issues

The Tenants also claimed they felt unsafe when the parking garage doors were left open on a number of occasions from July 2018 to July 2019. Based on the information provided by A.D., the parking garage doors were open for roughly 12 weeks during this period.

The Tenants testified that their main concern was safety. Although the Tenants did not personally experience any assault, theft, or vandalism, they are aware of issues with other occupants. The Tenants specifically referred to break-ins related to cars and the bike room. The Tenants' suggested they did not get full value for the $135.00 parking fee they paid.

In response, L.P. advised that the Landlord provided additional security during these times although the tenancy agreement does not provide any obligation on the Landlord to provide security. The tenancy agreement states that any security measures provided are not "an express or implied warranty of security, or as a guarantee against crime or of reduced risk of crime." L.P. also referred to terms in the tenancy agreement that required the Tenants to maintain insurance that protects against personal injury, loss or damage. L.P. referred to a provision that required the Tenants to maintain appropriate insurance coverage for any vehicle parked or stored. L.P. also stated the Tenants did not request any security escort offered by the Landlord, which the Tenants acknowledged.

Noise

The Tenants testified that the rental property is an "open concept" design and that noise travels easily throughout the rental property. The Tenants testified that other occupants held parties but that quiet hours were not enforced resulting in a loss of quiet enjoyment. The Tenants testified they complained about noise "many times" but were told the partygoers could not be asked to leave. The Tenants testified they were advised by security to call the police which they did on one occasion.

In response, L.P. advised that the Tenants never asked to move. The Tenants responded by stating that would not have been convenient and should not be necessary. In addition, L.P. submitted that the Landlord acted reasonably in response to noise complaints and has not breached the *Act* or the tenancy agreement. Specifically, L.P. advised that fines and correspondence has been issued to offending tenants, quiet hours have been altered, and the number of guests permitted has been reduced. L.P. noted that these updates were referenced in a document titled "October 2018 Community Updates" provided with the Tenants' evidence.

"Pet rent"

The Tenants testified that they added a dog to their home in October 2018. At that time, the Landlord collected a pet damage deposit of $250.00 and started charging additional "pet rent" in the amount of $35.00 effective November 1, 2018. A.D. characterized this as an illegal rent increase contrary to the *Act*.

In response, L.P. submitted that the Tenants agreed to the increase and have paid for 22 months without complaint. Accordingly, L.P. invoked the equitable doctrine of laches. That is, L.P. asserted that the Tenants' delay in bringing their claim bars them from doing so now.

Analysis

Based on the documentary evidence and oral testimony provided during the hearing, and on a balance of probabilities, I find:

Section 67 of the *Act* empowers me to order one party to pay compensation to the other if damage or loss results from a party not complying with the *Act*, regulations or a tenancy agreement.

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided for in sections 7 and 67 of the *Act.* An applicant must prove the following:

1. That the other party violated the *Act,* regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and
4. That the party making the application did what was reasonable to minimize the damage or loss

In this case, the burden of proof is on the Tenants to prove the existence of the damage or loss, and that it stemmed directly from a violation of the *Act,* regulation, or tenancy agreement on the part of the Tenant. Once that has been established, the Tenants must then provide evidence that can verify the value of the loss or damage. Finally, it must be proven that the Tenants did what was reasonable to minimize the damage or losses that were incurred.

The Tenants' claim is based on a loss of use of a service or amenity, and loss of quiet enjoyment.

Elevator issues

With respect to the Tenants' claim regarding loss of use of the elevators, I find there is insufficient evidence before me to grant the relief sought. While I accept that the Tenants suffered occasional inconvenience as a result of the service disruptions, I find the Tenants have not demonstrated that the Landlord breached the *Act*. Rather, I find the Landlord acted reasonably by arranging a repair in a timely manner and by obtaining the services of a new contractor when the original contractor appeared to be unable to resolve the problem. Further, I find the Landlord acted reasonably by offering assistance with "any and all needs" arising as a result of the disruption, although the Tenants did not avail themselves of this service. Finally, I find the Landlord offered and the Tenants accepted compensation for the disruptions. This aspect of the Tenants' claim is dismissed.

Garage/Security issues

With respect to the Tenants' claim for loss of use of a secure parking garage, I find there is insufficient evidence before me to grant relief. I find the Landlord did not breach the *Act*. The Tenants' own testimony confirmed they did not personally experience an assault, theft, or vandalism, although I accept the Tenants might have felt less safe for a period of time. I also find that the experience of other tenants does not give rise to a right for these Tenants to be compensated. In addition, I find the Landlord acted reasonably by providing additional security in the parking garage and offering security escorts, which the Tenants did not request. This aspect of the Tenants' claim is dismissed.

Noise

With respect to the Tenants' claim for compensation as a result of noise in the rental property, section 28 of the *Act* confirms a tenant is entitled to quiet enjoyment including, but not limited to, rights to reasonable privacy, freedom from unreasonable disturbance, exclusive possession of the rental unit, and use of common areas for reasonable and lawful purposes, free from significant interference.

Policy Guideline #6 elaborates upon the meaning of quiet enjoyment. It confirms that a breach of a tenant's right to quiet enjoyment means "substantial interference" with the ordinary and lawful enjoyment of the premises. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment. This includes situations when the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance but failed to take reasonable steps to correct them. However, temporary discomfort or inconvenience is not a basis for a breach of the entitlement to quiet enjoyment. In determining whether a breach of quiet enjoyment has occurred, it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises.

I find there is insufficient evidence before me to grant the relief sought. I find that the noise from neighbouring tenants and their guests was temporary and is to be expected in apartment living. Further, I find there is insufficient evidence before me to conclude that the noise was frequent, ongoing, or unreasonable. In addition, I find the Landlord's responses to noise complaints, as articulated in the correspondence provided in the Tenants' documentary evidence, was reasonable. The Landlord sent warning letters and issued fines to offending tenants, altered quiet hours, and reduced the permitted number of guests. I also note the tenancy was accepted by the Tenants who were aware of the "open concept" design from the beginning of the tenancy. This aspect of the Tenants' claim is dismissed.

"Pet rent"

With respect to the Tenants' claim related to "pet rent", section 41 of the *Act* confirms that a landlord must not increase rent except in accordance with Part 3 of the *Act*. There was no dispute that the Tenants' rent was increased by $35.00 per month when they added a pet to their family. The increase was effective November 1, 2018. That the Tenants agreed to and paid the increased rent for 21 months does not alter the provisions of the *Act*. I was not referred to and am unaware of any provision of the *Act* that allows a landlord to increase rent, even by agreement, when a pet is added to a tenancy. Accordingly, I find the Tenants have established an entitlement to some refund of rent paid. However, section 7 of the *Act* confirms that a party who claims compensation for damage or loss must do whatever is reasonable to minimize the damage or loss. In this case, I find the Tenants allowed the loss to continue for 21 months (November 1, 2018 to July 31, 2020) without taking steps to minimize their loss. As a result, I find it is reasonable to grant the Tenants a refund of $525.00 (15 months x

$35.00) for an overpayment of rent. In addition, I order that the so-called pet rent be eliminated, and that total rent due be set at $2,828.73 per month ($2,863.73 - $35.00) effective August 1, 2020. This order does not impact the Landlord's ability to increase rent annually in accordance with section 42 of the *Act*.

With respect to the Tenants' request to recover the $100.00 filing fee, I find the Tenants have been successful and are entitled to recover the filing fee.

Pursuant to section 67 of the *Act*, I grant the Tenants a monetary award in the amount of $625.00 ($525.00 + $100.00) which I order may be deducted from a future rent payment at the Tenants' discretion.

Conclusion

The Tenants are granted a monetary award in the amount of $625.00 which I order may be deducted from a future rent payment at the Tenants' discretion.

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 30, 2020

Residential Tenancy Branch