



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 tenants 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*.

At the start of the hearing the tenant informed me that he had reduced his monetary claim from \$7,700.00 to \$2,515.00 which is the equivalent of one month's rent.

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 and noise disturbances? Is the tenant entitled to the recovery of the filing fee?

Background and Evidence

The background facts are generally undisputed. The tenancy started on January 31, 2019 for a fixed term of one year. The rental unit is located on the 17th floor of a multi-storey building that houses 202 rental units. The building was relatively new at the start of tenancy.

The monthly rent at the start of tenancy was \$2,515.00. The tenant received a move in bonus of \$1,000.00. On July 20, 2019 the tenant gave written notice to end the tenancy effective August 15, 2019. The tenant agreed that the landlord waived liquidated damages for ending the tenancy prior to the end date of the fixed term and allowed the tenant to pay half a month's rent for August 2019, despite having served inadequate notice to end the tenancy.

The tenant 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 tenant made a written complaint on April 06, 2019. The landlord responded immediately requesting the tenant to contact security during the times of the disturbances. The landlord testified that they also addressed the issue with the resident who caused the disturbance.

The landlord stated that 24-hour on-site security was provided on a daily basis and that they did address the noise and security issues by responding to complaints, issuing fines, putting up signs and hiring security.

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 3rd floor up to the tenant's apartment on the 17th 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 that the troubles with the elevators were in existence at the beginning of his tenancy. and there were outages for a couple of hours, one to two times a week for the period of January 31 to April 18, 2019.

The tenant stated that for the period of April 18 to August 12, 2019, there was only one elevator in service and for the period of June 17 to June 27, 2019, both elevators were out of service. The tenant stated that this resulted in extensive delays waiting to use the elevator.

The tenant acknowledged that there was a separate service elevator that was available from the lobby to the 3rd floor and when used, would mean 11 flights of stairs to the tenant's apartment on the 17th floor, if the elevators on the 3rd floor were out of service. The landlord indicated that there was no 4th, 13th or 14th floors in this building.

On July 17, 2019, the landlord offered compensation in the amount of half a month's rent plus a gift certificate of \$100.00. The tenant accepted the compensation.

The tenant is claiming an amount of \$2,515.00, as compensation for the loss of quiet enjoyment due to the lack of access and poor service of the elevators and for the noise disturbances. The amount of compensation is one month's rent.

The tenants stated that they are both 32 years of age and have 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 3rd floor was available, which meant there were 11 flights of stairs to climb if both elevators were inoperative
- There were many days when the elevators worked, and the landlord should not have to compensate the tenant for those days

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 disturbances that affected the tenant in such a way that compensation is due.

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 at least 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 despite their efforts, 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 17th 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 February 2019 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 February 2019 to the end of tenancy o August 12, 2019
- The tenant paid \$2,515.00 rent per month.
- The tenants agreed that they have no physical limitations.
- When no elevators were working or when the waits were too long, the tenant was required to walk a minimum of 11 floors

When considering compensation, 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 17th floor and would involve at least 11 flights of stairs. I also take into account the physical abilities of the tenant impacted by the lack of this service. The tenants testified that they are 32 years old and have 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 \$2,515.00 for the loss of elevator service is excessive given that the tenant had full use of the suite during the period of limited or no elevator service. The tenant agreed that he has been compensated for a total of \$1,357.50.

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 10% of the rent paid for the period when the elevator service was unreliable or unavailable. Based on the testimony of both parties, I accept that one or both the elevators were unavailable for approximately 125 days.

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 January 31, 2019 to August 12, 2019	\$15,347.00
Approximate rent per day	\$79.51
Approximate rent for 125 days	\$9,939.00
10% of rent for 125 days	\$993.90
Filing Fee	\$100.00
Total	\$1,093.90

Based on the above, I find that the tenant has established a claim of \$1,093.90. The tenant agreed that he has received compensation in the amount of \$1,257.50 plus a \$100.00 gift certificate.

Accordingly, I find that the tenant has already been compensated for his losses for the same period of time that there was intermittent and inefficient elevator service. Since the tenant has already received compensation in an amount that is greater than his established entitlement, I find that he is not entitled to additional compensation.

Conclusion

The tenant's application is dismissed.

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 28, 2020

Residential Tenancy Branch