



Dispute Resolution Services

Page: 1

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: RR, FF

Introduction

This hearing dealt with an application by the tenant, pursuant to the *Residential Tenancy Act*. The tenant applied for a rent reduction pursuant to s.65 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*.

During the hearing, the tenant explained that he had applied for a rent reduction in error and was seeking compensation for loss under the *Act* pursuant to s.67, instead. The landlord did not object to this amendment. Accordingly, this hearing dealt with the tenant's application for compensation for loss under the *Act* and for the recovery of the filing fee.

The tenant had initially applied for compensation in the total amount of \$11,850.00. At the start of the hearing the tenant informed me that he had reduced his claim to \$5,180.00 which consisted of \$575.00 for the return of pet rent, \$1,096.00 for the return of parking fees and \$3,509.00 for the loss of the use of the elevators.

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 on May 10, 2018. The rental unit is located on the 9th 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 \$1,376.00. Effective July 01, 2019, the rent was raised to \$1,410.40. The tenant stated that from the start of tenancy he was required to pay \$25.00 per month for "pet rent" and \$225.00 per month for a parking fee effective October 2019. The landlord testified that as of March 2020, which is 22 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 22 months of tenancy, to this landlord who managed the property and collected pet rent until March 2020. I note that it is possible that there is an error in this amount. If the tenancy started in May 2018, the tenant would have paid \$550.00 in pet fees.

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 is also claiming the return of parking fees paid for the period of October 2019 to February 2020 in the amount of \$1,096.00. 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 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.

In addition, the landlord referred to an email from the tenant confirming the prorated parking fee for October 2019 in the amount of \$196.00 and full fee of \$225.00 for November 2019 on. The landlord believes that since the tenant agreed to pay a parking fee and 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 3rd floor up to the tenant's apartment on the 9th 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 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 3rd floor and when used, would mean five flights of stairs to the tenant's apartment on the 9th floor, if the elevators on the 3rd floor were out of service. The landlord indicated that there was no 4th 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 \$3,509.00, as compensation for the lack of access and poor service of the elevators for the period of May 2018 to September 2019.

The amount of compensation is calculated as approximately 10% of rent paid for this period. The tenant stated that he is 38 years old and has no physical limitations.

The tenant stated that one elevator was inoperative for a total of 171 days and both were inoperative for 27 days through his tenancy.

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 only five 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 was offered compensation on July 17, 2020, in the amount of half a month's rent plus a gift certificate of \$100.00, and he refused the offer.

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.

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.

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.

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 9th 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 May 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 May 2018 to September 2019
- The tenant paid \$1,376.00 rent per month for the first 14 months of tenancy and then from July 01, 2019 rent was increased to \$1,410.10.
- 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 five floors

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.

The tenant testified that one elevator was out of service for 171 days of the tenancy and both elevators were out of service for 27 days. The tenant did not file documentation to support this testimony.

The landlord stated both elevators were not in service for 10 days but there was partial service for 5 of the 10 days. I accept the landlord's testimony that both elevators were out of service for 5 days.

Based on the testimony of both parties, I find that one elevator was not in service for 171 days and both were not in service for 5 days for a total of 176 days of inefficient and inconsistent elevator service.

I find that the absence of the elevator had a significant impact on the tenancy because the unit is on the 9th floor and would involve at least 5 flights of stairs. I also take into account the physical abilities of the tenant impacted by the lack of this service. 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. The tenant did not accept the offer. Accordingly, I find that the tenant did not make efforts to mitigate his losses.

I find that the tenants' claims for compensation in the amount of \$3,509.00 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 claim for compensation is 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 10% of the rent paid for the days 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 176 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 May 2018 to June 2019	\$17,888.00
Rent for July 2019 to September 2019	\$4,231.20
Total rent	\$22,119.20
Approximate rent per day	\$45.42
Rent for 176 days	\$7,993.92
10% of rent	799.39
Filing Fee	\$100.00
Total	\$899.39

I grant the tenant a monetary order under section 67 of the *Residential Tenancy Act*, for **\$899.39**. 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 \$899.39.

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

Residential Tenancy Branch