Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, RP, PSF, OLC, FFT, CNC

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the "**Act**") for:

- an order to the landlord to make repairs to the rental unit pursuant to section 32;
- cancellation of the landlord's One Month Notice to End Tenancy for Cause (the "**Notice**") pursuant to section 47;
- an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62;
- an order to the landlord to provide services or facilities required by law pursuant to section 65;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $4,410 pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The landlord was assisted by her husband and co-landlord ("**WS**"). The tenant was assisted by her husband and co-tenant ("**DG**").

Preliminary Issue – Service of Documents

The tenant testified, and the landlord confirmed, that the tenant served the landlord with the notice of dispute resolution form (but not her evidence package) on September 30, 2020. The landlord testified, and the tenant confirmed, that the landlord served the tenant with her evidence package. I deem that the parties have been served with these documents in accordance with the Act.

The tenant testified that she served her evidence package on the landlord by registered mail on November 7, 2020. The landlord testified that she did not receive the tenant's evidence until November 16, 2020.

Rule 3.14 requires an applicant (in this case, the tenant) to serve all documentary evidence that she will rely on at the hearing no later than 14 days prior to the hearing.

The tenant did not do this. She mailed her evidence to the landlord 12 days prior to the hearing, and per section 90 of the Act, it was deemed received by the landlord on November 12, seven days before the hearing. The landlord testified that she has not had sufficient time to review the tenant's evidence. The tenant provided no explanation as to why she served these documents late.

As such, I excluded the tenant's documentary evidence, in its entirety, from this application. The tenant was permitted to give oral testimony and refer to the landlord's documentary evidence. Additionally, the tenant was permitted to refer to prior decisions from the Residential Tenancy Branch between the parties, as the landlord had been served with copies of these prior to this dispute.

Preliminary Issue – End of Tenancy

The tenancy ended on October 31, 2020. Accordingly, the tenant no longer requires:

- an order to the landlord to make repairs to the rental unit;
- the cancellation of the Notice;
- an order requiring the landlord to comply with the Act, regulation or tenancy agreement pursuant to section 62; or
- an order to the landlord to provide services or facilities required by law pursuant to section 65.

As such, I dismiss these portions of the tenant's application, without leave to reapply.

I will adjudicate the application for a monetary order, which relates to compensation due to the loss of use of part of the common area of the residential property and compensation for loss of quiet enjoyment due to the conduct of another occupant ("**BH**").

Preliminary issue – Additional Monetary Claim

At the hearing, the tenant advised me that in addition to the monetary claim set out above, she was also seeking compensation for damages relating to the cost of relocating from the rental unit to a new unit as well as compensation to cover the difference in rent between the rental unit and the new unit.

The tenant did not amend her application to include this new monetary claim. The landlord did not become aware of this new claim until she received the tenant's evidence package three days before the hearing.

The Act only provides me with the jurisdiction to hear disputes for relief that has been applied for at the RTB, in accordance with the Rules of Procedure. Rules 4.3 and 4.6 require that a claim be amended, and the respondent notified of the amendment no later than 14 days before the hearing. The tenant did not do this. As such, I have no authority to adjudicate this new claim for damages. The tenant may bring a future application to obtain this relief.

Issues to be Decided

Is the tenant entitled to:

1) a monetary order for $4,410; and
2) recover her filing fee?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims, and my findings are set out below.

The parties entered into a written tenancy agreement starting October 1, 2012. Monthly rent is $1,476 and is payable on the first of each month. The tenant paid the landlord a security deposit of $700, which the landlord continues to hold in trust for the tenant. The tenancy ended on October 31, 2020.

The rental unit is the upper unit of a single detached home. The lower level contains two rental units, each of which is rented to another occupant ("**C**" and "**BH**"). The relationship between the tenant, the occupants of the lower units (in particular BH), and the landlord is acrimonious.

At a hearing before a different arbitrator of the RTB on January 27, 2020 (decision issued February 3, 2020), the parties entered into a "partial settlement" which included the following terms:

1) The landlord agrees to replace the outdoor stairs and railings when the landlord replaces the fiberglass surface of the deck area this spring or summer of 2020. The tenant agrees to allow the landlord to do this repair on 24 hours' notice of the landlord's intention to do so.
2) The landlord will ensure BH takes down the yurt/tent that was installed on the common property of the residential property by February 2, 2020.

The tenant alleges that the landlord has failed to comply with these terms and seeks compensation for the breach.

a. The Gazebo

She also testified that BH did not take down the yurt/tent, (which at this hearing the parties referred to as a “gazebo”) by February 2, 2020. Rather, she testified it was not taken down at all, but was rather relocated from the rear of the residential property (where it was situated on a parking area which was common property) to the front yard (which she asserted was also common property) approximately five paces from the front door to the rental unit.

The landlord denied that the gazebo was never taken down. Rather, she testified that BH took it down immediately per the order, and then re-erected it in the front yard sometime later. WS gave conflicting testimony as to when it was re-erected: at first, he said it was set up in the front yard “two months” and “a couple months” later (which I understand to mean after the partial settlement was made) and then later he said it was re-erected “four months” later. He also testified that it was set up “for the summer”, although I understand that it remained in place on the front lawn into the fall.

Additionally, the landlord testified that the front yard where the gazebo was relocated to was not common property that the tenant was permitted to use. WS testified that the tenant was permitted to use parking area in the rear, the large rear patio, a garden shed, and the yard at the side of the house. He also testified that the tenant was responsible for mowing the lawn (he did not specify if this was the front or side lawn) but that she never did.

The tenant testified that she was permitted to use the front lawn throughout the tenancy as part of the common property. She testified in the winter her children would build snowmen on it, and in the summer she would set up a pool and a badminton net in the front lawn, and the landlord never objected.

The tenancy agreement is silent as to whether the front yard (or any part of the exterior of the residential property) is common property that the tenant may use.

b. <u>The Repairs</u>

The tenant testified that the landlord has not made any of the agreed to repairs. The landlord did not disagree. The landlord testified that the repairs ordered would take approximately one month to make and would require the tenant to remove several heavy items from the patio.

The landlord testified that DG emailed her on April 30, 2020 and advised her that the tenant has started looking for other places to live. DG wrote that “we need to be very clear; this is NOT our written notice. Once we have found a place, we will give you our official written notice of 30 days. Again, this is NOT out notice.” (emphasis original).

The landlord testified that, as the tenants were looking to move, she believed she should wait until they moved before making the ordered repairs, as this would remove the need for the tenants to relocate the heavy items from the patio.

c. Loss of Quiet Enjoyment

The tenant testified that she and her family was harassed, threatened, and disturbed by BH on a regular basis. She testified that this conduct intensified after BH was required to take down the gazebo. She testified that BH constantly hosted parties, was frequently drunk, and would attempt to goad the tenant into a physical confrontation. I note that in the January 27 application, the tenant claimed compensation for loss of quiet enjoyment due to the conduct of the BH. The tenant testified that, in this hearing, she was only claiming compensation for loss of quiet enjoyment due to BH's actions from February 2020 until the end of the tenancy.

The landlord testified that they have not seen any evidence of BH's constant partying. WS testified that it is the tenant, and not BH, who is constantly disruptive and depriving the other occupants of the residential property of their right to quiet enjoyment.

The tenant referred to text messages of C, the other downstairs occupant, regarding her conduct, which, respectfully, I do not find relevant to this application (as the tenant's conduct is not at issue in this hearing). I will not address these text messages further and will not recount the testimony that followed from both sides regarding the conduct of the tenant during the testimony.

d. Damages

The tenant seeks compensation of $4,410 which the tenant testified represents the the return of 50% of the rent for the months of February to October 2020 for loss of quiet enjoyment due to BH's conduct, as compensation for the loss of use of the common property, and a failure for the landlord to make the agreed to repairs.

I am unsure how the tenant arrived at this figure, as 50% of monthly rent is $738, and the tenant is claiming loss for nine months (9 x $738 = $6,642).

Analysis

Rule of Procedure 6.6 states:

> **6.6 The standard of proof and onus of proof**
>
> The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.
>
> The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application.

So, the tenant bears the burden to prove that it is more likely than not that the landlord caused the damage she alleged.

a. Loss of Quiet Enjoyment

There is no documentary evidence that supports the allegations regarding BH's conduct. I have only the testimony of the tenant and DG to support the allegations that BH acted in a manner that deprived the tenant of her right to quiet enjoyment. The landlord and WS testified that they had not seen any evidence of the conduct that BH alleged.

In the absence of corroborating evidence, I find that the tenant has failed to discharge her evidentiary burden to prove that it is more likely than not that BH has acted as alleged.

b. Repairs

The partial settlement requires the landlord to replace the outdoor stairs and railing in the spring or summer of 2020. The landlord did not do this. I am not persuaded that the basis for the landlord's inaction is valid. DG's letter of April 30 was unambiguous that the tenant was not giving notice to end the tenancy. There is no indication in the letter as to when the tenancy would be ended. The April 30 letter has no effect as to the status of the tenancy. At the time the landlord received the letter, the tenancy could have continued another year. As such, it is not appropriate for the landlord to deprive the tenant of having a repaired deck for any portion of the tenancy, given that the landlord agreed to make the required repairs.

The language of the partial settlement does not set an exact date by which the repairs must be completed; it only requires that they be completed in the spring or summer. The first day of fall is the Fall Equinox, on September 22, 2020. As such, I find that the landlord was required to have completed the repairs by September 21, 2020 (the last day of summer). The landlord did not do this.

I find that the by failing to complete the repairs as set out in the partial settlement, the landlord breached the partial settlement. As a result, I find that the tenant was deprived of the full use of the patio in the condition she could reasonably expect from September 22, 2020 to the end of the tenancy (October 31, 2020). She is entitled to compensation for this loss.

The tenant provided no evidence as to how much she used the patio or how the failure of the landlord to make repairs impacted her ability to use it. I have no basis in the evidence on which I can quantify the damages.

In circumstances such as these, nominal damages are appropriate. Policy Guideline 16 states:

> "Nominal damages" are a minimal award. Nominal damages may be awarded where there has been no significant loss or no significant loss has been proven, but it has been proven that there has been an infraction of a legal right.

In the circumstances, I find that $100 is an appropriate amount at which to fix nominal damages. I order the landlord to pay the tenant this amount.

c. Loss of Use of Common Property

The parties disagree as to whether the tenant was permitted to use the area of the front lawn where the gazebo was set up. The tenant gave testimony as to her use of the front lawn for summer and winter activities. The landlord did not deny that she undertook these activities. The landlord's evidence is that the use of the various parts of the exterior of the residential property was apportioned between the tenants. He provided no documentary evidence in support of this assertion.

The tenancy agreement is silent as to the use of any part of yards on the residential property.

Based on the tenant's unrefuted testimony as to her use of the front yard, and the lack of corroborating evidence for the landlord's assertion that use of the outside areas was apportioned between the occupants of the rental unit, I find that it is more likely than not that all occupants of the residential property were permitted use all parts of the yard located on the residential property.

I would expect that if there were some arrangement to the contrary, particularly one which apportions specific areas of the yard to specific occupants, that it would have been reduced to writing at some point (even if just an email or a text message) or referenced in communications between the parties, especially given the contentious relationship between the tenant and BH.

Accordingly, I find that, by permitting BH to erect the gazebo on the front lawn, or by not demanding that she take it down immediately upon being made aware that it had been erected on the front lawn, the landlord failed to ensure that the tenant had full use of the common property to which she was entitled.

The parties dispute when the gazebo set up in the front yard. The tenant alleged it was done so immediately after the partial settlement was entered into. The landlord testified it was either two or four months after the partial settlement was entered into (that is, either April 2020 or June 2020).

As stated above, the tenant bears the evidentiary burden to prove her assertions. She has not provided no corroborating evidence supporting her testimony that the gazebo was moved to the front yard immediately following the making of the partial settlement.

Accordingly, I find that she has failed to discharge her evidentiary burden to prove it was moved by this date.

Based on the landlord's acknowledgment, I find that BH did relocate to the gazebo to the front yard. I find that this was more likely to have occurred in June 2020, rather than in April 2020. During his testimony, I understood the WS's usage of the phrase "two months" or "a couple of months" not to be a precise estimate of time, but rather a euphemism to mean the more imprecise "a bit later". Later in his testimony, WS stated that the gazebo was set up for the summer and testified that it was set up four months after the partial settlement. I understand summer to start in June. Additionally, I found this part of the landlord's testimony regarding the date the gazebo was set up to be more considered, and that WS was attempting to reconstruct events in his mind to provide an accurate date. Accordingly, I find that BH re-erected the gazebo in June 2020. The landlord did not provide an exact date in June when this occurred. For the purposes of this matter, I will use June 1, 2020, as the date the gazebo was set up in the front yard, and as the date from which the tenant was deprived of the use of the front yard.

The tenant testified that, in the past, she made use of the front yard for recreational activities. I find that, with the presence of the gazebo, she was not able to do this.

I find that the loss of use of outdoor space is not an insignificant loss. However, I do not find that it warrants a 50% reduction in monthly rent. The tenant still had the full benefit of the entirety of the inside of the rental unit and the other exterior areas. I find that a 5% rent reduction for loss of use of the front yard is appropriate. Accordingly, I order the landlord to reimburse the tenant $369, representing the return of 5% of the month rent for the months of June to October, inclusive ($1,476.00 x 5% = $73.80, $73.80 x 5 months = $369.00).

As the landlords have been mostly successful in this application (with the tenants receiving less than 15% of the monetary order they sought), I decline to order that the landlord reimburse the filing fee to the tenant.

Conclusion

Pursuant to section 67 of the Act, I order that the landlord pay the tenant $469, representing the following:

Nominal damage for failure to make repairs to patio	$100.00
5% rent reimbursement for loss of use of front year (5 months)	$369.00
Total	**$469.00**

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: November 27, 2020

Residential Tenancy Branch