Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes PSF, MNDCT, OLC, RR, FFT

Introduction

Pursuant to section 58 of the Residential Tenancy Act (the Act), I was designated to hear an application regarding the above-noted tenancy. The tenants applied for:

- an order requiring the landlord to provide services or facilities as required by the tenancy agreement or the Act, pursuant to section 62;
- a monetary order for compensation for damage or loss under the Act, Residential Tenancy Regulation (Regulation) or tenancy agreement, pursuant to section 67;
- an order for the landlord to comply with the Act, the Regulation and/or tenancy agreement, pursuant to section 62;
- an order to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65; and
- an authorization to recover the filing fee for this application, under section 72.

Tenants MV (the tenant) and ST and the landlord attended the hearing. The tenants were assisted by counsel HF. The landlord was assisted by counsel MA. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

At the outset of the hearing the attending parties affirmed they understand it is prohibited to record this hearing.

Per section 95(3) of the Act, the parties may be fined up to $5,000.00 if they record this hearing: “A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than $5 000.”

As both parties were present service was confirmed. The parties each confirmed receipt of the application and evidence (the materials). Based on the testimonies I find that each party was served with the respective materials in accordance with sections 88 and 89 of the Act.

Preliminary Issue - Unrelated Claims

Residential Tenancy Branch Rule of Procedure 2.3 states that claims made in an application for dispute resolution must be related to each other. Arbitrators may use their discretion to dismiss unrelated claims with or without leave to reapply.

It is my determination that the priority claims regarding the order requiring the landlord to provide services or facilities and the order to reduce rent are not sufficiently related to any of the tenants' other claims to warrant that they be heard together.

The tenants' other claims are unrelated in that the basis for them rests largely on facts not germane to the question of whether there are reasons to order the landlord to provide services or facilities and to reduce rent. I exercise my discretion to dismiss all of the tenants' claims with leave to reapply except the claims regarding the order for the landlord to provide services or facilities and the order to reduce rent.

Issues to be Decided

Are the tenants entitled to:

1. an order for the landlord to provide services or facilities?
2. an order to reduce rent?
3. an authorization to recover the filing fee?

Background and Evidence

While I have turned my mind to the evidence and the testimony of the attending parties, not all details of the submission and arguments are reproduced here. The relevant and important aspects of the tenants' claims and my findings are set out below. I explained rule 7.4 to the attending parties; it is the tenants' obligation to present the evidence to substantiate the application.

The tenant affirmed the tenancy started in December 2017 or January 2018. The landlord does not remember when the tenancy started. Both parties agreed monthly rent is $1,200.00, due on the first day of the month. The tenancy agreement is verbal.

Both parties agreed there are four rental units in the rental complex, the landlord was aware that the tenants built a garden in the common area of the rental complex in the spring of 2018 and did not increase rent when the garden was available for the tenants. The garden for each rental unit measured 600 square feet (40x15 sq ft).

The tenants' counsel stated the garden is not an essential service or a material term of the tenancy agreement, but that it was a benefit for the tenants.

Both parties agreed that in October 2020 the tenants' access to the garden was partially restricted because of issues with another tenant. On May 17, 2021 the landlord completely restricted the tenants' access to the garden and did not serve a written notice to terminate the access to the garden.

The landlord testified he allowed the tenants to use a 1,500 square feet area in the rental complex as an alternative garden and area for a greenhouse after he restricted the tenants' access to the previous garden. The tenant said this area was only for the greenhouse.

The tenant affirmed he built a new garden next to his rental unit and he was able to continue to cultivate strawberries in the new garden. Later the tenant stated he cannot cultivate the same products in the new garden because the sun exposure was better in the previous garden.

The landlord testified the tenants can cultivate the same products in the new garden and that the new garden also has sun exposure.

The tenants are claiming for an order to have access to the prior garden or to have a rent reduction in the amount of $60.00 because the tenants need to spend this amount to have access to a similar garden elsewhere. The tenants are claiming for a retroactive rent reduction in the amount of $600.00 because they have not had full access to their prior garden since October 2020.

Both parties agreed this application was not submitted earlier because they were seeking an amicable resolution for this issue.

The tenants' counsel said the landlord did not comply with section 27 of the Act and Residential Tenancy Branch Policy Guideline 22, the tenants incurred significant costs to build the garden and rent was not increased because of these costs.

The landlord's counsel affirmed the landlord is complying with the Act, rent did not increase when the garden was built, the access to the garden does not qualify as a service or a facility under section 1 of the Act, and it is not fair to reduce the amount of rent.

Analysis

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 the case is on the person making the claim.

Section 27 of the Act addresses the landlord's ability to terminate or restrict services of facilities:

> (1)A landlord must not terminate or restrict a service or facility if
> (a)the service or facility is essential to the tenant's use of the rental unit as living accommodation, or
> (b)providing the service or facility is a material term of the tenancy agreement.
> (2)A landlord may terminate or restrict a service or facility, other than one referred to in subsection (1), if the landlord
> (a)gives 30 days' written notice, in the approved form, of the termination or restriction, and
> (b)reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

Residential Tenancy Branch Policy Guideline 01 states:

> 1. The tenant must obtain the consent of the landlord prior to changing the landscaping on the residential property, including digging a garden, where no garden previously existed.
> 2. Unless there is an agreement to the contrary, where the tenant has changed the landscaping, he or she must return the garden to its original condition when they vacate.

Section 1 of the Act defines that service or facility includes recreational facilities. Based on the tenants' testimony, I find that the garden is not a service or facility, per section 1 od the Act.

Thus, section 27 of the Act does not apply. I dismiss the claim for the landlord to provide services or facilities.

Section 65(1) of the Act states:

> (1)Without limiting the general authority in section 62 (3) [director's authority respecting dispute resolution proceedings], **if the director finds that a landlord or tenant has not complied with the Act, the regulations or a tenancy agreemen**t, the director may make any of the following orders:
> […]
> (b)**that a tenant must deduct an amount from rent to be expended on** maintenance or a repair, or on **a service** or facility, as ordered by the director;
> […]
> (f) **that past or future rent must be reduced by an amount that is equivalent to a reduction in the value of a tenancy agreement**;
>
> (emphasis added)

A useful guide in regard to conflicting testimony, and frequently used in cases such as this, is found in Faryna v. Chorny (1952), 2 D.L.R. 354 (B.C.C.A.), which states at pages 357-358:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

In this case, the landlord's testimony about the possibility of cultivating products and sun exposure in the new garden was more convincing. I find the tenants' testimony was vague. I therefore accept the landlord's version that the tenants can cultivate the same products and that there is sun exposure in the new garden.

The landlord provided access to a new garden in the rental unit when access to the prior garden was restricted. The tenants did not submit a receipt, or any evidence, to prove that they need to pay $60.00 per month to have access to a similar garden

outside the rental complex. I find that the tenants failed to prove, on a balance of probabilities, that they suffered a damage or loss because the landlord restricted access to the prior garden or that there was a reduction in the value of the tenancy agreement.

Thus, I dismiss the tenants' claim for a rent reduction because of the restriction of access to the prior garden.

For the purpose of educating the parties, I note that under section 12(1)(a) of the Act, the tenancy agreement must be in writing.

The tenants must bear the cost of the filing fee, as they were not successful.

Conclusion

I dismiss the tenants' claims without leave to reapply.

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: January 12, 2022

Residential Tenancy Branch