Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **PSF, RR, FFT**

Introduction

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

- an order to allow the tenant to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65;
- an order that the landlords provide services or facilities required by law pursuant to section 65;
- authorization to recover the filing fee for this application from the landlords pursuant to section 72.

The tenant attended the hearing. The landlord was represented at the hearing by an Agent. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenant testified, and the Agent confirmed, that the tenant served the landlord with the notice of dispute resolution form and supporting evidence package by registered mail. The tenant's evidence package was served to the landlord late. The Agent provided Canada Post tracking information confirming the late delivery; however, the Agent will not take issue regarding late service and will proceed. The Agent testified, and the tenant confirmed, that the landlords served the tenant with their evidence package. I find that all parties have been served with the required documents in accordance with the *Act*.

At the outset, I advised the parties of rule 6.11 of the Residential Tenancy Branch (the "**RTB**") Rules of Procedure (the "**Rules**"), which prohibits participants from recording the hearing. The parties confirmed that they were not recording the hearing. I also advised the parties that pursuant to Rule 7.4, I would only consider written or documentary evidence that was directed to me in this hearing.

Issues to be Decided

Is the tenant entitled to:

1) a rent reduction for repairs, services or facilities agreed upon but not provided;

2) an order that the landlord provide services or facilities required by the tenancy agreement or law;
3) recover the 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 fixed term tenancy agreement starting December 1, 2002, that continued on a month-to-month basis at the end of the fixed term. Monthly rent was $950.00 and payable "in advance on or before the first day of each month". The tenant paid the landlords a security deposit of $450.00. The landlords still retain this deposit. The Residential Tenancy Agreement (the "**Agreement**"), Part 3, identified what the rent include: in suite washer and dryer, fridge, stove, heat, water, garbage collection. Part 4, "Rent" stated parking was included with the rent.

Clause 28 of the Agreement reads:

Common Areas: The tenant shall not misuse common areas of the Residential Property, but shall use them prudently, safely, and equitably and shall conform to all notices regulations posted on or about the residential property concerning the use of common areas, including, the use of laundry room, recreation room, swimming pool, parking areas, storage and including restriction of their use to tenants only and restriction on use by children. All such use shall be at the sole risk of the tenant or the tenant's guests. [incomplete due to poor quality of the uploaded document]

The tenant testified that she is a long-term resident of the townhouse complex. One of the reasons she rented in the complex was because it had a pool.

The tenant provided the following chronology. In March 2020, the property's pool, part of the common area, was closed in keeping with public health measures to reduce the risk of COVID transmission. The Public Health Order (the "PHO") permitted the landlord to restrict access to this service/facility without providing compensation. On July 12, 2021, the PHO orders were cancelled yet the complex's pool remained closed.

In September 2021, tenant contacted the Office of Housing and Construction Standards' residential Tenancy Branch to determine if she was entitled to a rent reduction for loss of access to the pool and sauna, acknowledging the pool and sauna are a non-essential service and/or facility.

In a September 8, 2021, email response from the RTB reads as follows:

> According to the Residential Tenancy Branch website:
> **Restricting use of common areas**
> Effective July 10, 2021, the provisions that allowed a landlord to reasonably restrict or schedule the use of common or shared areas to support physical physical distancing are repealed.
>
> If the restrictions are kept in place by a landlord, a tenant could apply to the Director of the Residential Tenancy Branch for an order that their rent be reduced as a result of the landlord restricting a service or facility. A landlord would have to demonstrate to the Director that the restrictions are reasonable.

On September 18, 2021, the tenant sent a text message to the landlord requesting a rent reduction based on continued restriction of a service or facility. The landlord in a September 20, 2021, email responded, "Pool has been closed due the covid pandemic and will remain closed until covid has been lifted. No amenity was taken away." [reproduced as written]

The tenant argues that an "amenity", the pool, has been "taken away". She further argues the landlord is obligated under the *Act*, if terminating or restricting a non-essential service or facility, to:

- provides 30 day written notice, and
- reduces rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from restricting or terminating the service or facility.

The tenant contends that the landlord has made no effort to implement basic and inexpensive health and safety protocols that would allow for the reopening of the pool.

The tenant referenced the landlord's evidence, "Coronavirus Disease (COVID-19) "Guidance for Swimming Pools" Version 2, June 19, 2020 [Guidance for Swimming Pools], specifically "Elimination Controls" and "Commercial Pools" as examples of safety measures that can be put in place. New rules advising if a person is sick with any symptoms of a cold, influenza or COVID, pool use is prohibited.

Page 13 specifically references "commercial" pools and states:

- Commercial/strata pools could keep a sign in/sign-out sheet at their entrance stating the maximum number of people allowed in the pool enclosure, so patrons can self- regulate.
- Commercial pools operated in conjunction with condos could provide sign-up sheets so members of the same household can book a private time slot to access the facilities.

The tenant points out if pool usage was limited to one household per time slot, the 2-meter bubble would not apply. Further, if contact tracing was a concern, if a guest was using the pool with a tenant, the tenant would have the guest's contact information.

The tenant also referenced page 12 of the Guidance for Swimming Pools pointing out that recommendations such as cleaning dirty surfaces with soap and water before disinfecting were common sense. The landlord can provide pool patrons with household disinfectant wipes to clean high touch surfaces requiring the patrons to clean between uses. As per the guidelines, "specialized disinfection products are not necessary. On September 20, 2018, a camera was installed in the pool facility for safety and security and can be used to monitor compliance.

The tenant also pointed out that the posted rules, as well as numerous memos throughout the years, and the signed lease limits the landlord's liability. The #1 Pool Rule reads:

> #1. All persons using pool do so at their own risk. Owners and management are not responsible for accidents or injuries.

The tenant provided that the pool shower/locker facility is still utilized for specific reasons. When a rental unit's bathroom, for example, is undergoing renovations, the tenants are permitted to use the shower facilities.

The tenant requests compensation by way of rent reduction in the amount of $90.00 per month, from July 10, 2021, less the annual one (1) month pool closure each December for maintenance. She entered into evidence Residential Tenancy Policy Guideline #22, "Termination or Restriction of a Service or Facility".

The tenant's calculation was based on averaging the cost of a monthly family pass from two public pools in the area. The tenant stated she rounded up the dollar figure from $89.01 to $90.00. She states the landlord may argue that she is a single person so not entitled to a "family pass". She counters the argument stating that the reduction should be based on the type of unit rented, a two-, three-, or four-bedroom units not on number of occupants. She also requests that "any reduction of monthly rent should also be incorporated and deducted on your annual notice(s) of rent increases for all XXXX tenants". She also provided that the issue is about restricting access not about usage.

In conclusion the tenant stated that all businesses have had to adapt and change due to COVID. The landlord runs a business and so this is no different. The landlord does not hesitate to raise rents but seems to be reluctant to implement processes that would allow the pool to reopen.

The landlord's Agent provided the following evidence and testimony. The Agent stated that the pool was closed based on a PHO in March 2020. He acknowledged that the PHO expired July 10, 2021.

The Agent agreed that the pool is not a “public pool” but there is limited provincial information/guidance for protocols related to “commercial pools”- the classification under which this pool falls. In view of this, the landlord looked to the provincial standards for public pools for guidance on how to proceed.

The Agent states that the tenant’s expectation the pool reopen is not reasonable from management’s perspective. The current COVID variant numbers in the health region have grown exponentially and the hospitals and health care system are overwhelmed. To reopen the pool is irresponsible given the current OMICON surge.

The Agent explained that the pool is unsupervised; therefore, if cleaning protocol rules, for example, were posted, it is not possible to monitor enforcement. Although cleaning products could be provided there is no guarantee if they would be used or how well. The Agent referenced p. 12 of the Guidance for Swimming Pools citing “Administrative Controls” that provide the cleaning standard for pool areas:

- The frequency of cleaning and disinfection of high-touch areas (door handles, faucets, bathrooms, handrails, chairs, and tables in pool viewing area) should be increased.
- Consider creating a checklist of high-touch surfaces to be cleaned and disinfected, establish a frequency based on the facility’s needs and modify according to usage patterns.
- Record when cleaning and disinfection has occurred.
- Damp cleaning methods should be employed such as clean wet cloths, and/or wet mop. Avoid sweeping or dusting as these methods can distribute virus droplets into the air.
- Lockers and cubbies used by pool patrons to store personal belongs should be cleaned and disinfected between uses (consider providing wipes for this purpose).
- Towels provided for public use should be laundered on the hottest possible setting.

While there are cameras in place, the cameras monitor the pool area not the change rooms. The cameras are monitored by the resident manager, but the Agent was not certain how often.

The Agent submitted pictures of the pool and change room pointing out the narrow perimeter around the pool making social distancing impossible and similarly the confined space of the shower/change room, again making social distancing unfeasible. He argues that given the configuration of the facility, social distancing requirements cannot be complied with.

There are a total of sixty (60) units on site. Staff include an off-site resident manager, on site daily, and a half-time maintenance person responsible for renovations, repairs, and ongoing construction throughout the property. There is no cleaner. The Agent said

that to comply with the above standards, the landlord would need to hire a full-time person to monitor use and clean facility surfaces throughout the day.

The Agent stated that the pool is closed for more than 1 month per year, it is closed through the winter months, December through April each year as confirmed by the resident manager.

The Agent provides the tenant's claim that the landlord increases rent at every opportunity is unreasonable. The landlord does increase rent as allowed by the province. The landlord's costs have increased, and the allowable rent increase is below the increased costs.

The Agent cannot confirm when the pool will re-open. He states it will reopen when it is safe to do so. The Agent pointed to the posted "Pool Rules" specifically Rule #8 that reads," Management reserves the right to deny use of pool to anyone at any time". Management is exercising its right.

The Agent confirmed that the landlord maintains a log of pool patrons even pre-COVID. He cannot speak to the accuracy of the records but pointed out that the tenant only logged in once since 2015. The Agent argued quantum meruit – if the arbitration favors the tenant the amount of damages awarded must be a reasonable sum in respect of the loss of access to facilities/services. The Agent argued based on the tenant's past usage, compensation should be limited to a daily pass or at most a monthly pass for an individual, not a family pass. In further support of his argument, the Agent references Clause 28 of the Tenancy Agreement (reproduced on page 2 of this decision) stating that common areas are restricted to the tenant – the person named in the lease and do not include roommates if those persons are not listed on the tenancy agreement.

Analysis

The tenant submitted an application for the landlord to provide services and facilities as set out in the tenancy agreement, and for the landlord to comply with the *Act*. The tenant also requested a rent reduction in relation to the landlord withholding these services/facilities.

Definitions

1 in this *Act*

"rent" means money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of a tenant to a landlord in return for the right to possess a rental unit, for the use of common areas and for services or facilities, but does not include any of the following:

(a) a security deposit;
(b) a pet damage deposit;
(c) a fee prescribed under section 97(2)(k) *[regulations in relation to fees];*

"service or facility" includes any of the following that are provided or agreed to be provided by the landlord to the tenant of a rental unit:

(a) appliances and furnishings;
(b) utilities and related services;
(c) cleaning and maintenance services;
(d) parking spaces and related facilities;
(e) cablevision facilities
(f) laundry facilities;
(g) storage facilities;
(h) elevator;
(i) common recreational facilities;
(j) intercom systems;
(k) garbage facilities and related services;
(l) heating facilities or services;
(m) housekeeping services.

"tenancy agreement" means an agreement, whether written or oral, express, or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit.

According to the Agreement "facilities, services or utilities" listed are: in- suite washer and dryer, fridge, stove, heat, water, garbage collection, a/c". Part 4, "Rent" states parking is also included with the rent.

In Clause 28 "swimming pool" is included as part of the "common areas" and use restricted to tenants only or tenant's guests and use "shall be at the sole risk of the tenant or the tenant's guests".

Although Part 3 of the Agreement does not specifically list the "swimming pool" as part of the "facilities, services or utilities", the swimming pool is part of the "common recreational facilities" as identified in Clause 28 above. The pool is a provided by the landlord in addition to the "basic living space" in exchange for monthly rent.

Policy Guideline 22, "Termination or Restriction of a Service or Facility", "Legislative Framework" states:

In a tenancy agreement, a landlord may provide or agree to provide services or facilities in addition to the premises which are rented. For example, an intercom entry system or shared laundry facility may be provided as part of the tenancy agreement. A definition of services and facilities is included in Section 1 of the *Residential Tenancy Act* (RTA) and the *Manufactured Home Park Tenancy Act* (MHPTA).

Under section **27** of the RTA and section 21 of the MHPTA 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 or facility is a material term of the tenancy agreement.

An “essential” service or facility is defined in part as “one which is necessary, indispensable, or fundamental”. Restricting use of a swimming pool does not meet the test of “essential” service or facility.

A “material term” is defined in part as “a term that the parties both agree is so important that the most trivial breach of that term gives the other party the right to end the agreement.” Similarly, restricting the use of a swimming pool does not meet the definition of a “material term”.

Section 27(b), however, states as follows:

27 (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. [emphasis added]

Policy Guideline #22, C and D, in part state:

C. RENT REDUCTION

Where it is found there has been a substantial reduction of a service or facility, without an equivalent reduction in rent, an Arbitrator may make an order that past or future rent be reduced to compensate the tenant.

D. BURDEN OF PROOF

Where the tenant claims that the landlord has restricted or terminated a service or facility without reducing the rent by an appropriate amount, the burden of proof is on the tenant.

I find that for the purposes of this matter pursuant to s. 27(2)(b) and s. 65 the swimming pool qualifies as a “service or facility” as stipulated in the **Definitions** of the *Act.*

I find the landlord did not provide the tenants with the required notice in the approved form pursuant to s. 27(2)(a) restricting a service or facility of the tenancy agreement pursuant to s. 27(2)(b).

The *Act* is clear. Upon termination of a service or facility the appropriate remedial rent reduction amount should be “**equivalent**” to the reduction in the value of the tenancy agreement. The requisite calculation prescribed in s. 27(2)(b) is predicated on the question, *“what is the reduction in the **value** of the tenancy agreement resulting from the absence of the facility”?* In other words, *“by what amount is the value of the tenancy agreement (rent) reduced in absence of this facility”?* I have not been presented with sufficient evidence supporting such a calculation.

Under the *Act* “value” is defined the total of “rent”, “service or facility”, and “tenancy agreement” combined.

I have considered both the minimum and maximum calculations offered by the parties and the evidence provided by both the tenant and the landlord.

The tenant’s case was well documented, organized, and presented. The tenant’s calculation of $90.00 per month is based on the averaged cost from two public pools. The description of facilities included in the submissions offered by one of the pools, for example, includes: 50 m. indoor pool, 8 swim lanes, 1 & 3 m. diving boards and a 5 m. diving tower, waterslide, leisure pool, steam room, sauna, hot tub etc. Thus, the public facility valuation and cost includes amounts related to facilities and supervision not provided by the landlord. It is, therefore, difficult for me to conclude *the reduction in the **value** of the tenancy agreement resulting from the absence of the facility* is $90.00 per month.

The Agent’s suggestion, to assess compensation based on the cost of single entrance tickets or at maximum a monthly adult pass is equally problematic as the recommendation is not predicated on *the reduction in the **value** of the tenancy agreement resulting from the absence of the facility* and the landlord has not provided a dollar value.

Having considered the testimony of both parties and having carefully reviewed all of the comments associated with the tenancy, I find that the landlord did have a responsibility to adhere to s. 27(2) of the *Act* and to reduce the tenant’s rent by 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.

I find the tenant’s application for a monetary award to be excessive, as the pool facilities provided by a public pool significantly exceed those provided in the complex for residential use. Notwithstanding having said that, the tenant has demonstrated a loss.

Policy Guideline #16 allows the Arbitrator to award compensation for damage or loss in situations where the applicant has proven a loss but where establishing the value of the damage or loss is not as straightforward.

In this case, I find the tenant has suffered a reduction in the value of her tenancy in the amount of $30.00 per month. I based this estimate on the following criteria: access to a commercial pool and considering the size of the pool, the available amenities included with pool usage, in concert with seasonal pool closures.

Based on the aforementioned, I order the landlord reduce the tenant’s rent in the amount of $30.00 per month less the pre-established annual seasonal pool closure. For ease of administration, the rent reduction calculation can be multiplied by the number of months the pool is open and divided by twelve (12) months. The rent reduction is

retroactive to July 12, 2021, when the public health orders were lifted and the pool, with protocols in place, could have reopened.

Further, I order the landlord to comply with the requirements pursuant to s. 27(2) (a) and (b) and provide the tenants with 30 days written notice, in the approved form **and** reduce 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, distributed equitably, and considering pre-scheduled annual pool closures.

Given the tenant was successful in the application, I award her $100.oo as reimbursement for the filing fee pursuant to s. 72(1) of the *Act.* Pursuant to s. 72(2) of the *Act,* the tenant can deduct $100.00 from their next rent payment.

Conclusion

The landlord is ordered to do the following:

- The landlord is ordered to reduce the tenant's rent in the amount of $30.00 per month based on the pre-established months the pool was open. The rent reduction calculation may be multiplied by the number of months the pool is open and divided by twelve (12) months to determine a monthly rent reduction.

- The landlord is ordered to calculate the rent reduction retroactive to July 12, 2021, when the public health orders were lifted and the pool, with protocols in place, could have reopened.

- Pursuant to sections 62 of the *Act*, I order that the landlord comply with the requirements of s. 27(2) (a) and (b) and provide the tenants with 30 days written notice, in the approved form **and** reduce 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, distributed equitably, and considering pre-scheduled annual pool closures

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: February 16, 2022

Residential Tenancy Branch