Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes RR, FFT

Introduction

This hearing was convened as a result of the Tenants' Application for Dispute Resolution ("Application") under the *Residential Tenancy Act* ("Act"), for an Order to reduce the rent for repairs, services or facilities agreed upon but not provided; and to recover the $100.00 cost of their Application filing fee.

The Tenants, C.W. and K.B., an agent for the Landlord, R.R. ("Agent"), and counsel for the Landlord, R.H., ("Counsel"), appeared at the teleconference hearing and gave affirmed testimony. I explained the hearing process to the Parties and gave them an opportunity to ask questions about it. During the hearing the Tenants and the Agent were given the opportunity to provide their evidence orally and to respond to the testimony of the other Party. I reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch ("RTB") Rules of Procedure ("Rules"); however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Neither Party raised any concerns regarding the service of the Application for Dispute Resolution or the documentary evidence. Both Parties said they had received the Application and/or the documentary evidence from the other Party and had reviewed it prior to the hearing.

Preliminary and Procedural Matters

The Tenant provided the Parties' email addresses in the Application and they confirmed these addresses in the hearing. They also confirmed their understanding that the Decision would be emailed to both Parties and any Orders sent to the appropriate Party.

At the outset of the hearing, I advised the Parties that pursuant to Rule 7.4, I would only consider their written or documentary evidence to which they pointed or directed me in the hearing. I also advised the Parties that they are not allowed to record the hearing and that anyone who was recording it was required to stop immediately.

Issue(s) to be Decided

- Should the rent be reduced for repairs, services or facilities agreed upon but not provided, and if so, by how much?
- Is the Tenant entitled to Recovery of the $100.00 Application filing fee?

Background and Evidence

The Parties agreed that the fixed term tenancy began on June1, 2021, and runs to May 31, 2022, and then operates on a periodic or month-to-month basis. They agreed that the tenancy agreement requires the Tenants to pay the Landlord a monthly rent of $2,458.00, due on the first day of each month. They agreed that the Landlord waived the security deposit for the Tenants, but they paid a pet damage deposit of half a month's rent or $1,229.00.

In the hearing, the Tenants explained their claim, saying that it is a new building and that it was under construction when they signed a lease. They said that certain amenities were promised, which they inferred were part of the rent. The Tenants said that some of these amenities did not come to fruition, therefore, they would like a compensatory rent decrease.

#1 CONCIERGE → $163.80

The Tenants said that upon moving in on June 1, 2021, there was no concierge. They said that the property manager was trying to handle those duties. They also said:

> When we signed the lease on April 9, 2021, the building was under construction. It was only partly opened and the amenities were not completed. We had been told that there would be a front door concierge who accepts packages and helps guests. There's a desk beside the front door and an office labelled 'Concierge and Package Room'.
>
> Upon moving in on June 1, there was no concierge. The property manager was operating this amenity, and not to fullest extent, because there was not the promised person at the front.
>
> On June 4th, there was a letter posted on the door saying that as of June 15, they will be suspending parcel receiving except Canada Post, but that packages would be put in the locked parcel room.

> Since then, no concierge has been provided. Any aspect in there, right up to they're claiming they're providing a person who should take the property manager's stuff. In their submitted parcel, they say they will hold parcels for us on request, though this is the first mention of this.
>
> An email from [the property manager] saying Confirmation of reduction of amenities from landlord, states, the [coffee] kiosk and the concierge is not happening - will not happen. That email is dated September 15, 2021.

The Tenants submitted a copy of the Amenity Use Agreement that was part of their tenancy agreement package. This agreement includes the following:

> 2. The Unit (as defined in the Lease) is located within a the building owned and/or operated by the Landlord and this building is equipped with the following amenities:
>
>   - Fitness Centre
>   - Business Centre
>   - Roof Top Patio
>   - Coffee Station
>   - Barbeque(s)
>   - Sauna
>   - Concierge
>   - Games Room
>   - Pet Wash
>   - Movie Theatre

The Parties executed the Amenity Use Agreement, including initialling or signing each of the four pages of the this Agreement.

The Tenants submitted a copy of this email, which is dated September 14, 2021, and it confirms:

> . . .
>
> As for the amenities, unfortunately the [coffee brand] kiosk and Concierge will not happen. This is out of our hands, so we are not able to do anything about that.
>
> For the sauna and steam room, they are almost complete but we won't be able to open them due to Covid restriction until the health order lifts.

When I asked the Tenants how they calculated the amount they seek for this claim, the Tenants said:

> That we contacted a closer [courier] store that does package receiving, and we got a yearly cost from them of $235.20 for a one-year rental of a mail box. Divided by 12 equals $19.30 a month. We used the mileage rate at 59 cents a kilometre, and extra time to get there at an average rate of minimum wage. We get a package every second or third day – 15 trips to the store, because we have to pick them up.

The Tenants submitted a document with a map illustrating the route they have to take to get to the nearest mailbox/courier rental store. They also included their calculations, pursuant to what they said in the hearing.

The Tenants said that it is more difficult to get a price to represent something like having a concierge in the building. The Tenant said: “I estimated their cost in lost value of $50.00 per month for the concierge.”

Counsel said:

> As they indicated, the tenancy started on June 1st, 2021. It should be noted that a previous owner was overseeing the rental property. They are the writer of the letter indicating that the concierge service was removed. The current Landlord and property manager didn’t take over the building until August 1, 2021. It has been filled.
>
> The concierge desk is not used. The Landlord has full time property manager on site, plus tenants have emergency contacts, as needed.

The Landlord submitted a copy of the notice with contact information for the property manager, as well as emergency contact information.

Counsel directed my attention to a notice the property manager provided to the tenants of the residential property regarding the amenities that were not going to be provided, such as the concierge and the coffee kiosk. Counsel suggested that this explains that it is a substitution of the services, rather than an approval or a removal of services.

The notice to which Counsel referred included a list of the names of property managers, building managers, a leasing agent, and an office assistant, to contact, with a

description of what they each do.

Counsel said:

> The managers on site are the concierge service. The Landlord is not required to man the desk 24/7. Furthermore, the Landlord also has an emergency service . And in terms of security, there is no loss to the Tenants.

Counsel directed me to the Landlord's evidence of the Landlord having hired a security company as of December 29, 2021. There is a schedule indicating that this company will provide one security staff member on site from 1900 hours to 0300 hours seven days a week.

Counsel addressed the Tenants' calculation of loss as follows:

> Regarding proving a loss, they have not written to management regarding any lost packages. They have not proved any loss. Nothing that went missing from [a courier service], Canada Post – not missed parcels or lost items. Property managers will unlock the parcel room, if asked. The Tenants have not submitted any requests to management to hold parcels for them. Delivery people can buzz up directly to the rental unit, as well.
>
> No where in the amenities' agreement was package receiving promised. The property management office is available to tenants during business hours Monday through Friday. The Landlord is not required to provide amenities to the Tenants' standards. With substitution of property managers on site, there is no loss of a concierge service.

I asked how tenants can receive packages currently at the residential property, and the property manager said:

> It's a system in the building – you can buzz up to the suite. A tenant gives their buzzer number, if they're working from home. They can receive a parcel at their residence without having to leave it downstairs. On a rare occasion, we've been asked to receive a package and have accepted it and kept it in office… There's been no report of security issues with these Tenants - no request for us to do that.

#2 COFFEE BAR → $295.00

The Tenant said:

> Upon signing the tenancy agreement on April 9, 2021, we were told that there was a coffee bar on site. A [international coffee retailer] coffee bar. On move-in day. It was under construction when we signed. But we were told there was a coffee bar, and that it was part of our rent. It has not been opened. And the Landlord has confirmed this reduction. . . the coffee bar will not happen. They say it was pay per use, so they do not believe we are eligible for compensation.

The Tenant directed my attention to pages 7 and 8 of the Parties' tenancy agreement for the "Amenity Use Agreement". The Tenants said:

> No where in the agreement does it state that the amenities are an additional cost. Also, they never mentioned that any amenity was an additional cost. They are charging market rate for the coffee . . .. it's not an included amenity. They say we have to pay for every cup of coffee. It is an included amenity and it doesn't say pay or fee for use or anything.

I asked the Tenants how they calculated the amount claimed for the coffee kiosk, and they said:

> See document #2 – breaking down the cost. The nearest [international coffee vendor] is a 3.8 kilometre round trip. At 59 cents a kilometre, that's $2.24 per trip. We got the price of standard Grande Cappuccino as $4.75 times two residents, equals $9.98, including GST.

The Tenants included a map showing the trip to the nearest [international coffee vendor]. They said they would each purchase a cup of coffee every weekday while working, which they said would cost them $295.00 per month.

Counsel responded:

> We state that this was always pay per use. There is no written comment by the Landlord, otherwise. On pages 20 and 21 of our evidence package, the images show a pin pad payment pad constructed by the builder when the coffee bar was first constructed. This indicates pay per use - purchase. This can be reasonably substituted for by tenants buying their own coffee machines. It is not material to the tenancy agreement. They have to pay for their drinks, anyway,

The photographs referred to by Counsel evidence a pay pad situated directly beside a drink machine of some kind.

Counsel referred me to Policy Guideline #5, "Duty to Minimize Loss" (PG #5). Counsel said:

> [PG #5], states that if compensation is awarded, it is only to cover a loss. Therefore, the Tenants can't claim the operating costs or pay per use. The extra costs of a luxurious item is not within the purview of the Policy Guidelines.

#3 SAUNA → $131.76

I asked the Tenants to explain this claim to me. They said:

> The sauna and stream room, they – as far as we're aware - they just became available mid-last month, and the sauna is broken again. So, we have been without amenities since we moved in. We are asking for compensation, because it took so long to get this up and running. They have stated that there are many reasons why it was not running, but that contradicts what we were told verbally before. We have had a loss of an amenity for at last half of our tenancy.
>
> On page 6 of their evidence, the Tenants said the sauna was available for use in November 2021. On page 30 of the Landlord's evidence, is a notice dated January 5, 2022, which gives the hours for the sauna and steam room. They were compliant with Covid. The health order didn't affect building . . ..
>
> The calculation of the amount we claimed - document #3 has the break down. The cost of a pass at [the] rec centre, which is $6.85 x 2, and a 12-kilometre round trip, . . .the average extra travel time of 24 minutes at the standard minimum wage of $12.60. We would use the sauna four times per month.

Counsel said:

> The sauna was under construction when they moved in. A significant promotion discounted their rent for the delays. So, we don't believe they are entitled to double recovery.
>
> Our submission states that by no fault of the current property manager - awaiting parts, which they didn't obtain until early 2021 - it was shut down with cleaning cycle issues. The Landlord called in a repair man to repair the automatic ozone

> cleaning system. These repairs took a few weeks, due to Covid. The sauna was open and ready for use in December 2021. Page 29 says it was open as of December 5th. Then it was closed by a Covid health order and out of an abundance of caution. It has been open since January 2022.
>
> Any delay before was due to the previous owner – they did not order sufficient parts or provide equipment. That promotional discount took into account any delays.

The Tenants submitted a file identified as the full tenancy agreement. This includes a document entitled: "Promotional Discount Agreement", dated April 9, 2021 ("Promotional Discount").

The Promotional Discount included one month of free rent for June 2021, and a waiver of the security deposit for the Tenants; however, I find that the Promotional Discount did not explain why it was given to the Tenants. The Tenants said:

> It doesn't say it's for incomplete amenities, just a move-in incentive. There was no other compensation, financial or in any other way. This was upon signing their agreement on April 9, 2021. It was just a move-in promotion, not a discount for incomplete or projected losses for amenities.

Counsel responded:

> In the rental market in the last few years - Landlords don't need to give promotional discounts. These come as a package – an incomplete building that's still under construction. It was an added financial incentive. They don't offer them on any other kind of buildings.
>
> The building was under construction, and it wasn't anticipated to be completed, which would include ongoing . . . and the amenities as well.

The Tenants said:

> The sauna was closed due to construction or repair. Yes, but to have it out of service for over half of the tenancy time is unacceptable and we should be compensated for the loss.

#4 BUSINESS CENTRE → $50.00

In the hearing, the Tenants explained this claim, as follows:

> Again, we were told by the previous Landlord that they would have computers and printers to facilitate doing business there. They were to provide that equipment.
>
> The amenity rules state that if alterations are made – see the Landlord's evidence on page 10 – of the Amenity Rules:
>
> **ALTERATIONS**. No person may install or download any programs, files and/or software onto any electronic equipment offered as the Amenities. There is no reasonable expectation of privacy on the Amenities' electronics and all files created and/or stored on same may be deleted by the Landlord without notice…

Counsel said: "It's [the property manager's] stance that no computers would be provided. [The property manager] said only 3 flat desks."

The Tenant said:

> I have submitted a picture with three desks and with wires for hook ups; there's a spot for a printer. The original mock-up displayed computers on desks and the amenity rules talk about using the computers.
>
> The picture was on [the prior landlord's] website, which has since been removed, so we weren't able to get that. But under the amenity rules in our tenancy agreement – book marks, and autologin features can't be used.

When I asked the Tenants how they calculated the amount they have requested for this claim, they said referred me to document four, which states:

> It is difficult to determine the monthly cost of obtaining the services of a business center every month as the usage can vary from month to month. I would estimate the monthly cost of business center services at $50.00 a month

Counsel said:

> It's the Landlord's position that the business centre is a quiet place to work, and

> this is available. The amenities listed at page seven does include a business centre, but there are no extra promises of computers or extra equipment.
>
> Computer maintenance and the replacement of equipment would be expensive. Photos show a clean, brightly lit . . . page 27. This is the first I'm hearing of [the prior landlord's] promotional photo allegedly showing computers at the work space. I don't believe that there is anything in writing of this - not even from the previous landlords that computer should be provided.

The Agent said:

> I spoke to the former landlords about the business center. They said it was completed. They never anticipated supplying computer equipment. We haven't changed anything from what the former owner did. We also provide Wifi service out there. It's just a quiet place, and most people would bring their own laptop, and use it there.

In their closing statements, the Tenants said:

> [The property manager] says they are not responsible for some of these amenities, but they need to provide them as per our legal contract. And re the discount being for loss of amenities during construction - I never stated that. It was purely a move-in concession, which we took.

In their closing statements, Counsel and the Agent said:

> I was advised that the amenities do not give a promise to pay for any fees or . . . pay per use coffee bar. The amenity agreement says the Landlord can set hours of use for each, and that they may be shut down by the Landlords, and not entitle Tenants for any compensation. The Tenants cannot be bettered by their claim. The Landlord provided a substitution for the amenities.
>
> Policy Guideline #5, ["Duty to Minimize Loss"] states that compensation is not supposed to better a party; the extra cost of luxurious items was not the responsibility of the Landlord, if not promised initially.

The Agent said:

> The issues really are that this was a couple pay per use amenities which were

always meant to be that way. The sauna took a few months to be active. Part of that - it was a concrete floor - it wasn't built at all. We put the entire room together and we feel pretty good about that. The rest of our amenities are there. So, I don't see any claim here at all.

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on a balance of probabilities, I find the following.

Before the Parties testified, I advised them of how I analyze evidence presented to me. I said that a party who applies for compensation against another party has the burden of proving their claim on a balance of probabilities. Policy Guideline 16 sets out a four-part test that an applicant must prove in establishing a monetary claim. In this case, the Tenants must prove:

1. That the Landlord violated the Act, regulations, or tenancy agreement;
2. That the violation caused the Tenant to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the Tenants did what was reasonable to minimize the damage or loss.

("Test")

#1 CONCIERGE → $163.80

As set out in Policy Guideline #16 ("PG #16"), "The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party claiming compensation to provide evidence to establish that compensation is due."

PG #16 also states that damage or loss is not limited to physical property only, but also includes less tangible impacts such as loss of access to any part of the residential property provided under the tenancy agreement.

The Tenants said that this service was promised to them when they signed the tenancy agreement on April 9, 2021. They referenced the Amenity Use Agreement, which sets out that the residential property is equipped with a concierge service. The Parties agree that the concierge service has not been provided by the Tenants' current Landlord.

Counsel asserted that the Landlord had provided a property management company as a substitution for the missing concierge; property managers are on site during business hours. Counsel said that property managers will store parcels in a locked room, if asked, and will unlock the parcel room, if asked. Counsel also said that delivery people can buzz up directly to rental units, as well.

I find that I agree with Counsel's statement that the Tenants have not provided any evidence of packages they have lost, in this situation. However, I find that the duties of a concierge would, in all likelihood, require this person to remain at the concierge desk in the lobby. I find that the property managers are do not work from the concierge desk.

I find from the Landlord's evidence that the Tenants would have to alert the property managers that a package was coming each time the Tenants ordered something. I find this is not equitable to the services that a concierge could provide to them.

PG #16 states:

> **D. AMOUNT OF COMPENSATION**
>
> In order to determine the amount of compensation that is due, the arbitrator may consider the value of the damage or loss that resulted from a party's non-compliance with the Act, regulation or tenancy agreement or (if applicable) the amount of money the Act says the non-compliant party has to pay. The amount arrived at must be for compensation only, and must not include any punitive element. A party seeking compensation should present compelling evidence of the value of the damage or loss in question. For example, if a landlord is claiming for carpet cleaning, a receipt from the carpet cleaning company should be provided in evidence.

Policy Guideline #6, "Duty to Minimize Loss", includes the following:

> **B. REASONABLE EFFORTS TO MINIMIZE LOSSES**
>
> A person who suffers damage or loss because their landlord or tenant did not comply with the Act, regulations or tenancy agreement must make reasonable efforts to minimize the damage or loss. Usually, this duty starts when the person knows that damage or loss is occurring. The purpose is to ensure the wrongdoer is not held liable for damage or loss that could have reasonably been avoided.
>
> In general, a reasonable effort to minimize loss means taking practical and

common-sense steps to prevent or minimize avoidable damage or loss. For example, if a tenant discovers their possessions are being damaged due to a leaking roof, some reasonable steps may be to:

- remove and dry the possessions as soon as possible;
- promptly report the damage and leak to the landlord and request repairs to avoid further damage;
- file an application for dispute resolution if the landlord fails to carry out the repairs and further damage or loss occurs or is likely to occur.

Compensation will not be awarded for damage or loss that could have been reasonably avoided.

I find that the Tenants did not enquire further with the Landlord about which concierge services the property managers were able to provide. Further, they did not indicate why they could not receive packages via the intercom system at the residential property. I infer from their comments about going for coffee every work day from the rental unit, that they work in the rental unit. As such, I find that the Tenants have not provided sufficient evidence as to why they need a concierge to accept parcels for them. I find that the Tenants failed the fourth step of the Test to mitigate or minimize the damage. As a result, I dismiss this claim without leave to reapply.

#2 COFFEE BAR → $295.00

I find based on the evidence before me, that the coffee kiosk that was planned for the residential property did not, in fact, offer free coffee to tenants. Rather, the original landlord provided space for a coffee bar, which would have been more convenient for the Tenants than having to travel somewhere for coffee drinks.

I find that Counsel's suggestion that the tenants of the residential property can mitigate this loss by purchasing a coffee maker, is not a reasonable solution. A standard coffee maker does not make espresso drinks. I find it consistent with common sense and ordinary human experience that an espresso machine costs significantly more than a standard coffee machine. As such, I find that this approach would not mitigate the Tenant's damages appropriately.

I find that the coffee kiosk was part of the Amenities Use Agreement; however, it was not provided to the tenants of the residential property. I find this is a breach of an

addendum to a tenancy agreement, and that the Tenants have incurred a loss, as a result.

However, I find that the calculation of the loss should not include the cost of the coffees, as it would not have been free at the planned coffee kiosk. As such, I find that the Tenants are eligible for compensation for the cost of having to travel to obtain the coffees that were supposed to be available in the residential property.

The Tenants calculated that it would cost $2.24 per trip to go the 3.8 kilometre round trip. The Tenants said they would make this trip every working day of the year, although they did not say how many days this was. The Tenants' calculation included the coffee cost, the travel cost, and an additional cost of $2.53 per trip, the basis of which they did not explain.

I find that the Tenants have established that the promise of a coffee kiosk in the lobby of the residential property was an amenity that the Tenants would have frequented. However, their calculations inaccurately includes the cost of coffee and another charge that was not explained.

I again turn to PG #16, wherein it states:

> An arbitrator may also award compensation in situations where establishing the value of the damage or loss is not as straightforward:
>
> - "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.

I find that the Tenants have established a loss, the value of which is difficult to determine. I award the Tenants with nominal damages of five percent of their rent, or **$122.90** for the loss of the coffee kiosk in the residential property, pursuant to sections 67 and PG #16.

#3 SAUNA → $131.76

I find that the Promotional Discount is not clearly for the failure to provide the amenities upon move in. Counsel suggested that a landlord does not need to offer promotional discounts in this rental market. However, the lack of explanation of the reason for the discount raises questions in my mind about why it was granted by the Landlord.

PG #16 states:

> **D. AMOUNT OF COMPENSATION**
>
> In order to determine the amount of compensation that is due, the arbitrator may consider the value of the damage or loss that resulted from a party's non-compliance with the Act, regulation, or tenancy agreement or (if applicable) the amount of money the Act says the non-compliant party has to pay. The amount arrived at must be for compensation only, and must not include any punitive element. A party seeking compensation should present compelling evidence of the value of the damage or loss in question. For example, if a landlord is claiming for carpet cleaning, a receipt from the carpet cleaning company should be provided in evidence.

I find that the Tenants were aware that the construction of the residential property was not complete when they moved in. They did not direct me to any evidence indicating when the sauna was scheduled to be completed. And therefore, I find that there was no promise broken in this regard.

Further, I find that it is common knowledge that businesses have been affected by staffing losses, distribution slow-downs, health orders, and other delays from the pandemic. I find it more likely than not that these slow downs would have affected the completion of the residential property, as well, at no fault of the Landlord.

When I consider all the evidence before me on this matter, I find that the Tenants have not provided sufficient evidence of the Landlord's breach of the Act, regulation, or tenancy agreement. Accordingly, I dismiss this claim without leave to reapply, pursuant to section 62 of the Act.

#4 BUSINESS CENTRE → $50.00

Based on the evidence before me in this matter, I find that the Tenants have established that it is more likely than not that the original landlord intended to have computer equipment in the Business Centre. Further, the evidence before me is that the Business Centre does not have any such equipment, nor is the Landlord intending to supply such equipment.

However, I also find that the Tenants did not indicate how or why they would use this Business Centre, and that they do not have their own computers at home or work.

The Tenants said it was difficult to determine a monthly cost of the loss they suffered from this change in plans for the contents of the Business Centre. When I consider this matter overall, I find that the Tenants have not provided sufficient evidence to prove the validity of their claim in this regard. Accordingly, I dismiss this claim without leave to reapply, pursuant to section 62 of the Act.

Summary

The Tenants are awarded a rent reduction of **$122.90** for their Application. Given that they were primarily unsuccessful in their Application, I decline to award the Tenants with recovery of the $100.00 Application filing fee.

I authorize the Tenants to reduce one upcoming rent payment by **$122.90**, in complete satisfaction of this award.

Conclusion

The Tenants are successful in the Application in the amount of $122.90, as a nominal award for the loss of the promised coffee kiosk. The Tenants failed to provide sufficient evidence to prove their other claims on a balance of probabilities. The other claims are, therefore, dismissed without leave to reapply.

The Tenants are authorized to deduct **$122.90** from one upcoming rent payment in complete satisfaction of this monetary award.

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 24, 2022

Residential Tenancy Branch