Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **PSF, MNDCT, FFT**

Introduction

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

1. An Order for compensation for a monetary loss or other money owed pursuant to Section 67 and 62 of the Act;
2. An Order for the Landlord to provide services or facilities required by the tenancy agreement or law pursuant to Section 62(3) of the Act; and,
3. Recovery of the application filing fee pursuant to Section 72 of the Act.

The hearing was conducted via teleconference. The Landlord's Associate Property Manager, EC, and the Tenant, BE, attended the hearing at the appointed date and time. Both parties were each given a full opportunity to be heard, to present affirmed/sworn testimony, to call witnesses, and make submissions.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch (the "RTB") Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they were not recording this dispute resolution hearing.

The RTB emailed the Notice of Dispute Resolution Proceeding package for this hearing to the Tenant on February 9, 2022 (the "NoDRP package"). The Tenant confirmed with the Landlord that email was a permitted way to serve legal documents on them. The Landlord agreed and the Tenant served the Landlord the NoDRP package by using a permitted email address for service purposes. The Landlord confirmed receipt of the NoDRP package. I find that the Landlord was deemed served with the NoDRP package on February 12, 2022, in accordance with Sections 43(2) and 44 of the *Residential Tenancy Regulation*.

The Landlord served the Tenant with their evidence via registered mail on April 20, 2022. EC referred me to the Canada Post registered mail tracking number as proof of service. I noted the registered mail tracking number on the cover sheet of this decision. The Tenant confirmed receipt of the Landlord's evidence on April 21, 2022. I find that the Landlord's evidence was served on the Tenant on April 21, 2022 pursuant to Section 88(c) of the Act.

Issues to be Decided

1. Is the Tenant entitled to an Order for compensation for a monetary loss or other money owed?
2. Is the Tenant entitled to an Order for the Landlord to provide services or facilities required by the tenancy agreement or law?
3. Is the Tenant entitled to recovery of the application filing fee?

Background and Evidence

I have reviewed all written and oral evidence and submissions before me; however, only the evidence and submissions relevant to the issues and findings in this matter are described in this decision.

The parties confirmed that this tenancy began as a fixed term tenancy on June 1, 2021. The fixed term ended on May 31, 2022, then the tenancy continued on a month-to-month basis. Monthly rent is $1,600.00 payable on the first day of each month. A security deposit of $800.00 was collected at the start of the tenancy and is still held by the Landlord.

The Tenant testified that on January 4, 2022, the building's pool was suddenly closed due to a BC Health Order. The Tenant stated he never received a notice from the management of the building, although the property management company has a message portal and messages were posted there. The Tenant says the sauna has been closed for almost one year. The Tenant claims for the closure of the pool he is seeking $100.00 per month for eleven months, $200.00 for preparation of his submissions for this dispute resolution hearing, $100.00 for the application filing fee and interest.

The Landlord stated the pool was re-opened and fully operational on August 26, 2021, then due to BC Health orders, the pool was closed on December 29, 2021. The Health

orders permitted the pool to be opened on January 11, 2022, then the building conducted chemical testing and adjustments and re-opened the pool for resident use on January 20, 2022.

Two weeks after January 20, 2022, the pool was closed again because of failure of a drain line from the suite above the pool, and the only way to repair it effectively was from below the suite. The building retained a building restoration group to complete the extensive project repairs and upgrades to prevent future failures of this kind. At present the area above the pool is still under repair, and the property management company was seeking an estimate from soffit installation companies.

These repairs were not done purposefully, but are required and the building is taking extra, very expensive precautions to prevent future failings of the drain lines above the pool. The pool was opened between August and December 2021, then again for a short period in January 2022. All the residents were notified via the resident messaging portal, and the Landlord maintained that she has confirmation that the Tenant's unit did receive a message about the pool's closure through the portal. The Landlord also stated that notices were posted on the pool door about its closure.

The pool facility is not noted in the tenancy agreement between the parties. The Landlord submits it cannot be construed as a material term of the tenancy agreement. The Tenant states for his daughter, who is autistic, the pool is an important facility they use to maintain her good health. The pool was a feature of the building that was important for him in residing here, otherwise, he would have looked elsewhere.

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 their case is on the person making the claim.

A service or facility is defined in the Act to include "*any of the following that are provided or agreed to be provided by the landlord to the tenant of a rental unit: … (i) common recreational facilities …*".

The Tenant wants the Landlord to provide services or facilities required by the tenancy agreement or law. The Landlord submits that the pool in their building is not a material term included in their tenancy agreement. The tenancy agreement between the parties

includes no mention of the pool, and I find it is neither an essential component to the Tenant's use of the rental unit as living accommodation, nor is the pool a material term of the tenancy agreement. Nonetheless, I find the pool is a facility in the residential building, and although not explicitly mentioned in the tenancy agreement, it is an implied common recreational facility offered in the building, of which the Tenant values. He testified it was a selling point for him applying for residence. The Landlords have rightly conducted themselves in its upkeep, and at present, use of the pool is off limits until the repairs are completed.

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 that party to pay compensation to the other party. As noted in Policy Guideline #16, in order to claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage or 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. In this case, the onus is on the Tenant to prove their entitlement to a claim for a monetary award.

Based on the Landlord's evidence, and through no fault of their own, the Landlord is in the midst of extensive repairs that prevent use of the pool. I find the Landlord has failed to comply with Section 27(2)(b) of the Act which provides:

Terminating or restricting services or facilities

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.

I find the Tenant has proven on a balance of probabilities that he has suffered a loss from the non-use of the pool facilities. I find that the Landlord did notify all residents via the messaging portal that they use to communicate with their residents. The Landlord

testified that the Tenant's unit was notified as they received confirmation the message was sent. I also find that the Tenant is entitled to compensation pursuant to Section 67 of the Act for the loss of use of the pool facility essentially since January 1, 2022. The Tenant submitted evidence from a highly rated hotel which is about a kilometer away that offers swim memberships that include a 25m pool, sauna, steam room, hot tub and Aquafit classes. Some of these offerings are not facilities at the Tenant's residence. I find the Tenant is entitled to compensation for the loss of use of the pool facility at a rate of $75.00 per month for five months, totalling a Monetary Award of $375.00.

The Tenant's claim for the Landlord to provide services and facilities required by the tenancy agreement or law is dismissed with leave to re-apply as the Landlord is taking steps to restore the usability of the pool facility.

The Tenant is not entitled to compensation for his preparation of his submissions or interest on the monetary amount he claimed for this hearing, but I do find as the Tenant is successful in his claim, he is entitled to recovery of the application filing fee. The Tenant may, pursuant to Section 72(2)(a) of the Act, withhold $100.00 from next month's rent due to the Landlord.

Conclusion

The Tenant's application is allowed in part, and I grant a Monetary Order to the Tenant in the amount of $375.00. The Landlord must be served with this Order as soon as possible. Should the Landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court of British Columbia and enforced as an Order of that Court.

The Tenant may withhold $100.00 from next month's rent to recover his application filing fee.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the Act.

Dated: May 19, 2022

Residential Tenancy Branch