Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes RR, OLC, FFT

Introduction

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

- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- an order to allow the tenant to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65; and
- authorization to recover the filing fee for this application, pursuant to section 72.

This hearing commenced at 11:00 a.m., and ended at 12:23 p.m. in order to give both parties a full opportunity to be heard, to present their sworn testimony, to make submissions, and cross-examine one another.

Pursuant to Rule 6.11 of the RTB Rules of Procedure, the Residential Tenancy Branch's teleconference system automatically records audio for all dispute resolution hearings. In accordance with Rule 6.11, persons are still prohibited from recording dispute resolution hearings themselves; this includes any audio, photographic, video or digital recording. Both parties were also clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour Both parties confirmed that they understood.

The landlord confirmed receipt of the tenants' application. In accordance with section 89 of the *Act*, I find that the landlord duly served with the tenants' application. As all parties confirmed receipt of each other's evidentiary materials, I find that these were duly served in accordance with section 88 of the *Act*.

Preliminary Issue – Tenants' Updated Monetary Order Worksheet

I note that although the tenants' had originally filed this application requesting a rent reduction of 22 percent of their monthly rent, the tenants submitted a revised monetary

order worksheet dated March 16, 2023 requesting additional claims totalling $34,955.40.

The tenants did not file any proper amendments to their claim.

RTB Rule 4.6 states the following about amendments:

***As soon as possible**, copies of the Amendment to an Application for Dispute Resolution and supporting evidence must be produced and served upon each respondent by the applicant in a manner required by the applicable Act and these Rules of Procedure.*

The applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Amendment to an Application for Dispute Resolution and supporting evidence as required by the Act and these Rules of Procedure.

***In any event, a copy of the amended application and supporting evidence must be received by the* by the respondent(s) not less than 14 days before the hearing.**

Residential Tenancy Policy Guideline #23 sets out of the sequence of events that must be followed in amending an application, including the following steps:

The following sequence of events must be followed in amending an application for dispute resolution:

1. the applicant completes an Amendment to an Application for Dispute Resolution (form RTB-42);

2. the applicant submits this form and a copy of all supporting evidence on the Dispute Access site or to the Residential Tenancy Branch directly or through a Service BC office to allow service upon each other party as soon as possible, and in any event to each other party not less than 14 days before the date of the hearing;

3. the Residential Tenancy Branch or Service BC accepts the Amendment to an Application for Dispute Resolution form submitted in accordance with the Rules of Procedure;

4. the applicant serves each respondent with a copy of the Amendment to an Application for Dispute Resolution form with all supporting evidence as soon as

possible, and in any event, so that it is received not less than 14 days before the date of the hearing; and

5. the arbitrator, at the hearing, considers whether the principles of administrative fairness have been met through the amendment submission process and whether any party would be prejudiced by accepting the amendment(s), determines whether to accept the amendment(s) and records the determination in a written decision.

A party must be prepared to provide proof of service of the Amendment to an Application for Dispute Resolution and supporting evidence for each respondent.

The tenants did not follow the proper steps in amending their application, which must be properly submitted online, or submitted in person, and accepted at the RTB or Service BC office, and then processed accordingly.

RTB Rules of Procedure 4.2 allows for amendments to be made in circumstances where the amendment can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made. As these circumstances do not fall under RTB Rule 4.2, as no amendments were filed in accordance with RTB Rules of Procedure and Policy Guidelines, only the claims referenced in the tenants' original application were considered.

Preliminary Issue – Jurisdiction

The rental unit referenced in this application is a unit on the second floor of a building where there is commercial space on the main floor. The tenants feel that this matter should fall under the jurisdiction of the RTB as the rental unit is used primarily as a residence since March 2012.

The tenant SA testified that they have lived at the residence for over 11 years, which is used as a live/work space. SA testified that the landlord required them to sign a commercial lease although the primary purpose of the space wasn't for commercial use. SA testified that the space consists of 3 bedrooms, a bathroom, kitchen, and living room. SA testified that the majority of the space was used for living, with approximately 46% used for work until August 2014. SA testified that HB moved in in September 2014, and approximately 41% of the space was used for work purposes. The tenants testified that after 2020, only 34% of the space was used for work.

HB testified that they are a self-employed landscaper, and performs some work related tasks from home such as invoicing. HB testified that they do store some items inside the suite. SA testified that they operate a business that specializes in prints and art reproductions. SA also performs wholesale printing, and does this work out of the live/work space.

RY argued that SA had signed the original lease agreement with their late father, which was noted as a commercial lease. RY testified that the space was formally rented out as part of the retail space, but that in 2012 the landlord started renting out the space as a live/work space, and informed the tenant that a commercial lease was therefore required.

RY testified that in 2020, the tenants had applied for and received federal benefits in the amount of $10,260.00 for small businesses, which the landlord had assisted with by extending the lease for another two years. The landlord argued that the application for benefits would be fraudulent in the absence of a commercial lease. The landlord also pointed out that the structure of rent payments included additional payments that were customary of commercial leases such as “operating expenses” and tax.

The landlord included the original email correspondence from 2012 where the tenant SA had requested discussed their concerns about the use of the space, and how they want to legally operate their business from this space. The landlord noted that it is undisputed that the tenant SA required a crane to move large equipment into the space, which is used for SA’s business.

SA responded that they did purchase a large inkjet printer that was heavy and too long to fit up the stairs. SA argued that the inkjet printer was purchased from a local store that sold standard office equipment and supplies.

Analysis

Residential Tenancy Policy Guidelines #14 and #27 speak to Commercial Tenancies and the jurisdiction of the RTB to deal with tenancies which involve commercial use.

Residential Tenancy Policy Guideline #27 states the following:

Commercial Tenancies

The RTA does not apply to living accommodation included with premises that
i) are primarily occupied for business purposes, and
(ii) are rented under a single agreement.

Generally, if the primary use is residential, the RTA will apply. For example, if a tenant rents a house to live in, and the house has a detached garage which the tenant runs a small yoga studio out of, the RTA probably applies.

If a tenant rents a shop and small living accommodation under a single agreement and the purpose for renting the property is to run a convenience store, the RTA probably does not apply even if the tenant lives in the accommodation.

An arbitrator may consider municipal by-laws including how the property is zoned in deciding whether the tenancy is primarily residential or commercial.

Residential Tenancy Policy Guideline #14 further states:

Sometimes a tenant will use a residence for business purposes or will live in a premises covered by a commercial tenancy agreement. The Residential Tenancy Act provides that the Act does not apply to "living accommodation included with premises that (i) are primarily occupied for business purposes, and (ii) are rented under a single agreement.[1]

To determine whether the premises are primarily occupied for business purposes or not, an arbitrator will consider what the "predominant purpose" of the use of the premises is.[2]

Some factors used in that consideration are: relative square footage of the business use compared to the residential use, employee and client presence at the premises, and visible evidence of the business use being carried on at the premises

In consideration of the evidence and testimony before me, the tenants do not dispute that they utilize the space for both residential and commercial use. The determination of jurisdiction is determined by whether the premise was primarily occupied for commercial use or not.

The landlord argued that the lease agreement was clearly noted as a commercial lease agreement, and that both parties were of the understanding that this was what both parties wanted. The landlord argued that the tenants clearly benefitted from this classification and understood the differentiation from a regular tenancy agreement.

As noted above, the test for whether the RTA applies is not simply about whether the referenced lease agreement is designated as a commercial one, or whether business was operated on the premises. The question is of what the predominant purpose of this space is. In this case, I am satisfied that the main purpose of this space is for living accommodation, rather than for business purposes. I find that both parties clearly reside in the space full time, and consider this space their primary residence. All parties, including the two adults and child, live, sleep, eat, and occupy the home on a full time

basis. Both parties also happen to be self-employed business owners who operate their business out of their living space. I am satisfied that in HB's case, the primary purpose of their business is landscaping which primarily takes place outside of this residence. I am also satisfied that SA's business is one where they perform their work out of the home, and occupy a portion of the space to do so. I am satisfied that regardless of what both parties had agreed to, and regardless of what benefits the tenants received from what the accommodation was classified as, the main use of this space was clearly for living accommodation. Although business may have been conducted on or out of the premises, I am not convinced that the home was used primarily for business purposes.

As such, I conclude that this is a residential tenancy and one which is not excluded from my jurisdiction. As I do have jurisdiction to consider this application, I set out the details of the tenants' application and my findings below.

Issues

Are the tenants entitled to an order to allow the tenants to reduce their rent?

Are the tenants entitled an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement?

Are the tenants entitled to recover the cost of the filing fee from the landlord for this application?

Background and Evidence

I note that both parties had submitted a considerable amount of written materials for this hearing, in addition to their testimony, which I did not take lightly. I thank all parties for their patience in awaiting a decision on this matter as it was important that I took the time to carefully review and consider the evidence before me. While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This tenancy originally began on March 1, 2012 as a 1 year fixed-term tenancy between SA and CY, who is now deceased. A copy of the original agreement was submitted in evidence, which stated that the tenant was renting a portion of the premises located at the rental address, which was approximately 1600 square feet, consisting of the second story unit. The total monthly payment was $2,154.00 per month, which was rent plus 12% HST and $250.00 in Operating Expenses. The landlord had collected a security deposit of $2,194.00.

The current tenancy agreement was signed on July 22, 2022 between the current landlord, LY, and the tenants for a 2 year term. The current agreement also states that the rented area is approximately 1600 square feet, and comprises of a portion of the premises at the rental address. Monthly rent as set out in this agreement is $1,883.00 base rent plus $392.00 Operating Expenses plus $50.00 for the tenants' share of water and gas usage. 5% GST is applied to the amount, bringing the total monthly amount to $2,441.25. The tenants confirmed that as of March 1, 2023, the tenants stopped paying the GST and the Operating Expense portion of their monthly rent.

The tenants testified that they have had limited access to and use of the rental unit as of late March 2023 due to asbestos concerns. The tenants testified that they had only entered the rental unit to attempt to retrieve personal belongings only, and have had to stay elsewhere.

The tenants filed this application as there is a dispute over the tenants' right to access and use of the outdoor space on the premises, which the tenants argue is an actual deck equal to about 22% of the leased space, and a space that they had originally had the use of as part of their monthly rent and tenancy agreement. The tenants testified that the landlord had denied them the use of this space as of November 2022, and the tenants are requesting that the landlord should repair and restore the tenants' access and use of this area, provide the tenants with a rent reduction equivalent to the value of the loss suffered by the tenants by removing this space, and provide the tenants with a proper lease agreement. The tenants are seeking a rent retroactive rent reduction equivalent to 22% of the leased space, or $537.07 per month until September 30, 2024 or until the landlords repair and restore the tenants' access and use of this space. The tenants want a revision to the lease agreement to amend the fixed-term to a month-to-month one which would allow the tenants to look for new housing prior to September 30, 2024.

The tenants confirmed that at the time of the hearing they still did not have use of the outdoor space. The tenants argued that they always had the use of the outdoor space prior to November 2022 when the brought to the landlord's attention the issues with the outdoor deck. The tenants testified that in November 2022 the landlord informed the tenants that they never had permission to use the outdoor space during this tenancy. The tenants argued that until this time, they were never informed that they were prohibited from using this space despite their knowledge of the fact that the tenants were using this outdoor space. The tenants also deny that that they were informed that the door was an emergency exit only. The tenants also argued that the landlord has not proven that there was a risk associated with the tenants using this outdoor space. The

tenants feel that the landlord's motive was to avoid repairing or maintaining the outdoor space, which is showing signs of age and wear and tear. The tenants submitted google earth images of the building, which showed the outdoor space in 2004 and 2009. The tenants argued that items were visible on the deck, which appeared to be a picnic table and chairs.

The tenants submitted text messages between them and the roofing contractor, who referenced the area as a "deck". The tenants also included an email from RY to the previous tenants on March 3, 2012, informing them that "the new tenant in the upstairs space at Main Street, is asking that the couch and chair that [J] left behind on the deck are removed" (names and identifying details redacted for privacy reasons).

Further mails from the previous occupants were submitted in evidence, where the party informed the tenants that the landlord was "well aware that area was being used as a deck as far back as 2004 so to pretend it never was is pretty disingenuous…They visited the space, and saw the deck area being used as a deck area, and they did not object at that time. They certainly didn't say that it was not to be used as a deck when clearly I was using it that way (there was a table and chairs etc…and they saw that)."

The tenants submitted an email from GM, who leased he space from 2002 to 2012. GM stated that the "upstairs deck was definitely considered part of the leased space. We…used it all the time and there isa door specifically for deck access. It was common knowledge that the deck was part and parcel of the…lease and the owners knew it was used by us frequently. They did indeed show me the deck when I leased the space and never mentioned it was off limits".

The tenants testified that although they did not use the outdoor space the space in the winter due to the weather, the tenants used the space daily when the weather was warm, and considered the space an extension of their living area. The tenants testified that the especially enjoyed the use of the outdoor space due to the fact that the rental unit was old and hot in the summer months. The tenants feel that the requested rent reduction is justified based on the square footage of the deck, which the tenants approximated to be 453 square feet.

The landlord responded in the hearing that in November 2022, the tenants were informed that they had to remove their items off of the roof. The landlord argued that their father did inform the tenants in 2012 that the area was a roof, and not a proper deck as the area did not have the proper deck flooring or membrane to be used as a deck. The landlord argued that the lease agreements never included the use of any

outdoor recreational area, and that the landlord had the right to deny the tenants' access and use of the area without compensating them.

The landlord argued that the landlord did include the provision, as noted on the tenancy agreement, that the tenant may move their printing equipment "into the unit via the back deck."

The landlord testified that they discovered in 2022 that the area "looked like a junk yard" and they could not properly access the area and inspect it due to the amount of debris covering the roof. The landlord felt that the damage to the roof was caused by the tenants' belongings. The landlord testified that the continued use of the roof will cause further damage, and caused a significant risk to the business tenants downstairs.

The landlord testified that they were shocked by the fact that the tenants had a gas barbeque, large planters, and other belongings on the roof. The landlord denies knowledge of this as the items are not visible from the street, and the landlord has not inspected the area since the beginning of the tenancy in 2012.

The landlord testified that they were informed by their insurance adjuster that the tenants' behaviour have put the landlord's insurance at risk. The landlord confirmed that there is access to the roof through a door, which was meant to be used as an emergency exit only. The landlord denies that the roof is considered a useable outdoor space.

Analysis

Section 27 of the *Act* establishes the basis for a landlord to terminate or restrict services or facilities with respect to a tenancy:

> ***27*** *(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.*

Section 65(1)(c) and (f) of the *Act* allow me to issue a monetary award to reduce past rent paid by a tenant to a landlord if I determine that there has been "a reduction in the value of a tenancy agreement."

In consideration of the evidence and testimony before me, I do not consider the outdoor space essential to the tenant's use of the living accommodation, and therefore section 27(1) of the *Act* would not apply.

I will now consider whether the tenants are entitled to a rent reduction. In light of the evidence before me, regardless of whether the outdoor space is truly safe to be used as a deck or not, I find the evidence clearly shows that not only have the tenants been using this outdoor space during this tenancy, but so did the previous tenants and occupants as noted in their written statements. I also accept the photo evidence as well as the google images that show the outdoor area containing outdoor furnishings that belonged to the current and previous tenants.

I find that despite the landlord's denial of the fact that they were aware of the tenants' use of this outdoor space, I find that the tenants have established that they have been using this outdoor space for an extensive amount of time with no prior written stipulations or warnings that this area was a roof and not intended to be used as a patio or deck. I find that the evidence clearly shows that the area was referenced as a "deck" by both RY and the roofing contractor as well.

I have considered the landlord's argument that the area was not included in the tenancy agreement as part of the living space. I note that the tenants had an accessible and useable door that allowed them to access this area, and which was not marked as "an emergency exit only". I further note that the tenancy agreement did not contain any exclusions or addendums that clearly noted that the tenants were not to access this area, or use the door for this purpose. I also note that there were no physical barriers that prevented the tenants from accessing this space using the door.

While the current and previous agreements may not have included the outdoor space as part of the area that was rented, these agreements also did not contain any terms excluding this space from the tenants' use. While the landlord argued that this area was clearly excluded, I do not find that the evidence supports this. As the area was physical

attached and accessible through the tenants' rental unit, I do not find it was necessary for the agreements to explicitly list the outdoor space as an included area, much like any adjoining or attached outdoor area such as a yard, patio, or garage. Although the rented area is noted as approximately 1600 square feet, consisting of the second storey unit, I do not find that this clause necessary excluded the outdoor space, especially when decks are not normally included in the calculation of livable space. I further note that the landlord had included a provision for the tenant to move their printer through this area. I do not find that the addition of this provision strengthens or weakens the argument of either party, but it does highlight the fact that this area was contemplated and known to exist by both parties. I find that the evidence supports that the rental agreement was inclusive of the outdoor space, regardless of whether this would pose a potential risk to the property or not.

I will now consider whether the tenants are entitled to a rent reduction pursuant to sections 27(2)(b) and 65 of the *Act.* As noted above, the landlord has the right to remove a facility as long as the facility is not essential to, or a material term of, the tenant's use of the rental unit. In this case I find that the use of the outdoor space is neither essential nor material, and therefore the landlord has the right to terminate the use of the facility as long as they give the tenants proper notice, and the tenants are provided with a rent reduction equivalent to its value.

In this case, the tenants calculated the rent reduction using the approximate square footage of the outdoor space. Although I recognize that the outdoor space is large, and was important to the tenants, especially in the warmer months, I am not satisfied the tenants have established how their calculation reflects the value of the loss resulting from the loss of this space.

I find that the tenants have not demonstrated their entitlement to a 22% monthly rent reduction. I do, however, find that a rent reduction is justified. I note that the tenants confirmed that they did not frequently use the space in the winter months. As the tenants lost use of this space in November 2022, I do not find that any rent reductions for the months of November 2022 to February 2023 to be justified. I find that the tenants are entitled to a rent reduction of 20% for March base rent to be fair. I allow the tenants a monetary order of ($1,883.00 x 20%) $376.60 for their loss of use of the outdoor area for the month of March 2023. I allow the tenants an ongoing rent reduction of this amount for the warmer months of April through to October until the tenants' access to this area is restored, or until this tenancy has come to an end in accordance with the Act.

I note that the tenants requested further orders for the tenancy agreement to be amended. I note that the tenants referenced an inability to access the rental unit due to fears of asbestos contamination, which could possibly mean that the tenancy as become frustrated.

Residential Tenancy Policy Guideline 34 states the following about a Frustrated Tenancy:

A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.

The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms.

A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been frustrated if the frustration is the result of their own deliberate or negligent act or omission.

The Frustrated Contract Act deals with the results of a frustrated contract. For example, in the case of a manufactured home site tenancy where rent is due in advance on the first day of each month, if the tenancy were frustrated by destruction of the manufactured home pad by a flood on the 15th day of the month, under the Frustrated Contracts Act, the landlord would be entitled to retain the rent paid up to the date the contract was frustrated but the tenant would be entitled to restitution or the return of the rent paid for the period after it was frustrated.

As the status of this tenancy is unknown at the time this decision is written, I decline to make any further findings or orders related to the tenants' application.

I allow the tenants to recover the $100.00 filing fee paid for this application.

Conclusion

I allow the tenants a monetary order of $376.60 for their loss of use of the outdoor area for the month of March 2023. I allow the tenants an ongoing rent reduction of this amount for the warmer months of April through to October until the tenants' access to this area is restored, or until this tenancy has come to an end in accordance with the Act.

The tenants may also recover the filing fee.

I issue a monetary award in the tenants' favour in the amount of $476.60. The tenants are provided with a Monetary Order in this amount, and 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 and enforced as an Order of that Court.

The remainder of the tenant's application is dismissed with 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: May 05, 2023

Residential Tenancy Branch