Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

A matter regarding FORTH GEN HOLDINGS LTD and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCT, FFT
PSF, FFT

Introduction

This hearing was convened by way of conference call concerning 2 applications made by the tenants which have been joined to be heard together.

The first application of the tenants seeks a monetary order for money owed or compensation for damage or loss under the *Residential Tenancy Act,* regulation or tenancy agreement and to recover the filing fee from the landlord for the cost of the application. The second application seeks an order that the landlord provide services or facilities required by the tenancy agreement or the law, and to recover the filing fee from the landlord.

Both named tenants and an agent for the landlord attended the hearing, and one of the tenants and the landlord's agent each gave affirmed testimony. The parties were given the opportunity to question each other and to give submissions.

The parties agree that all evidence has been exchanged, all of which has been reviewed and the evidence and testimony I find relevant to the application is considered in this Decision.

Issue(s) to be Decided

- Have the tenants established a monetary claim as against the landlord for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, and more specifically for items removed by the landlord?
- Have the tenants established that the landlord should be ordered to provide services or facilities required by the tenancy agreement or the law, and more specifically for a rooftop patio?
- Should the tenants recover either of the filing fees from the landlord?

Background and Evidence

The tenant testified that this fixed-term tenancy began on August 15, 2021 and reverted to a month-to-month tenancy after February 28, 2022 and the tenants still reside in the rental unit. Rent in the amount of $1,935.00 was payable on the 1st day of each month, which has been increased and is now $2,137.25. There are no rental arrears. On July 28, 2021 the landlord collected a security deposit from the tenants in the amount of $965.00 which is still held in trust by the landlord, and no pet damage deposit was collected. The rental unit is an apartment suite, and a copy of the tenancy agreement has been provided for this hearing.

The tenants have provided a Monetary Order Worksheet setting out the following claims, totaling $165.63:

- $102.92 for a baby playmat; and
- $62.71 for steel storage shelving.

Since moving into the rental unit, all tenants had been given access to the roof top. Everyone stored outside furniture and plants behind the doorway. The tenants in this matter had stored a child's playmat and shelving, but when the new landlord took over, the landlord removed them. The tenants did what everyone else had done. The tenants talked to another agent of the landlord, who said she would get back to the tenants because she didn't know where the tenants' items were, but never did. The landlord said no one is allowed to store anything there and disposed of the tenants' items without notice.

The rooftop was a large rooftop patio and when the tenants first moved in, the owner at the time showed the rooftop first, and shared patio, the whole rest of the roof of the building, and said it was for everyone's use and said the tenants could add furniture and make it their own. However when the new landlord took over, they said that years previously there was a suicide. The rooftop is why the tenants rented there, and is outside the tenant's front door. The tenants purchased furniture, lighting and 2 full sets were there, which was common knowledge and the tenants' daughter spent time there in the summer.

In the fall or winter 2023 a new roofer was called in and the new owner sent paperwork to the tenants saying a fire safety person recommended closing it, with no reasoning. There is no lighting in the exits, no exit signs, and there is nothing in the report but the landlord felt it was an emergency, which seems fishy. The landlord is making it difficult for people to live there so they will move out and the landlord can increase rent. They immediately threw out items, then closed roof then closed visitor parking, saying, "Too bad," which is an odd way to handle it. The tenant contacted the Residential Tenancy Branch and was

told that the landlord cannot close it without process but closed it within a couple of weeks or less of sending notice to the tenants on the landlord's letterhead. On June 26, 2024 the landlord gave the notice, put up metal bars on both sides of the rooftop, and no access is permitted.

The landlord's agent testified that the new landlord took over the rental complex on June 19, 2024.

Items left were not labeled, left in a location which was an emergency stairwell, was a safety hazard and obstructed access to the emergency exit stairwell. The tenants' items accordingly were considered abandoned to maintain safety and cleanliness in the building. The recommendation came by the Fire Safety contractor.

The tenancy agreement states that all property must be kept in a proper storage area and the landlord will not be responsible for any loss. Nothing was of any value. Items must be stored in the tenants' rental unit or in an assigned storage locker agreement, and never in public areas of the building.

The landlord has provided a copy of the fire safety report and testified that a copy of the document was not provided to tenants; they were instructions for the landlord, and has only been provided to the tenants as evidence for this hearing. The rooftop was never a service or facility required by the tenancy agreement or the law. Landlords can set rules for common areas. There are over 40 units, and this unit is larger than most with regular sized balconies, which the tenants have access to. A copy of the 9th floor layout has also been provided for this hearing, which is not to scale, however the roof has nothing to do with the rental unit and it is not connected. The Fire Safety report instructions also say to restrict access, and install a fence with a gate for roofers or elevator contractors. It does not mention fire exits or lighting because it was an initial assessment and the fire inspection took place at a later date.

SUBMISSIONS OF THE TENANTS:
In the fall of 2023 the rooftop was brought up to code by a roofing company. This emergency inspection didn't feel it was important for lighting or fire exit signs, is fishy and the tenants feel they are being forced out. The landlord had to give notice of closure of the common amenity or services, but still hasn't done so, and it took away the tenants' summer on the rooftop.

SUBMISSIONS OF THE LANDLORD'S AGENT:
The landlord was not aware that the tenants had a daughter. Items unlabeled and left in an area that they should not have been, and there was no value. The Invoice for removing garbage and photographs of items removed have also been provided for this

hearing. The notice of closure of common amenity or services is needed if a service or facility is removed, but the rooftop was never included in the tenancy agreement, and only those in the tenancy agreement are applicable. Section 25 of the tenancy agreement states that tenants must follow the rules that are valid and enforceable.

Analysis

Firstly, I have reviewed the tenancy agreement, and I agree that the rooftop patio is not mentioned in it. However, the tenants had asked the landlord in an email to return the tenants' personal items, and the landlord emailed the tenants saying that any items stored in the stairwells by the roof top deck must be removed or they will be sent to the garbage. The landlord testified that the items removed had no value and were not labeled.

The landlord also testified that a landlord may set rules for common areas, meaning that the rooftop patio is a common area.

I have also reviewed the Fire Safety contractor's report, which speaks to training staff, removing items and cleaning common areas and stairwells, inspecting smoke alarms and erecting a fence to restrict roof access. It also states that the building's annual fire and safety inspection is booked for July 23, 2024, but the landlord did not provide any information about that, such as whether or not it did take place, or whether or not it would be completed by a contractor or the fire department. The contractor's report is written by the owner of a company, not by the fire department, and there is no evidence to support whether or not the report or the contractor is qualified to do the inspection or make recommendations.

The tenant testified that the rooftop patio is the reason the tenants moved there, which would make it a material term of the tenancy agreement. However, if it was a material term, it ought to have been written into the tenancy agreement, but it isn't.

I have also reviewed the landlord's notice dated June 26, 2024 stating that effective immediately smoking is prohibited anywhere on the property, including the parking lot. A landlord may not prohibit smoking unless it is contained in the tenancy agreement. The notice also mentions visitor parking, and that the roof access will be permanently closed, and personal items will be put in the garbage after July 31, 2024.

I have also reviewed another notice, presumably by the previous owner saying that tenants are welcome to enjoy the fireworks on the rooftop patio, but no glass or alcohol are permitted. Several emails have also been provided for the hearing indicating that the rooftop patio may be removed. One of the emails, dated May 13, 2023 from

presumably the previous landlord states that work will be completed to the rooftop deck, during which there will be no access to the area for approximately 2 months. It was not until June 26, 2024 that the landlord posted a notice indicating that the rooftop would be closing permanently effective July 31, 2024, and the email from the tenants dated June 28, 2024 indicates that the tenants' items were removed while the tenants were out of town. There was little to no notice to the tenants prior.

A landlord may not remove a service or facility that a tenant has enjoyed. I refer to Residential Tenancy Policy Guideline 22 – Termination or Restriction of a Service or Facility, which states, in part:

> **A. LEGISLATIVE FRAMEWORK**
>
> 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 facilities 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).
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> 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.
>
> A landlord may restrict or terminate a service or facility other than one referred to above, if the landlord:
> - gives the tenant 30 days written notice in the approved form, and
> - reduces the rent to compensate the tenant for loss of the service or facility.

The Policy Guideline also states that:

> 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. There are six issues which must be addressed by the landlord and tenant.
> - whether it is a service or facility as set out in Section 1 of the Legislation;
> - whether the service or facility has been terminated or restricted;

- whether the provision of the service or facility is a material term of the tenancy agreement;
- whether the service or facility is essential to the use of the rental unit as living accommodation or the use of the manufactured home site as a site for a manufactured home;
- whether the landlord gave notice in the approved form; and
- whether the rent reduction reflects the reduction in the value of the tenancy

Section 1 of the Legislation sets out definitions, which includes common recreational facilities. The definition of a "common area" means any part of the residential property the use of which is shared by tenants, or by a landlord and one or more tenants.

In this case, there is no question that the rooftop patio is not an essential service. However, considering the evidence which shows that the facility was advertised as available, and that it was provided to the tenants by the previous landlord since the beginning of the tenancy, I find that the tenants are entitled to 30 days notice and a reduction in rent to compensate the tenants for the loss, and I so order.

With respect to the tenants' monetary claim, the onus is on the tenants to satisfy the 4-part test for damages:

1. that the damage or loss exists;
2. that the damage or loss exists as a result of the landlord's failure to comply with the *Residential Tenancy Act* or the tenancy agreement;
3. the amount of such damage or loss; and
4. what efforts the tenants made to mitigate any damage or loss suffered.

The tenants have provided proof that the loss exists, and that the loss exists as a result of the landlord's failure to comply with the *Act*, and the amount of the loss. I accept the landlord's testimony that the items were not labeled, but that does not give the landlord the right to dispose of them. The tenants' email to the landlord dated July 8, 2024 states that the tenants would have gladly removed them if they had been given notice. I find that the tenants have established a claim as against the landlord in the amount of $165.63.

Since the tenants have been successful with the applications, the tenants are also entitled to recover the $200.00 in filing fees.

I grant a monetary order in favour of the tenants as against the landlord in the amount of $365.63. The landlord must be served with the order, and I order that the tenants be permitted to reduce rent for a future month by that amount, or may file the order in the

Provincial Court of British Columbia, Small Claims division and enforce it as an order of that Court.

Conclusion

For the reasons set out above, I hereby order the landlord to provide the tenants with no less than 30 days notice of removal of the rooftop patio and reduce the rent accordingly.

I further grant a monetary order in favour of the tenants as against the landlord pursuant to Section 67 of the *Residential Tenancy Act* in the amount of $365.63, and I order that the tenants may reduce rent for a future month by that amount, or may otherwise recover it.

This order is final and binding and may be enforced.

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: October 01, 2024

Residential Tenancy Branch