



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes:

MNDC, FF

Introduction

This hearing was scheduled in response to the tenant's Application for Dispute Resolution, in which the tenants have made application for a monetary Order for loss or damage and to recover the filing fee from the landlord for the cost of this Application for Dispute Resolution.

Both parties were present at the hearing. At the start of the hearing I introduced myself, the Application for Dispute Resolution was reviewed, the hearing process was explained to the parties and the parties were provided an opportunity to ask questions in relation to the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral evidence and to make submissions during the hearing.

Issue(s) to be Decided

Are the tenants entitled to compensation as the result of a loss of quiet enjoyment?

Background and Evidence

The tenants entered into a tenancy agreement in July 2008 for a 7th floor rental unit. Rent was \$3,500 per month and, effective August 1, 2009, increased to \$3,625.00. The tenants submitted evidence which supported their testimony that commencing in September 2008 a Marine Centre construction project commenced in the 10,000 sq. foot ground-level floor of their building.

The tenant's stated they had sold their home with the intention of locating to a residence that would be suitable for convalescence as the male tenant was to undergo two surgeries which would limit his mobility and require a period of recuperation. During the hearing both parties confirmed that, at the time the tenancy agreement was signed, neither the landlord's agent or the tenants were aware of the impending project.

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The tenants testified that from September 2008 until the end of June 2009 they experienced a significant loss of quiet enjoyment. The tenants are claiming rent abatement of \$500.00 per month for this loss of quiet enjoyment. The tenants stated that the construction project required the drilling of over 1,000 holes into concrete and that this, combined with other sounds of this large construction project, was so severe that it was difficult to listen to music, watch television or read.

The tenant's witness testified that he lives one floor below the tenants and that on occasion the noise was unbearable, at times causing him to leave his home. The witness stated that the first time he heard the noise he had no idea what it was and went searching the hallways in an attempt to discover the source. The witness stated that the sound of construction reverberated through the building and that it was loud and constant. The witness stated that construction occurred on week days only and that the manager of the project did communicate with the residents of the building and made attempts to work only between 8 a.m. and 5 p.m.

The tenants testified that the project manager did communicate a schedule of work to be completed and times occupants could expect high noise levels. The tenants supplied copies of the Marine Centre web site updates that were posted for the benefit of the neighbours to the construction project. The first entry indicates that August 21, 2008 was to see the delivery of two large aquarium units.

The following correspondence took place between the parties:

- January 8, February 10, March 10, March 16, 2009 emails to the landlord's agent, the first of which describes the on-going noise which commenced in the fall of 2008 and includes a request for rent abatement;
- March 18, 2009 letter to the landlord's agent again outlining their concerns and requesting abatement retroactive to September 2008;
- March 23, 2009 response from the landlord's agent indicating the landlord is not willing to provide compensation as they are not due to any action of the owner but "are part of life in an area that is being developed" and do not violate the strata bylaws or municipal bylaws;
- April 7, 2009 letter to the landlord's agent again requesting rent abatement for the loss of quiet enjoyment; and,
- May 11, 2009 from a Calgary agent of the rental unit's owners which denies compensation as the noise is beyond the owner's control and that when the tenant accepted the rental; unit they were aware that the "area is still under construction."

The tenants testified that the rental unit owners are major investors in the Marine Centre project and would have been aware of the impending construction. The tenants stated

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that the Marine Centre has been named after the rental unit owner's family. The tenants stated they were not made aware of any upcoming construction and, if they had been, they would not have rented the unit.

The landlord's agent testified that he first became aware of the construction project when the tenants emailed him in January 2009. The landlord's agent could not tell me if the rental unit owners were aware of the project or not, only that a major project sponsor would not have known construction noise would transfer throughout the building. The landlord's agent stated that in July 2008 the ground floor of the building had signs posted indicating the space was for rent. The agent stated that he believed the noise transfer within the building would be minimal or negligible and that the construction complied with municipal bylaws.

The tenants stated that it is unfortunate they did not ask the landlord's agent to attend at their home so that he could obtain a full understanding of the level of disturbance.

Analysis

Section 28 of the Act provides:

A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

- (a) reasonable privacy;
- (b) **freedom from unreasonable disturbance;**
- (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [*landlord's right to enter rental unit restricted*];
- (d) use of common areas for reasonable and lawful purposes, free from significant interference.

(emphasis added)

Residential Tenancy Branch policy requires that every tenancy has the right to quiet enjoyment. The policy also provides that a landlord would not be held responsible for interference by an outside agency that is beyond his or her control, except that a tenant might be entitled to treat a tenancy as ended where a landlord was aware of circumstances that would make the premises uninhabitable for that tenant and withheld that information in establishing the tenancy.

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I must examine the claim made by the tenants in relation to the knowledge the landlord had at the time the tenants entered into the tenancy agreement. Whether the tenants are entitled to compensation hinges on the knowledge the landlord and rental unit owners had at the time the tenancy agreement was signed.

The tenants testified that the rental unit owner “is a major sponsor” of the Marine Centre and referenced the May 11, 2009 letter from the owner’s Calgary agent which confirms the owners last name. The tenants stated that the Marine Centre has been named after this family. If the owners were aware of the construction project, prior to July 2008, or at least at the time the tenancy agreement was signed, there would be no doubt that the owner’s knowledge of the imminent construction project was not shared with the tenants.

During the hearing the landlord’s agent did not counter the assertion made by the tenants that the rental unit owners were major financial contributors to the Marine Centre project. The landlord’s agent did not provide any evidence or offer any testimony to the contrary. Therefore, I have accepted, on the balance of probabilities and, in the absence of any evidence to the contrary, that the owners of this rental unit were aware of the impending Marine Centre project and failed to inform their agent who arranged this tenancy. The failure to inform the agent resulted in a lack of critically important information being furnished to the tenants prior to them entering into the tenancy agreement.

It is not reasonable to expect that a ten month construction project, that was planned to commence in August 2008, would not impact those who lived directly above the project. Even if the landlord believed that the disruption was not going to be severe I find that the landlord had a responsibility to disclose the project to potential tenants so that they could make an informed decision. I agree that once the project commenced the disruption caused was beyond the control of the landlord, but disclosure of the project was withheld, resulting in a loss in the value of this tenancy.

Therefore; based upon the testimony and evidence before me I find that the tenants have experienced a loss of quiet enjoyment for an extended period of time and I find that the tenants are entitled to rent abatement for the loss of quiet enjoyment experienced from September 2008 to June 2009 inclusive, in the sum of \$500.00 per month. I find that this amount provides minimal recognition of the loss experienced by these tenants, particularly in light of the tenant’s explicit desire for a quiet location suitable for convalescence from surgery.

As the tenant’s application has merit I find the tenants are entitled to filing fee costs in the sum of \$50.00, which may be deducted from rent owed.



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Conclusion

The tenant's claim for compensation due to a loss of quiet enjoyment is accepted and I find that the tenants are entitled to rent abatement, retroactive to September 2008, to June 2009 inclusive, in the sum of \$5000.00.

I find that the tenants are entitled to filing fee costs and may deduct \$50.00 from rent owed.

The total compensation to the tenant's is \$5,050.00.

The tenants may deduct \$3,625.00 from the next month's rent owed and \$1,875.00 from the following month's rent owed.

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: September 25, 2009.

Dispute Resolution Officer