Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes:

MNDC, MNSD, FF

Introduction

This hearing was scheduled in response to the landlord's Application for Dispute Resolution, in which the landlord has made application for compensation for damage or loss under the Act and to recover the filing fee from the tenant 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 and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about 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 testimony and to make submissions during the hearing.

Preliminary Matter

The tenant had a witness present who did not testify. The witness planned on testifying as to the level of disturbance caused in the rental unit and as this testimony would mirror that of the tenant it was deemed unnecessary to have the witness provide testimony.

The tenant did not submit any evidence; the landlord served the tenant with 14 pages of evidence.

Issue(s) to be Decided

Is the tenant entitled to compensation for damage or loss under the Act?

Must the landlord be Ordered to comply with the Act?

Background and Evidence

During the hearing the parties agreed to the following facts:

- The tenancy commenced on September 1, 2010;
- Rent was $1,200.00 per month due on the first of each month;
- That prior to the start of the tenancy the landlord told the tenant that exterior work was being completed to the 83 unit building;
- That at the time of move-in scaffolding was visible on the exterior of the building;
- That on October 31, 2010, the tenant gave written notice ending the tenancy effective November 30, 2010;
- That the tenant moved out on November 30, 2010; and
- That this was a fixed-term tenancy that was to terminate effective August 31, 2011.

The tenant is claiming compensation in the sum of $300.00 per month from September to November, 2010, inclusive, for the loss of quiet enjoyment.

The tenant stated that she was told the exterior work to the building would be completed by the end of September and that she was not forewarned of the extent of disruption she could expect in the her unit as a result of this work. The tenant works part-time and is a student, so she was home at least 75% of the time that the work was undertaken each week day between the hours of 8 or 9:30 a.m. to 3:30 p.m.

The tenant described the grinding sounds as unbearable and found the stopping and starting of the noise very difficult to deal with. The tenant did not approach the landlord to request any rent abatement or to seek a solution. On November 8, 2010, the tenant wrote the landlord to address a number of concern such as move-in cleanliness issues, a hedge in the parking area, smells emanating from the suites next door and the issues of noise. The letter indicated that the tenant had been told the work would be completed by the end of September, that she had been subjected to noise that was not contemplated or presented at the time she submitted her application for tenancy, that she knew windows would be installed but was not told about the noise that would result in concrete work and intrusions onto her balcony.

The November 8 letter did not seek a solution but informed the landlord that the tenant would submit an application for compensation. The tenant gave her notice and asked that the liquidated damages clause be cancelled. The tenant stated even if the landlord had offered abatement she would have moved out as she was no longer willing to live in the building. The noise was intolerable and she could not peacefully enjoy her unit.

The landlord responded that she would never have told the tenant when the work would be completed as she did not have a possible date to present to tenants. The landlord felt the tenant fully understood that remediation was taking place; that she could see the scaffolding when she applied to become a tenant and that she does not recall the tenant

ever calling her to complain. On September 10 and October 4, windows in the tenant's unit were replaced. There was intermittent grinding of concrete and the hours of work were limited, at one point moving the start time from 8 a.m. to 9:30 a.m. in an attempt to minimize disturbances.

The landlord responded to the tenant's November 8 letter with a letter dated November 15, 2010, a copy of which was supplied as evidence. This letter indicated that the tenant had been aware at the time she moved in that remediation work and concrete work was to be completed and that an exact completion date was not known. The letter stated that tenant decided she would rent and that she was made fully aware of the project.

The landlord does not deny that the remediation caused disturbances, but, in answer to my question, that of the 14 new tenants who signed tenancy agreements since the tenant moved in, none have moved out or requested compensation. Some occupants have complained to the landlord, as they have also been disturbed by the noise.

The landlord stated she was stunned by the tenant's application; that she made no formal complaint or attempts to find a solution and that they would have taken her concerns seriously as they have with all of their tenants.

Analysis

Residential Tenancy Branch Policy suggests that a claim for quiet enjoyment must include consideration of factors such as the amount of disruption suffered by the tenants, the reasons for the disruptions, if there was any benefit to the tenants for the disruptions and whether or not the landlord made his or her best efforts to minimize any disruptions to the tenant.

The policy also suggests that it is necessary to balance a tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises, however a tenant may be entitled to reimbursement for loss of use of a portion of the property even if the landlord has made every effort to minimize disruption to the tenant in making repairs or completing renovations.

Substantial interference that would give sufficient cause to warrant the tenant leaving the rented premises would constitute a breach of the covenant of quiet enjoyment, where such a result was either intended or reasonably foreseeable. I find this to be a reasonable policy.

The tenant has claimed for loss of quiet enjoyment as the result of remediation to the exterior of the building. The parties agreed that there were disturbances caused to all occupants of the building and that the work continued beyond the date the tenant vacated the unit, November 30, 2010.

When making a claim for damages under a tenancy agreement or the Act, the party making the allegations has the burden of proving their claim. Proving a claim in damages requires that it be established that the damage or loss occurred, that the damage or loss was a result of a breach of the tenancy agreement or Act, verification of the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

I have considered the testimony of both parties and have determined that the tenant failed to take any steps to mitigate the loss she is now claiming. Section 7 of the Act requires a party to do whatever they can to minimize the damage or loss claimed. There is no evidence before me that the tenant sought any solution to the claim she is now making. The only communication that outlined the concerns she had was contained in a November 8, 2010, letter in which she informed the landlord that she would be seeking a remedy via the dispute resolution process.

Even if the tenant had not failed to mitigate her loss claimed, I find that she was aware of the remediation work at the time she applied to move in; which would have been obvious from the scaffolding around the building. Further, the landlord reported that none of the 14 other occupants who have moved in since the tenant have issued any formal complaint or sought compensation. I find that this supported the landlord's submission that the steps taken to minimize the disturbances were reasonable.

I found the landlord's testimony in relation to an expected end date of construction reasonable; the landlord was not provided with a construction end date and it is unreasonable to accept that she would have provided a completion date when none had been issued by the contractor.

The tenant moved out 3 weeks later, without providing the landlord any opportunity to reach some sort of settled agreement with the tenant. Further, the tenant has claimed compensation for a period of time during which there is only disputed testimony in relation to 1 telephone call to the landlord to discuss the noise. I cannot rely upon 1 telephone call; that is in dispute, as any indication of an attempt to mitigate the claim now being made by the tenant.

A landlord must retain the right to complete repair and renovate and in this case I find that the tenant did understand that remediation was occurring, prior to her signing her fixed term tenancy agreement. All units were having new windows installed, which would result in an increased value to the tenants. If there was evidence before me that the tenant had sought a solution to her concerns it is possible that this claim may have been unnecessary and the tenancy could have continued.

Therefore, I dismiss the tenant's claim for compensation.

Conclusion

The tenant's application is dismissed.

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: December 14, 2010.

Dispute Resolution Officer