



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes ERP, RP, MNDC, MNR, FF

Introduction

This hearing dealt with the Tenant's Application for Dispute Resolution, seeking order for the Landlord to make emergency repairs, to make other repairs required under the Act or tenancy agreement, an order for the cost of emergency repairs, for monetary compensation under the Act or tenancy agreement and to recover the filing fee for the Application.

Both parties appeared, gave affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions to me.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

In this Application, the Tenant named an Agent for the Landlord who represented the Landlord during much of the relevant times of the claims. Just prior to the first hearing the Landlord had a new commercial Agent take over from the prior commercial Agent. Therefore, I have amended the style of cause of the Application to reflect the new commercial Agent.

I also note the hearing was conducted over two days. The first part occurred on June 16, 2011, and was adjourned as the new Agent for the Landlord requested time to view the rental unit and familiarize himself with the circumstances. This Agent appeared in the second hearing, as well a representative of the prior Agent for the Landlord.

Issue(s) to be Decided

Is the Tenant entitled to the relief sought in the Application?

Background and Evidence

The rental unit is a penthouse style apartment on the roof of a building in Vancouver. The monthly rent is \$1,413.00. The rental unit has two balconies, which represent approximately 17.3% of the total square footage rented by the Tenant. The Tenant used to occupy a unit on a lower floor, however, the balcony and views made it attractive to her to move to this unit. The Tenant has lived in the rental unit for approximately 10 years.

In June of 2009, the Landlord had construction work performed on the roof and terrace of the building. The Tenant testified that the construction ceased in February of 2010.

During the course of this work, the Landlord removed a wooden deck which sat on top of the balcony floors for the rental unit. The wooden deck allowed water to drain from the surface to the membrane below. The wooden deck also allowed the Tenant and her family to walk on the wooden deck, rather than the surface below.

A torch on roof material was used to resurface the balcony floors. The torch on material is similar to a shingle as it has grit on its surface.

The Tenant's claim in this matter is that the Landlord has failed to replace the wooden deck covering the balcony floor. If the Tenant or her family go out onto the balcony they track in the grit from the membrane. If it has rained recently, there are pools of water.

More importantly to the Tenant, the lack of the wooden deck creates a larger gap between the balcony floor and the railing around it. She is concerned for the safety of her two young children due to the large gap. The Tenant alleges that the gap on the balcony railing now exceeds what is required under the bylaws of the city of Vancouver. The Tenant alleges that the bylaws allow a gap of 4 inches, while the gap is currently 5 ½ inches.

The Tenant requests the Landlord replace the wooden decking and wants compensation in the amount of \$6,074, for loss of use of the balconies, based on 23 months loss of use of 17.3% of the rental unit. Included in this compensation is \$452.00 for loss of use of an ensuite bathroom from June 2009 to January 2010. The Tenant had to store her balcony furniture in this bathroom during the approximately eight months of construction.

The Tenant also claims during the construction her two children, respectively aged five months and three years at the time of the construction, were not able to sleep due to the loud hammering and drilling during the week. The Tenant submits that on many occasions during construction she had to leave the rental unit and have the children

sleep in the car. The Tenant also claims that the roofing materials stored on the roof at the time of construction made a great deal of noise at night when it was windy. The Tenant claims compensation of \$504.00 for loss of quiet enjoyment, as she and her children had to leave the building for approximately four hours per day, on weekdays, during the noisiest three months of the construction.

During the eight months of construction there was caution tape on the glass doors of the rental unit, blocking views. The Tenant also had to close the blinds for privacy and there was plastic matting in the hallway. The Tenant claims for \$800.00, or \$100.00 per month, for loss of enjoyment of the rental unit.

The Tenant also had to hire a plumber to fix two toilets in the rental unit. The Tenants had asked a building manager to have the two toilets repaired. After three months of waiting, the Tenants had these repaired and submitted the receipt in the amount of \$150.00 to the Agents for these repairs, however, they have not been reimbursed.

The Tenant wrote to the Agent for the Landlord on January 18, 2010, requesting the balconies be repaired, and that other issues as described above be addressed. In that correspondence the Tenant requests an unspecified amount of compensation, and cautions the Landlord that failure to do the repairs will result in an Application to the branch.

In her testimony and submissions, the Tenant brings forward a similar case with a different rental unit in the same building requesting mostly similar relief.

The current Agent for the Landlord testified that he has viewed the rental unit and he is not sure the Landlord is obligated to provide the wooden decking. He testified that the current balcony is useable by the Tenant and her children, if she supervises her children while they are out on the balcony. The Agent testified that the balcony is not as "user friendly" without the wooden deck, but it is still useable. The Agent also questioned the Tenant's calculation of loss of use of the deck, as the Tenant would not be using the balcony 24 hours per day, every day of the year. The Agent testified that, for example, the decks would not be used much in winter.

The Agent testified that he was uncertain of the code that applied to the balcony railings at the time these were installed.

The Agent also testified that the Landlord could have made alternate arrangements for the Tenant to store her deck furniture, rather than using her ensuite bathroom.

The prior Agent for the Landlord testified that the construction did start in June of 2009 and was completed in February of 2010. This Agent testified that the Tenant was not communicating with her in the January 2010 email sent. The Agent testified that the Tenant was not communicating with her after the email, and therefore, she believed the work had been completed. She testified the Tenant did not repeatedly tell her or the other Agents that the work needed to be done. The Agent further testified that at the time the Tenant wrote to the Landlord there was still work being done and the Agent had to consult with the engineers doing the construction.

The Agent further testified that during the transition period between the different Agents the Landlord had instructed her not to spend money on the balcony decks or other matters.

Analysis

Based on the above, the evidence and testimony, and on a balance of probabilities, I find the Landlord is in breach of the tenancy agreement and the Act.

I find that the Tenant is entitled to orders for the Landlord to make repairs to the rental unit balconies to provide what the parties had contracted for at the start of the tenancy.

Under section 62 of the Act, an order may be made which is necessary to give effect to the rights, obligations and prohibitions under the Act, including an order to comply with the Act, regulation or tenancy agreement.

Therefore, I order the Landlord to immediately install new wooden deck coverings substantially similar in quality and style to the ones removed during construction.

I further find the breaches of the Act and tenancy agreement have caused the Tenant to suffer losses, as described below. I find the Tenant notified the Landlord in writing of these problems and the Landlord failed to take any substantial action to remedy this breach of the tenancy agreement and the ongoing breaches of the Act. I find the Landlord was aware, or ought to have been aware, of the breaches from June of 2009, until the present day. Furthermore, despite the fact the Landlord had been in one previous dispute hearing regarding substantially similar facts with a different unit in the same building, the Landlord ignored the requests of the Tenant.

While I note the similar case with a different rental unit in this same building, section 64(2) of the Act sets out that I am not bound to follow this other decision. Each case is

different and must be determined on the merits of the particular case, based on the evidence admitted.

On the issue of the wooden deck covering, I find the Landlord has failed to provide the Tenant with balconies with wooden deck covering which was part of what the Tenant contracted for when she rented the unit. Consequently the Tenant has suffered a loss of use for a portion of the rental unit, although I do accept that the Tenant would not have been using the balcony everyday during the tenancy and have taken this into account below.

Section 67 of the Residential Tenancy Act states:

Without limiting the general authority in section 62(3) [*director's authority*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

I find that the Tenant is entitled to compensation for approximately half of the amount she has claimed for, in the amount of \$125.00 per month for the past 24 months, totalling **\$3,000.00**, for loss of use of the balconies.

Furthermore, the Tenant may deduct the sum of **\$125.00** per month from her rent beginning in July of 2011, until the wooden deck coverings are installed once again, in accordance with my order above.

I find the Tenant had a loss of use of the ensuite bathroom during the approximately eight months of construction, and I allow her **\$400.00** for this loss.

As to the claim for loss of quiet enjoyment, policy guideline 6 to the Act states, in part:

Temporary discomfort or inconvenience does not constitute a basis for a breach of the covenant of quiet enjoyment.

It is necessary to balance the 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.

I find the Tenant, her spouse and her children suffered a loss of quiet enjoyment of portions of the unit during the noisiest three months of construction and I allow the Tenant **\$300.00**, or \$100.00 per month, for this loss.

I find the Tenant has been adequately compensated for loss of use of the balcony above and therefore, I make no award for the loss of views.

Lastly, I award the Tenant **\$150.00** for the repair of the toilets. While the Tenant did not submit an invoice to prove this amount, I accept her testimony that she gave it to an Agent for the Landlord and this amount was not reimbursed.

In summation of the monetary orders, I find the Tenant has established a monetary claim in the amount of **\$3,950.00**, comprised of the above described amounts and the \$100.00 filing fee for the Application. I grant and issue an order in those terms.

It is open to the Landlord and the Tenant to make an arrangement that the compensation may be deducted from monthly rent payments.

Conclusion

The Landlord is ordered to replace the wooden deck coverings on the balcony. Until this is done, the Tenant may deduct \$125.00 per month from the rent.

The Landlord must pay the Tenant the sum of \$3,950.00. An order has been granted, however, the parties are free to come to an arrangement to deduct the monetary compensation from the rent payable.

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: June 29, 2011.

Residential Tenancy Branch