Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC, FF, RR

Introduction

This hearing dealt with an application by the landlord seeking a monetary order for unpaid rent, damage to the suite, and compensation for loss or damage suffered under the Act, the regulation or the tenancy agreement, and an order to retain the security deposit in partial satisfaction of the claim. The tenants have made an application seeking a monetary order for compensation for damage or loss suffered under the Act, regulation or tenancy agreement and an order seeking the return of their security deposit. Both parties participated in the conference call hearing. Both parties gave affirmed evidence. This matter was conducted over two separate days.

Issues to be Decided

Is either party entitled to any of the above under the Act, the regulations or the tenancy agreement?

Background and Evidence

The tenancy began on or about February 1, 2011 and ended on November 26, 2011. The tenancy was to be for a fixed term of one year and was set to expire on January 31, 2012. Rent in the amount of $1400.00 is payable in advance on the first day of each month. At the outset of the tenancy the landlord collected from the tenant a security deposit in the amount of $700.00.

The landlord gave the following testimony; subject unit is one of four penthouses situated beside each other, there is a “Limited Common Property” rooftop terrace that is situated over the subject unit, the owner of the apartment next door owns the “Limited

Common Property" above the subject unit, that person is also the vice president of the strata council for this particular building, the landlord was not aware construction was going to be undertaken, was not aware of the scope and length of duration, when she made inquires with the resident building manager she was informed that the individual who was conducting the construction had "all the right permits, special ones", on November 7, 2011 received the first verbal complaint from her tenant that the construction noise was excessive and regular, the landlord made inquires with the building manager as to what options she had to deal with this issue, the landlord was informed by the building manager that the tenant would have to write a formal complaint that would have to be submitted to the Strata council for it to be considered, received a written complaint from her tenant on November 21,2011, the tenant advised the landlord she was seeking to get out of the lease agreement and was offering to sublet the unit, the tenant offered to conduct the viewings of the unit and to go through the application process with prospective tenants; however this option was not acceptable as the Strata does not allow sub-letting of suites as part of their bylaws, however if they did the landlord wanted to conduct those viewings and applications on her own, the tenant offered to split the cost of soundproofing and insulating the suite; the landlord obtained information that it would do little to reduce the sound and was hesitant in taking on the cost with the uncertainty of the tenant's future plans, the landlord had made arrangements for the matter to be brought before the Strata council for consideration and invited the tenants to be present when making their complaint; the tenants chose not to attend, the tenants moved out on November 26, 2011, tenants did not give proper notice to the landlord that they would be vacating the unit and "breaking the lease", seeking the loss of revenue for the months the unit remained empty (December 2011-January 2012) ,the costs of cleaning the unit, and the cost of repairing the neighbors door that she believes the tenants damaged.

The tenant's gave the following testimony; was seeking a quiet place to rent as they needs a very peaceful environment, work 60-70 hours per week, feels the landlord did not disclose enough information in regards to the construction as it would have restricted the likelihood of renting the unit, the majority of the construction occurred from

August 2011 – November 2011, construction would begin as early as 7:14 a.m. and would go as late as midnight, felt like someone was hammering over their head all day long, feels as if there is a small house being built above them, has confronted the owner of the "Limited Common Property" and voiced her complaints to him and he "laughed in her face" and was non responsive to her concerns, seeking compensation in the amount of $700.00 rebate per month for the term of the tenancy for having to deal with all of the construction being conducted above their penthouse and the return of the security deposit for an amount of $6700.00.

Analysis

Both parties provided extensive documentary evidence. All parties' testimonies, witnesses and evidence have been considered in making a decision. As this matter was conducted over two separate days and almost 3 hours of hearing time, all issues, evidence and arguments were considered but for the sake of clarity and brevity this decision will not repeat each and every item, instead it will focus directly on the claims as made in each parties application.

As explained to the parties during the hearing, the onus or burden of proof is on the party making the claim. In this case, both parties must prove their claim. When one party provides evidence of the facts in one way, and the other party provides an equally probable explanation of the facts, without other evidence to support the claim, the party making the claim has not met the burden of proof, on a balance of probabilities, and the claim fails.

When a party makes a claim for damage or loss the burden of proof lies with the applicant to establish their claim. To prove a loss the applicant must satisfy the following four elements:

1. Proof that the damage or loss exists,
2. Proof that the damage or loss occurred due to the actions or neglect of the other party in violation of the Act, Regulation or tenancy agreement,

3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage, and
4. Proof that the applicant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

I will deal with the landlord's claims and my findings as follows:

First Claim – The landlord is seeking the recovery of loss revenue in the amount equivalent to two months' rent (Dec 2011- Jan 2012) = $2800.00. The landlord is of the position that the tenants did not give proper notice and ended the tenancy prematurely. The tenants are of the position that since the landlord misrepresented the suite from the outset they are entitled to end the tenancy. The landlord gave testimony to the efforts made to re-rent the unit. In the landlords own testimony they acknowledged that they were dealing with a family illness throughout the month of December 2011 and did not actively advertise or commence viewings of the unit until the first week of January 2012. I do not find that the landlord is entitled to two months loss revenue but do find that the landlord is entitled to the recovery of one months' loss revenue in the amount of $1400.00.

Second Claim – The landlord is seeking $1097.60 for the repairing of her neighbors' front door. The landlord is relying on the notice given to her that the Strata were of the belief that one of the subject tenants damaged the neighbors' door. The landlord submitted that letter and the proof of payment for this hearing. The tenants adamantly dispute this claim as made as there was no evidence to prove that claim and as the female tenant stated "it just didn't happen". The tenant's are relying on a police report that was submitted by two attending officers that stated that there was no apparent damage to the door. There is no question that the landlord was charged this amount and that she paid for it; however I asked the landlord if the Strata had ever produced any evidence to clearly show the tenant causing the damage; she responded "no they

did not". There is no conclusive evidence that either of the tenants's caused this damage and accordingly I dismiss this portion of the landlords' application.

Third Claim – The landlord is seeking $53.00 for obtaining the police report. The Act does not prescribe for the cost of litigating one's claim and I therefore dismiss this portion of the landlord's application.

Fourth Claim – The landlord is seeking $200.00 for the cost of cleaning the rental unit. The landlord stated that she "paid a woman cash" and that the landlord herself also assisted in cleaning the unit for about 4-5 hours as well. The landlord did not provide a receipt to support her claim. The tenant's adamantly dispute this claim as made by the landlord. The tenant's gave testimony that the unit was left in a better condition than when they moved in. Both parties agree that a move in condition inspection report was conducted; however a move out was not. The landlord stated that attempts were made to contact the tenant to conduct the move out inspection but the tenant refused. The tenant stated that the landlord never offered an opportunity to do a final inspection. Regardless of whether there was or was not a final inspection, the landlord has failed to provide sufficient evidence of the condition of the unit upon move in versus move out. With this discrepancy I am unable to conclude what the condition of the unit was, in addition, the lack of receipts supporting any costs incurred, I therefore dismiss this portion of the landlords' application.

I will deal with the tenant's claims and my findings as follows:

First Claim- The basis of the tenant's claim as put forward by their counsel is that the landlord misrepresented the unit, fail to advise the tenant of the construction, and that she failed to mitigate the loss of quiet enjoyment for the tenant's. The tenants are seeking a rebate of $700.00 x the length of tenancy (10 Months) = $7000.00 in addition to the return of the $700.00 security deposit for a total of $7700.00. Although the tenant's application reflects a claim of $6700.00 I accept that it was a mathematical error and proceed as stated during the hearing. The tenant's counsel submitted that the landlords were misrepresenting the property and negligent in the responsibilities as

landlords in not advising the tenants of the construction being conducted over the tenant's unit. The landlords had their realtor with 30 years experience give evidence for this hearing. The realtor stated that when an area is designated as a "Limited Common Property it is for the sole and exclusive use of one specific Strata Lot". In the case before me it is the landlord's neighbor that owns that area above the subject unit. The realtor further submitted that if a person wishes to conduct any construction or work in that "Limited Common Property" they only require the approval of the executive Strata council and the local municipal authorities, not the neighbors or general Strata membership. The realtor gave testimony that she was the realtor who assisted with the subject landlords purchasing this unit. She submitted it is on the top floor of the building and it is in fact a penthouse unit and that the tenant's complaints should be made with the Strata not the landlord. I accept that the landlords conducted their business in good faith and advertised their unit as a penthouse as they purchased it as such and believed it to be true. The tenant's acknowledged that the unit is on the top floor of the building. I do not find that the landlords misrepresented the unit at the time the subject tenant's took possession of the unit.

The tenant testified that due to the ongoing noise and construction she became "very stressed out" and that her work suffered greatly. She testified that the work commenced at the beginning of August 2011 right through until the tenant's moved out. The landlord was first made aware of this situation on November 7, 2011 through happenstance when she saw the tenant shopping in a mall and was advised of all the noise. The tenant testified that the work would often begin early in the morning and was hopeful that if it could be conducted after 10:00am it wouldn't have been as invasive. The landlord disputed that suggestion as it was unreasonable as those hours were permitted by the Strata bylaws and the city ordinance. The tenant made some attempts to work with the landlord in trying to resolve this issue but decided she could no longer endure the situation and moved out with five days notice by giving her notice on November 21, 2011 and vacated the unit on November 26, 2011. The landlord testified that she was willing to try and resolve the issue as best as she could but felt the tenant did not give her a reasonable amount of time to mitigate the situation. The landlord offered the

tenants to go on a month to month contract whereby the tenants would only need to give one months notice to end tenancy and both parties could move forward and go their separate ways, the tenant's declined. In the tenant's own testimony she acknowledged that the landlord was first made aware of this situation on November 7, 2011 even though the tenants testified that it started in early August 2011. I accept that the tenants made verbal complaints to the concierge and night security staff however they made no attempts at notifying the landlord verbal, written or otherwise until three months later. I find that the tenants were negligent in notifying the landlord of this situation and did not allow the landlord a reasonable amount of time to investigate and mitigate. The tenants were afforded the opportunity to make their case before the Strata council which they chose not to do. Based on the above, I do not find that the tenant's are entitled to any compensation for damage or loss suffered under the Act, the regulations or the tenancy agreement and therefore dismiss this portion of their application.

Second Claim – The tenant and landlord have both applied to be awarded the $700.00 security deposit. Both parties feel they are entitled to the amount.

Section 72(2)(b) of the Act states "If the director orders a party to a dispute resolution proceeding to pay any amount to the other, including an amount under subsection (1), the amount may be deducted in the case of payment from a tenant to a landlord, from any security deposit or pet damage deposit due to the tenant". As I have found the landlord to be entitled to $1400.00 of unpaid rent I apply the $700.00 security deposit towards that debt in the benefit of the tenants to offset the cost, leaving a balance of $700.00 payable to the landlord.

As for the monetary order, I find that the landlord has established a claim for $700.00 in unpaid rent. As neither party has been completely successful in their application I decline to award either party the recovery of the filing fee, each party must bear the cost of the filing fee. I order that the landlord retain the $700.00 deposit in partial satisfaction

of the claim and I grant the landlord an order under section 67 for the balance due of $700.00. This order may be filed in the Small Claims Division of the Provincial Court and enforced as an order of that Court.

Conclusion

The landlord is granted a monetary order for $700.00. The landlord may retain the security deposit.

The tenant's application is dismissed in its entirety.

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 15, 2012.

Residential Tenancy Branch