Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CORNERSTONE PROPERTIES LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC OLC RR FF

Introduction

This hearing dealt with an Application for Dispute Resolution filed by the Tenants on March 13, 2015, to obtain a Monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement; to obtain the following Orders: to have the Landlord comply with the *Ac,* regulation, or tenancy agreement; to allow the Tenants reduced rent for repairs, services, or facilities agreed upon but not provided; and to recover the cost of the filing fee from the Landlord for this application.

The hearing was conducted via teleconference and was attended by the Landlord and the Tenant, C.F., who affirmed that he was also representing the co-tenant, K.H. at this hearing Therefore, for the remainder of this decision, terms or references to the Tenants importing the singular shall include the plural and vice versa.

Each person gave affirmed testimony and confirmed receipt of evidence served by the Tenants. The Landlord stated that they did not submit documentary evidence. At the outset of the hearing I explained how the hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however, each declined and acknowledged that they understood how the conference would proceed.

During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. Following is a summary the testimony and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

1. Have the Tenants proven entitlement to a rent reduction for services, facilities, or repairs not provided?
2. Have the Tenants proven entitlement to monetary compensation for non-disclosure of the remediation project?
3. Should the Landlord be ordered to comply with the *Act,* Regulation or tenancy agreement?

Background and Evidence

The undisputed evidence was the parties entered into a one year fixed term tenancy that began on December 1, 2014, and is set to expire on November 30, 2015 at which time the tenancy may be renewed or continue on a month to month tenancy. Rent of $1,400.00 is due on or before the first of each month and on November 19, 2014 the Tenants paid $700.00 as the security deposit plus $200.00 as the pet deposit.

The Tenant testified that in early January 2015 they noticed that all of the plants and shrubs from the front of the building were being removed. Upon further investigation they saw a notice posted in the lobby which indicated the front of the building would be painted. Then they began to see scaffolding being set up at which time they determined that the building was undergoing a remediation. The Tenant said that they sent an email to the Landlord to complain about not being informed of this work, prior to entering into their tenancy agreement, and to negotiate compensation for having to live in a building during the remediation construction.

The Tenant argued that the Landlord and/or owner neglected to inform them that the remediation had been planned to begin in January 2015 or that the work would be ongoing for more than half of the time period of their lease. He stated that they would not have agreed to rent this unit had they known of the planned remediation work. He asserted that they should be compensated for not be told and for having to live through the remediation so they are seeking a 40% ($560.00) monthly rent reduction until the remediation has been completed.

The Tenant submitted that since the end of January the construction has begun anywhere from 7:30 a.m. to 7:45 a.m. when the contractors arrive, set up, and begin banging and hammering. . He noted that the construction noise was so loud that he had to make the call into this teleconference from inside his car, in order to ensure that he could be heard.

The Tenant testified that they have lost the use of their patio, as the patio door has been locked from the exterior and scaffolding has been set up. The contractors have erected stairs to get up onto the scaffolding, and those stairs are immediately outside their bedroom windows which has caused a loss of privacy and quiet. He argued that the patio was a factor when agreeing to rent this unit because they had hoped to sit out on the private patio that had previously been surrounded by shrubs, and to enjoy their privacy. They have also lost use of their fire place because the exterior wall has been removed.

The Tenant asserted that they are now prevented from opening their windows and patio door to gain fresh air, which will be even a bigger concern for the summer months as they do not have air conditioning. They are also forced to keep their curtains closed for privacy while the contractors are working outside their unit and going up and down the stairs to work on other areas.

The Tenant submitted a chronological list of events between February 4, 2015 to March 12, 2015, in his oral submission, which described their continued communications with their Landlord and their request for reduced rent. He noted that the Landlord was awaiting a response from the owner, who did not respond to their requests until they threatened to take their concerns to the Residential Tenancy Branch (RTB).

The Tenant asserted that the remediation work has affected their enjoyment of the rental unit but also their ability to work from home. He argued that his co-tenant, K.H., is an occupational therapist who normally works from home two days a week when she would schedule

appointments over the telephone and complete her charting. This work was normally performed on Wednesday mornings, prior to the start of her shift at noon, and again on Fridays. Her normal workdays, away from home, are Sunday through to Thursday.

The Tenant stated that up until February 18, 2015 he was employed as a financial adviser which required that he conduct some business over the telephone from home as well as meet clients at the office. Since February 19, 2015 he has been home fulltime, except for two hours per week when he is out volunteering and looking for work. The Tenant noted that they have since been informed that their windows and patio door will be removed and replaced which will require someone to be home on those days to ensure their cat does not get out.

The Landlord testified that they completely understand the inconvenience this remediation work has caused the Tenants. She submitted that the owner contracted them to work as her Agent back in the fall of 2014 and the owner did not inform them of the planned remediation. The Landlord stated that it was not until late January 2015 when she was added to the strata corporation's email list in order to receive information and updates about the remediation project.

The Landlord submitted that the owner had offered a rent reduction of $100.00 and has since authorized the Landlord to proceed with compensation up to a maximum of 15% or $210.00 per month. The Landlord stated that the owner based the calculation for rent reduction on the fact that the patio was a small portion of the overall rental unit which was described as being a 2 bedroom, 2 bathrooms, condo that was approximately 865 to 925 square feet. The Landlord argued that they normally negotiate reduced rent up to $200.00 per month.

The Tenant submitted that their request for 40% rent reduction was their starting point for negotiation which was based on information he obtained from someone who worked in insurance.

In closing, the Tenant argued that the owner had to have known about the planned remediation and that she withheld that information from them. The Tenant clarified that they are not looking to end their fixed term lease as they do not want to have to move again anytime soon as they recently moved from back east. They are simply seeking compensation during the remediation construction and are willing to pay their full rent again once the project has been completed.

Analysis

After careful consideration of the foregoing, documentary evidence, and on a balance of probabilities I find as follows:

The undisputed evidence is the building, in which the rental unit is located, has been undergoing a remediation project that began in January 2015. The remediation project is scheduled to continue until approximately August 2015. The completion date is tentative depending on various stages and aspects of this project.

Section 27 stipulates that a landlord must not terminate or restrict a service or facility if that service of 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.

If the landlord terminates or restricts a service or facility, other than one that is essential or a material term of a tenancy the landlord must provide 30 days' notice and reduce the rent in an amount that is equivalent to the reduction in the value of the tenancy.

Section 27 of the *Act* defines what a service or facility is and a patio is not considered a service or facility. Although the Tenants had applied for a rent reduction based on Section 27, I find they have provided no evidence indicating that the landlord has breached this section of the *Act*. Accordingly, the claim for reduced rent for services, facilities, or repairs agreed upon but not provided, is dismissed.

Section 28 of the *Act* states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to reasonable privacy; freedom from unreasonable disturbance; exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with the *Act*; use of common areas for reasonable and lawful purposes, free from significant interference.

In many respects the covenant of quiet enjoyment is similar to the requirement on the Landlord to make the rental unit suitable for occupation which warrants that the Landlord keep the premises in good repair. For example, failure of the landlord to make suitable repairs could be seen as a breach of the covenant of quiet enjoyment because the continuous breakdown of the building envelop would deteriorate occupant comfort and the long term condition of the building.

Residential Tenancy Policy Guideline 6 stipulates that it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises. That being said a tenant may be entitled to reimbursement for loss of use of a portion of the property or loss of quiet enjoyment even if the landlord has made every effort to minimize disruption to the tenant in making repairs or completing renovations.

Remediation projects conducted on the exterior of condo buildings involve the removal of exterior finishes, windows, patio doors, and may even involve the removal of balconies, which creates loud construction noise, dust, debris, loss of use of space such as patios and balconies, and in some cases loss of privacy due to workers conducting their jobs at or near windows and doors.

Based on the foregoing, I find it undeniable that the Tenants have and will continue to suffer a loss of quiet enjoyment, since January 2015 and continuing until the project has been completed sometime during or after August 2015. This will result in a subsequent loss in the value of the tenancy for that period of time. Given the length of time this project is scheduled to be conducted (8 or 9 months) I do not consider this matter to be a temporary discomfort or inconvenience. Rather, I find it to be a major disruption to this tenancy, as construction will be ongoing for 75% of the length of this one year tenancy. As a result, I find the Tenants are entitled to compensation for their loss of quiet enjoyment.

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.

Policy Guideline 6 states: “in determining the amount by which the value of the tenancy has been reduced, the arbitrator should take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use the premises, and the length of time over which the situation has existed”.

Neither the Landlord nor the owner submitted evidence in response to this claim and neither have informed the Tenants of the full scope of the remediation work, which has left the Tenants trying to gather information from the job foremen. As such, I accept the Tenants` undisputed submissions that the project work is being completed Monday to Friday normally from between 7:30 a.m. and 5:00 p.m. leaving the interior of the rental unit undisturbed for all evenings, nights and there was no evidence before me that would suggest the construction work is continuing on the weekends.

I accept the evidence that scaffolding and stairs to climb up the scaffolding have been placed directly in front of the Tenants` patio door and their bedroom window, leaving minimal privacy and no opportunity to open said windows or doors for fresh air. In addition, the Tenants have lost total use of the patio for an undetermined amount of time.

I have considered that the female Tenant currently works outside of the rental unit for approximately 37.5 hours per week, during similar hours that the remediation work will be performed. She had previously conducted some business work at the rental unit which is now required to be done outside of the rental unit. The male Tenant is currently at the rental unit fulltime, except for two hours per week, and will have to endure full days of noise, Monday through Friday, in addition to the negative effects of remediation work while at his home.

Notwithstanding the Landlord’s submissions that the most she has seen negotiated for rent reductions in remediation cases was $200.00 per month, I find that the amount of compensation must be determined on the merits of each individual case. Therefore, based on the above considerations and evidence that was before me, I find the Tenants are entitled to compensation for loss of quiet enjoyment equal to 20% of their monthly rent, for the period of the remediation project from January 2015 to August 31, 2015. This compensation is to be deducted at a rate of **$280.00** (20% of $1,400.00) from each month`s rent from January 2015 to August 31, 2015.

In addition to the compensation for loss of quiet enjoyment, I must also consider the Tenants` submissions regarding the Landlord and/or owner`s failure to disclose the planned remediation project at the time the tenancy agreement was being formed.

Policy Guideline # 6 provides that an arbitrator may award aggravated damages where a serious situation has occurred or been allowed to occur. Aggravated damages are damages which are intended to provide compensation to the applicant rather than punishing the erring party, and can take into effect intangibles such as distress and humiliation that may have been caused by the respondent’s behaviour.

The Tenants entered into a tenancy agreement and did not contemplate that they would move in only to find that 3 or 4 weeks later they would be faced with dealing with the stress, noise, and negative effects of six to eight months of an extensive remediation project, especially after having to deal with the stress of moving across the country. I accept the Tenants’ submission that had they been told about the remediation project they may not have rented this unit. I further accept that a project of this magnitude would not begin without prior notification to the property owner. Therefore, I conclude that the Landlord and/or owner’s failure to disclose the

remediation project to the Tenants was an intentional act to secure a fixed term tenancy and ensure rental income throughout the duration of the remediation project. Accordingly, I award the Tenants aggravated damages in the amount of **$2,000.00,** which is calculated at $1,000.00 for each Tenant**.**

There was no evidence before me that would suggest the Landlord was not complying with any other section of the *Act,* regulation or tenancy agreement. Therefore, there is no need to issue Orders in that respect.

Section 72(1) of the Act stipulates that the director may order payment or repayment of a fee under section 59 (2) (c) *[starting proceedings]* or 79 (3) (b) *[application for review of director's decision]* by one party to a dispute resolution proceeding to another party or to the director.

The Tenants have primarily succeeded with their application; therefore, I award recovery of the **$50.00** filing fee, pursuant to section 72(1) of the Act.

Conclusion

The Tenants have been awarded monetary compensation of $2,000.00 plus $50.00 filing fee plus a rent reduction of $280.00 for the period of January 2015 to August 2015.

In consideration of the current date, the Tenants' May 2015 rent may have already been paid by the time the parties receive this Decision. Therefore, the Tenants may deduct their monetary awards from their future rent beginning June 1, 2015, as follows:

The total rent reduction from January 2015 to May 2015 is $1,400.00 (5 x $280.00) plus aggravated damages of $2000.00 plus the filing fee of $50.00 totalling **$3,450.00.** The $3,450.00 monetary award may be deducted from future rent as follows:

a) June 1, 2015 Rent of $1,400.00 - $280.00 rent reduction = $1,120.00 rent owed less $1,120.00 compensation = NIL rent payment due for June 1, 2015, leaving a balance owed to the Tenants of $2,330.00 ($3,450.00 - $1,120.00)

b) July 1, 2015 Rent of $1,400.00 - $280.00 rent reduction = $1,120.00 rent owed less $1,120.00 from balance owed = NIL rent payment due for July 1, 2015 leaving a balance owed to the Tenants of $1,210.00 ($2,330.00 - $1,120.00)

c) August 1, 2015 Rent of $1,400.00 - $280.00 rent reduction= $1,120.00 rent owed less $1,120.00 balance owed = NIL rent payment due for August 1, 2015 leaving a balance owed to the Tenants of $90.00 ($1,210.00 - $1,120.00).

d) September 1, 2015 Rent of $1,400.00 less $90.00 balance of compensation leaves rent payable to the Landlord of $1,310.00.

To clarify, in order to recover the monetary award, the Tenants are to pay NO rent payments for June 1, 2015, July 1, 2014, and August 1, 2015, and they are to pay a reduced amount of rent for September 1, 2015 of $1,310.00, pursuant to sections 62 and 67 of the *Act.* Effective October 1, 2015 the Tenants' rent will return to the full amount of $1,400.00, unless additional compensation is negotiated or awarded at a future date.

In the event that this tenancy ends in accordance with the *Act,* before the full award has been recovered by the Tenants, the Tenants may serve the Landlord with the enclosed Monetary Order that has been issued in the amount of $3,450.00. The amount of the Monetary Order would automatically be reduced by any amounts taken in reduced rent prior to the end date of the tenancy.

If the remediation continues to cause the Tenants a loss of quiet enjoyment past August 31, 2015, then the Tenants will be at liberty to seek further compensation from September 1, 2015 onward.

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: April 22, 2015

Residential Tenancy Branch