Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Devon Properties Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OLC, RP, RR, FF

Introduction
This hearing dealt with an application by the tenant for a repair order; an order compelling the landlord to comply with the Act, regulation or tenancy agreement; and an order reducing the rent for repairs, services or facilities agreed upon but no provided. Both parties appeared and gave affirmed evidence. No issues regarding the exchange of evidence were identified.

Issue(s) to be Decided

- Is the tenant entitled to a monetary order and, if so, in what amount and on what terms?
- Should any other order be made against the landlord and, if so, on what terms?

Background and Evidence
The rental unit is a one bedroom/one bathroom apartment on the seventh floor of a high rise building. It is in one of two towers on the same property. The unit has a balcony that overlooks a large and beautiful urban park.

New owners purchased this property in December 2015. In January 2016 they started on an ambitious renewal program for both towers; the first major upgrades to the buildings since they were built more than fifty years ago. The renewal program includes the replacement of the exterior balconies; remediation of the exterior concrete; exterior painting; elevator modernization; corridor, lobby and entrance refurbishment; and building system upgrades. In addition, the interiors of all units are being extensively renovated as they become available.

In the spring of 2016 the tenant was looking for an apartment. He testified that he looked at several in the particular neighbourhood. They were all of similar size and cost. He said that any of them would have been quite suitable but eventually he chose this unit because of the balcony and the view.

The tenant testified that he was shown this unit, which was un-renovated, and a fully renovated unit. He was told that this unit would be renovated to the same standard and that the renovation would be complete by the August 1 possession date.

The tenant signed an application for tenancy on June 15. The landlord had the tenant sign an addendum to the application which stated:

> "This is Notice that [landlord] intends to proceed in the short term with the following maintenance, repairs and capital work at this residential complex:
>
> - Corridor, lobby and entrance refurbishment, security upgrades, elevator modernization, painting building envelope, balconies, unit renovations, energy efficient systems and mechanical equipment replacement.
>
> This work is intended to ensure the long term physical and structural integrity of the buildings and improve the quality and safety of your physical surroundings. The work is expected to take 24 to 36 months to complete. As a result of the proposed construction activity at the property there will be noise, vibration, dues and inconvenience to access and egress at the property; however, we will take steps to minimize inconvenience and will provide status updates as work progresses."

The tenant testified that before signing this document he did ask the landlord's representative for more detailed information about the planned construction but she was not able to give him any information, other than what was set out on the form. In particular, he was not told that the major remediation work to the exterior of the building, i.e. jackhammering was scheduled to start in a couple of weeks or that the planned work to the balconies would result in them being unusable for the first several months of his tenancy.

The tenant's application was approved. On June 20 he signed a tenancy agreement and paid the security deposit. The tenant cannot remember if he was given a copy of the tenancy agreement. The landlord took over management of this building on October 1. They have received minimal records from the previous property manager. The end result is that a copy of the tenancy agreement was not submitted into evidence.

The tenant testified that he cannot recall whether window coverings and dishwasher were specifically mentioned in the tenancy agreement but they were verbally promised when he looked at the unit.

On July 29 the resident manager told the tenant that the renovations to the unit wold not be completed by August 1. When the tenant moved in on August 1 there were a number of deficiencies:

- No dishwasher.
- No window coverings.
- No closet rods.
- No railings on the balcony.
- Unsealed tile and grout.
- Poorly installed kitchen drawers.
- No transition between the tile floor in the kitchen and the wood floor in the living area.

The resident manager found some old drapes for the tenant to use on August 5. New window coverings were eventually installed on September 19.

On August 11 closet rods were delivered and installed. The tenant testified that they were not installed properly. He re-installed them himself so they could unpack.

On August 22 the tenant wrote the landlord a letter setting out the deficiencies; advising that they would be away from August 24 to September 12; and giving the landlord permission to enter the unit while they were away for the purpose of completing the repairs. When the tenant returned home on he was disappointed to discover that nothing had been done.

On September 15 a dishwasher was installed.

On September 22 and September 22 most of the interior issues were addressed.

The transition between the two different floor coverings was installed at the end of November.

The major issue has been the lack of use of the balcony and the noise caused by the ongoing construction. The balcony has been unusable since the start of this tenancy. For some time the balcony itself was under construction. The scaffolding has been moved away but the railings have still not been installed.

Since he moved in the exterior of their building has been undergoing remediation which involves jackhammers, drills, grinders and hammers. In addition, the workmen are playing music and talking loudly. Often, this is all going on inches from the apartment windows.

Under cross-examination the tenant testified that he is a self-employed computer programmer/project manager. He usually works from home but also works at client sites from time to time. Part of his work includes telephone conference calls. He said that the noise level is not the same very day – some days the notice is constant, others are quiet.

The tenant's evidence is that there is no advance information about what work will be done on any particular day or week and it is not always apparent what the next step in the construction process will be. The tenant gave a couple of examples. The workers appear to be finished the preparation work on the balcony and the scaffolding was moved to another part of the building without the railings being installed. A month later the scaffolding was moved back and work that appears to be preparatory to painting began outside the bedroom window. In another example, the carpet was removed from the hallways but has not been replaced for several weeks. As a result, sound really carries through the hallways.

The tenant argued that the schedule appears to have been created for the convenience of the landlord and not to minimize the inconvenience to the tenant. For example, all the balcony railings for one side of the neighbouring tower were installed in one day meanwhile their balcony, which only requires the installation of railings to be usable, has been sitting for some time in that condition.

The landlord argued that the tenant was warned about the impending construction before he rented the unit and he signed off on that. The landlord also argued that a discount has been built into the current rent because once the renovations are complete the market rent for this unit will be higher than the rent paid by the tenant.

Analysis

The *Residential Tenancy Policy Guidelines*, available on-line at the Residential Tenancy Branch web site, provide succinct summaries of the legislation and the common law applicable to residential tenancies in British Columbia. Those guidelines will be referenced in the course of this decision.

This is a claim in contract by the tenant against the landlord. As explained in *Residential Tenancy Policy Guideline 16: Claims in Damages:*

> "Where a landlord and tenant enter into a tenancy agreement, each is expected to perform his/her part of the bargain with the other party regardless of the circumstances. A tenant is expected to pay rent. A landlord is expected to provide the premises as agreed to. If the tenant does not pay all or part of the rent, the landlord is entitled to damages. If, on the other hand, the tenant is

> deprived of the use of all or part of the premises through no fault of his or her own, the tenant may be entitled to damages, even where there has been no negligence on the part of the landlord. Compensation would be in the form of an abatement of rent or a monetary award for the portion of the premises or property affected."

Section 65(1) allows an arbitrator who has found that a landlord has not complied with the Act, regulation or tenancy agreement to order that past or future rent must be reduced by an amount that is equivalent to a reduction in the value of the tenancy agreement.

As explained in *Residential Tenancy Policy Guideline 6: Right to 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. . . .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."

I accept that the tenancy agreement provided that a dishwasher and window coverings were included in the rent. The fact that they were eventually supplied by the landlord is proof of that.

The tenant claims a reduction of $50.00 per month for each of these deficiencies. $50.00 is approximately 3.5% of the total rent, which I think is a very fair estimate of their respective proportion of the value of this tenancy.

The tenant also claimed $50.00 per month for the miscellaneous unfinished elements of the interior renovation. While none of them, including the unfinished transition, was major they were not completed when promised and those repairs did involve the disruption caused by tradesmen's visits on several days.

On the other hand, the tenant was away for over two weeks during this period so did not suffer any personal inconvenience during that time.

After considering all of these factors I award the tenant the sum of $150.00 for all of the above mentioned deficiencies.

The addendum the landlord had the tenant sign when he applied for tenancy warns the prospective tenant that for the next two or three years there will be “noise, vibration, dust and inconvenience to access and egress at the property; however, we will take steps to minimize inconvenience and will provide status updates as the work progresses.”

Several observations flow from this document which was clearly intended to limit the landlord’s liability for claims of loss of quiet enjoyment and/or loss of services and facilities:

- It does not say that the balconies will be unusable for several months.
- There is no evidence of any efforts to provide status updates to the tenant. In fact, even in this hearing the landlord did not provide any information about the expected completion date for any of the tenant’s major complaints –when the balcony might be usable; when the remediation of the exterior building envelope on his side of the building might be completed; and when the carpet will be installed in the hallway. Nothing.
- There was no evidence presented of what measures, if any, the landlord had taken to reduce the time during which the balcony was unusable.

I find that a usable balcony, particularly one that overlooks the view that this one does, represents 20% of the value of this tenancy, or $282.00 per month.

I find that the value of this tenancy has been reduced by 20% or $282.00 since August 1, 2016. I award the tenant the sum of $1410.00.00 as compensation for services or facilities agreed upon but not provided for the period August 1, 2016 to December 31, 2016.

I am not awarding the tenant any compensation for the disruption, including the noise, caused by the renovations to the building outside of the rental unit because he was warned, before he signed the application for tenancy, that these conditions would exist and he chose the rent this unit with that knowledge.

In total I find that the tenant is entitled to a monetary order in the amount of $1660.00 comprised of $150.00 for the deficiencies in the interior of the rental unit at the start of this tenancy; $1410.00 for lack of use of the balcony from August 1 to December 31, 2016; and the $100.00 fee that the tenant paid to file this application.

Pursuant to section 72(2) this amount may be withheld from each rent payment due until paid in full. Alternatively, the landlord may, at its’ option, pay the tenant the sum of $1660.00 in full satisfaction of this award.

In addition, the tenant may deduct the sum of $282.00 from each rent payment due commencing January 1, 2017 until renovations to the balcony are complete and it is fully usable. If the parties are not able to agree on when this has occurred, either party may apply to the Residential Tenancy Branch for further direction.

Conclusion

A monetary order has been granted to the tenant as has an order reducing the rent until certain repairs are complete.

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 02, 2016

Residential Tenancy Branch