Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding SKYLINE TOWERS and BAYSIDE PROPERTIES
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC, FF

Introduction

This hearing convened as a result of the Tenants' Application for Dispute Resolution wherein the Tenants requested the sum of $4,359.56 representing return of all rent paid during a period of construction as compensation for loss of quiet enjoyment, the sum of $420.00 representing increased electricity charges and to recover the filing fee.

Both parties appeared at the hearing and were given a full opportunity to be heard, to present their affirmed testimony, to present their evidence orally and in written and documentary form, and make submissions to me.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Are the Tenants entitled to monetary compensation for loss of quiet enjoyment and increased electrical charges?

2. Should the Tenants recover the filing fee?

Background and Evidence

A.L. testified that the tenancy began July 1, 2014 with his wife, J.J. He confirmed that with a rental discount the rent at the time the tenancy ended, on November 9, 2016,

was $896.00; he confirmed that they had an agreement with the Landlords that the Tenants were permitted to move out of the rental at this time.

On the Tenants Monetary Orders worksheet the Tenants indicated they sought return of the totality of their rent in the amount of $921.00 per month for four months. A.L. confirmed that the correct amount of rent is $896.00 and as such, and by amendment filed November 2, 2016 he confirmed they seek return of the rent paid from February 15, 2016 to August 28, 2016, or 146 days for a total of $4,359.56.

The Tenants further sought the sum of $420.00 for increased electricity charges as they claim they were required to boil their water in a kettle to do their dishes. A.L. testified that each municipality has a minimum requirement for hot water; according to A.L. the applicable bylaw in the municipality in which the rental unit is located is 45 degrees Celsius and that the hot water in the rental unit was between 32-36 degrees Celsius.

A.L. testified that he spoke with D.O. in the first week that they lived in the rental unit about the lack of hot water; apparently D.O. confirmed she was aware of the issue and there was nothing that could be done about it.

The Tenants sought compensation for breach of quiet enjoyment due to construction noise as a result of a parkade restoration project. In support they provided video recordings taken over numerous days in March, May and June of 2016. These videos confirm the sound from the excessive construction noise, in the form of loud fans and jackhammering in the rental unit as well as the common areas of the rental building.

A.L. stated that the construction went on from 7:00 a.m. to 6:00 p.m., on all days except Sundays, although at times it would start shortly before 7:00 a.m.

A.L. also stated that he and his spouse sleep between 6:00 a.m. and 3:00 p.m. as they often work 12 hour days on “graveyard and night shift”. He stated that as a consequence, although the work was performed during regular “business hours”, due to their work schedules, the construction and jack hammering made it impossible for them to sleep.

A.L. confirmed that in between April 4 and July 29 he was trying to negotiate with the Landlords as to an appropriate amount of compensation. Evidence submitted by the Landlords included a letter dated April 4, 2016 wherein the Landlords offered all occupants of the rental building compensation for 8 hours a day from February 15, 2016 until the anticipated end date of April 15, 2016. In an email sent by the Tenant A.L. sent

to the landlord on April 21, 2016 the Tenants requested $32.00 per day ($4.00 per hour of jackhammering at 8 hours per day).

K.O. testified on behalf of the Landlords.

K.O. stated that when the parkade restoration project commenced, it was made very clear to the contractors that they were going to do work which was going to cause “extraordinary noise and disruption” to the Tenants above the area, and that they were given explicit instructions that they were only to work Monday to Friday 8:00 a.m. to 5:00 p.m. and perform only quiet work on Saturdays.

K.O. stated that the number of days the Tenants were impacted was 135 days. She stated that she did not factor in Saturdays or stat holidays as on Saturdays the work was “quiet” and therefore not a breach of quiet enjoyment.

K.O. further stated that she was not in the rental building to confirm when the work occurred.

She further stated that all of the tenants who provided written complaints were also present during the day (sleeping, retired, or worked from home), as with the Tenants. K.O. confirmed that the contract extended much longer than originally anticipated and each of those tenants were compensated with the same formula as was offered to the Tenants.

K.O. testified that the parkade reopened on August 26, 2016. Based on this end date, K.O. confirmed that the Landlord was willing to offer the Tenants the sum of $1,321.76 for their loss of quiet enjoyment during the construction.

K.O. stated that the first she learned of an issue with the Tenants’ hot water, was when she received a telephone call from the health department on October 1, 2016. She stated that at no time prior to this was she aware that the Tenants had an issue with their hot water and therefore no opportunity to resolve this issue. K.O. stated that the Landlord was willing to compensate the Tenants one half of their electrical utility in the amount of $17.50. In total, the Landlord was willing to provide the Tenants with $1,340.00.

In reply, A.L. stated that he mentioned the water issue to D.A. and she said there was nothing that could be done. A.L. confirmed that they did not put a request in writing to the Landlords about the hot water.

D.A. testified as well. She confirmed that she lives in the rental building and was therefore there during the constructions. She confirmed that she was only made aware of the Tenants' hot water issue in October 2016. She denied having a conversation with A.L. at the beginning of the tenancy about the hot water. She also stated that they were not aware A.L. was living there.

D.A. further testified that the construction was from 8:00 a.m. to 6:00 p.m. from Monday to Friday. She further stated that most of the time they were done between 3:00 and 4:00 p.m. She also stated that on Saturdays you could barely hear them as they were cleaning up, sweeping up and were not jackhammering or drilling.

D.A. further stated that there was no agreement that the Tenants could move mid-month, except that they could move out, but would be liable for the full month's rent.

Analysis

In a claim for damage or loss under section 67 of the *Act* or the tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard, that is, a balance of probabilities. In this case, the Tenants have the burden of proof to prove her claim.

Section 7(1) of the Act provides that if a Landlord or Tenant does not comply with the *Act*, regulation or tenancy agreement, the non-complying party must compensate the other for damage or loss that results.

Section 67 of the Act provides me with the authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

The Tenants allege they spoke to the Landlord about their lack of hot water. The Landlord's representatives deny such conversations occurred, and stated that the first they were made aware of this issue was when they received a call from the local health department. The Tenants concede that they did not make a written request to the Landlord with respect to the hot water.

To prove a loss and have one party pay for the loss requires the claiming party to prove four different elements:

- proof that the damage or loss exists;

- proof that the damage or loss occurred due to the actions or neglect of the responding party in violation of the Act or agreement;

- proof of the actual amount required to compensate for the claimed loss or to repair the damage; and

- proof that the applicant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

Conflicting versions of events can be difficult to reconcile. Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further corroborating evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails. In this case, I find the Tenants have failed to prove they brought their concerns about the water temperature to the Landlords' attention.

I am unable, based on the evidence before me, to find that the Tenants informed the Landlords that the water temperature in their rental unit was inadequate. Accordingly, I am unable to find that the Landlords were neglectful, or otherwise breached the *Act* or the tenancy agreement by failing to attend to this repair. Further, as the Tenants failed to give written notice to the Landlords of this alleged deficiency, they failed to provide the Landlords with an opportunity to address this issue. In failing to do so, I find the Tenants failed to mitigate any losses associated with the inadequate water temperature.

The Landlords' representatives testified that they were willing to compensate the Tenants the sum of $17.50 for their increased electrical charges. While I have found the Tenants have failed to prove their claim in this regard, I am cognizant the Landlords are willing to provide them some compensation and therefore I award the Tenants compensation in the amount offered by the Landlords in the amount of **$17.50.**

I will now turn to the Tenants' claim for compensation for breach of quiet enjoyment due to the parkade construction noise.

A tenant's right to quiet enjoyment is protected under section 28 of the *Residential Tenancy Act,* which reads as follows:

> **Protection of tenant's right to quiet enjoyment**

28 A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

(a) reasonable privacy;

(b) freedom from unreasonable disturbance;

(c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*;

(d) use of common areas for reasonable and lawful purposes, free from significant interference.

Residential Tenancy Policy Guideline 6—Right to Quiet Enjoyment provides further assistance and reads in part as follows:

> "…Frequent and ongoing interference by the landlord, or, if preventable by the landlord and he stands idly by while others engage in such conduct, may form a basis for a claim of a breach of the covenant of quiet enjoyment.
> …
> 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.
> …
> 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.

After careful consideration of the evidence, and the testimony of the parties, I find as follows.

I find the Tenants have met the burden of proving their right to quiet enjoyment was breached by the construction and repair noises created by the parkade renovations. Although the Landlords attempted to minimize the impact on tenants, the evidence supports a finding that the construction noise was very significant and disruptive.

As noted, the Tenants provided videos taken over numerous months, both during the week and on Saturdays; these videos confirm the significant noise caused by the jackhammering, fans, and other construction equipment. In one such video, items in the

rental unit are seen shaking and moving from the noise and vibration. It is clear, by the video evidence submitted that sleep would be very difficult, if at all possible. It is also clear that enjoyment and use of the rental unit would have similarly been very difficult as a result of the excessive noise.

The Tenants testified that they work "graveyard shifts" such that they often sleep during the day. While the Landlord made efforts to ensure construction noise occurred during the *regular* work day hours only, this was highly problematic for the Tenants as they were unable to sleep and therefore rest for their work shifts. Accordingly, I find the Tenants were likely more impacted than other residents who either worked from home with flexible schedules, or were retired.

The Tenants claim compensation for 146 days of construction between February 15, 2016 and August 28, 2016. Notably, the evidence indicates the Landlords offered to compensate Tenants at one point for the time period February 15, 2016 to April 15, 2016 the anticipated completion date. Both parties agreed the construction went on much longer, and did not complete until August 28, 2016.

The Landlords calculated any compensation on the basis that Saturdays were not compensable because they were advised the work was "lighter" and therefore "quieter". Based on the evidence submitted by the Tenants, and their testimony, I find that they are entitled to compensation for Saturdays as well.

The Tenants claim reimbursement of $29.86 per day, which represents the *full* amount of rent paid. While their right to quiet enjoyment of the rental unit was clearly impacted, they worked and were therefore away from the rental unit and the construction noise for approximately one third of their day. Further, the Tenants also had the benefit of storing their items in the rental unit during this time. As well, the videos submitted by the Tenants do not cover the entire period of construction; presumably, the amount of noise varied by day, as well as the stage of the project. For these reasons, I find, on a balance of probabilities, that the Tenants should be awarded return of 60% of the rent paid for the days claimed by the Tenants ~~days~~, or the sum of $17.92 per day, for a total of **$2,616.32.**

In sum, and pursuant to sections 7, 65(1), 67 and 72, I award the Tenants a Monetary Order in the amount of **$2,733.82**; this sum includes the following: the sum of **$2,616.32,** representing compensation for 60% of the rent paid for 146 days from February 15, 2016 to August 28, 2016; **$17.50** for the amounts agreed upon by the Landlord for their increased electricity claim; and, recovery of the **$100.00** filing fee. The Tenants are granted a Monetary Order in this amount and must serve the Monetary

Order on the Landlords. If necessary, the Order may be filed and enforced in the B.C. Provincial Court (Small Claims Division).

Conclusion

The Tenants are awarded a Monetary Order for the sum of **$2,733.82** representing return of 60% of the rent paid for ~~125~~ 146 days in which the construction occurred, $17.50 for their increased electricity charges and recovery of the $100.00 filing fee.

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 28, 2016

Date of Correction: January 18, 2017

Residential Tenancy Branch