Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OLC, MNDC

Introduction

The Application for Dispute Resolution filed by the Tenant seeks an order that the landlord comply with the Act, regulation or tenancy agreement.

The Amended Application for Dispute Resolution filed by the landlord filed by the Tenant on December 8, 2016 seeks a monetary order of $5000. In the Details section if provides: heat/hydro, carts/buggies and no-smoking. The Monetary Order Worksheet filed by the Tenant claims the following:

- Compensation $5000
- Hydro $164.84
- Paper & Ink expenses $300.

On December 9, 2016 the Tenant sent a letter to the Branch that stated that she wanted to change her monetary claim from $5000 to $15,000.

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached.

The hearing was initially set for December 22, 2016. I granted an adjournment at the request of the landlord. I made the following order:

> "After considering the submissions of the parties I determined it was appropriate to grant and adjournment for the following reasons:
>
> - It was unclear what claims were being made by the Tenant
> - The tenant failed to serve her amendment seeking compensation on the landlord within 14 clear days as set out in the Rules of Procedure.
>
> As a result I made the following orders:
>
> a. The matter shall be adjourned to some time in February to be set by the Residential Tenancy Branch registry.
> b. The Tenant shall provide the landlord and the Residential Tenancy Branch with a clear statement of the claims she is making referencing the provisions of the Residential Tenancy Act, Residential Tenancy Act Regulations, Rules of

Procedure, Policy Guidelines, statutory provisions and case law which she is relying on by January 15, 2017..

c. The landlord shall provide a response to the tenant and to the Residential Tenancy Branch by January 31, 2017."

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present. All of the evidence given at the hearing was carefully considered.

Both parties submitted several hundred pages of evidence. I advised the parties at the start of the hearing that the fact they have submitted the documents does not make it evidence in this hearing and that the documents would have to be referred to in the oral testimony to become evidence in this hearing.

I find that the Application for Dispute Resolution/Notice of Hearing was personally served on the landlord on November 7, 2016. I find that the Amended Application for Dispute Resolution was served on the landlord. With respect to each of the applicant's claims I find as follows:

Issue(s) to be Decided

The issues to be decided are as follows:

a. Whether the Tenant is entitled to an Order that the landlord comply with the Act, regulations or tenancy agreement?
b. Whether the tenant is entitled to a monetary order for the reduced value of the tenancy and if so how much?

Background and Evidence

The landlord is a senior citizens housing society and offers subsidized housing for independent living for seniors over the age of 55 years. The residential property is composed 80 units with 29 units facing the inside courtyard.

The tenancy began on July 31, 2013 on a month to month basis. The present rent is subsidized and the Tenant pays $378 per month payable in advance on the first day of each month. The tenant(s) paid a security deposit of $350 at the start of the tenancy.

The tenancy agreement provides that the Residential Tenancy Act applies. There are further provisions in the landlord's Policy referring the parties to the arbitration process under the Residential Tenancy Act if the parties are unable reach an agreement if there is a landlord-tenant dispute. The landlord agreed that the Residential Tenancy Act applies to the tenancy relationship between the landlord and the tenant.

Law

The tenant claims the landlord has breached her right to quiet enjoyment found under section 28 of the Act which provides 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.

Policy Guideline #6 includes the following:

> "**B. BASIS FOR A FINDING OF BREACH OF QUIET ENJOYMENT**
>
> A landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.
>
> Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.
>
> In determining whether a breach of quiet enjoyment has occurred, it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises.
>
> A landlord can be held responsible for the actions of other tenants *if* it can be established that the landlord was aware of a problem and failed to take reasonable steps to correct it.
>
> **Compensation for Damage or Loss**

A breach of the entitlement to quiet enjoyment may form the basis for a claim for compensation for damage or loss under section 67 of the RTA and section 60 of the MHPTA (see Policy Guideline 16). In determining the amount by which the value of the tenancy has been reduced, the arbitrator will take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use or has been deprived of the right to quiet enjoyment of the premises, and the length of time over which the situation has existed. "

Briefly, the Tenant gave the following evidence at the hearing.:

- She has been a tenant for approximately 3 ½ years and has been subject to unreasonable disturbances day and night caused by other residents.
- She has repeatedly complained about noise being made prior to 8:00 a.m. and shortly thereafter as she is woken up almost every morning for about 2 years. There is an excessive amount of noise all day long.
- Many of the problems relate to a smoking table that the landlord has placed in the courtyard. Other residents use the smoking table and cause excessive noise and disturbances.
- The smoking table was moved from another location to a location near where she lives because second hand smoke was filtering into other resident's suites. She originally filed a claim in September 2015 but because of ill health she had to withdraw that claim.
- On May 12, 2015 the entire property was made non-smoking. However, on June 16, 2015 I was advised by the resident caretaker that some residents had approached the board and there is a gazebo (otherwise know as the tenant) being put up and smoking is allowed in that area.
- Other residents are disturbed such as her but they are afraid to come forward.
- The landlord minimizes her complaints and she is told that "other people have a right to live."
- The landlord breached her privacy when talking to other people.
- The noise lasts for 2 to 4 hours at a time and is on a daily basis.
- She is on the third floor and is subject to the disturbances of having to endure second hand smoke.
- The courtyard is like an echo chamber with people talking. She is also disturbed by the metal garbage can lids.
- She has complained to the landlord about disturbances caused by excessive noise coming from K and B who reside inside the courtyard and they are still residing here. Another resident C verbally abused and threatened me.
- The landlord has failed to deal with people who are smoking outside the designated area.
- In June 2015 I texted the resident caretaker that L one of the residents who has been grandfathered in was smoking outside of the designated area.

Tenant's Witness #1 gave the following evidence:

- The courtyard is like an echo chamber.
- The greatest problems occur on the weekend when the resident caretaker is not on site.
- On one occasion from August 18 to 21, 2016 she had a problem with another resident. She reported the incident but the landlord failed to do sufficient to rectify the problem.
- The other resident referred to above beats his wife and she has had to endure the disturbances of domestic violence. The police were called.
- Since November the couple have seldom been in the rental unit.
- The walls are paper thin and one can hear disturbances in the neighboring room.
- .She is not seeking financial compensation from the landlord.
- She is disturbed by the disturbances caused by the resident's in the smoking tenant. She is also disturbed by the second hand smoke.

Tenant's Witness #2 gave the following evidence:

- She lives on the second floor above the lobby.
- In 2015 she was disturbed by noise from other residents who were smoking under her deck. The landlord has moved the smokers to the end of the courtyard and put up a tenant. This has made it more livable for me.
- She has been subject to disturbances caused by the resident who lives above her. He yells, screams and appears to be dropping weights at all hours of the day and night.
- After she complained to the landlord the landlord investigated and the disturbances were reduced.
- The resident who lives above me has a loud voice and one can hear him on the telephone.
- He is up early in the morning around 4:00 a.m. and disturbs me while getting ready for work.
- On one occasion he has threatened me with a hammer.
- On one occasion I banged on the walls when he disturbed me. I apologized to him the next day.

The landlord gave the following evidence:

- The complaints referred to by Tenant's Witness #1 have been investigated by the landlord. The male is elderly, his hard at hearing and has a leg problem necessitating that he wear an orthopaedic shoe.
- The police are conducting an investigation and it includes complaints from the couple about Witness #1.
- The landlord investigated the incident that occurred at the end of August 2015. The resident told management that the problems started because the tenant was told kids who were playing with a ball outside in the courtyard. He told the tenant that he felt the complaints of the tenant were unreasonable and he told her so. The incident occurred

around 4:00 p.m. and involved grandkids from a lady who was celebrating a birthday party.

- The landlord has the following policies I place in relation to noise:

> "*<u>QUIET HOURS:</u>*
>
> Quiet Hours for PCM are between 11:00 p.m. and 08:00 a.m., 7 days per week. Tenants are asked to keep all noise levels down outside of these hours.
>
> Stereo speakers and TV's, air conditioners, concentrators should be off the floor and away from the walls of adjoining units.
>
> No pianos, organs, drums are allowed within the units.
>
> Complaints regarding musical instruments may be cause for complete restriction of use within the building."

- The landlord responds to complaints by tenants and investigates in order to find come resolution. The landlord referred to 63 letters, e-mails etc. between the landlord and the tenant between 2013 and January 16, 2017 relating to complaints from the tenant. In addition he referred to 18 letters from other residents. Many of the noise complaints are general and not specific. The landlord diligently attempts to enforce this policy but acknowledges there will always be occasions which are outside the landlord's control
- Many of the complaints given by the tenant do not include the specifics of when the disturbance occurred or who was causing it.
- Many of the complaints given by the Tenant are not reasonable. In one incident she complained about the noise that occurred after another resident who was disabled came home following a visit to family. The security camera shows the stopping of the car, assisting the disabled person getting into her wheelchair and help accessing the front door. The security indicates this lasted 3 to 4 minutes. The landlord received another complaint from the tenant which involved 2 taxi cabs arriving to pick-up a resident at around 8:04 a.m. Again this was of a short time in duration.
- The landlord has switched the metal garbage can lids to plastic lids at a cost of $600 to reduce noise.
- The landlord has put a timer on the laundry room door so that residents cannot use it after 8:00 p.m.
- The landlord has the following policy with regard to smoking:

> *<u>"SMOKING:</u>*
> The no smoking policy applies to tenants and guests alike.

PAM is endeavouring to become a no smoking building. Tenancy will not be offered to any one who smokes. Tenants who are not truthful regarding their smoking may have their tenancy terminated for cause.

Smoking is NOT allowed within the building (except by those "grandfathered"). All smoking must be done in the smoking tenant provided in the common area.

The manor will **not tolerate the smoking of marijuana** within the building or on the grounds. There are no exceptions. A medical marijuana certifi8cate will not be honoured, and the no smoking rule will still apply.

- The landlord attempts to enforce its no smoking policy and has arranged that the smoking tenant is situated in accordance with the City of White Rock Bylaw which provides that no person shall smoke "Within seven and a half meters measured horizontally from any door or window that opens or any air intake."
- The landlord has moved the smoking tenant on two occasions to reduce the interference with others. The landlord has complied with the City of White Rock Bylaws that require smoking is not permitted within 7 ½ meters from the rental unit. The tenant's rental unit is over 13 meters away and is on the third floor.
- The landlord is endeavouring to make this a "no smoking" property. No new tenants are permitted to smoke. The smoking area is the farthest away from the rental units and it is covered by a tent.
- The tenant's complaints have been dealt with in a timely fashion and in reasonable manner. However, the tenant's complaints are excessive and not reasonable.
- The resident caretaker works 5 days a week. During the summer he is off site at Harrison Hot Springs from Friday evening to Sunday evening.
- During a recent fire inspection it was requested that all metal shopping carts be removed from the building as they may obstruct emergency response personnel. These metal shopping carets have been taken from grocery stores and do not belong to the individual users. Personal shopping carts are allowed at on the rental property provided they are of small and foldable nature.
- The Residential Tenancy Act and the Society Policy Manual does not impose a requirement on the landlord to give written notices to each individual tenant. The individual tenant is given written notice on pressing issues such as suite inspections, water shut-offs, and fire drills. Minor issues such a social gathering or routine maintenance checks are posted in the common area.
- The respondent keeps personal information confidential and complies with the Personal Information Protection Act to the best of its ability. Personal files are kept in a locked file drawer in a locked office.
- When investigating the landlord does not disclose who made a complaint although another resident can often figure it out on their own. Personal
- For security reasons residents are not permitted to give their keys to others. There is an intercom system in the building. It would cost $2000 to $3000 to re-key the building.

- Security cameras were installed are around 2010 to 2011.

The tenant disputed much of the evidence given by the landlord including the following:

- When she first moved in the plumber arrived without giving proper notice.
- She gave the landlord a long e-mail given in the strictest confidence but she is afraid the landlord shared this information with other.
- The evidence given by the landlord about the dispute involving the young grandkids was not correct. The other tenant became belligerent and yelled at me.
- I wrote a long letter of complaint but the landlord failed to come to talk to me.
- In March 2015 when I complained about smoke in my suite the landlord suggested "Maybe this isn't the place for you."
- In May the landlord initially banned smoking but installed a smoking tenant a few months later.
- The fire department does not have any issue with buggies in the suite.
- Heat is included with my rent. My hydro has skyrocketed. There is an electric heater in the bathroom which increases my hydro.

Analysis

The tenant submitted a 12 page summary of complaints in a letter dated January 2, 2017. In addition the tenant submitted hundreds of pages of documents including e-mails, correspondence etc. The parties were advised that the start of the hearing that the documents etc. submitted by the parties would not become part of the evidence unless it was referred to in their oral testimony. Most of the complaints set out in the tenant's 12 page summary were not referred in her testimony at the hearing. As a result I have no alternative to dismiss these complaints as unproven.

In Stearman v. Powers, 2014 BCCA 206 (CanLII), the British Columbia Court of Appeal considered the covenant of quiet enjoyment in a commercial tenancy. The tenant noticed a creosote-like odour, which appeared to be exacerbated by the use of the ventilation system. After unsuccessful attempts by both the landlord and tenant to identify the source of the odour, the tenant stopped paying rent and vacated the premises, claiming that the presence of the odour constituted a fundamental breach of the agreement. The landlord sued for lost rent and other costs; the tenant counterclaimed. The trial judge found that the landlord's failure to eliminate the odour breached the covenant for quiet enjoyment and constituted a fundamental breach, justifying an award of damages to the tenant.

The Court of Appeal allowed the appeal and overturned the decision of the Trial Judge. It held that the trial judge erred in finding a breach of the term of quiet enjoyment, as there was no evidence that the landlord derogated from his grant of exclusive occupancy without interference. The existence of the odour did not constitute a fundamental breach of the agreement, such that the tenant was justified in treating the agreement as repudiated. The odour did not deprive the tenant of the entire benefit of the agreement, particularly as the tenant was solely responsible for the maintenance and repair of the Premises under the express terms of the lease.

The Court of Appeal set out the law as follows:

> *Quiet Enjoyment*
>
> [18] Both the landlord and tenant approached the second ground of appeal as an issue of fact, or perhaps mixed law and fact, in their factums. The meaning of the landlord's obligation to provide "quiet enjoyment", however, must be first examined as a matter of law. The term was express in this case, but is implied into any lease. Such a covenant protects against a landlord's derogating from his own grant. Thus, Christopher Bentley, John McNair and Mavis Butkus, the authors of *Williams & Rhodes' Canadian Law of Landlord and Tenant* (6th ed., looseleaf), state that the term provides "assurance against the consequences of a defective title and against any substantial interference, by the covenantor or those claiming under him, with the enjoyment of the premises for all usual purposes." (At 9-1, my emphasis.) Similarly, Richard Olson, in *A Commercial Tenancy Handbook* (looseleaf), describes the covenant for quiet enjoyment as a right to "exclusive occupancy of the premises without interference by the landlord". (At 3.20.1; my emphasis.) The author cites *Firth v. B.D. Management Ltd.* (1990) 1990 CanLII 2110 (BC CA), 73 D.L.R. (4th) 375, in which this court observed:
>
> > To establish a breach of the covenant of quiet enjoyment the appellant [tenant] must show that the ordinary and lawful enjoyment of the demised premises is substantially interfered with by the acts of the lessor. It is conceded by counsel that the question of whether there has been a substantial interference is a question of fact. Mere temporary inconvenience is not enough – the interference must be of a grave and permanent nature. It must be a serious interference with the tenant's proper freedom of action in exercising its right of possession: see *Kenny v. Preen* [1963] 1 Q.B. 499 (C.A.).
> >
> > Similarly, when one considers whether a landlord's acts can be construed as a derogation from its grant, the appellant must demonstrate that there has been some act which renders the premises substantially less fit for the purposes for which they were let. [At 379-80; emphasis added.]
>
> [19] In *Kenny v. Preen* [1963] 1 Q.B. 499, cited in *Firth*, the Court of Appeal discussed the nature of the implied covenant for quiet enjoyment. Pearson L.J. noted that the covenant is not an absolute one protecting a tenant against eviction or interference by anyone, but is a:
>
> > ... qualified covenant protecting the tenant against interference with the tenant's quiet and peaceful possession and enjoyment of the premises by the landlord or persons claiming through or under the landlord.

His Lordship continued:

> The basis of it is that the landlord, by letting the premises, confers on the tenant the right of possession during the term and impliedly promises not to interfere with the tenant's exercise and use of the right of possession during the term. [At 511, emphasis added.]

His Lordship also cited older cases, including *Budd-Scott v. Daniell* [1902] 2 K.B. 351 and *Markham v. Paget* [1908] 1 Ch. 697, for the proposition that the covenant protects against interference by the landlord with the possession which he himself has conferred on the tenant. (At 511-2.)

[20] With all due respect to the trial judge, I do not think it can be said in this case that the landlord or someone claiming through him derogated from his grant of exclusive occupancy without interference. There was no finding by the trial judge that the odour was caused by any act or omission of the landlord or someone acting for him. Nor can it in my view be said that the odour was necessarily of a "grave and permanent nature" in any event. Again, there is no finding to this effect and under para. 5.04 of the lease, the tenant agreed that the landlord would not be responsible for any defect in or changes of condition affecting the premises, howsoever caused.

After carefully considering all of the evidence I determined the Tenant failed to establish the landlord breached the covenant of quiet enjoyment for the following reasons:

With regard to each of the Tenant's complaints I find as follows:

a. I dismissed the Tenant's claim for a monetary order for the breach of the covenant of quiet enjoyment caused by the excessive noise of other residents for the following reasons:

    .

    - I determined the tenant failed to prove the alleged disturbances are "sufficiently grave and a permanent nature" to amount to a breach of the covenant of quiet enjoyment. Many of the complaints relate to other residents talking in the smoking tent. This is not a substantial interference with the enjoyment of the tenant. The tenant's right to quiet enjoyment is not absolute but consideration must be given to the rights of other tenants to enjoy the rental property including the common property.
    - I determined that many of the complaints raised by the tenant were normal user. The tenant failed to establish that other complaints which may have occurred during the quiet time period amounted to "substantial interference." For example, the tenant's complaint about the disabled tenant returning from an outing and noise associated with getting into her wheelchair access her rental unit was unreasonable and do not amount to a "substantial interference."

- Further, even if some of the complaints are justified in that they show unreasonable disturbances, the tenant failed to prove the landlord has not acted reasonably for the following reasons:
  - The landlord has a policy in place that covers noise and smoking that is applied reasonably.
  - I am satisfied the landlord has applied the policy and has acted reasonably in investigating the complaints of the tenant or others.
  - The tenant is under the misapprehension that the landlord must evict a tenant who may have made excessive noise. The law does not impose such an obligation.
  - The landlord has a resident manager on duty 5 days a week. The tenant's witnesses confirmed that their complaints are significantly reduced when the resident manager is on-site.
  - The landlord has acted reasonably in investigating complaints that may have merit.
  - The landlord has attempted to reduce noise by changing the metal garbage can lids to plastic lids and by limiting access to the laundry after 8:00 p.m.

b. One can empathize with the position of the Tenant on the issue of second hand smoke. I have no doubt that the tenant experience significant discomfort caused by second hand smoke. However, I determined the landlord has taken reasonably steps in limiting the exposure of the Tenant and others to second hand smoke. I determined the tenant failed to prove that landlord is liable for a monetary claim for the following reasons:
   - The tenant did not present any evidence to show that she has medical allergies or similar problems relating to second hand smoke.
   - The landlord has acted reasonably in dealing with the problem given that it must balance the rights of tenants who rented at a time when smoking was permitted with other tenants. The tenant failed to prove that the landlord has stood idly by.
   - It is endeavouring to make this property a smoke-free property and they are not renting to new tenants who are smoking. It is following City of White Rock bylaws. It is limiting smoking to those who are grandfathered in and to a small area on the property. The landlord has attempted to reduce the impact to others by installing a tent.
   - An obvious solution to the problems presented is moving the tenant to another unit on the side of the building that is facing in the opposite direction of the courtyard. However, neither party presented evidence as to whether the tenant has requested such a move or whether such a move is feasible.
c. The tenant made specific complaints about K and B. I accept the landlord's testimony that they have investigated the manner. There is a police investigation.
d. I dismissed the complaints set out in the January 2, 2017 letter of the tenant that the landlord failed to provide proper notices. The tenant failed to tender sufficient

evidence on this issue to prove the allegations.. As a courtesy to the parties I have pasted the provisions of the section 29 of the Act relating to the giving to notice to enter the rental unit:

> **Landlord's right to enter rental unit restricted**
>
> **29** (1) A landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:
>
> (a) the tenant gives permission at the time of the entry or not more than 30 days before the entry;
>
> (b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:
>
> (i) the purpose for entering, which must be reasonable;
>
> (ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;
>
> (c) the landlord provides housekeeping or related services under the terms of a written tenancy agreement and the entry is for that purpose and in accordance with those terms;
>
> (d) the landlord has an order of the director authorizing the entry;
>
> (e) the tenant has abandoned the rental unit;
>
> (f) an emergency exists and the entry is necessary to protect life or property.
>
> (2) A landlord may inspect a rental unit monthly in accordance with subsection (1) (b).

e. I dismissed the tenant's complaints of the policy requiring all residents remove their metal shopping carts. I determined there is a safety issue and that the landlord was responding to the request contained in the fire report of the fire department.
f. I dismissed the tenant's complaints relating to the giving of keys to friends, guests while they are not there, and permitting friends to use our parking spot as the tenant failed to provide sufficient evidence at the hearing to justify an order in this regard.
g. I dismissed the tenant's complaint regarding written notification regarding storage in the garage as the tenant failed present sufficient evidence at the hearing justify an order.
h. I dismissed the tenant's claim for breach of privacy as the tenant failed to provide any evidence on most of the complaints and failed to provide sufficient evidence to prove the remainder. The tenant I accept the evidence of the landlord that they have a duty to investigate a complaint that may have merit. In so doing, while the landlord

does not disclose who that have received the complaints from, it is often not difficult for a person to figure out who was making the complaint.

i. I dismissed the tenant's claim of $164.84 for additional hydro costs. The tenant failed to provide evidence at the hearing that she has incurred this additional cost in her hydro bill for the electric heater in the bathroom. Further, the tenancy agreement provided that the landlord provide heat. The landlord provides heat. The tenant failed to prove this claim.

j. The tenant claimed $300 for paper, ink expenses. The tenant failed to present evidence at the hearing to prove the quantum. Further, this claim relates to the cost of preparing for litigation. The only jurisdiction an arbitrator has relating to cost is the cost of the filing fee.

Conclusion:

In conclusion I determined failed to prove her claim and accordingly the claim is dismissed.

This decision is final and binding on the parties.

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: February 25, 2017

Residential Tenancy Branch