



Dispute Resolution Services

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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 O, RR, FF

Introduction

This hearing convened as a result of a Tenant's Application for Dispute Resolution wherein the Tenant sought an Order pursuant to section 65(1) of the *Residential Tenancy Act* that he be able to reduce his rent, and to recovery his filing fee.

This hearing was conducted by teleconference. It originally convened on December 8, 2016. During that hearing the parties had productive settlement discussions and the hearing was adjourned to December 16, 2016 in hopes it would resolve. The hearing reconvened on December 16, 2016 at which time the parties indicated they continued to have productive settlement discussions and wished to adjourn the hearing. The hearing then reconvened on January 23, 2017 at which time the parties advised settlement had not been reached. The arbitration commenced on January 23, 2017 and due to time constraints continued on February 22, 2017.

During the hearing on January 23, 2017 counsel for the Landlord stated that he did not receive all of the Tenant's evidence which had been submitted on October 28, 2016. By Interim Decision dated the same day, I ordered the Tenant to resend his evidence to counsel for the Landlord. At the February 22, 2017 hearing counsel for the Landlord confirmed the evidence had been received. Save and except for this, 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. Is the Tenant entitled to reduce his rent for the period of time in which the rental unit has been renovated on a retroactive and ongoing basis?
2. Should the Tenant recover the filing fee?

Background Evidence

The Tenant testified that his tenancy began April 1, 2015. At the time the tenancy began monthly rent was \$790.00 and that it increased to the current amount of \$812.91 in April of 2016.

The application before me relates to the Tenant's claim for a rent reduction as a result of extensive renovations being done to the rental building beginning in December of 2015. The Tenant described the nature of the work as the wholesale renovation/modernization of the rental building in which the rental unit is located.

The Tenant stated that the concrete balconies are being jackhammered and removed to put up glass and metal to modernize the balconies. At the hearing on January 23, 2017 he stated that the jackhammering had been going on for approximately eight months. He further stated that this significantly affects his ability to work (which he does from home approximately 50% of the time) and to enjoy the rental unit. The Tenant testified that the jackhammering starts at approximately 8:45 a.m. and continues throughout the day concluding at 4:00 p.m. He stated that he is awoken daily to the sound of jackhammering, sawing and drilling and hammering and that this noise interferes with his ability to work from home.

During the hearing on January 23, 2017, the Tenant asked if he could play an audio recording of the jackhammering. He confirmed he had not provided that recording to the Landlord as such, I informed the Tenant that his audio recording would not be considered.

The Tenant also testified that due to the renovations there have been frequent water shut offs which are sometimes unannounced and turned off for the entire day; he estimated that approximately 25% of the time the Tenants are not given notice of the water shut off. He estimated that the water has been turned off "countless times", which he clarified to mean at least 20 times. He described a time when he had a friend in town in August of 2016 and stated that during this time he and his friend had to leave the rental unit as they could not flush the toilet or even hear each other. He reported that he called the Landlord's reception office and was informed that they closed 4:00 p.m. E.S.T. and was then directed to the emergency line. He further stated that he spent an hour arguing with the person who answered the phone as they insisted that the Landlord did not manage the property despite clear signage at the rental unit. He stated that the water did not come on until 1:00 p.m. the next day. He confirmed that the previous Landlord was "worse" in terms of notifying the Tenants about water shut offs but the new Landlord (the Respondent in the within action and who took over in October 1, 2016) is better.

The Tenant testified that there are several crews of construction workers who have set up "camp in the front yard" where they have couches and tables. He further stated that not every worker has keys to the main entrance such that they leave the lobby door open throughout the day and sometimes they leave the door open at the end of the day. He submitted that this is a security concern for all the occupants of the rental building. The Tenant stated that in August of 2016 the lobby door was not closed and a group of homeless people had entered the lobby and were smoking marijuana.

The Tenant stated that when he first moved into the rental building it was a very peaceful place to live. He described how formerly he could walk through the yard and to go to the pool. He stated that due to the construction, the workers, and the debris, it is now very loud and very disruptive. He submitted that the whole property is affected by the yelling by the construction workers, the jack hammering, and sawing etc.

In addition to the general construction of the common areas, the Tenant also described more specific impact on his particular rental unit. He stated that for over a month he was requested to permit access to his unit for the window replacement project. He stated that he was asked to move his furniture and stereo equipment as it has to be unhooked and moved. He stated that he was informed to ready his rental unit on several occasions yet the work was delayed. For instance, he described how on one occasion he received a handwritten letter telling him that they would be there the next day. He stated that he then moved his stereo equipment, covered his furniture and otherwise made his rental unit ready for the work to commence. He stated that despite the notice, the window replacement did not happen the next day and the Tenant then received another letter indicating that access would be required for an entire week. Further documents from the Landlord indicate that the Tenant was asked to keep his rental unit ready for the window replacement for one month. The Tenant stated that on October 25, 2016 his window was removed, but as they had incorrectly measured the window, the workers simply put up a piece of plywood. He stated that he returned home to find his rental unit unlocked and testified that the plywood was not replaced until two weeks. He confirmed that the other windows remain unchanged and he is not clear whether they will require further access to his unit to deal with those windows.

The Tenant also testified that the project has been significantly delayed as the City has issued numerous stop work orders. He stated that a stop work order was first issued on January 15, 2016 and it was his understanding this was issued due to concerns with asbestos. He confirmed this prolonged the work by approximately one month.

The Tenant stated that a second stop work order was issued on May 6, 2016 again due to asbestos concerns which delayed the project further.

The Tenant stated that on December 14, 2016 a third stop work order was issued with respect to asbestos concerns and at that time, the Tenant decided to put his apartment back together

and set up his computer. He said that he got to a point where he could no longer wait for the work to be completed as he needed to put his apartment back together and carry on with his life. He said the rental unit is a small bachelor apartment and he could not handle the mess anymore. He further stated he uses his stereo equipment to produce music.

The Tenant also testified that during the stop work order, Canada post refused to enter the building and the property manager would not enter the building to receive the rent cheques and asked for rent payments by online transfers or to meet the Tenants outside the building to receive the rent cheques.

The Tenant stated that he understood that the stop work order was then modified to allow for exterior work, but no interior work.

The Tenant testified that due to the construction and the stop work orders, the maintenance and cleanliness of the building has significantly deteriorated. He noted that even during the stop work orders, the workers continued bringing the materials into the building (cabinets, flooring material, etc.) which made a mess of the elevators and hallways. When the stop work orders were issued no one was allowed in the building, even the cleaners and as such the rental unit has been very unclean during the construction.

The Tenant stated that the renovations were expected to last 24 months from the start date of December 2015 and would therefore be completing in December of 2017; however, as the work has been stopped several times, the expected completion date is likely much later.

He further stated that when the previous Landlord was involved, there was no regard to maintenance as far as the clothes washers or cleaning the stairways etc. from the garbage from the construction project. The Tenant stated that it is always a "dirty mess" at the rental building. He stated that there have been improvements, but it remains a problem as the construction work makes the rental building dirty.

The Tenant stated that as a result of the work, sometimes the pool would open later and sometimes the washers and dryers were not available. He stated that the building manager would say that he would get to an issue, but then wouldn't.

The Tenant stated that street parking has also been negatively affected due to the construction. He said most of the parking has been taken up by giant dumpster bins for the renovations. He further stated that he parks at a family members' residence in a different neighbourhood as he is not able to park on the street by the rental building.

The Tenant testified that it seems that many people have moved out of the rental building due to the ongoing construction. In his written submissions he wrote that "at least half of the tenants" who live there have moved out. He confirmed this was his understanding as to the current situation and noted that with so many people leaving the full scale renovation of their empty

units has been ongoing. He stated that work on the vacant suites begins as soon as the former tenants moved out and that for a significant period of time the work occurred 7 days a week 14 hours a day. He confirmed that now that the building is under new management, the interior work has stopped on weekends.

The Tenant also testified that recently his neighbours (part of the same building development) were evacuated due to elevated levels of asbestos. He noted that this was in the news as well. He said that even though the Landlord assured them that there were no asbestos concerns in his building, this is the third time others have been evacuated and as such he finds that concerning.

The Tenant also testified that there has been reduced access to elevators because often they are being used by construction personal. He said he lives on the 14th floor and as such he has had to climb the stairs when the elevator has not been available, which is a regular occurrence.

The Tenant also stated that he front door is always left open because of number of crews having access to the building. The Tenant notes this is a security risk because he does not know who is going in and out of the building.

The Tenant stated that he believes that there is a significant amount of work to be done, including the balconies which still need to be finished and the suite upgrades which need to be finished, which he understands are to include new flooring, new cabinets as well as all related clean up. The Tenant stated that there are hanging wires and exposed lighting units in the hallways which he believes is unsaef.

Counsel for the Landlord cross examined the Tenant as follows.

Counsel asked if the Tenant lived in another community, to which the Tenant responded he did not.

Counsel then asked the Tenant how he arrived at a 50% reduction in rent. In response the Tenant stated that due to the significant amount of things that have been going on, that he felt that 50% was a reasonable amount. He acknowledged that he has a place to live, but stated that it is not what he signed up for when he agreed to rent the rental unit.

Counsel further asked how often the Tenant was at home, and the Tenant responded that the time he is at home during the day is approximately 50%, or two thirds of the day including when he is sleeping.

Counsel suggested that the jackhammering, which he characterized as the "most offensive" started in June 2016, and the Tenant confirmed that this was likely the date this started.

Counsel then suggested that as the Tenant didn't write a letter to the Landlord between December 2015 and August 2016, that the Tenant felt it was "okay" until the jackhammering began. In response the Tenant stated that the construction workers' yelling and disturbances started at the beginning, but the "jack hammering put him over the edge". The Tenant also stated that he began talking to other tenants and realized that the Residential Tenancy Branch might provide some resolution as prior to this, he thought his only option was to move out. The Tenant stated that he knew he could not move to a comparable rental unit as his monthly rent was very low; further, he stated that he did not want to move as he really liked his unit.

Counsel suggested that all work stopped on the building on December 14, 2016 because of the stop work order and that as such there has been no real disturbance since then. The Tenant confirmed that at this point the building manager refused to come to the building and Canada Post would not deliver mail. The Tenant said it has been "quite refreshing" because there is no work going on, but there is still quite a mess.

Counsel asked the Tenant if he had anything stolen and the Tenant confirmed that he had not, although he does worry about this when the workers leave the front door open.

Counsel also asked if the Tenant's safety had been threatened. The Tenant stated that he had not been personally threatened but reiterated that street people/homeless people are now smoking marijuana in the lobby. The Tenant again confirmed that he has been concerned about it and he should be able to live in a building where the exterior door is secure.

Counsel then asked the Tenant about his asbestos concerns and the Tenant confirmed that he is concerned as a result of the news reports regarding the building across the street (which is part of the same development), as well as the stop work orders. He said the ceiling has been scraped and drilled into. The stop work orders have specifically noted that it is due to "asbestos mishandling" and the Tenant stated that he would not know about the effects for 10 years.

Counsel then asked the Tenant about street parking and had him confirm that street parking is not a part of his tenancy agreement. The Tenant confirmed that the parking is available for his guests and it is unfortunate that his guests cannot park near his rental unit anymore. Again, the Tenant stated that this was never an issue when he first signed up to live there and something he has been forced to accept due to the construction.

Counsel then asked the Tenant about water shut offs and asked the Tenant whether he kept a record as to the dates this occurred. The Tenant stated that he did have text messages that he sent to friends complaining about it as well as emails he sent to the management company. He further confirmed that he did not keep records at the beginning as he didn't know he had options as he was not aware that he should be compiling evidence for this hearing before the Residential Tenancy Branch.

Counsel then asked the Tenant to confirm that there are two elevators in the rental building and as such one was always available. The Tenant stated that this was not true as while the workers would lock one off, they continued to use the other elevator such that there was reduced access.

Counsel then had the Tenant confirm that he wrote a hand written letter to the Landlord wherein he requested a 50% rent reduction. In this letter the Tenant referenced a typed document titled "Schedule A—Details of disruptions at [address withheld]". The Tenant confirmed that this document was prepared by many tenants of the rental building.

Counsel also directed the Tenant to a document titled "Basis of Dispute" which the Tenant confirmed was prepared by another Tenant, Mr. A.; he confirmed that Mr. A. helped him with his claim and told him about the Residential Tenancy Branch.

Landlord's Response

At the hearing on February 22, 2017, R.K. testified as to the current status of the construction.

He stated that there was a stop work as of December 14, 2016 and as of January 4, 2017 building management has been reinstated and there has not been any construction.

R.K. submitted that to compare the building across the street (which is in the news and which has issues with asbestos) is "apples to oranges" as while the buildings look the same the materials used were very different. He also confirmed that the asbestos concerns for the building across the street are not shared with the building in which the rental unit is located.

R.K. also confirmed that environmental engineers have been at both locations to ensure that the Tenants are not exposed to asbestos.

R.K. stated that the current management, D.P., took over October 2016.

R.K. confirmed that there is a program in place to deal with cleanliness during construction. He also stated that the building managers are cleaning the hallways and common areas regularly.

He also stated that once the owners are given the "green light" (presumably once the stop work order is rescinded) there will be a new system in place to address communication issues.

R.K. further confirmed that the Landlord has decided to continue with exterior work first and then move on to interior work. He stated that this will reduce the impact on the tenants.

R.K. also stated that the exterior work will take approximately "two and a bit months" of exterior work and if it started tomorrow it would be done late March or early April. He also stated that

interior work will then commence. He was not able to be specific about when that work will be completed, only to say that the hope is that it will be done by the summer.

R.K. further stated that renovations/upgrading of the units only occurs when there is turnover which is a normal occurrence in a building with so many individual units.

In cross examination the Tenant asked R.K. to confirm the number of rental units which had been upgraded and the number left to complete. R.K. confirmed that there are 122 units in this rental building. He stated that over half have already been done. He also stated that due to the "tight market" in the community in which the rental unit is located there has been less turnover, and as such he anticipates there may be less upgrading than there has been in the past. He also stated that the Tenant's rental unit is on the top floor and of the top two floors over 50% have been done. He also noted that the top floor has fantastic views and the people who have been there for a while have substantially reduced rent compared to what the market would dictate at this point and as such he does not believe there will be a lot of turnover in those two floors.

Tenant's Closing Submissions

The Tenant stated that the fact that there are 50% of the units yet to be renovated and the extended time it has taken to renovate the common areas and the individual units over the past 14 months is why he came to the Residential Tenancy Branch. He stated that the dust, the yelling by the workers, the security and health concerns as well as the ongoing disruptions is why he is asking for a rent reduction.

The Tenant also stated that when he moved into the rental building, his rental unit was quiet, very nice and he was very happy. He said when the owners purchased the building it became an entirely different building to live in. Instead of a reduction in rent, he has received rent increases. He said that the living conditions have begun to deteriorate significantly due to the ongoing construction. He also stated that he is very worried about his health because of the stop work orders. He also stated that the security concerns continue and there is no onsite manager as of yet. He stated that it has been a long time since there has been a good onsite building manager to rely on.

He confirmed that he is asking for a 50% rent reduction from December 2015 to the summer of 2017 when the exterior and interior work is scheduled to be completed. He confirmed that once the interior and exterior work is completed he will address any further claims related to upgrading of individual units as and when it is needed.

Landlord's closing submissions

Counsel suggested that the Tenant should be given leave to reapply should he be affected by the renovation/construction of other units on his floor or below but as this is difficult to predict no award should be made at this time for these possibilities.

Counsel submitted that the evidence is that it has been quiet since mid-December and will be until the work commences again. Counsel stated that while the building isn't as pretty as it could be, and there are construction supplies, scaffolding, dumpster bins, etc. the Tenant is not affected to such an extent that he warrants a 50% reduction in his rent for this time.

Counsel further stated that a 50% is the highest possible award that anyone would get for such a situation. He further submitted that the Tenant testified that he is there 50% of the time when the construction is going on, as the other times he is sleeping.

Counsel stated that the Tenant is entitled to compensation, but it isn't 50%, rather it is "something less". He also stated that this figure would be appropriate for someone who works from home 100% of the time, or works night shift and sleeps during the day.

Counsel also stated that the "building security" is not an issue, nor are the alleged "safety concerns". He further submitted that the stop work orders are issued when Worksafe wishes to investigate and to counsel's knowledge there has not been any mishandling of asbestos.

Counsel also noted that the water shut off was unfortunate, but the Tenant did not provide a record of when this occurred.

Counsel submitted that the parking issue is a "non-issue" as street parking is not included in the tenancy agreement. Counsel further submitted that street parking is available or not and the Landlord makes no representations as to whether that parking will be available or not as this can be affected by other neighbours, the city bylaws around parking, etc.

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 Tenant has 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.

In this case, the Tenant alleges that his right to quiet enjoyment has been and continues to be negatively affected as a result of the large scale renovations to the rental building. He seeks the equivalent to a 50% reduction in his rental payments from the beginning of the renovation in December of 2015 to the present.

Based on the rent paid by the Tenant during the relevant time period, the amount sought by the Tenant is as follows:

Time period	Monthly rent	Total paid	50% rent reduction requested
December 2015 to March 2016	\$790.00	\$3,160.00	\$1,580.00
April 2016 to March 2017	\$812.00	\$9,744.00	\$4,872.00
TOTAL			\$6,452.00
Filing fee			\$100.00
TOTAL CLAIM			\$6,542.00

The Landlord acknowledges that the Tenant's right to quiet enjoyment has been affected, and that the Tenant is entitled to some compensation in the form of a rent reduction. The Landlord submits that the Tenant's request for a 50% rent reduction is excessive.

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 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.

...

A landlord would not normally be held responsible for the actions of other tenants unless notified that a problem exists, although it may be sufficient to show proof that the landlord was aware of a problem and failed to take reasonable steps to correct it.

...

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 the Tenant has met the burden of proving that his right to quiet enjoyment of the rental unit has been breached. I note that counsel for the Landlord conceded that the Tenant was entitled to a rent reduction due to the disturbance caused by the renovations.

The Tenant gave compelling and detailed testimony regarding the significant impact of the renovations on his ability to enjoy the rental unit and the common areas of the building. He testified that he works from home regularly and that in total he was in the rental unit approximately 50% of the time the construction was occurring.

I accept the Tenant's testimony that he was considerably impacted by the prolonged window replacement in his rental unit such that for an extended period of time his rental unit was in disarray as he waited for the work to be completed. I also accept his testimony that the noise from the jackhammering of the balconies was intolerable and went on for a significant amount of time. As he uses his stereo equipment to produce music, I find that he is particularly impacted by the sound of the renovations as well as the workers.

The subject rental unit is on the 14th floor of the rental building, such that the lack of use of the elevator would also impact the Tenant more than others in the building. I accept his testimony that at times the workers would lock one elevator and continue to use the other such that the Tenant was regularly required to climb the stairs to his unit.

Although there were times the work ceased during the times the project was halted due to stop work orders, I accept the Tenant's testimony that this continued to be disruptive as Canada post workers would not attend the rental unit, and at times an on-site manager was not present due to health and safety concerns. Further, I accept that during these times, the rental property was not maintained or cleaned sufficiently and that the Tenant was therefore required to navigate construction materials and potentially hazardous situations (such as bare wires hanging from fixtures). Further, as the stop work orders have been issued to do possible concerns with the

handling of asbestos, I accept the Tenant's evidence that this has been comparably disruptive to times when the work was being completed.

The Tenant testified that previously the rental unit was very quiet and relaxing. He spoke fondly of being able to walk through the grounds to use the swimming pool. When he described the condition of the rental unit during the construction, his voice broke at times indicating this has been very emotionally difficult for him.

I accept the Tenant's testimony that the water was shut off approximately 20 times without prior notice. While it would have been helpful for the Tenant to keep a record of such occurrences, I accept his testimony that at the time he did not realize such information might be useful at a Residential Tenancy Branch hearing as he was not even aware of the possibility of such a hearing. I find that these shut offs had a tremendous impact on the Tenant such that at times he was not able to remain in his rental unit at all. I note that on one occasion an out of town guest ended his visit as they were not able to flush the toilet.

It was clear from the Tenant's testimony that he has considered moving from the rental unit due to the impact of the construction and his concerns about the security and safety of the rental unit and the building. I note that the Tenant spoke candidly about the fact that he would not be able to find a comparable rental unit for the amount he pays in rent for the subject rental unit.

In all the circumstances I find that a reasonable decrease in the value of the rental unit due to the Tenant's loss of quiet enjoyment is 40% of the rent paid. I have discounted the amount claimed by the Tenant to take into consideration the fact that construction did not occur on Sundays and that approximately 1/3 of the time the Tenant is sleeping.

As the Tenant has been substantially successful, I also award him recovery of the \$100.00 filing fee.

Conclusion

The Tenant is entitled to a retroactive rent reduction of 40% of rent paid from the renovation period from December 2015 to the present as compensation for breach of his right to quiet enjoyment of the rental unit. I therefore award the Tenant the following:

Time period	Monthly rent	Total paid	40% rent reduction requested
December 2015 to March 2016	\$790.00	\$3,160.00	\$1,264.00
April 2016 to March 2017	\$812.00	\$9,744.00	\$3,897.60
Filing fee			\$100.00
TOTAL AWARDED			\$5,261.60

The Tenant is also entitled to an ongoing rent reduction of 40% of his monthly rent payments until the renovations to the exterior and common areas are completed.

The Tenant is also entitled to recover the \$5,261.60 award by further reducing his monthly rent payments until the amount is covered. Accordingly, the Tenant is permitted an ongoing rent reduction of 40% (until the renovations to the exterior and common areas are completed) *in addition to a monthly reduction* until the \$5,261.60 award is recovered.

In the event the tenancy ends prior to the Tenant recovering the \$5,261.60 awarded, he shall be at liberty to seek a Monetary Order for the balance due.

Finally, should the Tenant's right to quiet enjoyment be negatively impacted by future renovations and updating of individual rental units he is at liberty to apply for further compensation.

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: March 23, 2017

Residential Tenancy Branch