



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding IMH 415 & 435 MICHIGAN APARTMENTS LTD.
and [tenant name suppressed to protect privacy]

REVIEW HEARING DECISION

Dispute Codes MNDC RR FF O

Introduction

This Review Hearing was convened as a result of the Tenants' successful Application for Review Consideration. On January 31, 2017, the Tenants were granted a Review Hearing on the basis that they were in possession of new and relevant evidence that was not available at the time of the original hearing. Section 82(3) of the *Act* permits me to confirm, vary, or set aside the original decision.

The Tenants were both in attendance at the Review Hearing. The Landlord was represented at the Review Hearing by G.H., legal counsel. C.A. and R.K. also attended the hearing agents of the Landlord. All parties giving oral testimony provided a solemn affirmation.

The Tenant C.V.M. testified the Landlord was served with the Review Consideration Decision and supporting evidence by registered mail. He advised the package was received by the Landlord on February 10, 2017. On behalf of the Landlord, G.H. acknowledged receipt.

In addition, the Tenants submitted additional digital evidence. The Tenant C.V.M. testified it was served on the Landlord by registered mail and was received on February 21, 2017. Again, G.H. acknowledged receipt of the digital evidence. I find the Landlord was duly served with and received the above documents.

No further issues were raised with respect to service or receipt of the documentary and digital evidence relied upon by the Tenants. The parties were given an opportunity to present evidence orally and in written and documentary form, and to make submissions to me.

I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary and Procedural Matters

As I was the arbitrator at the original hearing on November 15, 2016, I have considered only the evidence tendered as new and relevant evidence that was not available at the time of the original hearing.

Issue to be Decided

Should the Decision issued on November 15, 2017, be confirmed, varied or set aside?

Background and Evidence

In the original decision, dated November 15, 2016, the Tenants were granted a monetary award in the amount of \$1,300.00, which was comprised of \$1,200.00 for loss of quiet enjoyment to January 31, 2017, and \$100.00 as recovery of the filing fee. The Tenants submitted the amount of the monetary award did not reflect the disruption they have experienced as a result of a renovation project taking part at the rental property. Rather, they suggested the original decision was unfair, biased and discriminatory, and did not fully address all of the Tenants' concerns. The Tenants also suggested in their written submissions that legal counsel and the witnesses for the Landlord "ganged up" on the Tenant C.V.M., who represented both Tenants at the original hearing. Accordingly, the Tenants have submitted what they say is new and relevant documentary and digital evidence, which I have summarized below.

The Tenants submitted a series of documents labelled as Schedule "A" through "L". The Tenant C.V.M. referred me to an image of a stop work order, dated January 15, 2016, which was labelled Schedule "B". Although the Tenants' rental unit was not directly impacted by the order, it was tendered as evidence that the construction and renovation disturbance has been going on for longer than was considered in the original Decision. The Tenants submitted it was not provided at the original hearing because of issues with their computer.

The Tenant C.V.M. also referred me to a series of video clips, taken on September 6 and December 12, 2016. The video clip, dated September 6, 2016, depicted a drawn curtain with jackhammering noise in the background. The Tenant C.V.M. advised this video clip was not available at the time of the original hearing due to computer issues.

According to C.V.M., the video clip demonstrates the “ear piercing” nature of the construction noise, adding that he believes construction debris had a health impact on the Tenants.

The Tenant C.V.M. referred me to a second video clip, dated December 13, 2016, which again highlights the reverberation and noise associated with construction.

Further, the Tenant C.V.M. referred to five photographs, received at the Residential Tenancy Branch on February 21, 2017. The first, taken on September 22, 2016, depicts dust on the floor of the Tenants’ rental unit. The second, taken on September 22, 2016, depicts drawn curtains with the following notation: “Curtains closed on a fine sunny day and for the best part of summer 2016.” The third, taken on July 18, 2016, depicts breakfast plates with earplugs lying beside them as evidence that ear plugs have been required by the Tenants. The fourth, dated October 25, 2016, depicts an emergency water shutoff notice with the following notation: “One of the many water shut offs. By Feb. 2017 water pressure is minimal.” Finally, the fifth, taken on August 18, 2016, depicts a second water shutoff notice.

The Tenants also submitted a series of black and white images including an email exchange between the Tenants and an information officer at the Residential Tenancy Branch, images of the laundry room, elevator, view from the Tenants’ window, and flammable items located in the storage area. The dates of these photographs and the reason they were not available at the time of the original hearing were not provided by the Tenants.

I note that at one point during the hearing, the Tenant C.V.M. advised that certain documents were unavailable due to computer issues. At another point, he suggested that documents were not provided at the original hearing because the Tenants were not aware of the importance of documentary evidence at the hearing. When asked whether the failure to adduce the evidence was because of computer problems or his unfamiliarity with the dispute resolution process, the Tenant C.V.M. responded, “both”.

On behalf of the Landlord, G.H. made submissions in reply. He stated that the Tenants appear to have been over-compensated as there has been no jackhammering since December 15, 2016, although the original Decision contemplated a loss of quiet enjoyment due to jackhammering noise continuing until January 31, 2017.

In addition, G.H. submitted that several of the documents submitted by the Tenants damage their claim as they suggest work stoppages, which would have decreased the disruption experienced by the Tenants.’

Analysis

Based on the documentary evidence and oral testimony provided during the hearing, and on a balance of probabilities, I find:

After careful review of the documentary and digital evidence submitted by the Tenants, I find that my original decision must be confirmed.

First, the Tenants submitted documentary evidence with their Application for Review Consideration, which was labelled as Schedules “A” through “L”. The documents were either dated after the original hearing, or the date was not specified. These documents were included to reinforce the significance or duration of the disruption caused by the remedial work performed by the Landlord. I find that these documents, if tendered at the original hearing would not have had a material effect on the outcome.

Second, the Tenant submitted digital evidence in the form of video clips, only one of which, dated September 6, 2016, was taken before the original hearing. The Tenant C.V.M. testified that this video clip was unavailable at the original hearing because of computer issues. The remainder were taken on December 12, 2016, after the date of the original hearing. In addition, I find the video clips would not have had a material effect on the outcome of the original hearing.

Third, the Tenant submitted five photographs into evidence, all of which were taken between July 18 and October 25, 2016. Again, the Tenant C.M.V. advised these images were not available at the time of the original hearing due to computer issues. However, I find the photographs would not have had a material effect on the outcome of the original hearing.

Fourth, the black and white images included with the Tenants’ Application for Review Consideration were dated after the date of the original hearing. Again, I am not satisfied these images, if tendered at the original hearing, would have had a material effect on the outcome.

This decision has also been influenced by the inconsistent testimony provided by the Tenant C.V.M. As noted above, he testified that some of the documents were not provided at the original hearing because of computer issues. He also testified some were not provided because the Tenants were not aware of the importance of documentary evidence in the dispute resolution process.

I also note that, despite the finding of the arbitrator after considering the Application for Review Consideration submitted by the Tenants, the Tenant C.V.M. did not raise any issues at the original hearing with respect to his inability to obtain documentary evidence because of computer problems, nor did he refer to any health issues that may have impacted his ability to prepare for the hearing. Despite the Tenants' comments to the contrary in their written submissions, it appears the Tenants merely disagree with the previous decision and now wish to reargue their case. It also appears that the Tenants required confirmation and clarification that the original Decision took the full duration of the disruption into account when coming to a monetary award, which it did.

It may also be helpful for the parties to note that the Tenants' right to quiet enjoyment as articulated in section 28 the *Act* and Policy Guideline #24 must be considered alongside section 32(1) of the *Act*, which states:

A landlord must provide and maintain residential property in a state of decoration and repair that

- (a) complies with the health, safety and housing standards required by law, and*
- (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by the tenant.*

[Reproduced as written.]

That is, a tenant's right to quiet enjoyment must be balanced with the Landlord's obligation to repair and maintain the building.

After careful consideration of the Tenants' submissions and admissible evidence, I find that the decision issued on November 15, 2016, is confirmed.

Conclusion

The original decision, dated November 15, 2016, is confirmed. However, the Tenants remain at liberty to apply for further relief as of February 1, 2017.

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 27, 2017

Residential Tenancy Branch