Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding IMH POOL XIV LP
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC, MNSD, OLC, ERP, RP, PSF, RR, FF

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* ("*Act*") for:

- a monetary order for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement, pursuant to section 67;
- authorization to obtain a return of the security deposit, pursuant to section 38;
- an order requiring the landlord to comply with the *Act*, *Regulation* or tenancy agreement, pursuant to section 62;
- an order requiring the landlord to make emergency and regular repairs to the rental unit, pursuant to section 33;
- an order requiring the landlord to provide services and facilities required by law, pursuant to section 65;
- an order to allow the tenant to reduce rent for repairs, services and facilities agreed upon but not provided, pursuant to section 65;
- authorization to recover the filing fee for this application, pursuant to section 72.

The landlord's agent, SP ("landlord"), the landlord's lawyer and the tenant attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The landlord confirmed that she was the property manager for the landlord company named in this application and that she had authority to speak on its behalf at this hearing. This hearing lasted approximately 124 minutes in order to allow both parties to fully present their submissions.

The landlord confirmed receipt of the tenant's application for dispute resolution hearing package and the tenant confirmed receipt of the landlord's written evidence package. In accordance with sections 88, 89 and 90 of the *Act*, I find that the landlord was duly served with the tenant's application and the tenant was duly served with the landlord's written evidence package.

During the hearing, the tenant clarified that she only wished to pursue her application for a monetary order, a rent reduction and the application filing fee. She explained that she only wanted the return of her security deposit if the tenancy was ending but both parties confirmed that this tenancy is continuing. The tenant maintained that she only wanted the landlord to finish the renovations to the rental building that were currently underway and that she was not looking for any other repairs, services, facilities, or orders. Accordingly, these portions of the tenant's application are withdrawn.

Issues to be Decided

Is the tenant entitled to a monetary award for compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement?

Is the tenant entitled to an order to allow her to reduce rent for repairs, services or facilities agreed upon but not provided?

Is the tenant entitled to recover the filing fee for this application?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the tenant's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on July 1, 2016 and is for a fixed term of one year, after which it transitions to a month-to-month tenancy. Monthly rent in the amount of $1,500.00 is payable on the first day of each month. Monthly parking in the amount of $60.00 is payable in addition to rent. A security deposit of $750.00 was paid by the tenant and the landlord continues to retain this deposit. Both parties signed a written tenancy agreement and a copy was provided for this hearing. The tenant continues to reside in the rental unit. The rental unit is an apartment in a high-rise multi-unit concrete building.

The tenant applied for a monetary order of $6,177.18. The tenant seeks reimbursement of her hearing-related costs of $12.58 for mailing documents to the landlord and two charges of $10.30 each for printing documents for the hearing. The tenant also seeks a past and future rent reduction for a loss of use of her balcony and a loss of quiet enjoyment, due to noise from renovations undertaken by the landlord on her balcony and all the other balconies in the rental building. The tenant applied for a past rent reduction of $750.00 per month, which is 50% of her rent, for an eight-month period,

totaling $6,000.00. The tenant applied for a future rent reduction of $750.00 per month until the landlord's renovations are complete.

Both parties agreed that the landlord has undertaken substantial renovations and improvements to both the interior and exterior of the rental building. Regarding the exterior, the landlord claimed that all of the existing balconies are being removed and replaced with new balconies. The landlord described the renovation process in one of its notices, dated June 17, 2016, to tenants at page 41 of the landlord's written evidence package: 1) removing the railing and front cement wall and replacing with a glass wall and new railings; and 2) repairs and resurfacing of the base and sides of the balconies. The landlord said that clean-up including pressure washing, as well as painting would be done after the replacement of balconies.

The landlord said that the above renovation phases would be fully completed in approximately six months, as per the page 41 notice. The tenant agreed that she was given this notice before signing her tenancy agreement. Both parties agreed that the renovations are still ongoing and have taken longer than six months. The tenant claimed that the renovations should have been completed in six months, while the landlord said that was just an estimate and construction is often delayed for a number of reasons, most notably the local weather in the area, which included higher than average snowfalls during the winter.

The tenant claimed that other written notices were given to other tenants in the same rental building, which indicated that the construction would take approximately one year, from May 30, 2016 to May 31, 2017. A copy of one such notice was produced and referred to by the landlord at page 43 of the landlord's written evidence. The tenant said that she only agreed to sign her written tenancy agreement based on renovations taking a maximum of six months, not longer. She said that she would not have moved into the building if the renovations were going to take so long. The tenant maintained that she was verbally "guaranteed" by one of the landlord's rental managers that the noise from the balcony renovations would only last three months and the remaining three months would only be clean-up of the renovation materials. She said that she did not receive this information in writing and the landlord denied making this statement.

The tenant explained that she selected this apartment, instead of another viable apartment, because it is five minutes closer to her school. She noted that she would have selected the other apartment, if she had known that the construction work would take longer than six months. She also claimed that she would have tried to negotiate the rental price for this current rental unit, if she had known of the long renovation

period. The landlord's lawyer claimed that any rent abatement should have been discussed between the parties before the tenant signed her written tenancy agreement.

The tenant stated that the landlord's former leasing agent told her that if she breached her fixed term tenancy agreement and left the rental unit early, that she would have to pay liquidated damages as well as a loss of rent for the remainder of the fixed term. The landlord claimed that this leasing agent no longer works for the landlord and that the tenant was offered the ability to breach her fixed term tenancy agreement early without paying liquidated damages, if the tenant provided one month's written notice to leave and the landlord was able to re-rent the unit. The tenant said that there is no longer an option for her to leave the rental unit because of her school and because it is hard to find a new place in the winter season.

The tenant testified that she is mostly at home during days and nights because she only attends school on a part-time basis, three times per week. She stated that because she is home a lot, she hears the construction noise between approximately 8:00 a.m. and 8:00 p.m. from Monday to Saturday on a constant and ongoing basis. She maintained that the renovations have not violated any of the municipal bylaws regarding the permitted hours for noise to complete construction. The tenant explained that she is an honour roll student on scholarship, that this construction noise is affecting her focus, concentration and ability to study and do well in school, and her school grades have now dropped. She noted that she has also suffered medically, developing a nervous anxiety due to the constant and ongoing noise and that she has been prescribed medications to help deal with it, particularly when as she wakes up in a panic in the morning anticipating the construction noise.

The tenant explained that the construction workers are often staring into her rental unit from the balcony windows outside. She stated that the workers have made fun of her while looking into her unit and mimicked her while she was laughing on the phone with her sister on one occasion. The tenant noted that her personal belongings have been damaged due to the construction dust and water and that she has had to keep her windows and balcony doors closed during the renovations but that water and dust has entered her rental unit despite this. The tenant explained that her service dog is afraid of the ongoing noise end she has had to find and pay people to take care of her dog outside of the rental unit. She stated that she has left her rental unit in order to avoid the noise on a few occasions but that she should not be forced to leave her home.

The tenant submitted audio and video files as well as photographs of the noise, the physical condition of her unit and the construction workers looking into her windows. She said that she did not submit her medical or school records because they are private

and confidential. The landlord claimed that the tenant has no documentary proof of her medical and school claims.

The landlord claimed that the noisiest period of time during the above renovations was the first phase of removing the concrete railings, which takes about one week, due to the jackhammer sounds. The landlord maintained that the construction workers advised her about what would be the noisiest levels during the renovations, and these warnings were issued by way of notices to the tenant and posted around the rental building. The landlord claimed that she personally experiences this noise when she works in the rental office five days per week, since the office is located inside the building undergoing renovation.

The landlord's lawyer stated that the right to maintain and repair an aging building should be balanced against the tenant's right to quiet enjoyment, as per Residential Tenancy Branch Policy Guideline 6. The landlord's lawyer stated that the tenant is warned about the type and location of work to be done during specific days and weeks, by way of posted notices in the rental building, so that she can mitigate and avoid being at home during the noisy times. The landlord provided copies of these notices for this hearing. The tenant said that the notices are not helpful, because she should not be forced to leave her home and the alternative "quiet room" offered by the landlord is in the middle of four apartment towers all undergoing renovation and is used by so many people that it is constantly noisy.

The landlord maintained that the landlord has been responsible in posting updated notices around the building to notify tenants of the progress of the renovations and any further delays. The tenant claimed that the landlord has just been posting notices to report the continuous delay in the renovations beyond the six-month renovation completion date that she was originally given by the landlord.

The landlord's lawyer said that the tenant was fully aware of and consented to a loss of the use of her balcony as well as construction noise during the renovation period, which is still not complete. The landlord's lawyer disputed that the tenant is entitled to any compensation or rent reduction for a loss of use or loss of quiet enjoyment. In the alternative, the landlord's lawyer claimed that if I found a loss, it should be significantly less than 50% of the rent per month, although he did not provide a figure when asked. He also stated that the past rent reduction should not apply during the six months that the tenant was aware that the renovations would be occurring.

Analysis

Legislation and Policy Guidelines

Pursuant to section 67 of the *Act*, when a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim. To prove a loss, the tenant must satisfy the following four elements on a balance of probabilities:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the landlord in violation of the *Act*, *Regulation* or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the tenant followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

Section 32 of *Act* states the following, in part, with respect to the obligations of both parties during a tenancy:

> *(1) 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 a tenant.*
>
> *(2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.*

Section 28 of the *Act* deals with a 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 states the following, in part, with respect to 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.*
> *…*
> *…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.*
>
> *A tenant may be entitled to compensation for loss of use of a portion of the property that constitutes loss of quiet enjoyment even if the landlord has made reasonable efforts to minimize disruption to the tenant in making repairs or completing renovations.*

Rent Reduction and Monetary Compensation

Both parties agreed that there is ongoing construction noise that is clearly audible in the rental unit. The landlord hears the noise personally when working in the rental building. The tenant was calling into this hearing from her rental unit and I asked her to move to a quieter location because it was so noisy and I could not hear her properly. The tenant confirmed that the noise was from the construction and she had to leave her rental unit

and move to the hallway and stairwell area in order to be heard. The tenant also submitted audio and video files of the constant noise and the different types of noise from the construction.

I find that the tenant is not entitled to a past rent reduction between July 4, 2016 and January 4, 2017, the six month period that the landlord estimated that it would take for the balcony renovation to complete. The tenant agreed that she was aware of the significant construction being undertaken to all the balconies of the rental building before signing the tenancy agreement and prior to moving in. The tenant was given a notice, dated June 17, 2016, by the landlord, stating the specific work to be done on all the balconies, as well as the expected effects and noise of such work. She was advised that the estimated period was six months.

I find that the tenant was aware and agreed to the loss of use of her balcony as well as a loss of quiet enjoyment for the six-month period. Although I accept that the tenant was bothered by the noise, the tenant's right to quiet enjoyment and full use of her balcony must be balanced with the landlord's right to renovate and repair an old building in order to provide better and newer facilities. The tenant is expected to benefit from a new balcony. The tenant agreed that there were no violations of the municipal bylaws regarding the hours of construction, whether on weekdays or weekends. It takes time for replacement of balconies in such a large high-rise concrete building.

I do not accept the tenant's submission that the noise was only expected to last for three months and the clean-up was to last for the remaining three months of the total six-month period estimation. The tenant did not produce any documentary information to this effect and the landlord denied this fact. The landlord's notice from June 17, 2016, clearly states that the noise would be ongoing during the different phases of the construction, which was expected to last approximately six months.

After the six-month period, I find that the tenant is entitled to a loss of the use of her balcony and a loss of quiet enjoyment. I accept the landlord's submission that there were delays in the construction due to snow and bad weather. However, I find that the landlord was not forthcoming with the tenant in advising her that the construction was expected to last until at least May 31, 2017. Other tenants in the building were informed that the construction was expected to last one year between May 30, 2016 and May 31, 2017, as per the notice on page 43 of the landlord's written evidence. Yet, the landlord still informed the tenant, prior to her signing the tenancy agreement, that the construction would only last approximately six months from the start date of July 4,

2016, as per their notice on June 17, 2016 at page 41 of the landlord's written evidence. This is an estimated difference of almost five months (end dates of January 4, 2017 or May 31, 2017).

I find that the tenant signed the tenancy agreement based on this six-month construction estimate. While this was an approximation, I find that the landlord has to be prudent, reasonable and err on the side of caution by providing the tenant with the first and latest time estimation given to other residents of the building that the work would take approximately one year, not six months, with a completion date of at least May 31, 2017.

While I accept that the landlord made efforts to inform the tenant about the progress of the renovation by posting repeated notices with updates on the construction, the deadlines for completion continued to extend to later dates. The tenant produced emails of her inquiries into the progress of the situation, as well as photographs of the construction and progress on her balcony. As per Residential Tenancy Policy Guideline 6, even where the landlord has made reasonable efforts to minimize disruption to the tenant, in this case, the tenant was deprived of using her balcony and suffered a loss of quiet enjoyment.

I find that the landlord breached section 32 of the *Act* by failing to provide a rental unit that was properly suitable for occupation by the tenant, due to the ongoing and unreasonable noise from the construction. Although the noise is under the control of the construction company, the landlord is still responsible to provide an adequate rental unit to the tenant as part of her tenancy agreement. The tenant has a legal contractual relationship with the landlord.

I accept the tenant's testimony that she becomes nervous and anxious when waking up to this noise in the morning, that her focus and concentration in school studies has suffered, and that it has affected her ability to live in her rental unit. I find that the tenant suffered a loss of the value of her rental unit, due to the ongoing noise. I find that the tenant is entitled to live in an environment free of constant, ongoing loud noises, in order to function in activities of daily living. I find that the tenant's right to quiet enjoyment under section 28 of the *Act* is breached by the construction noise, which constitutes an unreasonable and ongoing disturbance.

I find that the tenant is entitled to a return of 15% of the rent paid to the landlord between January 5, 2017 to March 16, 2017, a 71-day period. I find that the start date

is January 5, 2017 because the June 17, 2016 notice referenced by both parties states a construction start date of July 4, 2016 and a completion date for all phases of approximately six months. I find that the six month period would have ended on January 4, 2017 when the tenant could have reasonably anticipated that all of the construction would have been completed. As per both parties' evidence at the hearing, the tenant's balcony is still not complete. I find that this hearing date of March 16, 2017, is the end date for the past rent reduction award.

Both parties agreed that the tenant paid a monthly rent of $1,500.00 to the landlord during the above time period. Based on the number of days per month, I made the following calculations in determining the tenant's compensation of 15%:

- January 5 to 31 inclusive, paid prorated rent = $1,500.00/31 days x 27 days = $1,306.45
- February 1 to 28, 2017 paid rent = $1,500.00
- March 1 to 16 inclusive, paid prorated rent = $1,500.00/31 days x 16 days = $774.19
- Total rent paid from January 5 to March 16, 2017 = $3,580.64
- $3,580.64 x 15% past rent reduction = $537.10

Accordingly, I find that the tenant is entitled to a past rent reduction of $537.10 from the landlord for a loss of use of her balcony as well as a loss of quiet enjoyment due to the ongoing construction work and noise. I order the tenant to deduct $537.10 from her future rent payable to the landlord for this rental unit and this tenancy.

I find that 15% is a reasonable amount for this loss. I find that the tenant still had use of the interior of her rental unit during the above time period and that she owes rent for this use. Although the tenant has been unable to use her balcony during the above time period, I find that this is a minimal loss as compared to the other areas of her rental unit. The tenant has use of the essential areas of her rental unit, including the kitchen, bathroom, and bedroom. I find that the balcony is not an essential portion of the rental unit; however, I still find that the tenant is entitled to use her balcony because it is included in her rent. I find that the loss of the balcony during the winter months (between January 5 and March 16, 2017) is not as significant of a loss as during the spring and summer months, due to the weather in the area. The tenant did not show that she required use of the balcony for specific reasons during the winter months.

In determining the 15% past rent reduction, I have taken into account the landlord's efforts to minimize the renovation disruption to the tenant. The landlord continuously posted update notices regarding the progress of the construction, warned the tenant regarding certain types of construction so she could plan her days, and offered an alternative "quiet" room to the tenant, although this may not have been as effective since others were using it and it was in the middle of the construction zone.

The tenant referred to another application at the Residential Tenancy Branch ("RTB"), where she claimed that another tenant in the same area with the same landlord was given a monetary award of 50% of the rent reduction requested. The tenant did not provide a copy of this decision to the RTB or the landlord. The landlord objected to me considering that case, stating that a new future hearing was granted on a review consideration of the original decision. I do not consider that case because the tenant did not provide a copy of the case to the RTB or notice to the landlord that she intended to rely on it. Further, the original decision has been suspended until a new future hearing is held so no final decision has been made, as per the landlord. In any event, I am not bound by another Arbitrator's decision on a different application involving a different tenant.

I dismiss the tenant's application for a future rent reduction from March 17, 2017 onwards, with leave to reapply. I have only awarded compensation to the tenant until the date of this hearing on March 16, 2017. After the hearing date, I cannot predict how long the construction is expected to take, any potential delays, or the level of noise or disturbance that the tenant might experience. I do not know whether the tenant will leave the rental unit.

The tenant provided limited submissions that she was unable to use the pool when she moved in because it only opened a month before this hearing. She also claimed that she was shown a model rental unit by the landlord, had selected one with a walk-in closet and was "guaranteed" that type of suite by the landlord. She said she was never given a suite with a walk-in closet because none was available and she was only put on the waiting list. As the tenant did not provide documentary evidence regarding the walk-in closet "guarantee" and she did not specifically enumerate the amount she was seeking for the pool loss or how it affected her specifically, I find that she is not entitled to a loss of use or a loss of quiet enjoyment for these claims.

Other Costs

As advised to the tenant during the hearing, she is not entitled to recover mail or printing costs totaling $33.18 associated with this application. The only hearing-related cost that is recoverable under section 72 of the *Act* is for a filing fee.

I dismiss the tenant's claim of $144.00 for noise-cancelling headphones. I find that this purchase was voluntarily made by the tenant in order to assist her in coping with the noise. The tenant was not required to make this purchase. The tenant agreed that there was no bylaw violation due to the hours of the construction noise.

As the tenant was partially successful in her application, I find that she is entitled to recover the $100.00 filing fee from the landlord.

Conclusion

I order the tenant to deduct $637.10 from her future rent payable to the landlord for this rental unit and this tenancy, in full satisfaction of the past rent reduction and the application filing fee.

The tenant's application for a future rent reduction from March 17, 2017 onwards, is dismissed with leave to reapply.

The tenant's application for other costs totalling $177.18 for printing costs, mail costs and headphones is dismissed without leave to reapply.

The remainder of the tenant's application is withdrawn.

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 30, 2017

Residential Tenancy Branch