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 *FF, MNDC, OLC, PSF, RP, RR*

Introduction

This hearing dealt with an application by the tenant for the following orders:

- A monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement;
- An order that the landlord comply with the Act, regulation or tenancy agreement;
- An order that the landlord make repairs to the rental unit;
- An order that the landlord provide services or facilities required by law;
- An order allowing the tenant to reduce the rent for repairs, facilities agreed upon but not provided; and
- An order that the tenant recover the filing fee from the landlord for the cost of this application.

This application was originally heard on November 22, 2016. The landlord did not attend the hearing. The Arbitrator found that the landlord was adequately served with the notice of hearing and the hearing continued in the absence of the landlord. In a decision dated November 22, 2016, the tenant was granted a rent reduction for the duration of the construction work.

The landlord applied for a review hearing and was successful. In a decision dated January 10, 2017, the reviewing officer suspended the decision dated November 22, 2016, pending the outcome of a review hearing. Both parties were informed of the date and time of the new hearing but failed to attend. In a decision dated February 01, 2017, the Arbitrator reinstated the decision dated November 22, 2016.

The landlord made a second application for a review hearing and was successful. In a decision dated February 28, 2017, the Arbitrator suspended the decision dated November 22, 2016 pending the outcome of a review hearing. The review hearing was scheduled for this date, March 31, 2017. Both parties attended the hearing and were given full opportunity to present evidence and make submissions.

At the start of the hearing, the landlord stated that he had received digital evidence from the tenant three days prior to this hearing. The tenant agreed that he had served the landlord and the Residential Tenancy Branch with digital evidence on March 28, 2017 for a hearing that was scheduled for March 31, 2017.

Rule 3 of the *Residential Tenancy Branch Rules of* Procedure addresses how to serve the application and the applicant's evidence. Rule 3.1 (d) states that together with a copy of the application for dispute resolution, the applicant must serve each respondent with copies of any evidence accepted by the Residential Tenancy Branch with the application or whatever is available to be served. The purpose of serving evidence to the respondent is to notify the person being served of matters relating to arbitration and to provide the person with an opportunity for rebuttal.

In this case, the tenant did not have all his evidence available to be filed along with his application or at the time he served the notice of hearing on the landlord. Rule 3.5 states that if documents are not available to be filed with the application but which the applicant intends to rely upon as evidence at the hearing, these documents must be received at the Residential Tenancy Branch Office at least five days before the hearing and must be served on the other party as soon as possible.

The tenant served digital evidence on the landlord and the Residential Tenancy Branch three days prior to the hearing. The tenant stated that he was unable to serve his evidence earlier due to lack of time and stress associated with the ongoing construction work. The initial application was made by the tenant on September 28, 2016.

I find that the tenant has not provided sufficient reason why he could not have served evidence to the Residential Tenancy Branch and to the landlord in a timely manner and prior to the date that he did (March 28, 2017) which is almost six months after the date of the initial application.

Even if I accept the tenant's testimony regarding his reasons for the late service which I do not, I find that the tenant had ample time to serve his evidence in advance of the hearing scheduled for March 31, 2017. Service of evidence in a timely manner would have given the landlord an opportunity to respond to the tenant's evidence.

Rule 11.5 (b) states that an Arbitrator may refuse to accept evidence of one party if the Arbitrator determines that the acceptance of the evidence would prejudice the other party or result in a breach of the principles of natural justice. Since the landlord did not have sufficient time to file a rebuttal, the late evidence of the tenant was not used in the making of this decision.

The tenant stated that he had filed digital and documentary evidence with his initial application made on September 28, 2016, and sent a copy to the landlord by registered mail. The landlord agreed that he had received paper documents but stated that he had not received digital evidence (memory stick). Based on a balance of probabilities, I find that it is more likely than not that the tenant included the digital evidence with his documentary evidence. The evidence that was filed along with the application made on September 28, 2016, was used in the making of this decision.

Both parties provided extensive documentary evidence. All parties' testimonies and evidence have been considered in the making of this decision. As this matter was conducted over 86 minutes of hearing time, I have considered all the written evidence and oral testimony provided by the parties but have not necessarily alluded to all the evidence and testimony in this decision.

Issues to be Decided

Did the tenant suffer a loss of quiet enjoyment? Is the tenant entitled to compensation? Is the tenant entitled to the other remedies that he has applied for? Did the landlord act in a responsible manner?

Background and Evidence

This tenancy began on April 1, 2016 for a fixed term of one year, pursuant to a written tenancy agreement dated March 10, 2016. The rent is $1,600.00 per month due on the first of each month. According to the tenancy agreement, at the end of the fixed term the tenancy will continue on a month to month basis. The tenants paid a security deposit of $800 at the start of the tenancy. The rental unit is on the ninth floor of a large concrete tower located in a rental complex of four towers plus commercial space.

The tenants testified that they viewed the apartment in the presence of a rental agent on or about March 10, 2016. The tenant stated that the agent did not mention the landlord's plans to carry out renovations in the coming months.

During the hearing on November 22, 2016, the tenant informed the Arbitrator that he was never informed that the residential property would be undergoing a complete envelope reconstruction and interior hallway renovation as well as redevelopment of neighbouring units in the building. The tenant stated in that hearing that he found out sometime at the beginning of June 2016, when he woke up to find that his balcony was completely covered in scaffolding and the door to the balcony was locked shut but for seven inches of opening.

During this hearing on March 31, 2017, the tenant agreed that he had seen notices that were posted in the main lobby, in the elevators and on every floor, informing the residents of the work that was scheduled. However the tenant stated that he only saw these notices after he moved into the building on April 01, 2016. The tenant also agreed that his balcony was inaccessible starting June 27, 2016 and not early June as he had testified in the prior hearing.

The landlord testified that the residents were informed of the work by written notices as early as December 2015. If work is specific to any particular suite then individual notices are provided to the occupants of those suites. The landlord testified that full disclosure is provided to all occupants and that the occupants are also provided with weekly updates of progress and upcoming work. The landlord testified that she meets with the construction foreman every Friday to obtain an update on the progress of the work and this information that is provided to the occupants. The landlord filed copies of all the notices posted in various parts of the towers providing information to the occupants of the progress and upcoming construction activities.

The tenant testified that the entire building was covered in scaffolding and that when construction work began it was unbearably loud in the form of jack hammering, drilling, concrete cutting which started at 8:00 a.m. and continued until 3:00 or 4:00 p.m. Monday through Friday. According to the tenant, the work is still ongoing. The tenant submitted photos and video on a memory stick of the extent of the work.

The tenant testified that they have had no use of their balcony since June 27, 2017 and that they regularly have men working on scaffolding outside their unit when they normally expect privacy. The tenant testified that the noise is unbearably loud and that sleeping past 8:00 in the morning is impossible and spending time in the unit during the day is not possible either due to the extremely loud noises.

The landlord testified that the construction work starts every morning between 7:30 – 8:00 am and ends between 4:00 – 4:30 pm. The landlord added that this is in compliance with the local by laws.

The landlord testified that buildings were constructed in the 1970’s and that the concrete exterior was deteriorating and in need of repairs. The landlord agreed that the concrete in and around each balcony had to be jack hammered which resulted in loud noise disturbances for one week, to the occupants of the unit.. The remainder of the work in the balcony was to place concrete and railings. The landlord agreed that this work was ongoing in the four towers.

The tenant's main argument was that had he known that there was major renovation to be carried out, he would not have entered into a one year lease. He reiterated that the rental agent made no mention of this planned renovation. The landlord stated that the rental agent who showed the tenant the unit, no longer worked for the landlord and therefore the landlord had no way of knowing what transpired between the rental agent and the tenant. The landlord stated that the agents were trained to inform all potential tenants of the landlord's construction work plans.

Both parties agreed that the work started on June 27, 2017 and was ongoing as of the date of this hearing. The tenant is claiming compensation in the amount $7,000.00 for the loss of quiet enjoyment due to the noise, dust, loss of privacy, loss of the use of the balcony and allergies due to the construction dust.

The tenant testified that one day a construction worker entered the rental unit without knocking and without prior notice. The tenant agreed that he had left the door unlocked and that the worker had mistaken his rental unit for an adjacent one. The tenant also stated that the manager once used her key to enter the unit without prior notice. The tenant could not remember the dates that these incidents occurred and the landlord denied having entered the unit without prior notice.

The tenant stated that the noise levels are high throughout the day with the workers yelling out, drilling, jack hammering etc. The tenant also stated that his fiancée suffers from allergic reactions to the dust. The tenant stated that one of the reasons he chose to rent this unit was the balcony and since late June has been deprived of the use of the balcony.

Analysis

Section 32 of the *Residential Tenancy Act,* addresses the landlord and tenant obligation to repair and maintain the rental unit. The landlord must provide and maintain the rental property in a state of decoration and repair that complies with the health, safety and housing standards required by law.

In order to prove an action for a breach of the covenant of quiet enjoyment, the tenant has to show that there has been a substantial interference with the ordinary and lawful enjoyment of the premises, by the landlord's actions that rendered the premises unfit for occupancy. Such interference might include intentionally removing or restricting services to the tenant.

In this case, the landlord was simply carrying out his responsibilities to provide and maintain the rental unit in a condition that complies with the health, safety and housing standards. However in order to carry out this duty, the landlord inconvenienced the tenant by making the balcony inaccessible for use and by the noise and dust that usually accompanies any type of renovation. I find that this inconvenience to the tenant resulted in a reduction of the value of the tenancy.

In determining the amount by which the value of the tenancy has been reduced, I take into consideration the seriousness of the situation and the length of time over which the situation has existed. It is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises. However a tenant may be entitled to reimbursement for loss of use of a portion of the property even if the landlord has made every effort to minimize disruption to the tenant in making repairs or completing renovations.

Based on the sworn testimony of both parties, I find that the tenant has not proven negligence on the part of the landlord but has proven that he was inconvenienced by the repair work and did lose the use of the balcony from June 27, 2016 to date. Therefore I find that the tenant is entitled to compensation. I must now determine the quantum of the damages that the tenant is entitled to.

I find that the tenant experienced excessive noise disturbances for at least one week while the concrete in and around his balcony was being removed. I also find that the tenant has lost the use of the balcony since June 27, 2016.

Section 27 of the *Residential Tenancy Act* addresses terminating or restricting services or facilities. Section 27(1) states that a landlord must not terminate or restrict a service or facility if the service or facility is essential to the tenant's use of the rental unit. Section 27(2) states that a landlord may terminate or restrict a service or facility other than the one referred to in section 27(1) if the landlord gives 30 day's written notice, in the approved form of the termination or restriction and reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

In this case, I find that the tenant was provided with notice that the work to repair the concrete envelope of the building was to start in June 2016. The tenant testified that he had seen notices to this effect. However the tenant also testified that had he been informed of the pending work prior to entering into a one year lease, he may have chosen not to rent this unit.

The landlord testified that the excessively loud noise is ongoing for one week while the workers remove the concrete from the balcony of the rental unit. Therefore I find it appropriate to award the tenant $500.00 as compensation for the week that the workers jack hammered the balcony attached to the rental unit.

Since June 27, 2017 the work has been ongoing in the building complex. The landlord testified that the work is carried out within the times set by the local municipality. However, the tenant is still subject to the loss of the balcony and the general noise involved in construction. Pursuant to the tenant's testimony, I accept that he was not informed of the pending work prior to entering into a tenancy agreement and therefore is now subject to the noise and inconvenience associated with the repairs to the building complex. I find it appropriate to award the tenant a rent reduction of $200.00 per month starting July 2016 and ongoing for the duration of the construction work.

The tenant did not provide sufficient evidence to prove that allergies suffered by his fiancée are directly linked to the dust created by the construction work. The tenant also did not provide sufficient evidence to establish that an invasion of his privacy by a construction worker or the landlord.

Based on my review of the materials submitted by the tenant and the testimony of both parties I find that the tenant is entitled to a one time compensation of $500.00 and an ongoing rent reduction of $200.00 effective July 2016 to the end date of construction.

Since the decision dated November 22, 2016 awarded the tenant a rent reduction and was suspended, reinstated and then suspended again, the tenant paid reduced rent for some months which prompted the landlord to serve the tenant a notice to end tenancy. I do not have information on the amount of rent owed by the tenant and therefore am unable to provide a schedule of rent payments.

Effective the date of this hearing, March 31, 2017, the landlord owes the tenant $500.00 plus $200.00 for the months of July 2016 to March 2017 which is a total of $2,300.00. Since the tenant has proven his case, I award him the recovery of the filing fee of $100.00 for a total of $2,400.00. The landlord may reduce the amount of rent owed by the tenant, by this amount.

At the previous hearing on November 22, 2016, the tenant acknowledged that most of the requests made in their application for dispute resolution are not possible for the landlord to provide – like access to their balcony, the pool, the recreational areas etc.

Therefore, the tenant may continue to deduct $200.00 off his rent going forward until all of the construction that affects their unit and the recreational and common areas has been completed.

Conclusion

I hereby order that the tenant is entitled to:

- A one-time award of $500.00
- Retroactive rent reduction of $200.00 for the months of July 2016 through March 2017 for a total of $1,800.00
- The filing fee of $100.00
- A rent reduction of $200.00 going forward until all construction affecting the tenants` unit and the recreational areas to which they were entitled are once again available for their use.

The landlord must reduce the amount of outstanding rent or rent owed by $2,400.00.

The tenant may make a $200.00 deduction off rent for the remainder of the time of the construction.

The remainder of the tenant's application is dismissed.

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 31, 2017

Residential Tenancy Branch