



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding METCAP LIVING
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC, RR, FF

Introduction

This hearing dealt with an application by the tenants pursuant to the Residential Tenancy Act (the “Act”) for:

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- an order to allow the tenants to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65; and
- authorization that the tenants recover the filing fee of this application from the landlords.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. The landlord SP confirmed she is an employee of the corporate landlord named in the tenants’ application. Landlord’s counsel represents the owner of the rental building, though the owner was not named in the tenants’ application. Counsel primarily spoke on behalf of the landlords (the “landlord”). The tenant AC confirmed she represented both co-tenants (the “tenant”).

As both parties were in attendance I confirmed that there were no issues with service of the tenants’ application for dispute resolution or either party’s evidentiary materials. The parties confirmed receipt of one another’s materials. In accordance with sections 88 and 89 of the *Act*, I find that the parties were duly served with copies of the tenants’ application and their respective evidence.

Issue(s) to be Decided

Are the tenants entitled to a monetary award for damages?

Are the tenants entitled to reduce the amount of monthly rent for repairs agreed upon but not provided by the landlords?

Are the tenants entitled to recover the filing fee of this application from the landlords?

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 / or arguments are reproduced here. The principal aspects of the tenant's claim and my findings around each are set out below.

The parties agreed on the following facts. This tenancy began in April, 2014 and is currently a month-to-month tenancy. The monthly rent is \$2,005.00 payable on the first of the month and includes the use of two parking stalls. A security deposit of \$900.00 was paid at the start of the tenancy and is still held by the landlords.

In early June of 2016 the landlords began maintenance and upgrade work to the rental building. The parties testified that the scope of the construction work involves both the interior and exterior of the rental building. The landlord testified that the upgrade work is necessary for the preservation of the building. The landlord said that the work is not simply cosmetic but being performed for the safety and benefit of the occupants.

The tenant testified that the construction has resulted in an inability to use the balconies of the rental unit, and to only be able to open the sliding doors a few inches. As a result the tenant said the air in the rental unit is stale and uncomfortable.

The tenant testified that she saw a sign posted on a neighboring unit warning that the construction involved asbestos. The tenant said she was concerned about the use of asbestos. She testified that she was not aware of asbestos being used in her rental unit or of any negative effects from the work with asbestos in the other rental unit.

The tenant testified that the rental unit temperature has been uncomfortably cold during the past months. She said that the thermostat in the rental unit is malfunctioning and does not effectively control the temperature in the rental unit. The tenant said that she has brought up the issue to the landlord on numerous occasions and it has not yet been resolved. The landlord's service logs showing a record of tenant complaints only had one instance where the heating issue was raised by the tenant on January 19, 2017. The tenant testified that she was advised to reconfigure the radiator at that time but said that it was not an effective solution.

The parties testified that while the construction is ongoing the tenant has been unable to use the balconies of the rental unit. The tenant described the balconies as “approx. 125 square feet each” in her written submissions. The landlord testified that balconies are not expressly included in the tenancy agreement. The landlord argued that balconies should be considered as common areas of the rental building and not something that is included in the rental unit.

The tenant testified that there has been a rent increase during the ongoing upgrade work. While she does not dispute the rent increase she said that it was “thoughtless and uncaring” to issue it while she was inconvenienced by the construction.

Analysis-Loss of Quiet Enjoyment

The tenant makes a claim for a monetary award for loss of quiet enjoyment pursuant to section 28 of the *Act*. That section provides in part:

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;

Residential Tenancy Policy Guideline 6 further discusses quiet enjoyment and provides that:

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 a 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 covenant of 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.

The onus is on the party making the claim to show on a balance of probabilities that there has been a loss of quiet enjoyment as a result of the action or negligence of the landlords.

The parties have testified that the rental building is undergoing some major renovations and repairs on both the interior and exterior of the building. The work has been ongoing since August, 2016. The landlord provided undisputed testimony that the work is being conducted in a professional manner in accordance with local noise and construction bylaws. The tenant testified generally that the work is accompanied by noise and dust.

I find that there is insufficient evidence that the construction work has caused an unreasonable disturbance to the tenants. The tenant has provided general complaints about the work but I find there is insufficient evidence that the disturbance has been unreasonable. While the tenant has mentioned noise and dust she has not provided evidence to show that their effect has been beyond what a reasonable person would expect in the circumstances.

The tenant testified that that it was uncomfortably cold in the rental unit during the winter months. There is written evidence of one complaint made by the tenant to the landlords regarding the temperature in the rental unit in January, 2017. The tenant testified that the work done in January failed to rectify the temperature issue but there is little evidence that this was an ongoing problem. There is no written record of the tenant continuing to raise the issue with the landlords.

While I accept the evidence of the parties that the ongoing construction is accompanied by noise and dust I find that the tenants have provided insufficient evidence to show that there has been an unreasonable disturbance infringing their right to quiet enjoyment. Accordingly, I dismiss this portion of the tenants' claim.

Analysis- Rent Reduction

The tenant seeks compensation for loss in the value of the tenancy due to the ongoing construction. Section 67 of the *Act* allows me to issue a monetary award for loss resulting from a party violating the *Act*, regulations or a tenancy agreement. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. This provision is also read in conjunction with paragraph 65 (1)(f) of the *Act*, which allows me to reduce the past rent by an amount equivalent to the reduction in value of a tenancy agreement.

The parties have testified that the tenants are unable to use the balconies of the rental unit while the exterior construction is being performed. I do not find the landlord's

argument that the balconies should not be included as part of the tenancy agreement to be persuasive. I find that the tenants were entitled to use of the balconies under the tenancy agreement. The landlord testified that the tenants' right to the balconies should be balanced against the landlord's duty to maintain the structure. I find the tenants have demonstrated to the extent required that they have lost access to their balcony, a service and facility that the landlord committed to provide to them when they entered into this tenancy agreement.

Residential Tenancy Policy Guideline 16 provides guidance in determining the value of the damage or loss under such circumstances. The tenant suggests an amount of \$3,500.00, \$500.00 for each of the 7 months when the balconies were inaccessible, would be appropriate. The tenant provided little evidence regarding the loss of use of the balconies. The tenant gave evidence that the two balconies are approximately 125 square feet each but little other information regarding how the tenants use the balconies, the frequency of use, or the impact their loss has had on them. I find the tenants have not shown on a balance of probabilities that the loss of use of the balconies had a significant effect on their enjoyment of the rental unit. I find that the suggestion of \$500.00, more than a quarter of the monthly rent, to be excessive under the circumstances.

It is undisputed that the tenants lost the use of the balconies due to the landlords' construction work. Under the circumstances, I am issuing a monetary award which reflects that the tenants did suffer loss in the value of the tenancy agreement. Based on the evidence before me I find that the loss was not significant, had no major impact on the tenants' daily routine and the tenants were able to enjoy the rest of the rental unit. Under the circumstances, I find that the monetary award should reflect a smaller portion of the monthly rent and a monetary award for loss of \$350.00, \$50.00 for each of the 7 months when the balconies were inaccessible, to be appropriate. This reduction in the value of the tenancy equates to roughly 2.5% of the \$2,005.00 in monthly rent the tenants have been paying, an amount which I find to be adequate given the scarcity of evidence the tenants presented in support of their application. In coming to this determination, I have also taken into consideration that much of the 7 month period of entitlement would be at a time of the year when tenants would not typically be making use of their balconies. The tenants have provided little evidence that they would have used the balcony frequently or at all during the months that it was unavailable but for the construction work. Therefore, I issue a monetary award to the tenants for loss of value of the rental agreement of \$350.00 to March 29, 2017, the date of the hearing.

As the tenants were partially successful in their application, the tenants are entitled to recovery of the \$100.00 filing fee for this application.

I find that it is premature to make an order regarding future rent reduction or damages as the construction is ongoing. I dismiss the tenants' application for loss arising after the date of the hearing, March 29, 2017, with leave to reapply.

Conclusion

I issue a monetary order in the tenants' favour in the amount of \$450.00 which includes the loss of the value of the tenancy to the date of the hearing and the filing fee for their application.

As this tenancy is continuing, I allow the tenants to recover the filing fee by reducing the monthly rent by that amount on the next monthly rental payment to the landlords. In the event that this is not feasible, I issue a Monetary Order in the tenants' favour in the amount of \$450.00.

The tenants are provided with these Orders in the above terms and the landlords must be served with this Order as soon as possible. Should the landlords fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

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: April 5, 2017

Residential Tenancy Branch