Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FF, MNDC, OLC, RR

Introduction

The Application for Dispute Resolution filed by the Tenant makes the following claims:

a. A monetary order in the sum of $13,100
b. An order that the landlord comply with the Act, regulations or tenancy agreement.
c. An order to allow the tenant to reduce rent for repairs, services, or facilities agreed upon by not provided.
d. An order to recover the cost of the filing fee.

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

I find that the Application for Dispute Resolution/Notice of Hearing was served on the landlord by mailing, by registered mail to where the landlord carries on business on March 20, 2017. With respect to each of the applicant's claims I find as follows:

Issue(s) to be Decided

The issues to be decided are as follows:

a. Whether the tenants are entitled to a monetary order for the reduced value of the tenancy and if so how much?
b. Whether the tenants are entitled to an order that the landlord comply with the Act, regulations or tenancy agreement.
c. Whether the tenants are entitled to an order to allow the tenant to reduce rent for repairs, services, or facilities agreed upon by not provided.
d. Whether the tenant is entitled to recover the cost of the filing fee?

Background and Evidence

On May 1, 2016 the parties entered into a fixed term tenancy agreement that provided that the tenancy would start on June 15, 2016 and end on June 30, 2017. The tenancy agreement provided that the rent was $2400 per month payable in advance on the first day of each month. In addition the tenants paid a $60 parking fee and a $100 a month sublet fee. The tenants paid a security deposit of $1200 on May 1, 2016 and a pet damage deposit of $1200 on June 15, 2016.

The tenants seek compensation for the reduced value of the tenancy caused by the breach of the covenant of quiet enjoyment and reimbursement of the $100 per month sublet fee for 10 months.

The tenant gave the following evidence:

- The rental unit identifies the two tenants and a third person living in the rental unit. In addition, with the consent of the landlord a fourth person (JB from July 1, 2016 to October 31, 2016 and TT from November 1, 2016 to present) occupied the third bedroom). The landlord charged $100 per month sublet fee. The tenant submits this amount to an illegal rent increase.
- Prior to entering into the tenancy agreement the rental agent for the landlord represented the rental unit was a newly renovated suite. The agent failed to mention the following:
    - The rental property would be subject to a major construction project
    - The courtyard would be unusable because of the construction activities.
    - That the rental unit would be subject to a major plumbing project
    - The pool and spa would not be accessible
    - There was going to be asbestos removal.
- The only thing mentioned by the agent was that the balcony construction would involve a new liner and a paint job.
- On July 29, 2016 the landlord commenced a major plumbing construction in the interior of their suite including the following:
    - The replacement of the plumbing in both bathrooms and the kitchen.
    - The job was completed in their apartment on September 16, 2016 although they would return from time to time to the middle of November.
    - They were required to move all of their towels etc. from the bathrooms.
    - There were considerable dust and noise disturbances. The work would often involve one or two full days a week and parts of the other days.

  - Half of the master bedroom closet was unusable while they ripped out a wall to put in new piping. The belongings in the sink storage and above the toilet had to place in the middle of their bedroom for roughly 4 months.
  - The main storage closet in the hallway was a construction zone for 4 months and the cleaning products, laundry detergent had to be relocated.
  - The kitchen sink was a construction zone for 4 months
- The lobby and hallway was a construction zone from August to the end of December.
- There was a constant danger to their small dog with carpet nails showing after the carpet was ripped up. The tenant had to carry their dog from the elevator to their unit which was a distance of approximately 80 feet.
- Construction tools were left out including drills, open buckets of chemicals, knives, screws and nails.
- The rental agent promised a dog friendly courtyard. Within days of moving in the courtyard was locked up as being under construction
- A pond in the middle of the complex was advertised as a “tranquil place for relaxing.” Very quickly it was blocked off as a construction zone with equipment tools, scaffolding etc.
- The agent advised the tenants there would be free parking for guest. In October the landlord installed metered parking for guests.
- A major factor entering into their decision to rent the rental unit was the representation that the tenants had access to the Fitness 2000 pool and spa.
- The entire pool and spa was placed under construction in early August. The pool was not reopened until January 2017. The spa is still under construction.
- On September 9, 2016 the landlord changed the locks to the suite without notice. They only gave two keys which was not sufficient as there are 4 people living the rental unit. A third key was supplied on September 20, 2016 and the 4th key was not supplied until October 24, 2016.
- Prior to renting the rental unit the rental agent advised the tenants that the balcony would be subject to a quick job of installing a liner. The landlord has done extensive work on the balconies involving considerable construction noises and jackhammering. The tenants have been denied access to their smaller balcony from July 17, 2016 to April 10, 2017. The landlord is now working on the larger 2nd balcony.
- The work involves a week of heavy jackhammering and a second week of work with lesser noise problems. However, the jackhammering is extremely disruptive and after they completed the work of his unit they moved to neighbouring units (the noise pollution of 8 units). The noise is extreme and often residents cannot talk in their units.

- The noise will continue on the tenants' larger balcony. This balcony is more extensive and the scaffolding blocks their views from the window.
- The workers have advised the renovation work involved the removal of asbestos.

On cross examination the tenant testified as follows:

- He does not know whether he has been exposed to asbestos and does not have any evidence that the asbestos has been removed improperly.
- He is more than 8 feet away from his neighbour's unit.
- The use of the pool is not included as a service or facility in the tenancy agreement.
- There is limited access to the pond.
- He never had access to the courtyard upstairs.

The Property Manager for the landlord gave the following evidence:

- She was hired by the landlord and commenced work on September 1, 2016. She does not have any knowledge of what the rental agent told new tenants.
- The pool is operated by another company. The residents of the rental property were given free access to the rental unit as a courtesy. It was not a facility granted as a service or facility in the tenancy agreement.
- The parking involves a separate contract.
- The plumbing work for the project finished near the end of September It was her understanding that the renovations for the plumbing was limited to the closet and bathrooms.
- The plumbing work normally lasted about a week per suite. However, she does not have first hand knowledge of what happened in the tenants' unit.
- Willow Lake is a small pond. She acknowledged there is scaffolding and other construction equipment around the pond. However, access has not been denied. She often walks around the pond.
- The work on the external balconies normally takes one week for each suite. It is expected that all of the work will be completed by the end of May 2017.
- The landlord always worked during the times set out in the Burnaby noise bylaw.
- The landlord has a quiet room in the rental property.

Analysis

I dismissed the tenants' claim for reimbursement of the $1000 ($100 per month sublet charge). Section 40 of the Residential Tenancy Act provides as follows:

> **Meaning of "rent increase"**
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> **40** In this Part, **"rent increase"** does not include an increase in rent that is
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> (a) for one or more additional occupants, and
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> (b) is authorized under the tenancy agreement by a term referred to in section 13 (2) (f) (iv) *[requirements for tenancy agreements: additional occupants]*.

Section 13(2)(f)(iv) of the Act provides as follows

> **Requirements for tenancy agreements**
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> **13** (1) A landlord must prepare in writing every tenancy agreement entered into on or after January 1, 2004.
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> (2) A tenancy agreement must comply with any requirements prescribed in the regulations and must set out all of the following:
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> …
>
> (iv) the amount of rent payable for a specified period, and, if the rent varies with the number of occupants, the amount by which it varies;

The tenancy agreement provided the landlord can charge $100 for each additional tenant. I term this provision in the tenancy agreement is permitted under the Act and is valid. It is probably not accurate to call this a sublet fee as this does not involve a sublet. However, it involves a fee for an additional occupant and the landlord is entitled to the extra charge under the Act and tenancy agreement.

The tenants seek compensation in the sum of $12,000 for a 50% rent reduction representing the reduced value of the tenancy.

Section 28 of the Act provides as follows:

> **Protection of tenant's right to quiet enjoyment**
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> **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

Policy Guideline #6 provides as follows:

B. BASIS FOR A FINDING OF BREACH OF 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.

A landlord can be held responsible for the actions of other tenants *if* it can be established that the landlord was aware of a problem and failed to take reasonable steps to correct it.

Compensation for Damage or Loss

A breach of the entitlement to quiet enjoyment may form the basis for a claim for compensation for damage or loss under section 67 of the RTA and section 60 of the MHPTA (see Policy Guideline 16). 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.

I determined the tenants are entitled to compensation for the reduced value of the tenancy. However the tenants failed to prove they are entitled to a $1200 per month reduction for 10 months as the extent of the disruptions and interference varied from month to month. I made the following determinations:

- I determined there has been a substantial interference with the ordinary and lawful enjoyment of the premises that is frequent and ongoing.
- I do not accept the submission of the solicitor for the landlord that the work is necessary and that after balancing the tenant's right to quiet enjoyment with the landlord's right to maintain the property the tenants should be dismissed. The rental unit was rented as a newly renovated unit. The rental agent was or should have been aware of the upcoming construction but failed to advise the tenants. The effect of this submission is that the tenants should bear the cost of the construction renovations by being subject to a major and significant disruption to their enjoyment of the rental unit and rental property while at the same time paying full rent. I do not accept this submission. The landlord will reap the benefit of the construction and the tenants are entitled to compensation as they got something significantly less than what they bargained for.
- The rent is $2400 per month.
- With respect to each of the tenants claims I find as follows:
    - I determined the tenants are entitled to compensation of $600 per month for 2 ½ months for the plumbing work for a total of $1500. There was significant interference within the rental unit for this period. However, I do not accept the evidence of the tenant that it lasted for the 4 months.
    - I determined the disruption caused by the jackhammering and the removal of the balcony was a major disruption. I accept the tenant's testimony that at times it was not possible to talk over the noise. The landlord has installed a quiet room for the use of residents. I infer from this the landlord recognized there was a significant noise disruption. I do not accept the submission of the landlord that compensation should be limited to the period of time the work was done on the tenant's balcony only. The noise from the work on the neighbouring 8 balconies was similarly disruptive. I

determined the tenants are entitled to compensation in the sum of $75 per month for 8 months for $600 being unable to use their small balcony.

In addition I determined that the tenants are entitled to compensation for the severe noise disruptions. The notices given by the landlord indicate the work was started in July 2016. However, I determined the significant disruption has occurred in the last 2 months when the work was being done on the tenants unit and the neighbouring 8 units. I determined the tenants are entitled to $1500 for the reduced value of the tenancy caused by the noise, vibrations and dust from the removal of the balconies. This award is to compensate the tenants to the date of the hearing and does not include any possible claim the tenants may have for the removal of their larger balcony.

- I dismissed the claim for compensation for being denied access to Willow Lake and the courtyard. I determined this does not amount to a breach of the covenant of quiet enjoyment. I am satisfied that while access was reduced it was not denied as the agent for the landlord was able to access this area on many occasions.
- I dismissed the tenants claim for compensation for the metered visitors parking as the tenants failed to prove they suffered a loss.
- I dismissed the tenants claim for compensation for being unable to use the pool and spa. These services were not included as services offered in the tenancy agreement. These services are offered by a third party corporation. I accept the testimony of the witness for the landlord that they were given as a courtesy to the tenants.
- I determined the tenants are entitled to $50 per month for 4 months for a total of $200 for the disruption caused by the construction in the lobby and hallway.
- I determined the tenants are entitled to $100 for the failure of the landlord to provide sufficient keys to be given all residents in the rental unit. One of the residents was without a key for two weeks and a second resident was without the key from September 8, 2016 to October 24, 2016.
- I dismissed the tenants' claim for compensation for being exposed to asbestos. The tenants failed to prove this claim.
- I dismissed the tenants claim for too many people in and out of their apartment as they failed to present sufficient proof to establish damages.

Monetary Order and Cost of Filing fee

I ordered the landlord(s) to pay to the tenant the sum of $3900 plus the sum of $100 in respect of the filing fee for a total of $4000.

I determined it was not appropriate to grant a future reduction of rent as it is not possible to fully assess the extent of the disruptions. If the parties are unable to come to an agreement the tenants have the right to file another application for compensation for the period after the date of hearing.

It is further Ordered that this sum be paid forthwith. The applicant is given a formal Order in the above terms and the respondent must be served with a copy of this Order as soon as possible.

Should the respondent fail to comply with this Order, the Order may be filed in the Small Claims division of the Provincial Court and enforced as an Order of that Court.

This decision is final and binding on the parties.

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 18, 2017

Residential Tenancy Branch