



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

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

DECISION

Dispute Codes MNDC, OLC, ERP, RR, FF

Introduction

The tenants apply for compensation and for repair and compliance orders as well as a rent reduction, claiming that building renovations undertaken by the landlord have caused unbearable noise and dust. As well, they claim there is a mould smell coming from the closet.

The style of cause has been amended to show the landlord's legal name, as related by its counsel, Mr. A.C..

The listed parties attended the hearing, the landlord by its representative Ms. S.P. an counsel, and were given the opportunity to be heard, to present sworn testimony and other evidence, to make submissions, to call witnesses and to question the other. Only documentary evidence that had been traded between the parties was admitted as evidence during the hearing.

Issue(s) to be Decided

Does the relevant evidence presented during the hearing show on a balance of probabilities that the landlord has breached an obligation to the tenants entitling them to damages? If so, what is the proper measure of damages? Is there mould in the tenants' closet and is it the responsibility of the landlord? If so, what is the proper remedy?

Background and Evidence

The rental unit is a one bedroom apartment on the seventeenth floor of a multi-storey apartment building.

The tenants have lived in the rental unit since November 2008. The current monthly rent, as of March 2017, is \$1026.63 plus \$50.00 for parking. The landlord holds a \$440.00 security deposit.

The landlord is in the process of conducting major renovations to the building and to other apartment buildings it own in the same complex or area. The work involves closing off all the balconies in the building. The railings are systematically removed, then the concrete balconies are removed, then new balconies and railings are installed. The landlord also intends to renovate the interior of rental units in the building.

The tenants' access to their balcony was closed off by the landlord around July 18, 2106. At the time the application was made the railing on the tenants' balcony had been removed. The balcony itself was removed after the tenants' application was made in May.

The deconstruction of the concrete walls and floors of the balconies in the building involves substantial use of heavy machinery like jackhammers.

The tenant Mr. T. testifies that for a year the tenants have been prohibited from using the balcony on their 17th floor apartment. The "patio door" style door to the large balcony has been altered by the landlord to prevent it opening much more that a few inches.

He complains that the work on the building causes a considerable amount of dust to enter the rental unit. He says it is "silica" dust and is deep in the carpeting in his suite. The rental unit does not have air conditioning and so he needs to open the balcony door in order get fresh air. The dust comes in through the balcony door.

Mr. T. testifies that the noise associated with the work on the building is "unbearable." It starts at 8:00 a.m. and continues to 4:00 p.m. during the week, with a break between 11:00 a.m. and noon.

He says that both he and Ms. J.T. are retired but they have to leave the apartment during the day because of the noise. He says it is so loud they cannot use the telephone in their rental unit.

Mr. T. also testifies that he has discovered mould growing on items he has stored in an on-site storage locker. He says the closet in the bedroom of the rental unit has mould in it. The landlord sent someone to check on it but it has been five weeks without any report back.

Ms. S.P. for the landlord testifies that she is the property manager on site in a different building. She denies knowing of any mould problem until the tenants' application. The landlord conducted an inspection of the unit on May 31 and no visual signs of mould were observed.

She appears to deny that the tenants' carpet has concrete dust in it, saying that the tenants should clean their carpets annually.

Ms. S.P. testifies that the landlord is performing a balcony and exterior renovation of the building. She says the concrete exterior is deteriorating and the balconies have drainage "issues."

She notes that the landlord has provided frequent written updates of the work to the tenants of the building.

She says she works in another apartment tower in the same complex and which undergoing the same work and the noise is not as bad as the tenants say.

She says that all the work on the tenants' balcony will be complete by the end of August 2017.

Analysis

The evidence establishes that some dust is entering the rental unit. However, the limited evidence given by the tenants is simply too sparse to permit a finding on the extent of it. The tenants supplied photographs of the balcony. It would have been a simple task to take photos of the carpet in order to establish the degree to which dust had infiltrated the rental unit. It has not been proved that there is excessive dust in the rental unit and I dismiss this portion of the tenants' claim.

Similarly, it has not been established that there is a mould problem in the closet or that it is somehow the responsibility of the landlord. I dismiss this item of the claim.

At hearing the tenant Mr. G.T. claimed a mould problem in the tenants' storage unit. As Mr. A.C., counsel for the landlord, pointed out, this claim was not raised in the tenants' application. I dismiss it, but with leave for the tenants to re-apply.

The remainder of the tenants' claim falls into two categories as I see it: the loss of use of the balcony and the disturbance caused by the building renovations.

Loss of Balcony

Regarding the balcony, it is obvious that the balcony forms part of the premises and that the landlord has denied the tenants' possession of it. It is clearly a derogation of the landlord's grant.

I do not accept the landlord's argument that the balcony does not form part of the premises; that it is part of the general residential property with the tenants having exclusive use. That argument is claimed to be based on the designation of balconies said to be common to strata properties. In my view a balcony might be classified under a strata plan as limited common property, remaining under the ownership of the strata corporation and such a scheme might be

necessary for the proper functioning of a strata corporation operating a building containing a number of individual owners, but here the landlord continues to own the entire building. The question of ownership of balconies in strata buildings is not analogous to an apartment building.

Simply put, the tenants are paying for a balcony and the landlord is not providing it. The tenants are entitled to compensation and to an adjustment in their rent.

The evidence about the tenants' actual use of the balcony is scant. Neither gave evidence about in what manner or how often they use it. The balcony itself appears to be approximately 2.5 metres by 5 or 6 metres. It is a large balcony and affords an enviable view of a forested area. Though assessment of damages might be difficult, the tenants are entitled to an award. In all the circumstances I consider that during the warmer months the balcony is of a value of \$150.00 per month and during the colder months, a value of \$75.00.

The tenants' access has been prohibited since about July 18, 2016. I award them \$50.00 for July 2016 and \$150.00 for each of the months August and September. I award them \$450.00 for the months October 2016 to March 2017 inclusive, and \$600.00 for the months April to July 2017, inclusive for a total of \$1400.00.

Effective August 1, 2017 I direct that the tenants' rent be reduced by the amount of \$150.00 for the months of April to September in each year and by \$75.00 per month during the months of October to March in each year, until the first of the month following the tenants' receipt of the written authorization of a professional engineer or an occupancy permit or the equivalent form from the local government indicating that the tenants may once again occupy the balcony.

Noise Disturbance

I find that the renovation noise caused by the landlord's workmen is significantly interfering with the tenants' normal use of the rental unit.

Despite Mr. A.C.'s able argument I cannot agree that the interference caused by the renovation work does not qualify as a breach of the covenant for quiet enjoyment; a covenant included in every tenancy agreement by s. 28 of the *Residential Tenancy Act* (the "Act").

The landlord relies on the decision in *Firth v. B.D. Management Ltd.* (1990), 73 D.L.R. (4th) 375 in which the BC Court of Appeal noted that to establish a breach of the covenant of quiet enjoyment a tenant's ordinary and lawful enjoyment of the premises must be shown to be substantially interfered with by the acts of the lessor. Mere temporary inconvenience is not enough. The interference must be of a grave and permanent nature.

It is argued that the interference in this case is not of a permanent nature.

In *Firth* the Court did not elaborate on the meaning of the wording “of a permanent nature.” In case cited by the Court as a reference for the statement that the interference must be of a grave and permanent nature, *Kenny v. Preen*, [1963] 1 Q.B. 499; [1962] 3 All ER 814 (C.A.), the interference was the landlord’s attempt to drive out the tenant by persistent threats and banging on her door. In this case I find the daily construction noise suffered by the tenants for almost twelve months to be of an equivalent or even more permanent nature than the landlord’s interference in *Kenny*.

In any event, aside from the common law, the *Act* defines “quiet enjoyment” to include “freedom from unreasonable disturbance. Section 28 states:

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 Policy Guideline 6, “Entitlement to Quiet Enjoyment” provides, among other things;

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.

Ms. S.P. for the landlord testified that the concrete on the exterior of the building is deteriorating and that the balconies are leaking. Without the evidence of someone with an expertise in such matters, I do not find this to be persuasive evidence that the renovations to the exterior of the

building are somehow required to be done or to be done in the manner they have been, namely the complete removal and reconstruction of the balconies to all the rental units in the building.

The continuous jackhammering during daylight hours during the week for a period of over eleven months, resulting in a noise preventing the tenants from using the telephone in their apartment is, I find, an unreasonable disturbance and is a breach of the landlord's covenant of quiet enjoyment.

As with the balcony usage, there is little evidence from the tenants about the effect on them caused by the noise from the balcony and building exterior renovation work.

It is apparent that the work involves the use of heavy equipment like jackhammers on the structure of the building itself and that it occurs weekdays from 8:00 a.m. to 4:00 or 4:30 p.m., with a one hour interlude for lunch.

The tenants are both retired and so they do not go off to jobs during the day. Mr. G.T. describes the intensity of the noise as being so great he cannot use the telephone.

In the circumstances I consider an award of \$150.00 per month to be an appropriate award, for each month the jackhammering continues. I award the tenants \$50.00 for the month of July 2016 and \$1800.00 for the months of August 2016 to July 2017, inclusive.

Effective August 1, 2017 I direct that the tenants' rent be reduced by the additional amount of \$150.00 each month, until the first of the month following the landlord's notification in writing to the tenants that the jackhammering on the building they occupy has ceased.

Conclusion

The tenants' application is allowed. They are entitled to a monetary award totalling \$3250.00 plus recovery of the \$100.00 filing fee for this application. The tenants will have a monetary order against the landlord in the amount of \$3350.00.

The tenants are free to enforce the monetary order or to apply the amount ordered against rent as it comes due, in accordance with s. 72(2) of the *Act*, which provides:

(2) If the director orders a party to a dispute resolution proceeding to pay any amount to the other, including an amount under subsection (1), the amount may be deducted

(a) in the case of payment from a landlord to a tenant, from any rent due to the landlord

Effective August 1, 2017 the tenants' rent is reduced by a total of \$300.00 for the length of time and on the terms set out above.

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: July 03, 2017

Residential Tenancy Branch