Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

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

DECISION

Dispute Codes MNDC, FF

Introduction

This hearing dealt with a tenant's application for a Monetary Order for damage or loss under the Act, regulations or tenancy agreement. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

The hearing process was explained to the parties and the parties were provided the opportunities to ask questions.

I was provided a considerable amount of written and oral submissions and evidence. I have considered everything before me; however, with a view to brevity in writing this decision I have only summarized the parties' respective positions and the most relevant evidence.

Issue(s) to be Decided

Has the tenant established an entitlement to compensation for damages or loss under the Act, regulations or tenancy agreement in the amounts claimed?

Background and Evidence

The tenancy started on April 1, 2015 and at the relevant time the tenant was required to pay rent of $1,106.17 on the first day of every month. The rental unit is described as a one bedroom apartment, with a balcony, in a multiple unit rental building that the tenant shares with two pet birds.

The landlord purchased the property in January 2016 and determined the building's balconies were hazardous and required significant repairs. Shortly thereafter, notices were given to tenants advising tenants of a planned project to repair the balconies. The landlord proceeded to enlist the services of a contractor and obtained necessary building permits from the City. In August 2016 the landlord notified tenants that the balcony project was going ahead. On October 11, 2016 the windows and doors leading to the balconies were locked from the outside, to limit opening of the windows and door leading to the balconies to three inches, and work commenced to remove the old railings and replace the rotten structures, including new plywood deck surface. In November 2016 work started to apply a primer and waterproof membrane ("the chemicals") to the new balcony surfaces. The application of the primer and waterproof membrane continued at the building until all of the balconies at the building were completed in February 2017.

The tenant alleges that the fumes from the primer and the waterproof membrane rendered her unit not suitable for occupation by her and her pet birds. The tenant and her pets went to stay elsewhere from November 18, 2016 through to February 17, 2017 (totalling 92 days) but the tenant left her possessions in the rental unit. The tenant attended the rental unit very frequently, nearly every work day, to assess whether she could detect fumes from the chemicals being applied to the balconies at the property. By February 18, 2017 the application of chemicals to the balconies at the property had been completed and the tenant returned to live at the rental unit although the balcony remained inaccessible until February 23, 2017 when the new railings were installed.

The tenant seeks compensation from the landlord in the sum of $4,350.23. This sum is comprised of:

Loss of use of the balcony for 43 days @ $10.00 per day	$ 430.00
Loss of use of rental unit for 92 days @ $36.00 per day	3,312.00
Bus fare paid to commute to work	229.50
Utilities for 92 days (hydro, cable, internet, telephone)	578.73
Filing fee paid for this application	100.00
Total	$4,650.23

The tenant seeks compensation equivalent to 100% of the rent payable for the rental unit for the period of November 18, 2016 through February 17, 2017 on the basis the unit was not suitable for occupation and the tenant was required to pay rent. The tenant described the chemical fumes as smelling like paint or paint thinner. The tenant first noticed the fumes in the common areas (lobby and hallways) and her unit even when

the application of the chemicals was being applied to balconies on the other side of the building; however, the tenant also acknowledged at the severity or intensity of the fumes would ebb and flow. The tenant submitted that it would be too disruptive to move in and out of the unit while the fumes ebbed and flowed so the tenant stayed elsewhere until application of the chemicals was completed for every balcony at the building.

The tenant stated that she used to work in a paint factory and as soon as she felt a "catch" in the back of her throat she knew the fumes were present. The tenant submitted that the product applied to the balcony surfaces is a carcinogen and that she vacated so as avoid becoming sick with asthma or cancer. The tenant called the City, air quality testers, and Worksafe BC in an effort to find a remedy to her concerns about the toxic environment. The City did not offer much to address the tenant's concerns, having issued a permit for the project and the tenant determined that air quality testing would cost thousands of dollars. Worksafe BC inspected the project after the tenant contacted them and a Stop Work Order was issued to the contractor hired for the balcony project on November 29, 2016. The work site was inspected again on November 30, 2017 and the site was found to be in compliance with worker safety regulations and the Stop Work Order was lifted.

The tenant seeks a rent abatement of $10.00 per day for the days she was living in the unit but did not have access to the balcony, described as being: October 11, 2016 through November 17, 2016 and February 18, 2017 through February 23, 2017. The tenant explained that she determined the amount of $10.00 per day based on other decisions issued by the Residential Tenancy Branch. The tenant also pointed out that an award based on square footage is not appropriate because the windows and doors act as a source of ventilation for the rental unit and not being able to open them left the rental unit very warm and stuffy.

The tenant also seeks recovery of the amounts she paid for utilities during the 92 day period she was staying elsewhere. The tenant explained that she had not suspended the services as she was of the understanding the project was almost complete whenever she requested an update from the landlord. In addition, the tenant seeks to recover the bus fare she paid to commute to work from the location she was staying, explaining that the rental unit was walking distance to work but that she had to take the bus from her alternative accommodation.

It is undisputed that the tenant notified the landlord of her concerns regarding the chemical fumes on multiple occasions, mostly via email. The correspondence, including

emails exchanged between the parties, and letters written by the landlord, was provided as evidence.

It was also undisputed that the landlord had the balcony project engineer attend the rental unit on December 1, 2016, while the tenant was present, in response to her concerns regarding the smell of chemicals and it was undisputed that at that time the fumes were practically undetectable. The tenant attributed the lack of fumes on December 1, 2016 to the Worksafe BC Stop Work Order issued on November 29, 2016.

The tenant submitted that the project had originally been projected to take approximately two months but took much longer, due in large part to the application of the chemicals while the temperature was lower than suggested by the manufacturer causing the chemicals to take took longer to dry and cure.

The landlord acknowledged that the balcony replacement project took longer than anticipated and acknowledged that the tenant is entitled to compensation for loss of use of the balcony; however, the landlord was of the position that the tenant is not entitled to loss of use of the rental unit.

The landlord submitted that the chemicals applied to the balcony surfaces are "neighbourhood friendly" and are designed for this type of application. The landlord obtained the appropriate permits for the project from the City and hired a third party contactor that has completed similar projects on several other buildings owned by the landlord. The chemicals applied dry within a few hours and cure several hours after that. The windows and door to balconies were to remain closed; however, some tenants chose to open their windows up to the three inches permitted. Other than the tenant, only one other tenant has complained about the project.

The landlord explained that the Stop Work Order issued by Worksafe BC was issued because the safety data sheets for the chemicals had not been posted at the job site by the contractor and because the workers applying the chemicals were not wearing their protective masks and googles. The following day the stop work order was lifted and work resumed. The landlord pointed out that the safety gear is to be worn by the people in direct contact with the chemicals and that if the products were so hazardous to others nearby the product would not permitted for such an application.

The landlord submitted that the landlord responded and addressed the tenant's concerns in a number of ways. The landlord had the project engineer attend the rental unit on December 1, 2016 and the fumes were not detectible; nevertheless, the

engineer attempted to reassure the tenant to no avail. In addition, other agents for the landlord were present at the building on numerous occasions and the fumes were not as described by the tenant. The landlord's agent appearing at the hearing testified that she also resides in the building, and has asthma, and she could smell the fumes a little bit but it was not that bad considering she did not encounter asthma symptoms as a result of the chemicals applied to the balconies. The landlord also pointed out that the landlord offered another unit in another building to the tenant starting for December 2016, along with a move-in allowance to help offset moving costs and short notice to end the existing tenancy, however, the tenant declined to take the offer.

The landlord is agreeable that the tenant is entitled to rent abatement for loss of use of the balcony while the windows were locked and the railings removed but submits that a per diem rate based on square footage is more appropriate.

The tenant was of the view the landlord's offer of a different apartment was an empty offer but that in any event she did not want to end her tenancy and move to another unit.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim. Awards for compensation are provided in section 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

In this case, the tenant has the burden to prove her case. The burden of proof is based on the balance of probabilities. However, it is important to note that where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Upon consideration of everything before me, I provide the following findings and reasons.

Loss of use of balcony

It was undisputed that the tenant is entitled to compensation for loss of use of the balcony while the balcony was inaccessible; however, the parties were in dispute as to the value of the loss.

The tenant submits that $10.00 per day is appropriate to compensate her for not only use of the space of the balcony, but also having a hot and stuffy apartment while the door and windows remained closed, as seen in previous decisions issued by the Residential Tenancy Branch.

Previous decisions with respect to other landlords and tenants and residential property are not precedent setting. Rather, each case is determined based on its own merits, as provided for under section 64(2) of the Act, which states:

> (2) The director must make each decision or order on the merits of the case as disclosed by the evidence admitted and is not bound to follow other decisions under this Part

While I accept that the tenant suffered a loss of use and enjoyment with respect to the balcony space and keeping windows shut, it is not sufficient for the tenant to merely point to previous decisions pertaining to other cases in determining her loss. The tenant, as the applicant, has the burden to establish a reasonable basis for determining her loss and I find it reasonable to take into consider factors such as rent payable for the unit; the size of the rental unit and balcony, among other things. To illustrate: it would unreasonable to award a tenant $10.00 per day, or $310.00 a month, for loss of use of a balcony where a tenant's rent is say only $350.00 and the balcony very small.

While the tenant asserted that the rental unit was hot and stuffy without having the door and windows open in making her claim, I did not see that raised as a complaint in the tenant's numerous emails she sent to the landlord while she was expressing her concerns about the balcony project. As such, I am not overly persuaded that keeping the windows and door shut in the fall and winter months amounted to unreasonable loss of enjoyment of the rental unit.

The landlord proposed a value of $3.024 per day based on the rent payable for the rental unit and divided that by square footage of the rental unit and balcony and that result was applied to the square footage of the balcony. I find this approach is more

sensible than the tenant's more abstract valuation. I also recognize that with the landlord's approach, the value of the exterior space is given the same value as that of finished interior living space which I find to be generous especially considering the loss pertains to exterior space in the fall and winter months. Therefore, I find the landlord's approach to valuation is sufficient to take into account loss of use of the exterior space of the balcony and having to keep the windows and door closed.

Both parties were in agreement that the tenant lost the use of the balcony starting October 11, 2016 and compensation should start as of that date; however, there was a discrepancy in when the new railings were installed and the tenant provided full use of the balcony. The tenant put forth that she returned to the property on February 17, 2017 because the application of the chemicals had been completed but the railings were not installed until February 23, 2017. It would appear that the landlord calculated compensation using the date the tenant returned to the property, on February 17, 2017, and did not dispute the tenant's submission that the railings were not installed until February 23, 2017. Therefore, I have accepted the number of days the balcony was not available for use as put forth by the tenant, which is 141 days.

In light of the above, I award the tenant compensation for loss of use of the balcony as follows: 141 days @ $3.024 per day = $426.34

Loss of use of the rental unit, utility costs and bus fare

Under section 28 of the Act, a tenant is entitled to quiet enjoyment of the rental unit which includes freedom from unreasonable disturbance or significant interference

Residential Tenancy Branch Policy Guideline 6: *Entitlement to Quiet Enjoyment* provides the following, in part:

> 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.

[My emphasis underlined]

A landlord's obligation to repair and maintain a property is provided under section 32 of the Act. Section 32 states, in part:

> **32** (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.

[Reproduced as written with my emphasis underlined]

In this case, the tenant did not provide or refer to any specific laws the landlord breached in completing the balcony project and the landlord provided evidence that the applicable building permits were obtained from the City. The tenant did provide evidence that the landlord's contractor was in breach of Worksafe regulations on November 29, 2016. Even if I were to accept that the landlord was vicariously liable for the contractor's violation of Worksafe regulations, I find the Stop Work Order in effect for one day does not demonstrate that the health or safety of the tenants was at risk since the Stop Work Order was lifted once the workers were wearing protective gear and the contractor had a safety data sheet for the chemicals available at the workplace. Therefore, I find there is insufficient evidence the landlord failed to repair or maintain the property in violation of a health, safety or building law.

Section 32(1)(b) does require that the landlord maintain the property so that it is suitable for occupation. The tenant also submitted in her evidence that she considered the rental unit not fit to live in given the chemical fumes. Accordingly, I have considered whether the tenant has sufficiently proven that the landlord failed to maintain the unit in a condition that is suitable for occupation by a tenant.

Both parties provided information with respect to the chemicals applied to the balcony surfaces, including reports from Worksafe BC, and the tenant provided safety data sheets for the chemicals. The tenant submitted that the products are toxic and carcinogenic; however, the Worksafe BC report indicates that the chemicals are an "ACGIH sensitizer" but it did not indicate the chemicals as being a carcinogen or reproductive toxin. The safety data sheet for the waterproof membrane provides the following information under "Hazard Statement":

- Flammable liquid and vapor
- Causes skin irritation
- May cause allergy or asthma symptoms or breathing difficulties if inhaled
- May cause an allergic skin reaction.
- May cause genetic defects.
- May cause cancer
- May damage fertility or the unborn child
- Harmful to aquatic life.

The information provided to me suggests the chemical may cause respiratory difficulties and may be carcinogenic and I accept that one would be prudent to limit exposure to such a chemical. However, I find I am not persuaded that the application of the product on the exterior of the building rendered the rental unit not suitable for occupation for three months, as asserted by the tenant, considering the following:

While it was agreed upon that at times the smell of the chemicals was detectible in the residential property, the severity or intensity of the smell was in dispute. The tenant acknowledged that at times the fumes were undetectable or slight but that at other times they were more intense. While the tenant provided in her written submissions that other tenants in the building had also voiced their dislike and concerns about the chemicals to her, the tenant did not call any witnesses or provide sworn affidavits from any of those people.

While workers applying the chemicals are required to wear protective gear under Worksafe regulations I find the evidence before me does not demonstrate that detecting the smell of the chemicals at times in the interior of the building carries the same risk to occupants of the building as the workers. I find it reasonable that the requirement to wear protective gear by workers is applicable given the potential to be in close or direct contact with the chemicals and the potential to be exposed for a considerable length of time. However, I would expect that a fumes emitted on the exterior of the building would dilute or disperse in the air with ventilation and distance. The tenant did not present an

expert or qualified person that is familiar with chemical exposure to present evidence that the harm or risk of harm from the fumes making their way into the interior of the building is the significant. Therefore, I find the potential risk to workers applying or working with the chemicals does not satisfy me that the same risk applies to occupants inside the building.

The tenant asserted that she was concerned about her exposure to toxic chemicals; yet, she worked in a paint factory causing me to question whether the tenant has developed a hyper-sensitivity to the smell of the chemicals which she described as smelling like paint or paint-thinner.

As provided above, the tenant also has an obligation to mitigate damages or loss. The tenant submitted that she enquired about air quality testing with companies that provide such services and she determined the cost to be considerable. Yet, the tenant did not make an Application for Dispute Resolution seeking an order for the landlord to perform any such tests. This remedy was available to her and she did not avail herself to it. Rather, she waited until the project was over and then filed for monetary compensation only. Also of consideration with respect to mitigation is that the tenant was offered another rental unit by the landlord. The tenant submitted that the offer was empty; however, she also acknowledged that she did not want to move anyways.

In light of all of the above, I find the tenant failed to prove the landlord breached the Act, regulations or tenancy agreement except for providing the tenant with access to the balcony while the balcony project was underway and for that the tenant is entitled to compensation. I am of the view that the tenant's decision to stay elsewhere while the chemicals were being applied to the balcony surfaces during the three months of November 2016 through February 2017 was her decision that she considered to be in her best interest but I am unsatisfied that decision translates into an obligation for the landlord to provide the tenant with the rental unit, rent free during that period while she remained in possession of the rental unit, and pay the tenant's utilities and bus fare to commute to work. I am also of the view the tenant did not take reasonable steps to mitigate losses, if any. Therefore, I find the tenant's claims to recover rent, utilities and bus fare from the landlord for three months to be unreasonable and the claims are dismissed.

Filing fee

A portion of the tenant's claim had merit, with respect to loss of use of the balcony, and I award the tenant recovery of 50% of the filing fee, or $50.00.

Monetary Order

In recognition of the awards provided to the tenant with this decision, I provide the tenant with a Monetary Order in the sum of $476.34 to serve and enforce upon the landlord as necessary. The tenant is authorized to deduct this sum from rent otherwise payable to the landlord in order to satisfy the Monetary Order.

Conclusion

The tenant was partially successful in this application and has been provided a Monetary Order in the sum of $476.34. The tenant is authorized to deduct this amount from rent otherwise payable to the landlord to satisfy the Monetary Order.

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: September 21, 2017

Residential Tenancy Branch