Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: O MNDC RR FF

Introduction:

Both parties (the landlord by a representative who is hereinafter referred to as 'the landlord') attended the hearing and gave sworn testimony. The tenant said they served the Application for Dispute Resolution hearing package by registered mail and the landlord acknowledged receipt. I find the documents were served pursuant to section 89 of the Act. The tenant requests pursuant to the *Residential Tenancy Act* (the Act) for compensation as follows:

a) A Monetary Order or Rent rebate for the failure of the landlord to ensure his privacy and reasonable enjoyment pursuant to section 28;
b) A further rebate for the landlord failing to inform them of the renovation and failing to reduce the rent in the appropriate amount;
c) A further rebate for the amount of useable area and facilities lost due to the construction;
d) Aggravated damages for rejecting the key deposit request and for no offer of a rent reduction;
e) To recover the filing fee.

Preliminary Issue:

The application for a rent rebate was brought by two parties. The landlord pointed out that only one of them was the tenant and subletting was not allowed. In examining the lease in evidence, I find the landlord is correct. Therefore, the Decision and Monetary Order will be in the name of the legal tenant only.

Issue(s) to be Decided:

Has the tenant proved on the balance of probabilities that the landlord failed to protect his right to peaceful enjoyment contrary to section 28 and failed to reduce rent in proportion to amount of facilities lost contrary to section 27? Is he entitled to compensation or a rent rebate for this neglect and if so, in what amount? Is he entitled to recover the filing fee?

Background and Evidence:

Both parties attended the hearing and were given opportunity to be heard, to present evidence and to make submissions. A witness for the tenant was also attending. The tenant said he was

a co-tenant or a sublet. The landlord said the tenant had no permission to sublet and the lease prohibits it.

It is undisputed that the tenancy commenced November 1, 2015 on a fixed term to October 31, 2016 and from month to month thereafter. Rent was $2478 a month and a security deposit of $1237.50 was paid. The unit is described as a 1416 sq. ft. penthouse with a private 800 sq. ft. roof terrace. The landlord said it was a common area for maintenance personnel could access it through a maintenance stair. The tenant said it was not a common area. The sole public access was through their unit, off one of the bedrooms. The bedroom was surrounded by the roof top terrace. In mid April, 2016, the tenants described how scaffolding was erected which by late April obscured their view with the scaffold and tarps protecting it. They said that every window had scaffold outside it and workers walking around so there was no privacy. It was still on the roof top when they left in May 2017 after being served a two month Notice to End Tenancy for landlord's use of the property.

During this time from April 2016 to May 2017, the workmen were resurfacing the concrete building. This involved loud drilling (like an earthquake) which started at 7:30 a.m. and prevented sleep. No windows could be opened and they found they could not use their two sunrooms beside the roof top deck for it was so hot, noisy and lacked any privacy. A visiting girlfriend was naked one morning when a workman saw her at 7:30 a.m. The tenants claim a 50% rent rebate/refund for the withdrawal of the use of the roof top deck, the ongoing dirt and noise and lack of privacy. They say this was a significant and unreasonable disturbance of their peaceful enjoyment contrary to section 28 of the Act and they were not offered adequate compensation for this and for the withdrawal of the use of the roof top deck. They were not informed before entering the tenancy of the renovation plans. They also claim aggravated damages for getting no offer of a rent reduction until they made a demand from the landlord. They point out this is contrary to section 27 of the Act where the landlord is to give a 30 day notice of withdrawal of facilities and adequate compensation for it.

In addition, the tenants claim $1000 aggravated damages for being charged for additional keys rather than being able to make a deposit for them.

In evidence is a USB, an email dated May 4, 2016 which the landlord says is a mutual agreement to a rent reduction of 15% a month, an email from the tenant dated April 28, 2016 in which the tenant asks for a 50% reduction, calculation of refunds of security deposit and keys and a monetary order. On the basis of the documentary and solemnly sworn evidence presented at the hearing, a decision has been reached.

Analysis:

Section 28 of the Act sets out the tenant's right to quiet enjoyment.
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.

I find in this case the weight of the evidence is that there has been a serious breach of the tenant's quiet enjoyment by the ongoing construction noise for over a year. As this involved drilling and hammering described as 'like an earthquake', I find this was unreasonable noise which, according to the evidence, prevented the tenant from getting adequate sleep as it started at 7:30a.m. I find also the scaffolds and tarps around their unit with workmen walking back and forth in front of their windows and the replacement of all windows was a significant invasion of their privacy.

I find the weight of the evidence is that the roof top deck was not a common area contrary to what the landlord alleged. I find it was not open to the residents in the building and only maintenance personnel had access. I find 'common area' is defined in the Act is a part of the property that is shared by tenants. The evidence is that other tenants did not share the use of the roof top patio.

Considering the amount of space (800 sq. ft.) lost to the tenant in the loss of the use of the roof top deck, and the ongoing severe disturbance of their reasonable enjoyment, I find the 15% rent rebate offered by the landlord is inadequate to compensate them for their loss. The landlord submitted as comparison that the tenant below had accepted 20% rent rebate but the tenants responded that the tenant below did not have a roof top deck and they were not evicted as the construction finished so were able to enjoy the improvements unlike them. I find it is reasonable to award this tenant 20% for the loss of the use of the roof deck and a further 15% refund of rent for the significant disturbance of their reasonable enjoyment from April 2016 to May 2017 (14 months x $2475 x 35%= 12127.50) less the 15% rebate already given to the tenants for May 2016- May 2017 ($2475x 12x15% = 4455.00).

In respect to the aggravated damage claim for requesting payment for extra keys, I find the weight of the evidence is that the tenant was supplied with a complete set of keys. He wanted extra keys and was required to pay for them. The landlord emphasized the tenancy agreement prohibited subletting and there was no obligation in the Act or agreement to provide extra keys. I find the landlord credible and the tenant did not deny that the keys were extra keys. He agreed he received a complete set with the normal deposit agreement. I dismiss this portion of his claim as I find the landlord had no obligation to provide extra keys and the strata caretaker required payment for them.

The tenant also requests aggravated damages for the failure of the landlord to provide 30 days written notice of the withdrawal of the roof top deck amenity and the construction. Policy Guideline 16 provides guidance on aggravated damage awards.

- *"Aggravated damages" are for intangible damage or loss. Aggravated damages may be awarded in situations where the wronged party cannot be fully compensated by an award for damage or loss with respect to property, money or services. Aggravated damages may be awarded in situations where significant damage or loss has been caused either deliberately or through negligence. Aggravated damages are rarely awarded and must specifically be asked for in the application.*

I find the weight of the evidence is that the tenant is being adequately compensated with the award of a 35% rebate of rent for the period. Therefore, I find an aggravated damages award is not appropriate in this situation. I dismiss this portion of the tenant's claim.

Conclusion:

I find the tenant entitled to a monetary order as calculated below and to recover filing fees for this application.

Rebate of rent 35% of 2475 x 14 months	12127.50
Plus filing fee	100.00
Less 15% rebate given for 12 months	-4455.00
Total Monetary Order to Tenant.	7772.50

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: December 04, 2017

Residential Tenancy Branch