



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Okanagan Custom Cut
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC

Introduction

This hearing was originally convened in response to an application by the Tenant claiming compensation pursuant to section 67 of the *Residential Tenancy Act* (the “Act”). An Interim Decision dated September 8, 2017 and confirmed by the Parties in attendance today dealt solely with the issue of jurisdiction on the Tenant’s claim and was adjourned to today’s date to consider the claim for compensation.

The Landlord and Tenant were each given full opportunity under oath to be heard, to present evidence and to make submissions. The Witnesses for the Tenant gave evidence under oath.

Issue(s) to be Decided

Is the Tenant entitled to the compensation claimed?

Background and Evidence

The following are agreed facts: The tenancy originally started on January 7, 2006. On February 1, 2014 the new owner of the unit entered into another tenancy agreement with the Tenant. Rent of \$750.00 was payable on the first day of each month. Parking was provided for one vehicle. On June 8, 2016 and without using an approved form the Landlord increased the rent to \$800.00 effective September 1, 2016. The tenancy was ended on December 1, 2016 by the Landlord who gave the Tenant a two month notice to end tenancy for landlord’s use (the “Notice”).

The Tenant states that after the tenancy agreement was signed the Landlord started the operation of a saw mill alongside the unit. The Tenant states that about two weeks prior the Landlord had started construction on the shop attached to the unit. The Tenant states that from the start of the tenancy to the end of the tenancy the Landlord operated the saw mill and used other machines and tools that caused noise from about 7:00 a.m. to 5:00 or 8:00 p.m. The Tenant states and the Landlord does not dispute that the Tenant was subjected to this noise about 1 to 3 hours each day 5 to 6 days each week throughout the tenancy. The Landlord states that the area has a bylaw allowing construction noise to continue until The Tenant states that within the first month the Tenant told the Landlord that there was too much noise and that it was disturbing the Tenant. The Tenant states that no written complaint was ever made about the noise.

The Tenant states that the operation of the saw mill caused excessive amounts of sawdust to accumulate in the unit and outside the unit, including in the cars. The Tenant states that she never asked the Landlord to cease the work and only mentioned the sawdust problem to the Landlord.

The Tenant states that from the onset of the original tenancy the Tenant had use of the front yard and the area along the side and front of the house. The Tenant states that the front yard was used by her daughter for biking and parking. The Tenant states that the area along the side and front was used as a flower, fruit and vegetable garden. The Tenant states that at the time of signing the tenancy agreement there was no discussion about not having the full continued use of the front yard. The Tenant states that after the tenancy agreement was signed the Landlord told her that he was moving large cans into the front of the yard. The Tenant states that the Landlord then moved these items, additional machinery and broken cars onto the front yard reducing the useable area and making the area unsafe for her daughter. The Tenant states that she was only left with room to park her vehicle. The Tenant states that in addition to planting vegetables in the spring the Tenant also had perennial plants growing such as raspberries. The Tenant states that the sawdust covered the plants in the spring, that the vegetables failed to grow and that the berries could not be washed clean by water to remove the sawdust. The Tenant states that the raspberries only flowered twice during

the season. The Tenant states that she informed the Landlord in the fall of the first harvest season about the problems with the sawdust and continued to have constant discussion about the garden problems throughout the tenancy. The Tenant states that the Landlord never gave her any response to the problems.

The Tenant states that the Landlord's customers were constantly blocking her vehicle from either leaving or returning to the parking spot. The Tenant states that she would have to stop and track down the customers to move their cars. The Tenant states that this occurred about 4 days each week at all hours between 7:00 a.m. and 6:00 p.m. The Tenant states that she informed the Landlord on multiple occasions about this problem and that the Landlord started to become verbally aggressive with the Tenant over her parking complaints. The Tenant claims \$2,838.00 for the loss off use of the yard calculated at \$86.00 for 33 months. The Tenant claims \$9,240.00 for loss of quiet enjoyment calculated at \$280.00 per month for 33 months. The Tenant states that she made a formal written complaint to the Landlord on September 20, 2016 and that nothing stopped. I note that this letter identifies only two issues: noise from the saw mill and laundry.

Witness BW provided a letter and confirmed that she had been in the Tenant's house regularly seeing the sawdust and hearing the noise in the unit. The Witness states that the Tenant reported the problems to the Witness that are set out in the letter. Witness BW states that she personally observed the Tenant's blocked driveway. Witness BW states that she saw sawdust all over the garden and that it also covered the interior and exterior of the unit, including the windows.

Witness JB provided a letter and states that the Tenant was driven by the Witness at times to see her physician about headaches and congestion and that prior to 2014 Witness JB has never heard of these problems experienced by the Tenant.

The Landlord states that the unit is located on industrial zoned land that allows industrial noise between the hours of 7:00 a.m. and 10:00 p.m. but that the Landlord only operated the saw mill, using a chain saw, forklift and electric sawmill usually from 7:00

or 8:00 a.m. until 7:00 or 8:00 p.m. The Landlord agrees that the operation of these machines and equipment caused noise at least 5 days each week. The Landlord states that the Tenant only once mentioned in September 2016 that the noise made late at night was a problem. The Landlord states that this did not stop the Landlord from continuing its operations. The Landlord states that the Tenant never told the Landlord in writing that the noise was a problem.

The Landlord states that there was not a whole lot of sawdust in the interior of the rental unit and that the Landlord tried to sweep up and dispose of the exterior sawdust on numerous occasions. The Landlord states that on occasion the wind would sometimes blow the sawdust around and that the wind also picked up dust from another of the neighbours operations.

The Landlord states that the Tenant's garden was never compromised by the sawdust and that while the use of the garden was not noted in the tenancy agreement the Landlord had noticed it on the side and that the Tenant always had access to use the area. The Landlord states that he first learned about this problem in September 2016 after the Landlord served the Tenant with the Notice. The Landlord states that the Tenant did mention the sawdust sometime prior to the letter written in September 2016 but at no time did the Tenant ask the Landlord to stop its activities. The Landlord states that the Tenant knew full well before the tenancy agreement was signed that the Landlord would be operating a sawmill at the unit and that things only became an issue when he verbally told her in the first week of September 2016 that he might be moving into the unit. The Landlord states that while he did renovations to the unit he never did move into the unit and that it is currently empty.

The Landlord's legal counsel argues that the Landlord could do nothing to rectify or remedy a problem if the Landlord was not aware of the problem. Legal Counsel argues that the Tenant has no supporting medical evidence of any health problems caused by the noise and sawdust and that the Tenant has provided insufficient evidence of mitigation efforts for the losses being claimed. Legal Counsel argues that the Tenant kept detailed records only after the Landlord acted to end the tenancy. Legal Counsel

argues that the Tenant only provides oral evidence of any harm or suffering and that the parking issue is difficult to rebut. The Landlord states that on occasion its customers did park in the Tenant's way but that whenever this occurred and the Tenant notified them that the situation was quickly remedied. The Landlord states that the parking was only a minor inconvenience. The Landlord states that there was no discussion about the use of the front yard at the time of signing the agreement. The Landlord states that he moved the items to the front yard in January and that the Tenant's "use of the yard was not grossly impacted", that "her yard and car all had room out front". The Landlord states that while there was no discussion on the decrease of the size of the yard the Tenant always had access and there were never any objections heard from the Tenant about the location of the items placed in the yard by the Landlord.

The Tenant's Advocate argues that the Landlord has not disputed the noise claim and that the Witness evidence and photos support the Tenant's claims of the Landlord's actions and the damage caused. The Tenant's Advocate argues that the usual operation of a saw mill is irrelevant to the claims as the unit was a rental unit governed by the Act. The Advocate argues that the Tenant started her complaints at the onset of the tenancy and that although the Tenant had been considering a move out of the unit, it was not easy for the Tenant to be able to find another rental unit in the current rental climate.

Analysis

Section 28 of the Act provides that a tenant is entitled to quiet enjoyment including, but not limited to, freedom from unreasonable disturbance and exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit. Section 7 of the Act provides that where a tenant does not comply with the Act, regulation or tenancy agreement, the tenant must compensate the landlord for damage or loss that results. This section further provides that where a landlord or tenant claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement the claiming party must do whatever is reasonable to minimize the damage or loss. Section 5(1) of the Act provides that landlords and tenants may not avoid or contract out of this Act or the regulations.

Based on the undisputed evidence that the Landlord's operation of a saw mill occurred during the tenancy and that noise occurred into the evening on most days, I find that the Tenant was subjected to a significant noise disturbance throughout the tenancy. The Tenant's right to quiet enjoyment extends beyond the noise bylaws for the area and I do not consider the late noise bylaw to be of any relevance to the Tenant's right to quiet enjoyment. I also consider that even if the Tenant was aware of the work that the Landlord was going to engage in this does not relieve the Landlord from ensuring the Tenant's right to quiet enjoyment is not breached as the Parties may not sign an agreement removing the Tenant's rights under the Act to quiet enjoyment. Given the Landlord's evidence that the Tenant verbally raised an issue about the evening noise I accept the Tenant's evidence that the Tenant did raise the matter from the onset of the noise and find that the Landlord was aware the saw mill operation in the evenings was disturbing the Tenant. There is no dispute that despite knowing of the disturbance the Landlord did not cease activities in the evening and in particular after receipt of the September 20, 2016 letter. However as the Tenant did not take any further action beyond a voiced complaint until September 20, 2016 I consider that the loss of quiet enjoyment is not equal to the proportional amount of rent claimed. As a result I find that the Tenant has only substantiated a nominal compensation of **\$100.00** for the Landlord's breach to the date of the written complaint letter. Given the evidence of no change in circumstances after the September 20, 2018 letter in relation to the noise disturbance and considering that the Tenant gave no evidence or raised any issue at the hearing in relation to the laundry I find that the Tenant has substantiated compensation of \$90.00 for September 2018 ($\$280.00/30 \times 10$ days) and \$280.00 for each of October and November 2016 in the total amount of **\$650.00**.

Given the photos I find on a balance of probabilities that the operation of the Landlord caused dust to enter the unit and cover the garden. I also accept that the dust on the garden caused some harm to the garden. I consider that as a reasonably foreseeable consequence from the dust, the Tenant would be required to carry out greater cleaning than would otherwise be required and that this would negatively affect the Tenant's right to enjoyment of the unit. The Tenant provided no supporting medical documentation of any adverse health affects and I therefore find that the Tenant has not substantiated

any losses in this area. Given the Landlord's evidence of the amount of sawdust outside the unit I find that the Landlord had to have known that there would be sawdust accumulation inside the unit. While the Landlord indicates that the Landlord tried to maintain external clean-up of the dust there is no evidence that the Landlord offered or paid for any cleaning services to the Tenant for the interior collection of dust. As the Tenant has not set out a specific amount for the loss of food or the accumulation of dust in the house and as the Tenant otherwise had full use of her unit I find that the Tenant is only entitled to a nominal amount of **\$100.00** for the inconvenience.

There is no dispute that the Tenant repeatedly lost exclusive possession of her parking. I accept that the Tenant mitigated her losses in relation to the loss of parking by acting to have the cars moved each time they were blocking her use and access to the parking. As there is no evidence that the Landlord took any action to stop customers from parking in the Tenant's spot I find that the Landlord was negligent in ensuring the Tenant's exclusive possession of her parking spot included with the rental unit. However as there is no evidence that the cars remained for longer than a few minutes I find this to be only slightly more than a minor inconvenience to the Tenant. I find that the Tenant is only entitled to a nominal compensation of **\$100.00**.

Given the Landlord's evidence that the Tenant's use of the yard was not grossly impacted and the Tenant's undisputed evidence of ongoing use of the yard after the Landlord took over, I find that the Tenant did have use of the yard under the terms of the tenancy and that this use was restricted by the Landlord's subsequent actions without the Tenant's agreement. I do consider that the Landlord was fully aware of the Tenant's use of the yard and that his obstruction of a portion of the yard would be a loss to the Tenant. However again, as the Tenant did little during the tenancy to raise this issue I find that the loss was not as compelling as claimed by the Tenant. I find that the Tenant has therefore only substantiated an entitlement to nominal compensation of **\$100.00** for this loss for a total entitlement of **\$1,050.00**.

As the Tenant did not make any claim in relation to the rental increase the Tenant remains at liberty to claim return of any rental monies collected by the Landlord through a rental increase made contrary to the Act.

Conclusion

I grant the Tenant an order under Section 67 of the Act for **\$1,050.00**. If necessary, this order may be filed in the Small Claims Court and enforced as an order 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: May 3, 2018

Residential Tenancy Branch