Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

FINAL DECISION

Dispute Codes: MNDCT FFT

This is a continuation of a hearing from April 26, 2018 on which an interim decision was issued on April 30, 2018. In the continued hearing today, the applicant tenant and landlord and witnesses attended the hearing and gave sworn testimony. The adjourned date of this hearing was June 21, 2018 and the parties confirmed receipt of each other's evidence. I find the documents were legally served pursuant to section 89 for the purposes of this hearing.

Adjournment:

The tenant requested an adjournment because he recently received some professional evidence pertinent to the dispute and was too late to file it. The landlord said they had similar evidence and information on actions they were taking based on it.

Rule 6 of the Residential Tenancy Branch Rules of Procedure provide rules on rescheduling and adjournments. Rule 6.1 states the Branch will reschedule if written consent is received from both parties at least 3 days before the scheduled date for the hearing. I find no written request or consent was made.

Rule 6.3 provides an arbitrator may adjourn the proceeding after the hearing commences. The criteria for granting an adjournment are set out in Rule 6.4. In applying the criteria, I find an adjournment is unlikely to contribute to a resolution of this matter as this is the second lengthy hearing and the issues have not narrowed between the parties. I find it is unnecessary to allow a fair opportunity for each party to be heard and may be prejudicial to the stress and time of the parties to allow it to continue for more months. The parties were given the opportunity to make submissions and raise issues in the hearing and discuss the new evidence. I find they had a fair hearing. I also allowed them to upload their new evidence by Monday, June 25, 2018 to be considered before the Decision was made. The tenant said he could do it immediately. I declined to grant an adjournment and the hearing proceeded.

Introduction:

On March 19, 2018, a preliminary hearing was held to decide if a large number of files should be joined and heard together. The tenants had all filed applications naming the same agents of the landlord. This is an 18 storey building with 170 dwelling units.

The tenants who filed applications claimed to have suffered losses due to the landlord's alleged breaches of the Act and the tenancy agreements. The lead tenant agreed that all the tenants had asked for their applications to be heard together. This tenant's claim was severed as the landlord argued that he was not a tenant but the ex-boyfriend of a tenant and the tenant herself had applied for the identical relief. Her application had been dismissed as she failed to attend a continuation of an adjourned hearing and failed to serve her evidence in accordance with the *Residential Tenancy Branch Rules of Procedure* and the interim order of the arbitrator. Her ex-boyfriend who is the applicant on the present file was not an applicant on her Application for Dispute Resolution and her Application was dismissed.

The tenants also claimed to cancel a rent increase issued in 2016. It was explained to the tenants that if the landlord has issued the correct notice of rent increase and acted in accordance with the Act, they could not dispute that rent increase pursuant to section 43(2) of the Act.

The arbitrator determined that the application of this tenant should not be joined with the other tenants' as there may be issues of jurisdiction and potentially *res judicata* so it was severed from the other tenants' applications to be heard in a different hearing. That hearing was scheduled for April 26, 2018. It was determined that more time was needed due to the multitude of issues so it was adjourned until today June 21, 2018.

Background and Evidence:

This tenant's hearing continued today. To summarize from the interim decision issued on April 30, 2018 the tenant said a lease was amended to add him to the lease with a female tenant, C.R., on April 1, 2013, although he moved in April 2012. Rent is $1280 per month. The lease is in evidence. He said he and C.R. share all the bills and rent equally and they would share equally in any compensation awarded. Pursuant to the *Residential Tenancy Act (the Act)* sections 7, 27, 28, 32, 33, and 67, he is requesting compensation of $19,200 as follows:

1. Loss of quiet enjoyment:
   Claim $3000: Loss of enjoyment due to no bathroom and kitchen ventilation. He said the condition continues until the present, there are moisture and condensation buildup and no way to vent the smoke from cooking so the smoke alarm goes off. He says he understands this has continued for 5 years. Because of the noise and debris of the construction by the landlord of an adjacent tower, they find it very difficult to live with their windows open so this further impedes any air flow.

The tenant said he calculated compensation for this based on $125 a month for 24 months since the construction started.

The landlord said that this tenant did not contact the office with complaints and his Application for Dispute Resolution was the first notice they had of his issues. The tenant said he had complained to the resident caretaker who testified in a hearing with other tenants that he had come up to his unit and held up a match to the fans in bathroom and kitchen to detect if there was sufficient air flow. The landlord said the caretaker was only with them four months and they have no recorded complaints from this tenant. Furthermore, they say the caretaker did not testify about the tenant's unit. The tenant said the caretaker said he had observed the tenant's unit and reported it.

The landlord provided professional reports of duct cleaning related to the kitchen and bathroom ventilation of the units. It was done over 7 days in October 2014 including inside and outside of the ducts. In that report, it was noted that there was much dust and debris in the ducts and they recommended yearly cleaning. In September 28, 2017, a report noted there was no airflow ventilation in kitchen or bathroom of a unit. In a letter to the City dated January 15, 2018, the landlord noted a visit was made by the City inspector on January 9, 2018 in response to tenant complaints. Their contractor for duct cleaning, their caretaker, their property manager and building manager were present. In the letter, they said they had had no complaints of any tenants other than one on the 17th floor who had appeared satisfied that there was air flow after the caretaker had used a lighter to demonstrate air flow in September 2017. They asked the City to explain how the ventilation system was tested and in what way it was not operational. They state the city building inspector saw that all 13 fans on the roof were functioning properly. A City inspector also arrived to inspect their plumbing and mechanical systems. They note they have preventative maintenance programs in place to service all these systems. Their duct cleaning contractor also told the inspector that the tenants have the responsibility to keep clear and clean the grills in the bathroom and kitchen. On April 23, 2018, an invoice is in evidence of service to the roof top exhaust fans and make-up air units (mostly grease and replacing belts). It shows they tested ok after service.

Another report notes the ducts were cleaned on February 5-9, 2018 and the landlord said there were no complaints afterwards. On May 7, 2018 a professional duct cleaning company's report stated that the tenant's unit had venting from the bathroom and kitchen although they reported some others had low air flow and recommended inducer fans be put into the ductwork in those units. The tenant said this report is wrong and will be confirmed by the City report which he is currently submitting. He said he also is submitting a restoration company report confirming this.

Further documentary evidence on the ventilation issue was submitted. On April 16, 2018, the City noted this unit's ventilation system was not functioning properly and required the landlord to retain Professional services to provide a balancing report to demonstrate compliance. The tenant contends this new evidence from the City inspection (which was requested by the landlord) states the ventilation system is still not functioning properly in their unit. A professional company wrote a report on May 18, 2018 stating the tenant's suite was exhausting normally. The landlord said they were not negligent in doing repairs when contacted by tenants. The City delayed in responding to their requests for a report and in giving them advice. However, they have now acted on the City recommendations to cure the problem. They have hired a mechanical engineer and each unit's system will be measured and appropriate measures such as balancing will be taken to cure the problem. Further emails show a mechanical engineer said the latest Professional report on June 20, 2018 showed a measured air flow of the kitchen exhaust grill of 40 feet per minute (or 6 cu. Ft.) and the bathroom of 70 ft. per minute) or 20 cfm. The City noted that they need to see significant progress being made to comply with their order and states that it appears the rebalancing work will be completed by June 29, 2018.

The landlord notes that prior to these tenants filing for arbitration, they made no reports of ventilation issues and this tenant only notified them during the arbitration process. They state that the bathroom and kitchen fans have manual louvres that can be manually opened and closed. They ask if the inspector looked to see if they might have been closed to make it appear there was no ventilation; no answer was received to this query.

<u>Noise and Dust Issue</u>

a. Claim of $6000: Loss of quiet enjoyment due to loud construction noise. The tenant says the landlord began constructing a new tower in 2016 and the contractors begin work beyond the hours permitted by city Bylaw, often at 6:30 a.m. and continue working late in the evening, often to 8:45 p.m. He says he often works night shift and can get limited sleep and even on the weekend, the contractors are working so it is impossible to enjoy breakfast, for example, and there is dirt and debris all over.

The landlord said there is increased densification in the city and multiple buildings being constructed. They have no control over other nearby building projects and some of the noise and debris is coming from those sites. They are building one tower adjacent to the tenants' building. For this hearing, they provided the construction manager's sworn affidavit. In it, he said the City Noise Bylaws permit construction between 7:30 a.m. to 8:00 p.m. on weekdays, 10:00 a.m. to 8:00 p.m. on Saturdays with no work permitted on

Sundays or holidays. He said the firm commences and ends work in accordance with the City Bylaws. However, he says there was one instance on January 11, 2018 when crews worked until 9:30 p.m. and there may have been other days when crews started before or after the permitted hours although it is the company's policy not to do so and he is not aware of other infringements. The tenant said the noise disturbance happened at least a dozen times although he could not remember specific dates and times.

Regarding dust and debris, the manager stated in his sworn affidavit that the company implements measures on site for dust and debris control. He states the concrete grinding equipment has vacuums for dust control and dust reducing sweeping compound is used when sweeping on site. He states public property and streets are cleaned daily, garbage is removed from the site in a timely manner and excavation equipment is operated within allowable decibel levels. He notes the trades employed must all comply with all codes and bylaws. He notes at a recent weekly meeting, it was emphasized that no construction activity noise must begin before 7:30 a.m. including loud talk, cell phones, vehicles etc. There was Zero tolerance for infringing this rule.

The tenant said he views the construction of this other tower owned by the same landlord. He sees workers grinding the concrete on the sides of the building and dust is flying in the air. He said this will continue for months. The landlord said they met the City inspector and they walked around the building and there was no dust. They pointed out that there was a mall and a main street between the tenant's building and the new building the landlord is constructing. Also a building next door is having its balconies restored and causing some dust and noise but they have no control over that.. The landlord supplied a map showing the area with many commercial buildings and high rises. They contended the noise and debris is not coming from the tenant's building and they should not be responsible for the densification of the City with its many buildings and ongoing restorations and buildings. However, they agreed that the landlord was the company constructing the building about which the tenant is complaining.

<u>Parking Issue:</u>
Claim $2000: Loss of underground parking. The landlord said this tenant has no car and doesn't use the underground parking for which tenants pay extra rent. The tenant agreed but said he lost visitor parking (claim $1000) and he has visitors. He agreed parking and visitor parking was not included in his lease and the landlord said there are some spots which are for use by contractors and sometimes the tenants' visitors have used them. There was never guest parking.

Loss of Patio Issue:

Claim $200: The landlord said the landscaping was just upgraded, nothing was removed. A wall was painted and some shrubs installed. Photographs of the patio and pool were provided as evidence. The tenant then complained the smoking area had been moved too close to the pool and this is a loss of his peaceful enjoyment due to second hand cigarette smoke. The landlord pointed out that he had never submitted a complaint but they will look into it with their lawyers. They noted other tenants want different things regarding the smoking area. I note the tenant's room-mate in her Application some time ago had complained the smoking area was not big enough.

Garbage Chutes lost and loss of proper Garbage Disposal:

Claim $600: The landlord said there had been no garbage chutes since this tenant's tenancy commenced as they were closed in 2005 after a fire. The tenant then complained about the garbage disposal area being moved from inside to a fenced area outside. The landlord said it is now enclosed in a chain link fenced area to which the tenants have keys. They note it has the same problems as when it was underground of tenants improperly disposing of their garbage and leaving doors open so vagrants can enter. The tenant said its current location is near the gym window and the smells are disturbing. He found a dead mouse in the gym at one time. He did not mention this in his Application. The landlord supplied in evidence a number of Notices posted to the tenants about proper procedure for disposing of garbage. They note there are many tenants and some are irresponsible but they do all they can to address the problem.

Lack of Security:

Claim $2,000 due to insecure locks on the doors. The landlord said it was agreed in a previous hearing with the majority of tenants that the primary deadbolt lock was fine but the chains were to be repaired. On April 25, 2018 in a related hearing, the property manager advised that the landlords were prepared to make alterations to the tenants' sliding chain door locks and advised that repairs to the ventilation system would commence on April 26, 2018. The landlord today advised that the tenants' doors were secured with deadbolts as the primary lock but the chains needed repair so they had agreed to repair/replace chains to make them more secure.

Loss of Bike Room security:

Claim $1000. The landlord said there had been one prior complaint from another tenant and there was no damage to the door during a bike theft. It is a secure lock and the tenants have their own keys. In addition, they are encouraged to lock their own bikes. The landlord contended that the bike room was locked; there was no prior complaint from the tenant on this issue. They said when the bike was stolen, there was no damage to the bike room door and no evidence that the stolen bike had been locked.

Loss of water pressure and continuing water fluctuation:
Claim $1200: In evidence are invoices from a plumbing company from May 2017 to September 2017. In September, they made repairs to the only suite reporting a plumbing problem. In January 2018, the City requested a back flow prevention update and the plumbing company supplied it.

Another tenant from a lower floor testified and said the noise and construction dust is unhealthy. She can't cook due to the poor ventilation and her smoke detector going off due to this.

Analysis:
I find I have jurisdiction to hear this matter as I find the applicant was a tenant commencing April 1, 2013 when the lease was amended to add his name. Based on the evidence that he and the female tenant share the rent and bills equally, I find this matter is not *res adjudicate* (already heard) as I find he has a separate claim for compensation for his losses as described. Although the claims arise from the same situation, he is an individual who experienced losses perhaps differently due to shift work and other factors so I find I have jurisdiction to hear his application.

On the issues, I find the following sections of the Act are applicable:

Section 28 of the Act provides 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) use of common areas for reasonable and lawful purposes, free from significant interference

Section 32 of the Act provides:
32(1) A landlord must provide and maintain residential property in a state of decoration and repair that

(a) Complies with the health and 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.

In respect to compensation for violations of the Act or tenancy agreement, sections 7 and 67 of the Act set out criteria. 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.

Director's orders: compensation for damage or loss

67 Without limiting the general authority in section 62 (3) *[director's authority respecting dispute resolution proceedings]*, if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Section 67 of the Act does *not* give the director the authority to order a respondent to pay compensation to the applicant if damage or loss is not the result of the respondent's non-compliance with the Act, the regulations or a tenancy agreement.

On the issues, I find as follows:

I find the weight of the evidence is that the landlord was generally complying with the section 32 maintenance requirements of the Act. I find they had professionals to clean the ducts both inside and outside the units and had the exhaust fans on the roof serviced also. I find the evidence is this tenant did not contact them with complaints of lack of ventilation; although he said he contacted a caretaker in 2017, that caretaker is no longer with the company and the company was unable to find any reports submitted to him at the time and he did not provide written or oral testimony for the tenant's application.

It appears that the tenants formed a group in 2017 and approached the City with complaints about the building and in response a City inspector inspected it. The subsequent evidence is conflicting as the City inspector said the ventilation system was not operational without specifying details of the problems or how he tested it. The roof top fans were exhausting properly, they had no complaints from tenants other than one on the 17th floor who had appeared satisfied after a caretaker visit in September 2017. The landlords have maintenance for the ducts and fans and their contractors invoices note they test ok after service. The professional report on May 7, 2018 notes the tenant's unit had venting but the tenant said it was wrong and he was given leave to submit late evidence to support his point. An Inspection Report submitted late and dated May 31, 2018 notes 5 units were visited and it appeared the kitchen and bathroom fans were not working and no air movement was determinable. I find the units inspected are not specified so this evidence has limited relevance to this case. Outlet grills in the hallways on the upper floors showed a high outflow with decreasing or no flow on the lower floors. I note this unit is on the 11th Floor which might be

classified as a higher floor. They concluded that the mechanical ventilation system as a whole was deficient. A City Order was issued on June 5, 2018 to retain a Professional Mechanical Engineer to report remediation measures required to ensure the building mechanical systems function as originally designed. An email from this engineer measures the flow from the tenant's unit. and states it will be adjusted by June 29, 2018.

In summary of the ventilation issue, I find insufficient evidence the tenant ever made complaints to the landlord. I find insufficient evidence that the unit had no air flow as the landlord had reports stating it had air flow when others had only low air flow. When ordered by the City to have a Professional Company investigate the air balancing for the tenant's suite, the Professional Company's report states the exhaust fans and in-suite exhaust for the tenant's unit are operating and exhausting normally. This was followed up by the Professional Engineer's report (as ordered by the City) that the kitchen exhaust air flow was measured at 6 cubic ft. per minute and the bathroom at 10 cubic ft. per minute. The report notes the estimated designed airflow for the kitchen exhaust is 25 cubic ft. per minute and for the bathroom is 20 cubic ft. per minute. I find this report shows that while the exhaust fans are operating, they are not operating as designed. I find the report by the tenant's contractor which was done long after this dispute was initiated indicates they are not operating normally also. While I find the ventilation system may need rebalancing, I find insufficient evidence that this tenant's unit did not have some ventilation; I find the weight of the evidence is that the kitchen exhaust system was operating at about 25% efficiency and the bathroom at about 50% efficiency. I find the tenant entitled to some compensation for this deficiency as the weight of the evidence is that the ventilation system was not adequately maintained to required standards as designed. I note a Professional report in 2014 states the ducts should be cleaned yearly due to excessive dust and debris buildup; I find insufficient evidence that this maintenance suggestion was followed and this may have contributed to the problems revealed in 2017. I find the ventilation problems surfaced in September 2017 in a unit on the 17th Floor and the landlord neglected to have them sufficiently investigated and rebalanced as their own contractors' reports showed differential air flow on different floors. While I understand the tenants can shut a louvre inside a duct manually to restrict air flow and perhaps influence findings, I find it improbable that the engineer would not have detected this when measuring air flow. I find the tenant entitled to compensation for 9 months of problematic ventilation (Sept. 2017 to May 2018). Considering the reports show he did have some air flow and has insufficient evidence to show he made complaints, I find compensation of 1% of his rent for 9 months or $576 is reasonable. ($640 x 9 x .01%). I find his rent is $640 a month as he shares the $1280 rent equally with a room mate whose previous application was dismissed.

In respect to the claim for construction noise and debris, I find the duct cleaning report in September 2014 notes there was a lot of dust and debris in the ducts. According to the evidence this was 2 years before the start of the construction project of the landlord. I find this supports the credibility of the landlord that the densification of a large City means they are surrounded by construction noise and debris and this is not attributable just to the landlord's building of the new tower. I find the weight of the evidence is that there is another building having balconies redone near the subject building. I find the tenant has not satisfied the onus of proving on a balance of probabilities that the dust and debris originate from the landlord's other building. I also note the City did not issue orders on this after walking around the building and issuing a number of other orders. I dismiss this portion of his claim.

While I find that construction noise is to be expected in an expanding City, I find that the landlord neglected in some instances to ensure the workers on his nearby building worked within the hours permitted by the City Bylaws. I find the sworn affidavit of the construction manager is persuasive evidence of their adherence to City Bylaws regarding noise and methods to reduce dust and debris. However, he does admit that they worked late one night to his knowledge and may have violated the noise bylaw a few other times. Although the tenant submits violations occurred at least a dozen times, he was unable to specify dates or times in the hearing so I find insufficient evidence of the amount of times the construction workers violated the noise bylaw and disturbed his peaceful enjoyment. However, I find the weight of the evidence is that the tenant was disturbed by construction noise from the landlord's contractors working on another building near this building from time to time. I find he is entitled to compensation for loss of sleep and peaceful enjoyment of his unit. Considering he was unable to specify dates and times and the contractor said he knows of once and maybe there were a few other times, I find it reasonable that the tenant receive compensation for 5 possible disruptions of his peaceful enjoyment by construction noise. I find he is entitled to compensation of 10% of his rent for 5 instances (total $320) as I find some evidence of neglect of the landlord.

<u>Parking Issue:</u>

I find insufficient evidence to support the tenant's claim for loss of parking or visitor parking. I find the landlord's evidence credible that he never had underground parking as he has no car, and parking or visitor parking was not included in his lease; the tenant agreed this was true. I find insufficient evidence that the landlord was obligated to provide this parking. I find the landlord did not cause him loss through any act or neglect in this area. I dismiss this portion of his claim.

Loss of Patio Issue:

I find the landlord's evidence credible that no space was actually lost as the patio was only upgraded. Their credibility is well supported by the before and after photographs showing the patio and pool area. I also find insufficient evidence that second hand smoke from a closer smoking area has caused loss of his peaceful enjoyment. I find the landlord has attempted to compromise with the various tenants' requests and retain a smoking area, for example, I note the tenant's room-mate in her Application some time ago had complained the smoking area was not big enough. I dismiss this portion of his claim.

Garbage Chutes lost and loss of proper Garbage Disposal:

I find the landlord's evidence credible that there were no garbage chutes since his tenancy commenced as they were closed in 2005 after a fire. I find insufficient evidence that he has lost proper garbage disposal facilities. The testimony and photographs of the landlord show the garbage disposal area is secured in a fenced area outside. I find the landlord has not violated the Act or tenancy agreement by moving the garbage disposal outside where the tenants have keys to a secured area. I find the facts that vagrants and careless tenants have caused some problems are not breaches of the Act or tenancy agreement by the landlord. I find the landlord posts Notices and Cautions often about proper procedure for disposing of garbage and they do all they can to address the problem. I find the change of garbage disposal location or the smells that emanate from it which may be due to careless disposal practices by tenants are not breaches of the Act or tenancy agreement by the landlord. I dismiss this portion of his claim.

Lack of Security:

I find the landlord agreed to repair the door chains in a previous hearing with the tenants who agreed that the primary deadbolt was fine. I dismiss this portion of his claim. I find insufficient evidence that he suffered any loss; I find insufficient evidence that the door chain to his unit was not secure.

Loss of Bike Room security:

I find insufficient evidence that the bike room was not secure. I find the landlord's evidence more credible that there had been one complaint from another tenant and there was no damage to the door during a bike theft. Their evidence is well supported by photographs and reports. It is a secure lock and the tenants have their own keys. In addition, they are encouraged to lock their own bikes. It appeared someone had left the door open or given someone a key and there was no evidence that the stolen bike had been locked. I dismiss this portion of his claim.

Loss of water pressure and continuing water fluctuation:
In evidence are invoices from a plumbing company from May 2017 to September 2017. In September, they made repairs to the only suite reporting a plumbing problem. In January 2018, the City requested a back flow prevention update and the plumbing company supplied it. I find the tenant provided insufficient evidence of any complaint to the landlord on this issue. I find the weight of the evidence is that the landlord did not cause this problem through act or neglect and addressed it diligently when notified by someone other than the tenant. I dismiss this portion of his claim.

I find the tenant's claim for compensation of $19,200 is excessive and lacking evidence to support the majority of his allegations.

Conclusion:
For the reasons stated above, I find the tenant entitled to compensation as calculated below. As I find his claim for $19,200 compensation was excessive and lacked sufficient evidence to support it, I find him entitled to recover only half of his filing fee for this application due to his limited recovery.

Ventilation problems for 9 months- 1% rent rebate	576.00
Disturbance of peaceful enjoyment – 5 times – 10% rent rebate (64x6)	320.00
Filing fee	50.00
Total Monetary Order to Tenant	**946.00**

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *ACT Tenancy Act*.

Dated: June 25, 2018

Residential Tenancy Branch