Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

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

DECISION

Dispute Codes MNDCT, MNSD, FFT

Introduction

This is an Application for Dispute Resolution (the "Application") brought by the Tenant requesting a monetary order of $6,886.29 to compensate her for damages and delays in moving into her rental unit caused by the Landlord. The Tenant also requests an Order for the return of her security deposit and for the $100.00 filing fee.

Both the Landlord and Tenant, along with their respective legal counsel, appeared for the scheduled hearing. I find that the notice of hearing was properly served and that evidence was submitted by all parties. Although all evidence was taken into consideration at the hearing, only that which was relevant to the issues is considered and discussed in this decision.

The hearing process was explained and parties were given an opportunity to ask any questions about the process. The parties were given a full opportunity to present affirmed evidence, make submissions, and to cross-examine the other party on the relevant evidence provided in this hearing.

As a preliminary matter, I raised the fact that a hearing was held on December 12, 2017, one day after this Application was filed by the Tenant; that hearing addressed the $680.00 security deposit. The Tenant's counsel agreed that the issue of the security deposit could be withdrawn as it has already been decided. In addition, the Tenant's counsel later confirmed that the extent of their claim was reduced to $5,000.00. Her Application is hereby amended to reflect these changes.

Issues to be Decided

Is the Tenant entitled to a monetary order for damage or compensation under section 67 of the *Residential Tenancy Act* ("Act")?

Is the Tenant entitled to reimbursement of her $100.00 filing fee, pursuant to section 72 of the Act?

Background and Evidence

The Tenant entered into a tenancy agreement on November 18, 2016, which was to begin on December 16, 2016 for a one-year term, to revert to month-to-month thereafter. She agreed to pay $1,400.00 per month and provided a $680.00 security deposit on November 18, 2016, as well as a pet deposit. A copy of the signed agreement was submitted into evidence. In a schedule to the agreement, there was an acknowledgment that there was construction work underway. However, the Landlord stated that the Tenant's rental unit was ready for occupancy, so the Tenant gave notice at her former residence and arranged for movers.

The night before her scheduled move-in date of December 16, 2018, the Tenant was contacted and told that due to complications from ongoing construction, she would not be allowed access to the building. Although there was a Stop Work Order in place effective December 14, 2016 at the building where the Tenant had rented, otherwise known as RT, the Tenant was told that she could move in temporarily to their neighboring property which was also under construction for renovations, which will be referred to as CH for the purposes of this decision; this building is adjacent to the original rental building and shares some of the common park space and a swimming pool.

The Tenant stated that she was told that this was temporary and that they expected access to be provided early January. In the meantime, the Landlord was prepared to compensate the Tenant for her additional move and inconvenience. She was presented with a "Release and Settlement Agreement" by email and asked to sign it. The Tenant states that she felt pressured as it was Christmas season and she had given her notice and had to vacate her former home, and that she really had no other options presented to her. Vacancy rates were low and the Tenant knew it would be difficult to locate a new place that allows pets on such short notice. The Landlord argues that there was no undue pressure to sign off, and that no deadline was given; the Tenant was free to obtain legal advice or go to the Residential Tenancy Branch if she chose to.

The Agreement was signed by both parties on December 19, 2016. It states that it applies to any dispute pertaining to the Building, which is defined as being the address for RT only. The settlement was to forgive $741.92 in rent to cover the period from

December 15 – 31, 2016, plus up to an additional $400.00 to cover moving expenses. The Landlord argues that this document serves to resolve any dispute that the Tenant may have against Devon Properties Ltd as property manager for the owner of the building, as well as the owner, IMH.

The Tenant then moved into an apartment in CH, which she was told was a temporary arrangement. She provided copies of many emails between the parties that indicate her attempts to move into the unit she had rented at RT, as well as her frustration in dealing with the delays. After receiving notice of lab results showing asbestos levels present in late January of 2017, the relocated tenants were moved again from CH to a hotel while asbestos concerns were addressed in that building; the Landlord paid for those hotel expenses for the tenants.

That relocation was expected to only last two weeks, but the Tenant was required to stay out of CH and at a hotel for five weeks in total. She eventually was instructed to move back into the temporary housing at CH. The Tenant states that during her stay at CH, she did not pay rent and was assured that this issue would be worked out between the parties. Months passed, with frequent promises in emails that the Tenant could finally move in, only to be told of a further delay each time.

The Tenant provided video/audio recordings as well as a number of photographs to document the conditions while she was residing at the temporary apartment at CH. She summarized a list of some 28 inconveniences or disruptions which she claims are due to the Landlord's failure to provide quiet enjoyment of her home. She described each in detail during the hearing. She also provided an indication of what months she was impacted by each, between December of 2016 and May of 2017.

To summarize, she testified to the following:

- She was subjected to excessive noise from heavy equipment and jackhammering, even outside regular work hours and while she was at home;
- The yard was unusable by residents, used instead as a staging area for workers and their equipment;
- The pool could not be used;
- The asbestos issue was mishandled and posed a threat to residents;
- She had to clean continually due to substantial dust accumulation as a result of the ongoing construction, the gaps in her windows and screen door and her front door which are visible in photographs;
- She had scaffolding and tarps up against almost all her windows, with workers right outside her windows; no window coverings or blinds were provided;

- The hallways were unfinished with no carpet, paint or light fixtures; wires were hanging loose from the ceiling and bulbs hung down inside the unit;
- The yard and surrounding areas were left full of debris and dust daily, creating an unsafe environment for tenants;
- Windows were filthy and not cleaned the entire time she lived there;
- No balconies could be used due to reconstruction;
- Lack of access to view, natural light and fresh air; loss of privacy due to presence of scaffolding and workers around the perimeter of the building;
- No covered parking and street parking difficult to obtain ($40.00 per month was for parking assigned to the Tenant which could not be accessed);
- Loss of access to a bike shed;
- Reduced availability of elevator due to ongoing construction;
- Plumbing failures and water shut-offs interrupting services;
- Heating failures and interruptions;
- Lack of security with doors propped open and people accessing units by climbing the scaffolding;
- Mail service disruption; and
- General displacement.

The Tenant states that because of the extent of the reconstruction work in and around the building, she was unable to unpack or settle in to live in the unit she was "temporarily" assigned. Due to the noise, dusty conditions and lack of privacy, she would stay at the unit only during the work days and would stay with family on the weekends to avoid dealing with it. Although the Tenant was compensated for her move to CH in December of 2016, she was later forced to move again several weeks later to a hotel, then several weeks later back to the apartment in CH. The Tenant vacated that unit on May 6, 2017, frustrated by the inability of the Landlord to provide her access to the original rental unit.

The Landlord filed a claim for unpaid rent and to retain the security deposit and a hearing was held December 13, 2017; the Arbitrator found that "despite the frustrating and unavoidable circumstances in this matter, the landlord acted reasonably to fulfill their obligations under the tenancy agreement and provide the tenant with a measure of equivalence of the value of the tenancy agreement." The Landlord was awarded $5001.29 for unpaid rent, $500.00 in liquidated damages, and allowed the Landlord to retain the security deposit of $680.00.

The Tenant is claiming compensation and damages for loss of quiet use and enjoyment of the unit and services while she was living at CH, at a rate of $1,400/month from December 2016 through May 2017, less the period when rent was waived, for a total claim of $5,000.00. She asks for a set-off from the previous monetary order, wherein the Landlord made a claim for unpaid rent and the security deposit and was awarded the sum of $4,921.29, after applying the security deposit. I note that the Tenant filed this claim prior to that hearing and decision.

The Landlord takes issue with the fact that the Tenant has filed a dispute application, stating that she is prevented from doing so pursuant to the terms of the Release and Settlement Agreement. The Landlord argues that the Tenant entered into it freely and that she has been compensated for those damages and has extinguished any rights to claim for further damages.

The Tenant argues that she only intended to waive any claim for the period of time in December she was not allowed access as she was told she would be moving in shortly thereafter, likely early January; issues arose which thwarted attempts to move her into the building, and she remained in the temporary unit in CH throughout the rest of the tenancy. In the alternative, the Tenant's counsel argues that the Agreement only covers the specific unit she originally rented, and not the unit she resided in at the neighboring building, and therefore is not applicable to this Application. He also stated that she signed the agreement under duress and under false promises.

The Landlord disputes the Tenant's claim for loss of quiet enjoyment and for breach of her rights for the following reasons:

- The Tenant failed to give notice in writing about problems with heat and water supply, as required under the Act;
- The Tenant was aware of ongoing construction on both properties and acknowledged the work underway in schedule to the tenancy agreement;
- The Tenant entered into the Release and Settlement Agreement of her own free will;
- The Tenant has been compensated for any inconvenience by the waiver of rent in December 2016, $400.00 for her movers, the hotel expenses being covered, numerous gift cards given to residents, replacement of vacuums, free breakfast and secure parking, and the use of a shuttle bus to travel to and from the hotel;
- Weekly stipends for food as well as gifts cards were provided to relocated tenants in February when they were moved to a hotel for 5 weeks;
- The noise bylaw prevents work outside of the following hours: 7:30 am to 5 pm Monday to Friday and 8 am to 3:30 pm on Saturday; workers may have been on-

site outside these hours but were not operating noisy equipment as argued by the Tenant;

- The pool is only open May through September each year, which means the Tenant did not suffer any loss as she moved in December and moved out May 6th;
- The buildings were cleaned daily by new managers hired at both buildings;
- Mail service was reinstated January 13, 2017, two weeks after being disrupted due to the Stop Work Order, which only meant the residents only had to pick up mail elsewhere for two weeks while the matter was straightened out by management;
- The exterior work was halted in January and did not resume around September of 2017, several months after the Tenant vacated, suggesting that the noise for exterior work would not have been an issue; and
- The Landlord has a legal duty to carry out the repairs and to maintain the building, in accordance with bylaws and legislation.

Analysis

Is the Tenant legally allowed to bring a claim for damages?

The Landlord's counsel claims that the Tenant's Application ought to be dismissed outright. She made argument that the Tenant's Application is for the *specific* rental unit at the address noted in the tenancy agreement, yet her actual claim is for disturbances and problems with a unit at a different building. I do not agree with the argument that this Application was incorrectly brought forward, as the Landlord also brought its 2017 claim against this Tenant under the *same* original address for unpaid rent and was awarded rent arrears for when she resided at the alternate address; also, the Landlord concedes in paragraph 45 of their written submissions that the tenancy agreement was created and that another suite on the premises was offered when the one the Tenant signed for was "unavailable". Therefore, I am not prepared to dismiss this Application on the grounds that it was bought under the original address under the tenancy agreement, as opposed to the actual unit she resided in throughout the tenancy.

The second argument for dismissing the Tenant's Application is that she signed a Release and Settlement that prevents her from bringing an application for dispute resolution under the Act. I find that the intention of the parties at the time of signing was to resolve any ongoing dispute resulting from the Stop Work Order that prevented access to RT on her move-in date.

I further find that the Tenant agreed to accept a waiver of rent for December, moving expenses and the alternate rental unit at CH, in satisfaction of the claim she would have had at that point in time, concerning the issues that had arisen immediately prior to her possession date that same week. The amount paid or waived is minor, and the monetary extent of the agreement clearly would not support any argument that it was intended to be in satisfaction of *any* future claim that may arise between the parties at any future time. This would be in contravention of section 5 of the Act, which states that parties may not contract out of their rights under the Act. I find that this Agreement only addresses the claim made by the Tenant in December of 2016 wherein she was prevented access to her rental unit on her move-in date and was forced to move instead to the alternate unit.

This conclusion is further supported by the fact that the Landlord's property manager, who had arranged for the Tenant to sign that Agreement, invited her to submit a formal request for further compensation in their email to her on March 1, 2017 which was submitted into evidence, "*As C—told you, if you require a different solution or compensation from Starlight, then the best we can offer at this point is to receive your specific suggestions or requests in writing, and we will pass it up the chain*." I note that in an email dated March 29th from the Tenant to the property manager, she does in fact request a reduction in the rent and reimbursement for costs associated with hooking up utilities after relocating back to her original unit. These communications further support my finding that the parties intended the December Agreement to address the Tenant's claims with respect to her inability to access and move into her suite on the move-in date, and her need to relocate to the alternate address; it was not intended to compensate her for the additional grief she endured over the course of several months that followed, while moving about and waiting for access to her rental unit.

The claim brought by the Tenant in this Application is for damages and compensation due to loss of quiet enjoyment and services at the property at the adjacent building. The Landlord would have had the ability to relocate this Tenant to a rental unit which would have afforded her the ability to reside in an environment that was not a construction zone, but chose not to do so.

The claims brought by this Tenant today are a direct result of the relocation to another building operated by this Landlord, and the issues which the Tenant claims interfered with her ability to reside there. I do not find that the Agreement was intended to prevent the Tenant from exercising any and all rights under the Act that she may have into the future; it was only intended to settle the claim she had in December of 2016 regarding the disruption to her move-in. There is no need for me to consider the argument that

the Tenant signed under duress, as the evidence suggests that she signed the agreement with the express understanding that it was to satisfy any claim she had at that point in time with respect to her sudden inability to move into her rental unit to begin the tenancy.

Compensation and Damages for Loss of Quiet Enjoyment and Breach of Rights:

Had the previous Arbitrator found that the tenancy agreement was *frustrated* and of no force and effect as of the moment the Stop Work Order was issued - which prevented the Tenant from accessing her rental unit (or any unit within the building) - the rights of the parties would cease to exist at that moment. However, the Arbitrator did not accept that argument and accordingly, the Tenant's rights continued to exist throughout the tenancy until she vacated the alternate unit in May of 2017. Sections 27 and 28 of the Act refers to some of the relevant rights of a tenant during a tenancy:

Terminating or restricting services or facilities
27 *(1)A landlord must not terminate or* ***restrict a service or facility*** *if*
(a) the service or facility is essential to the tenant's use of the rental unit as living accommodation, or
(b) providing the service or facility is a material term of the tenancy agreement.
(2) A landlord may terminate or restrict a service or facility, other than one referred to in subsection (1), if the landlord
(a) gives 30 days' written notice, in the approved form, of the termination or restriction, and
(b) reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

Protection of 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.*

The Landlord's own counsel, in an article dated November 4, 2017 and published on BC Housing Guide, clarifies the nature of a disruption from a renovation that would justify a finding of a breach:

> *"As with all renovation or repair projects, some disruption is to be expected. Tenants must be aware that when maintenance to a building is required, it is the landlord's obligation to ensure such maintenance is done. Pursuant to section 32 (1) of the Act, "a landlord must provide and maintain a residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law, and having regard to the age, character and location of the rental unit, make it suitable for occupation by the tenant".*
>
> *The RTB policy guideline states that temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. However, frequent and ongoing interference or unreasonable disturbance may form a basis for a claim of a breach**. A tenant's case can be made stronger when there are multiple disturbances from a construction project such as dust build-up, lack of elevator use, garbage pile up, excessive noise, and limited or no access to common use areas such as a pool or garden area**." (bolding added)*

It is up to the person claiming the damages or compensation to provide evidence that a breach has occurred and secondly, that a monetary order is warranted. I have reviewed and considered the evidence submitted by both parties. It is apparent that the Tenant suffered inconvenience as a result of the construction work and two relocations required in a relatively short period of time. However, the Tenant must also provide sufficient evidence that damages or compensation is warranted, and to what extent.

The Tenant provided a lengthy list of items to demonstrate the extent of the inconvenience to her. In some instances, the Landlord provided a reasonable explanation and demonstrated how the Landlord took measures to try to prevent as much disturbance as possible, while still complying with legal requirements during the construction period.

The Landlord questioned whether the Tenant reported the heat and water issues to the Landlord, and although she states it was verbal, the Landlord disputes this and states there was no opportunity given to address those complaints during the tenancy.

I find that the Landlord would have been aware of water/heat shut-offs required in the building by the ongoing construction. I find that the inability to use the outdoor pool in winter months was not an inconvenience to the Tenant. There were no independent witnesses or statements provided by the Tenant to verify the extent of the noise or the nature of the condition at or around the building from other residents, which would have been helpful.

My only measure of the extent of the disturbances are from her testimony, the photographs and the audio tapes submitted into evidence. The audio tape was of jackhammering, yet the Landlord stated that no exterior construction was allowed from January through September of 2017; the recording is undated, yet clearly was taken from the inside of the apartment unit, so I find that the noise was in fact taking place during the tenancy.

There is no doubt that when taking into account all of the complaints listed in the evidence *as a whole*, this Tenant suffered to some extent and the Landlord ought to compensate for this. When you consider all of the inconvenience and disturbances, it simply crosses the line from what is “reasonable” to unreasonable.

I find that the frequency and multitude of disturbances confirms a breach of the Tenant’s right to quiet enjoyment in this instance. The fact that some of this is not the fault of the Landlord who is at the mercy of the construction project does not allow the Landlord to escape liability for failing to provide a place for the Tenant to live that is relatively free of frequent and long-term disturbances.

There are several grounds for a claim of damages or compensation, each of which is considered below:

(a) Punitive Damages - an arbitrator does not have the authority to award punitive damages, to punish a respondent. Damages are only allowed to compensate a tenant for a loss suffered.

(b) Actual Expenses - an arbitrator may award damages as permitted by the Act or at common law. An arbitrator may award a sum for out of pocket expenditures if proven at the hearing and for the value of a general loss where it is not possible to place an actual value on the loss or injury. The Tenant did not submit receipts for actual out-of-pocket expenses into evidence. No evidence was led to suggest any money was spent by her as a result of any breach under the Act. Accordingly, I am not prepared to award damages on this ground.

(c) Nominal Damages - an arbitrator may award “nominal damages”, which are a minimal award. These damages may be awarded where there has been no significant loss or no significant loss has been proven, but they are an affirmation that there has been an infraction of a legal right.

(d) Aggravated Damages - in addition to other damages, an arbitrator may award aggravated damages. These damages are an award of compensatory damages for non-pecuniary losses, such as physical inconvenience and discomfort, pain and suffering, loss of amenities, mental distress, etc. It can include loss of access to any part of the residential property provided under a tenancy agreement, use of a facility, quiet enjoyment, etc. Aggravated damages are designed to compensate the complainant, and they are measured by the complainant's suffering. The damage must be caused by the deliberate or negligent act or omission of the wrongdoer. Based on the evidence of the Tenant I find that while she did not specifically seek aggravated damages by using the term "aggravated damages" I find that her submissions provided sufficient notice to the Landlord that aggravated damages were being sought.

I find that the Tenant has proven a breach of her right to quiet enjoyment and freedom from disturbances, but not to the extent where it would offset her entire obligation to pay rent. Unfortunately, dealing with a construction site is inconvenient to residents, and this case is no exception; however, it appears that this particular situation, with several relocations and moves, noise almost every day for several months, privacy/security concerns and the general poor condition of the building and premises warrants some type of compensation. This Tenant is being required to pay $1,400.00 a month under a contract for an alternate place that simply was not in a state which justified that amount; the construction process had some unfortunate events which further delayed and inconvenienced this Tenant and she is entitled to receive compensation for that.

I find that the Tenant has proven her claim for damages and compensation on a balance of probabilities and I award her the amount of $300.00 per month for a period of five months. In coming to this amount, I have taken into consideration the efforts of the Landlord to mitigate by providing gift cards, vouchers and alternate accommodations; however, even with these efforts, the Tenant is entitled to some additional compensation for having been forced to live "out of boxes'" in various locations while awaiting the use of an apartment that she never got possession of.

The length of time of all these disruptions, as well as the type and frequency, justify an award of $1,500.00. As the Tenant was successful in her claim, I award the filing fee of $100.00. This Order must be served on the Landlord and may then be filed in the Small Claims Division of the Provincial Court and enforced as an order of that court if the Landlord fails to make payment. Copies of this order are attached to the Tenant's copy of this Decision.

Conclusion

The Landlord shall pay to the Tenant the sum of $1,600.00 forthwith.

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: June 08, 2018

Residential Tenancy Branch