Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DEVON PROPERTIES LTD & IMH 415 AND 435 MICHIGAN STREET APARTMENTS LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCT, FFT, RR

Introduction

On July 23, 2018, the Tenant applied for a Dispute Resolution proceeding seeking a Monetary Order for compensation pursuant to Section 67 of the *Residential Tenancy Act* (the "*Act*"), seeking a rent reduction pursuant to Section 65 of the *Act*, and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

The Tenant attended the hearing with E.R., M.B., and K.G. as her advocates. E.S. attended the hearing as an agent for the Landlord and R.H. attended as the Landlord's counsel. All in attendance provided a solemn affirmation.

The Tenant submitted that the Landlord was served the Notice of Hearing package by registered mail on October 4, 2018 and the Landlord confirmed that this was received. In accordance with Sections 89 and 90 of the *Act*, and based on this undisputed testimony, I am satisfied that the Landlord was served the Tenant's Notice of Hearing package.

The Tenant advised that her evidence was served to the Landlord in person on October 25, 2018 and the Landlord confirmed that this was received. The Landlord advised that their evidence was served to E.R. by registered mail on October 31, 2018 and to the Tenant in person on November 1, 2018. The Tenant confirmed that they have received this evidence. As the service time frames of both parties' evidence complies with Rules 3.14 and 3.15 of the Rules of Procedure, I am satisfied that all of the evidence can be accepted and will be considered when rendering this decision.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me;

however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

- Is the Tenant entitled to a Monetary Order for compensation?
- Is the Tenant entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

Both parties agreed that the tenancy started on December 1, 1998. Rent was currently established at $1,259.15 per month, due on the first day of each month. A security deposit of $392.50 was also paid.

The Tenant is seeking compensation for a loss of quiet enjoyment due to construction related disturbances, unsafe conditions, loss of privacy, and a loss of access to her balcony and common areas, stemming from the Landlord undertaking significant renovations to the property. As a 90-year-old tenant with limited mobility, the significance of her loss has been magnified. The Tenant is seeking the following compensation, that was amended during the hearing:

December 2015 – December 2016 ($1,180.00 X 12 / 2 = **$7,080.00**)

- 30% rent reduction for a loss of quiet enjoyment.

- 20% rent reduction for a loss of her balcony.

December 2016 – December 2017 ($1,214.22 X 12 / 3.33 = **$4,375.57**)

- 30% rent reduction for a loss of quiet enjoyment.

July 2017 – January 2018 ($1,214.22 X 7 / 5 = **$1,699.91**)

- 20% rent reduction for a loss of her balcony.

<u>January 2018 – July 2018</u> ($1,259.15 X 7 / 3 = **$2,938.02**)

- 30% rent reduction for a loss of quiet enjoyment.

Her total claim for compensation is **$16,093.50**.

The Tenant advised that the Landlord commenced significant renovations to the property, as well as three other adjacent buildings, in December 2015. This renovation work created unsuitable and unsanitary living conditions in the Tenant's rental unit and the common areas of the property. She advised that significant noise was created from jackhammering, drilling, and noisy, disrespectful work crews and that this noise was constant for at least 5 days a week from before 8 AM, into the middle of the afternoon, but sometimes into the evening as well. From June 2016 to January 2018, the Tenant did not have access to her balcony due to the renovations, resulting in a loss of her freedom and enjoyment. Due to her mobility issues, the significance of the renovations within and outside her building impacted her ability to freely move in, out, and around the property, and affected her ability to have groceries delivered for a period of time.

She cited other instances of security breaches, the water being shut off unexpectedly at least a dozen times, and a disruption in her mail service as other issues during the renovation period. The Tenant advised that there was a stop work order, halting renovations from December 14, 2016 to July 5, 2017. The Tenant raised her concerns to the Landlord in writing on March 7, 2018 and requested a rent reduction. The Landlord responded by offering a one-time payment of $3,000.00, which the Tenant did not accept.

The Tenant cited Sections 28 and 67 of the *Act* outlining her right to quiet enjoyment of the rental unit and the potential for monetary compensation if this right has been breached. Her request for compensation is due to the loss she suffered as a result of the "large scale, mismanaged, and ongoing renovations in her unit and the building" for almost three years.

The Tenant provided an outline of the significant noise stemming from the construction equipment and workers. Based on her lack of mobility, she was subjected to this constantly without reprieve. This impacted her ability to have phone conversations, watch TV, or conduct daily activities in her rental unit.

The Tenant advised of one instance in December 2016 where workers entered her unit without knocking and stated that she must leave the rental unit for the day while renovations were conducted, regardless of the fact that she had nowhere else to go. When she returned later that day, she discovered that the workers had taken down her curtains and would not put them back up. She stated that the Landlord replaced them days later. In one instance in December 2017, the Tenant's daughter came to visit and encountered rude and aggressive construction workers in the rental unit that were behaving disrespectfully to the Tenant.

The Tenant advised that the construction equipment within the building hinders her ability to safely navigate the property and she has limited access to the laundry room. As well, the laundry room is being used as a storage facility for equipment. She stated that the interruption of mail service was significant as it impacted her during the Christmas season and that the renovations prevented the grocery store from being able to deliver groceries for a period of time.

The Tenant advised that due to the doors being propped open by the construction workers, security of the building has been compromised and unauthorized people have been in and around the property. Furthermore, she outlined her concerns with respect to the stop work order as asbestos was being removed from the property inappropriately. To support this point, a decision by an arbitrator, with respect to another claim in the same property, wrote "I do not understand, nor was it adequately explained to me, how a space that is too unsafe for anyone to work in, is safe enough to live in".

She stated that there was dirt, dust, and debris in common areas, that the windows were dirty, that the hallways were in a state of disrepair, and that the garbage containers were overflowing, and this occurred for over a year. As well, she was prevented from being able to use her balcony and had lost the use of this for over 23 months due to the renovations. Due to her mobility issues, leaving the property was difficult so the loss of the balcony for such an extended period of time deprived her of fresh air for significant stretches of time.

While the Landlord has a right to repair and maintain the property, this right must be weighed against the Tenant's right to quiet enjoyment. Submitted into evidence were previous arbitrator decisions of other tenants in the same building who suffered similar losses, and these decisions indicated that the disruption suffered by the tenants exceeded a reasonable and acceptable amount. Even if the Landlord took steps to diminish the loss, the Tenant is still entitled to compensation for the loss she suffered.

The Tenant submitted that the significance, scope, and duration of this renovation project has captured the attention of the media as it has impacted hundreds of tenants, all suffering from similar issues. She noted that despite the Landlord being aware of these significant issues, the Landlord did not discuss the extensive work or approach the Tenant with any compensation until being faced with the resulting media attention and her request for a rent reduction.

The Landlord advised that all the tenants were informed that significant renovations were to commence in the Fall of 2015 that were expected to take 36 months to complete, that as a result there may be noise, vibrations, dust, and inconvenience, and that the tenants were advised to make requests to the Landlord if they required special accommodation during the renovations.

The Landlord submitted an assessment report that indicated that there were balcony deficiencies that required immediate remediation. As well, the Landlord retained an environmental consultant on February 16, 2016 to determine the proper method to handle or remove asbestos.

The Landlord stated that construction was conducted from 7:30 AM to approximately 3:30 PM, Monday to Friday and 8:00 AM to 3:30 PM on Saturdays. This complied with the allowable times in accordance with city by-laws.

Around December 19, 2016, a stop work order was place on the property and the order was lifted on January 13, 2017 for certain services such as mail delivery. No construction was conducted during this period. The tenants were notified that core services would be allowed to continue on January 31, 2017. As well, they were informed that their building did not have the same asbestos concerns as other buildings.

Construction resumed in September 2017, the tenants were updated on the ongoing progress of the project, and the work done to the Tenant’s balcony was completed no later than January 2018 and the Tenant has had access since.

The Landlord’s position is that the Tenant has the burden to prove her loss, that she has not provided a calculation to outline her claims for compensation, and that the Tenant’s claims are excessive. Moreover, these claims are subject to a two-year period from when they were aware of the problem to make a claim, based on the Statute of Limitations.

The Landlord stated that the Tenant's rental unit was not renovated and that she did not provide evidence of the days other units were renovated or the extent of the disruption this caused her to experience. As well, the building manager did not receive any complaints from other tenants with respect to this issue. The Tenant's claims on this point are not specific, are unsubstantiated, and should be dismissed. The Landlord also submits that construction commenced during applicable hours and any noise associated with this work is an inconvenience rather than a breach of quiet enjoyment.

The Landlord submitted that balcony repairs began on June 27, 2017 and prior to this, there was no jackhammering or major noise disruptions. Furthermore, any hallway or corridor renovations did not begin until August 26, 2016.

Claims by the Tenant with respect to poor experiences with workers should not be considered as they were not made aware of these instances, nor has any evidence been submitted. Moreover, the Landlord disputes the Tenant's submissions with respect to the condition of the outside property, the clutter, or the use of the laundry room. In addition, the Tenant only suffered a loss of mail service for a two-week span, but as mail service was still available at another location, this was merely an inconvenience.

With respect to the claims of water being shut off, the Tenant did not specify how many times this happened. As this is to be expected during construction, this is mostly just an inconvenience. Regarding the security of the building, the Landlord refuted the significance of the loss the Tenant claimed for. As for her claims of the asbestos removal, the Landlord advised that the environmental consultant determined that there were not elevated levels of asbestos, that the tenants were informed of this, and that the workers handled all hazardous materials properly.

The Landlord advised that the cleaning services provided satisfied their obligation to deal with the dust and debris associated with construction, that the unfinished hallways do not interfere with the enjoyment of the premises, and that any excess garbage should not lessen the Tenant's quiet enjoyment. However, they did acknowledge that cleaning was not completed during the month of the stop work order.

Finally, regarding loss of use of the balcony, the Landlord asserts that the Tenant's claim is excessive and that a 5% rent reduction from June 2016 to February 2018 is sufficient. Furthermore, the Tenant did have some air flow, light, and a view from her balcony throughout this time. The Landlord also submitted numerous notices as documentary evidence outlining their willingness to advise tenants of the status of the project and to provide them with special accommodations or requests if necessary.

Analysis

Upon consideration of the evidence before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this decision are below.

Section 28 of the *Act* outlines the Tenant's right to quiet enjoyment and states that the Tenant is entitled to "reasonable privacy, freedom from unreasonable disturbance, exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29, and use of common areas for reasonable and lawful purposes, free from significant interference."

Section 32 of the *Act* requires that the Landlord maintain the rental unit 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.

Section 60 of the *Act* states that an application for dispute resolution must be made within two years of the date that the tenancy ended.

Section 67 of the *Act* allows for an arbitrator to determine the amount of compensation to be awarded to a party if a party has not complied with the *Act*.

Policy guideline # 6 outlines the covenant of quiet enjoyment and states the following:

> 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.
>
> A landlord can be held responsible for the actions of other tenants if it can be established that the landlord was aware of a problem and failed to take reasonable steps to correct it.

With respect to the Tenant's claims for compensation for loss, when establishing if monetary compensation is warranted, I find it important to note that Policy Guideline # 16 outlines that when a party is claiming for compensation, "It is up to the party who is claiming compensation to provide evidence to establish that compensation is due", that "the party who suffered the damage or loss can prove the amount of or value of the damage or loss", and that "the value of the damage or loss is established by the evidence provided."

The first issue I will address pertains to the Tenant's time frame to make her Application. While it is the Landlord's position that a claim can only be made for infractions within the last two years, Section 60 of the *Act* allows a party to make an application for dispute resolution within two years of the date the tenancy ended. As this tenancy is still ongoing, I am satisfied that the Tenant is still within her right to make this Application for compensation for loss during the entire tenancy.

Regarding the Tenant's claims for compensation, there is no dispute that substantial renovations were undertaken on the property, and surrounding buildings, and that the duration of this construction was to take an estimated three years to complete. While it is evident that the Landlord understands their requirement of Section 32 of the *Act* to repair and maintain the property, and while the Landlord's position that the renovations will benefit the tenants long term is understandable, the tenants are still entitled to freedom from unreasonable disturbance. When reviewing the totality of the evidence, there is no doubt that such an extensive construction project would inherently cause a substantial interference with the ordinary and lawful enjoyment of the premises. Despite the Landlord notifying and updating the tenants throughout the project, in my mind, given the timeline of the construction project, this could not reasonably be considered a temporary discomfort or inconvenience as purported by the Landlord. Rather, I find that this situation would more likely than not be considered a frequent and ongoing interference or unreasonable disturbance. Therefore, on a balance of probabilities, I accept that the Tenant's evidence carries more weight with respect to the severity and frequency of the disturbances. As well, I agree that this construction project would have

affected her negatively by impacting her day to day life as the conditions that she was subjected to go beyond what would be considered reasonable to accept.

When establishing the amount of compensation, given the Tenant's health and condition, a majority of her time was spent in the rental unit. As such, the loss that she suffered was significant as she had no respite from the ongoing disturbances. While it is understandable that some disturbances cannot be helped and are to be expected during such a massive renovation project, as the Landlord has not had to live through the renovations and experience what the Tenant experienced, I do not find the Landlord's submissions minimizing the Tenant's experience to be reliable or to carry much weight. I am satisfied that the Tenant endured a substantial loss and a significant reduction in the enjoyment of her rental unit due to the extent of everything associated with the construction project.

Consequently, based on the evidence submitted, I am satisfied that the Tenant has substantiated a claim for compensation, broken down as follows. Due to the construction and associated disturbances from December 2015 to November 2016, I grant the Tenant a monetary award of 30% of $1,180.00 per month ($1,180.00 X 12 X 0.3 = **$4,248.00**).

Although there was a stop work order issued in December 2016 until construction commenced again in September 2017, I am still satisfied that the Tenant suffered a loss due to a lack of accessibility throughout the building, a reduction in mail service, and intermittent water access, amongst other issues. Accordingly, I reduce the amount of compensation for a loss of quiet enjoyment for this period of time to 10% and I grant the Tenant a monetary award for this point in time of 10% of $1,214.22 per month ($1,214.22 X 9 X 0.1 = **$1,092.80**).

Finally, as the construction work continued from October 2017 onwards and the Tenant is seeking compensation until July 2018, I grant the Tenant a monetary award for October 2017 to November 2017 of 30% of $1,214.22 per month ($1,214.22 X 2 X 0.3 = **$728.53**) and for December 2017 to July 2018 of 30% of $1259.15 per month ($1259.15 X 8 X 0.3 = **$3,021.96**). Therefore, the Tenant's total monetary award for her loss of quiet enjoyment is **$9,091.29**.

With respect to the Tenant's claims for the loss of the balcony, both parties submitted contradictory timelines with respect to this loss. The Tenant stated that access to the balcony was terminated from June 2016 to January 10, 2018 but then stated that workers had locked the balcony door from January 2016 to November 2017. The

Landlord's submission is that the balcony repairs began approximately in June 2017, but they then advised that a rent reduction "of 5% from June 2016 to February 2018 or sooner (if completed sooner)" for this loss would be sufficient. As June 2016 appears to be the consistent date that the balcony was inaccessible, I am satisfied that this would establish when the loss began. Furthermore, I am satisfied from the submissions that the Tenant finally had access to her balcony on or around January 10, 2018.

Based on the evidence presented before me, I find that not having any access to the balcony presented a considerable loss to the Tenant. While the Landlord stated that the "Tenant still had some air flow, light and view from her balcony", I find this submission to be an attempt to minimize the magnitude of the actual personal loss one could reasonably have anticipated to suffer by not having access to this benefit of the rental unit for such an extended period of time. I do not agree that the Landlord's estimate of loss is commensurate with the loss that the Tenant endured.

Consequently, I am satisfied that the Tenant has substantiated a claim for compensation from June 2016 to January 2018 in the amount of a 20% loss. This would be calculated as seven months of rent in 2016 of 20% of $1,180.00 per month ($1,180.00 X 7 X 0.2 = **$1,652.00**), 12 months of rent in 2017 of 20% of $1,214.22 per month ($1,214.22 X 12 X 0.2 = **$2,914.13**), and 10 days of rent in January 2018 of 20% of $1,259.15 per month ($1,259.15 / 31 X 10 X 0.2 = **$81.24**). As such, I grant the Tenant a total monetary award in the amount of **$4,647.37** to compensate the Tenant for her loss of use of the balcony.

As the Tenant was successful in her claims, I find that the Tenant is entitled to recover the $100.00 filing fee paid for this application.

Pursuant to Sections 67 and 72 of the *Act*, I grant the Tenant a Monetary Order as follows:

Calculation of Monetary Award Payable by the Landlord to the Tenant

Loss of quiet enjoyment	$9,091.29
Loss of quiet enjoyment of balcony	$4,647.37
Recovery of filing fee	$100.00
TOTAL MONETARY AWARD	**$13,838.66**

Conclusion

The Tenant is provided with a Monetary Order in the amount of **$13,838.66** in the above terms, and the Landlord must be served with **this Order** as soon as possible. Should the Landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial 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: December 19, 2018

Residential Tenancy Branch