Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, FF

Introduction

The tenant applies to recover compensation for an alleged failure by the landlord to provide quiet enjoyment, as that term has been defined by the *Residential Tenancy Act* (the "*Act*").

Both parties attended the hearing, the landlord by its representative and its legal counsel, and were given the opportunity to be heard, to present sworn testimony and other evidence, to make submissions, to call witnesses and to question the other. Only documentary evidence that had been traded between the parties was permitted to be presented as evidence during the hearing.

At the start of the hearing the style of cause was amended by agreement to add the second corporate entity. It is the registered owner of the property.

The tenant filed a large group of documents and exhibits that are generic to a number of applications made or being made by other tenants in this apartment building and in at least three others owned by the same landlord. Not all of the documents and exhibits relate to his building or to the time he was a tenant. Between hearings the tenant submitted a list of those documents and exhibits that he claims relate to his tenancy. Mr. P.M. for the tenant and Ms. R.H. for the landlord agreed that those listed would be entered as evidence, subject to comment by the landlord.

It was also agreed that the tenant's witness Mr. R.M., who had been qualified as an expert witness in a previous proceeding involving a similar claim against the landlord, be accepted as an expert in this proceeding and that his report be entered as evidence.

Issue(s) to be Decided

Has the landlord failed to comply with its obligation to provide quiet enjoyment of the rental unit to this tenant? If so, what if anything is the tenant entitled to as compensation?

Background and Evidence

The rental unit is a one bedroom apartment in a fourteen floor, 112 unit apartment building that was constructed in the early 1960's.

There is a written tenancy agreement. The tenancy started September 1, 2017 for a one year fixed term at a monthly rent of $1360.00 (plus $30.00 parking). The tenant vacated the rental unit April 30. 2018.

The tenant is a college student from outside the province. He found this apartment for rent from a website while he was still outside the province. A friend visited the prospective rental accommodations, including this one, and sent him videos of the places. He took this particular place because he has a dog and it was a "dog friendly" building.

At that time the landlord was conducting significant renovation work on the inside and outside of the building. The exterior had scaffolding up around it, though it is not clear to what extent the scaffolding enshrouded the building. The tenant indicated it was "all around the building." The grounds around the building would have had the look of a worksite, with equipment and machinery.

The tenant testifies that he was told by a representative of the landlord that there would be renovations in his suite before he moved in and that the renovations would not affect him. Particularly he would have a new carpet and balcony. He says he was not told about any exterior renovations.

When he moved in renovations to the inside and outside of the building were in progress.

His complaints are:

1. The awning over the entrance to the building was right outside his second floor windows. Each workday morning the landlord's workers would congregate there before 8:00 a.m. and make noise as they got ready for work. The tenant's college classes started in the late morning and with the noise he could not sleep

in. As well, the workers mixed chemicals on the awning and on his balcony. They off gassed fumes that he found unpleasant. If he had to open his window at night for cooling, he would smell the fumes. The awning was only feet away from his bed and he felt that the early morning workers were invading his privacy and that of his girlfriend when she stayed over.

2. The exterior work required the use of jackhammers, grinders and drills. The tenant says the noise was very high and was “all the time.”

3. The exterior of the windows to his apartment were not clean and weren’t cleaned while he was there.

4. He was concerned and unhappy about the workers and the pace of the work.

5. He was embarrassed by the scaffolding all around the building.

6. He was concerned about the security of his rental unit because the workers would wedge the front door open all day. There were no security guards or cameras.

7. The apartment grounds were filled with construction material his entire tenancy. There was an eighteen wheeler truck parked in the visitor parking area of the building the entire time. Garbage was overflowing and workers’ cigarette butts were simply tossed onto the greenspace of the property.

8. The lobby of the building was taken up by construction supplies. The workers used the area for breaks. It was not a “welcoming” place. The tenant says that after a leak into the lobby it was “quarantined.”

9. In November 2017 there was a water leak in the hallway. About ten feet of carpet outside his door was removed as a result and never replaced. It remained as exposed subfloor during the rest of his tenancy, detracting from the amenity of the hall.

10. For all but the last few months of his tenancy the intercom system did not work. As a result, he could not open the front door remotely for his guests and had to walk to the lobby to do so.

11. A significant amount of dust created by the work would enter his suite anytime he opened his window.

12. On one occasion water from the unit above him leaked into his suite soaking the cupboards and cabinets, causing them to crack. The landlord did not repair the cupboards or cabinets.

13. The tenant was concerned about the workers hired for the project. He says is familiar with construction work and these workers were slow; they were seen to be sitting around for long periods. The on site manager did not seem to be in control of them.

14. His unit was one of the early renovations. As a result he could hear the other suites on his floor being renovated throughout his tenancy. The work was “pretty constant” and tools would be simply left in the hallway.

15. The outside renovations were a significant interference, he says. The “staging area” for the workers was right outside his window. The lift used by workers to get up and down the building was also right outside the window. During working hours 8:00 a.m. to 5:00 p.m. the sound of jackhammers and saws was “pretty loud” and made it hard to work at home during his days off. He would go elsewhere, like the library. As has been said, the work prevented him from sleeping in. The tenant testifies that the work impinged on his view and his privacy as well. The view was blocked or inhibited by the lift, the tools, materials and garbage on the awning. He could see the workers from his bed. He says the workers were right outside, three to five feet away.

16. His water was shut off frequently especially at the start of the tenancy and for long periods of time. He acknowledges the landlord would post notices of water shut off.

17. His rental unit came with a balcony but due to the ongoing work, he was prohibited from using it his entire tenancy.

18. The rental unit came with the use of a swimming pool which was closed as of October. The tenant did not indicate that he was or would have been a user of the pool.

19. He says his parking accommodation was not interfered with by the work, though the guest parking area was often occupied by workers and their vehicles.

20. The tenant says he saw two units on his floor with signs on them warning "asbestos do not enter." He indicates that it "freaked me out." The landlord informed him that his suite was fine.

In the written words of the tenant:

> I moved into apartment [*redacted*] in September 2017. At the time I was a third year student at the University of Victoria. Despite the high the cost of rent (1390$ per month) I was thrilled to move to move into this building. It was extremely challenging for me to find a pet-friendly rental in Victoria so as soon as the opportunity came up to get into this building, I took it. I was excited to live in a new neighbourhood and experience a new part of Victoria. Having previously shared houses with roommates over the years, this was my first time living myself. When I leased the apartment from [*redacted*], it was all done from a distance during the summer of 2017. I had returned to my hometown of[*redacted*], Yukon to work while on break from university. The leasing agent told me that my suite had been recently renovated. He told me that there were other renovations going on in the building but they would not affect me and would most likely be completed shortly after I moved in anyways. This could not have been further from the truth. In the 8 months that I lived at [redacted]t, I was subjected to a gross amount of noise disturbances, invasions of privacy, and loss of the quality and enjoyment of my living area

The landlord through its counsel refers to the affidavits of Ms. G.W. and N.A., the building managers. They describe the cleaning standards required of them which indicate weekly cleaning of the building common areas. They consider that they have an "open door policy" with the tenants. They live on-site and can field complaints.

Ms. E.S. for the landlord testified. She explained that the balconies of this building needed expensive repair and replacement, the windows too. Contracts for the work were properly awarded. The gardening and landscaping of the grounds will occur later as well as a resurfacing of the parking area.

She says the interior of the building was modernized and the electrical service in the hallways was upgraded. The laundry room will receive an upgrade. A new security system will be installed.

She indicates that all planned water shut offs were the subject of advanced notice to the tenants.

It is her understanding that all issues regarding hazardous materials pre-date this tenancy.

Ms. E.S. says that when the tenant's friend attended to view the apartment for him in 2017, the scaffolding and "swing stage" lift would have been there to see and so he must be taken to have known of the work that he is now complaining about.

In reply the tenant says he had verbal communications with the building manager about his complains and did not think he had to reduce them to writing.

The tenant has filed approximately 190 separate pieced of evidence in the nature of documents, photos, videos and audio clips. Some of the items do not relate to this tenancy or this building. By agreement between the parties these items of evidence were not individually adduced during the hearing. Rather, before the second hearing and with the agreement of counsel for the respondent, the tenant provided a list of those items of evidence considered pertinent to his case (about 186 items). The landlord was free to remark or call competing evidence pertaining to any of them.

I have reviewed those documents before reaching this decision.

Analysis

The tenant gave his evidence in a straightforward manner. It is unusual that he could not recall what his friend told him about this rental accommodation or whether she showed him a video of it but by and large the tenant's complaints were corroborated by the documentary evidence filed.

I find it most likely that the tenant's friend who viewed the rental unit for him informed him that there was construction work going on at the site. He was aware that suites were being renovated because he knew his suite was one of them.

However, he was not warned about the true state of affairs at the building: that the work was involving major exterior renovations and ongoing interior renovations that would last the entire term of his tenancy.

Thus he found himself living in a building with a large construction site beside it, with trailers, containers, bins, fences, supplies and vehicles taking up a major portion of the common area throughout his tenancy. In the rainy season the yard was muddy grass covered over with plywood sheet walkways.

Entering his building he would walk by a variety of construction bins and sometimes an overflowing garbage bin, then through a carpeted lobby containing upholstered furniture for the use of tenants and guests but also surrounded by construction material being store there. On some occasions the material would be stacks of cardboard boxes on other occasion it would be glass windows in their frames stacked leaning against a wall or raw lumber piled up on the floor. Immediately outside the lobby there was active

work, for example, in one video a workman can be seen to have set up a metal cutting chop saw outside the front door and is cutting metal; spraying sparks onto a plywood sheet propped against the building's wall. At some time during this tenancy the lobby itself underwent a renovation during which the flooring, walls and ceiling were removed, exposing pipes and wires, with extension cords and trouble lights hanging down from above.

From the lobby the tenant would travel up to his rental unit through a hallway which for a significant portion of his tenancy was bare subfloor. In the hallway would be stacked building materials like drywall sheets, tools and equipment. In one photo of the tenant's hallway the amount of equipment along the hallways left a pathway less that a meter in width for a person to get by.

Coming to his door the tenant would see his apartment number written in felt tipped pen on a piece of painters tape stuck to the door.

If it was during a work day, the tenant would hear the sound of grinders, jackhammers and drills being used on the building. I have reviewed the video evidence of this noise, taken from other apartments but which the tenant testifies matches his experience. In one video the sound of jackhammering outside a rental unit is so overwhelming that a woman playing a piano could not be heard on the video camera being held above her. A child's shout from two meters away is drowned out by the noise being created outside the building. The noise continues unabated as the cameraman moves into the building hallway. In my view the noise heard in the video evidence rendered that rental unit uninhabitable.

I accept the evidence of Mr. R.M., B.Sc., a certified industrial hygienist and former WorkSafeBC occupational health officer, that the impact and noise created by jackhammers, drills and the like on the concrete shell of a building can have a bell-like effect inside such a building. That effect is apparent in the video evidence presented by the tenant.

Between 7:00 and 8:00 a.m. on any workday the tenant would be awakened by the sound of workmen on the awning roof just outside his window and soon the grinding drilling and jackhammering would start for the day. He would see workmen in his hallway and workmen congregating in the lobby. While away during a workday he would be justly concerned that the front door to the building was often propped open by workmen, permitting the possible ingress of unwelcome people.

When the tenant was home in morning, the evening or on weekends, the view from his rental unit would be blocked first by the accumulation of dirt on the outside of his windows (as is apparent from the photo evidence) and then by the sight of a mini-construction site on the roof of the entrance awning in front of him. His rental unit was prone to accumulations of fine, light colored dust from the work being done.

He could not go out on his balcony. Pending repair of the balcony, the balcony door had been fixed to open only a few inches. The balcony was never useable during this tenancy.

On some rare occasions his water would have been shut off for a half day period.

If a friend dropped by the tenant would have to travel to the lobby to let the friend in because the intercom at the front door did not work for the first few months of the tenancy.

Had the tenant seen this future when he chose this apartment he would not have rented it for the price that he paid.

I do not accept the tenant's claim that he suffered a loss because of the pool. It was seasonally closed October to May, the bulk of his tenancy time. He did not indicate that would have used it otherwise.

I consider the tenant's claim regarding electrical danger in the suite to be minor. The photos show a television cable running through a wall plate that has not been attached to the wall and a telephone jack plate that has not been fastened to the wall either. Neither pose an electrical risk.

During this tenancy the tenant suffered water ingress into his rental unit from the unit above. He was inconvenience by it but the damage he complains of to the cupboard and wall finish is minor damage, not significantly noticeable.

I do not accept the claim that the tenant was inconvenienced by workers parking in the parking lot. He testified that he had a designated parking space and that it was never taken or obstructed by workers. His guests may have been slightly inconvenienced occasionally but I consider that a very minor complaint.

The tenant claims that he was stressed or otherwise rightfully concerned about hazardous waste. His evidence shows a long history of hazardous waste issues during

the work on this building prior to this tenancy. However, the report of the expert Mr. R.M. (document 00 M) indicates that tenants who may have been exposed to asbestos at this building were those before January 5, 2017. Before this tenancy started the landlord had appointed a new company to oversee compliance with the law regarding hazardous waste. The evidence does not show that the tenant risked exposure to asbestos nor respiratory crystalline silica from the dust accumulating in his apartment, nor from lead in the paint. The evidence does not prove that the landlord was out of compliance with hazardous waste management rules during this tenancy. Though asbestos warning signs were posted at various times and at various locations in the building during this tenancy, there is no evidence but that they were posted as required by law and that any asbestos being disturbed by the work was properly abated. In these circumstances the tenant's concern was misplaced.

The landlord argues that the tenants of this building and others undergoing similar renovations have been incited to organize and seek compensation as part of a money grab, by portraying an inaccurate narrative about their experiences as tenants of the this landlord. In my view, how the tenant got here, whether as a lone applicant or as the result of being recruited and educated by an organizer, is beside the point. His application rises or falls on the evidence that he submits to support his claim.

The tenant, through Mr. P.M. argues that the tenant has been a victim of "eviction by construction harassment" and that the landlord has been negligent in how it attended to the work. I do not consider either argument to be meritorious. The landlord conducts its affairs as it will and if it breaches the *Act* or the tenancy agreement it is responsible for the damage or loss a tenant suffers as a result. Its intention or its carelessness is not a finding that is necessary in determining the question of whether or not it has breached the *Act* or the tenancy agreement. Further, even if a landlord is shown to have acted in bad faith, and I need make no such finding here, there is no claim for aggravated damages in this proceeding, nor is it the purpose of this proceeding to impose a fine or other punishment for such conduct.

Section 28 of the *Act* provides:

> **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.

Section 32 provides:

> **32** (1) A landlord must provide and maintain residential property in a state of decoration and repair that
> (a) complies with the health, 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 this case, the landlord argues that the work it conducted on the building during this tenancy, or much of it, was work required to repair and maintain the building and so the tenant is obliged to put up with it.

Residential Tenancy Policy Guideline 6, “Entitlement to Quiet Enjoyment” addresses the conflict between a tenant’s right to quiet enjoyment (as defined by the *Act*) and the inconvenience associated with a landlord carrying out its s. 32 duties. The relevant portion of the guideline says:

> 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.

I find that the disturbance the tenant endured during his tenancy was not a temporary discomfort or inconvenience. It was an ongoing interference. The most significant aspects of that interference were the noise from tools being used on the building and the weekday morning disturbances caused by locating the workmen stationing area outside the tenant's window. To a lesser extent the general amenity of the premises; the grounds, the hallway and the lobby were drastically reduced by the general work on the property.

The work far exceeded normal maintenance and repair. It was a major construction project well exceeding the initial site survey directing remedial work on balcony railings and railing anchors.

I consider that the tenant is entitled to recover a significant portion of the rent he paid during this tenancy. In past cases of this type arbitrators have generally awarded a percentage of rent returned to a successful tenant. Given the broad nature of the complaints and the frequency or infrequency of occurrences over a tenancy, such an approach has merit over an attempt to parse each item of justified complaint and attempt to assess its contribution to the general loss of quiet enjoyment.

Mr. P.M. for the tenant argues that the rent for this apartment was in excess of the regional average and that if the landlord was charging a premium rent because the building and suites were newly renovated, that premium should be lopped off before any portioning is applied. I understand this approach but do not agree. The price for this accommodation was set when the tenant entered into his tenancy agreement. There were no doubt many factors contributing to the why the tenant agreed to pay what he did. Had the work proceeded and finished as he has expected, he would have no basis to claim a reduction of his rent.

In all the circumstances of this case, I find that the tenant rented this accommodation knowing that significant construction work was being done at the premises. He must be taken to have agreed to and accepted the inconvenience and disturbance that would reasonably arise from that. However, the work, interference and disturbance were far in excess of what the tenant could reasonably have expected, especially since he was paying full rent right from the first month. A reasonable expectation would be that the

work would be finished in a matter of weeks not months and that it would not involve the noise, interference and general disruption to the common areas of the building that he ultimately experienced.

I consider a 40% recovery of rent to be a reasonable assessment of the tenant's loss and I award him $4448.00 plus recovery of the $100.00 filing fee for this application.

Conclusion

The tenant's application is allowed. He will have a monetary order against the landlord in the amount of $4548.00.

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

Dated: December 28, 2018

Residential Tenancy Branch