Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding DEVON PROPERTIES and IMH 350 & 360 DOUGLAS APARTMENTS LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC, FF

Introduction

The tenants apply for compensation for loss of quiet enjoyment of their rental unit as defined by the *Residential Tenancy Act* (the "*Act*"), caused by repair and renovation work carried out by the landlord during this tenancy.

The listed parties and persons attended the hearing 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 admitted as evidence during the hearing.

At the request of the respondent DP and by agreement of the parties, the second respondent IMH was added as a respondent. It is the owner of the building. DP is a property management company and was acting as IMH's agent during the relevant time period.

Issue(s) to be Decided

Has the landlord violated its statutory obligation to provide the tenants with quiet enjoyment of their rental unit? If so, what if any damage or loss have the tenants suffered?

Background and Evidence

The rental unit is a one bedroom apartment on the seventh floor of a high rise apartment building containing about 108 units.

The tenancy started in July 2016. At that time there was significant construction work going on inside and outside the building. The landlord had undertaken a project to remove and replace

all the concrete balconies at this location and to conduct various improvements and renovations inside as well.

The tenant Ms. H.P. say she understood that the building was undergoing renovations but it was their only rental choice in the area and they thought the renovations would be conducted in a professional manner with support from a professional management company. She was aware the work was to last about three years from December 2015.

Notwithstanding the work, the tenants paid market rent of $1380.00 for their unit and were the subject of a rent increase to $1431.06 before they ended their tenancy in February 2018. The tenant Ms. H.P. describes the westerly view from the rental unit as stunning. The rental unit had been newly renovated before they moved in.

Unfortunately, the drapes for the unit were not provided until October and Ms. H.P. relates the temperature got very high in the unit before then. The rental unit not air conditioned.

The work on the building involved exterior work and interior work. The exterior work involved the removal of the balconies by the use of heavy equipment like jackhammers, drills and grinders and was, for the most part, carried on between 8:00 a.m. and 4:30 p.m. on weekdays. The interior work, the renovation of suites, hallways and the common area in the building also involved the use of power equipment but the noise was more contained as it was emanating from inside a suite. That work would take place on weekdays and on Saturdays..

The exterior work was ongoing when the tenants moved in. It was interrupted for approximately three months starting in February 2017 as the result of concerns over worker safety due to possible exposure to asbestos being discharged into the work environment. Not infrequently during the renovation of older buildings, hazardous materials safely entombed in building materials like drywall joint compound and tiling are disturbed and sent airborne as the material containing them is removed and disposed of. In that airborne state they pose a significant health risk. Special rules exist to ensure their capture and safe disposal. Specific concerns had been raised at a similar project being conducted by the landlord nearby and work was stopped. The work restarted in May 2017 and continued through the summer to the end of August.

The sound of the exterior work has been captured in an audio clip submitted by the tenants. The sound is thrumming and very loud. Although not captured on the recording, one can sense the vibration alleged to have been created by the equipment. While this work was going on It would not reasonably be possible to converse or listen to a radio or TV.

Mr. R.M. an agreed expert in the area of workplace safety and hygiene, described how work like jackhammering on the exterior of a concrete building can have the sound carried right through the structure. The building itself can act as a speaker. That effect is evident in the audio clip.

The landlord's work on the interior of the building was ongoing at the start of this tenancy and continued throughout. While the related noise was of a lesser degree, the tenant describes it as forming a background sound that made normal daily activities difficult, like talking on the phone or listening to the radio. The interior work lasted the duration of the tenancy. The tenants provided an audio clip of that sound corroborating Ms. H.P.'s description.

In addition, during at least the exterior work the tenants were required to keep doors and windows closed, thus restricting the flow of fresh and cooling air. As well, work stages were hung off the roof of the building and would hang in front of the windows of the rental unit, sometimes with workers on it right outside her seventh floor windows.

In or about August 2016 the carpeting in the hallway outside the rental unit was removed, exposing the concrete subfloor. Work commenced to change the light fixtures in the hallway but neither the hallway flooring nor the lighting work was finished during this tenancy. As a result the tenants were left with a concrete hallway floor that accumulated dust that tracked into the suite on the soles of their shoes and a hallway ceiling composed of a rough metal lattice or sub-ceiling.

For six weeks in early 2017 Canada Post ceased delivering mail to the building because it was not safe for their workers. A notice to this effect was posted in the building for all the tenants to see. The tenant Ms. H.P. indicates it was most worrying and that no information was given to indicate why postal workers could not enter the building. The tenant was required to travel to first one postal outlet and then a second to retrieve her mail; the first one kilometer away, the second ten kilometers away.

Ms. H.P. complains of having dirty windows restricting her view. She complained but was told the windows would not be cleaned until the exterior work was finished. Additionally, she had been told to expect new windows to be installed in the rental unit. She was concerned because it would mean workers would enter her suite and she might be away. She keeps a cat which friends tend to for her when she is away. She had been particularly worried about her cat and that it might escape. In February 2018 she received a notice from the landlord that there would be no new windows.

The grounds of the apartment building were a construction site with equipment and supplies stacked about. There was a considerable amount of construction debris. Some of it was piled near doorways in and out of the building.

The parking lot would collect construction debris. On one occasion the tenants' car suffered a punctured from a nail in a piece of discarded chipboard in the parking lot.

Ms. H.P. complains that the swimming pool and hot tub that came with the building were not reasonably useable the entire tenancy and were closed for most of it. For the entire tenancy the common room in the building was closed.

In January and February 2018 the basement hallway at the elevators became an area for the landlord to store work material.

The tenant called as a witness Mr. C.W. His written statement was read into the record and he was questioned by counsel for the landlord. He had been employed on site for about two or three months in the initial stages of the project. He is a carpenter who had been in charge of workers conducting interior renovations. He describes himself as having been "site supervisor" over four different apartment buildings, including this one, all undergoing significant renovation work for the same landlord. He says it was an impossible task for one person to oversee all the work. Mr. C.W. states that other contractors on site were doing "poor work" and that many were not qualified. Payment was slow, causing workers to leave, the landlord didn't care about the welfare of the tenants occupying the building and the quality of the work was cheap. In his view, during his fifteen years in the business these buildings were the most unprofessional worksites he had been on and the buildings would have been "nearly impossible" to live in.

Ms. K. C-F. gave evidence for the tenant by way of written statement and cross examination by counsel for the landlord. She was employed on the job site and became a safety officer, charged with ensuring worker safety on the job site. She indicates the sites were not safe for workers and that safety rules were not always followed. She indicates that the workers were often inexperienced and would smoke marijuana on their lunch breaks. She herself is a tenant in one of the landlord's buildings that underwent similar work and she has made her own claim for compensation through the Residential Tenancy Branch.

Ms. E.S. testified for the landlord. She says that the initial balcony work was extended because many of the balconies were "starting to fail" so the landlord decided to replace them all at the same time. At the same time it was determined that the interior of the building was dated and should be renovated. During the work, she, as an employee of the company managing the rental property, received only two complaints about contractors. She says the common room in this building was being renovated into a lounge and gym. She reviewed cleaning protocols that the building managers were required to follow.

The landlord also filed the affidavit of Ms. S.G., a building manager at this site. Ms. S.G. indicates that tenants were encouraged to relay complaints to her. She notes the schedule of cleaning duties for building managers. She notes that all work at this building stopped between December 2016 and May 2017.

The landlord also files 69 separate notices issued to the tenants of this building from the property manager, giving tenants notice of activity around the site and weekly notes and updates indicating what work was planned to be done for that week.

Analysis

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 the duty to repair and maintain residential premises imposed by s. 32. 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.
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> 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.

In this case, the landlord did not argue that the work it conducted on the building during this tenancy, or much of it, was work required to repair and maintain the building: that the tenants are obliged to put up with it. It did not provide any expert or other report to indicate that it was carrying out needed work under s. 32 of the *Act* as opposed to work designed to improve or modernize the building.

The tenants were aware of the fact they were moving into an active construction site and that fact must have an impact on what they might reasonable have expected the living conditions were to be at their new home. An additional and significant factor is that the landlord had demanded a healthy rent for this one bedroom apartment. I accept the tenant's evidence that the rent being asked was at the high end of the market in the area for accommodation of this type and location. Such a rent was not in keeping with the idea that the work apparent at the time the tenant's viewed the rental unit would be more than mild disturbance of a tenant's enjoyment of a rental unit.

There was evidence about "acknowledgement of work" forms and verbal evidence about an addendum to the tenancy agreement that warned the tenants of maintenance, repair and capital work lasting 24 to 36 months involving noise, vibration dust and access interruption. No copy of the addendum was filed but Ms. H.P. acknowledged it during cross examination and agreed to the contents described to her by the landlord's counsel.

Counsel for the landlord refers to the decision of Arbitrator K. dated December 2, 2016 (related file shown on cover page of this decision). In that case the tenancy was in the twin to this building. It started in June 2016 and the application was heard in November. Arbitrator K. dismissed the tenant's claim for disruption, including noise, caused by renovation to the outside of the building because the tenancy contained an addendum that provided:

> This is Notice that [landlord] intends to proceed in the short term with the following maintenance, repairs and capital work at this residential complex:
>
> - Corridor, lobby and entrance refurbishment, security upgrades, elevator modernization, painting building envelope, balconies, unit renovations, energy efficient systems and mechanical equipment replacement.
>
> This work is intended to ensure the long term physical and structural integrity of the buildings and improve the quality and safety of your physical surroundings. The work is expected to take 24 to 36 months to complete. As a result of the proposed construction activity at the property there will be noise, vibration, dues and inconvenience to access and egress at the property; however, we will take steps to minimize inconvenience and will provide status updates as work progresses."

The arbitrator determined:

> I am not awarding the tenant any compensation for the disruption, including the noise, caused by the renovations to the building outside of the rental unit because he was warned, before he signed the application for tenancy, that these conditions would exist and he chose the rent this unit with that knowledge.

Since the tenancy in this case was created about the same time and in the twin building, I consider it likely that the applicant tenants signed the same addendum.

In my view that case is distinguishable from this one. The arbitrator had not been provided with the objective evidence provided at this hearing, in the nature of photographs and audio evidence. It could not have been determined by that arbitrator that the noise of the work would effectively render a rental unit reasonably uninhabitable. She did not have the benefit of Mr. R.M.'s expert opinion about noise amplification caused by equipment such as jackhammers, an amplifying effect I am sure the landlord did not contemplate either, before the work started. Nor could that arbitrator have envisaged the delays and complications that actually occurred after the hearing of that matter.

I wish to note that having considered the 69 different notices the landlord's management company issued to tenants of this building it is apparent that the management company was making a significant effort to prepare and warn the tenants in their endurance of what can only be describes as an ordeal. In this case the notices and warnings would have done little to alleviate or mitigate the actual disturbances that were experienced.

Nevertheless, from the start the tenant Ms. H.P. was disturbed by the constant background noise of interior renovation in the building. I accept Ms. H.P.'s testimony that the interior noise was often such that she could not talk on the phone or listen to the radio during weekdays when she was home.

While for various periods during the tenancy the tenant Ms. H.P. worked weekdays and so would be away during the height of construction noise, for the latter portion of the tenancy she would have a weekday off to spend at home. She says Mr. M.P. worked shift work and would sometimes be home during the day as a result.

The amenity of the building deteriorated almost immediately from a comfortable apartment building to a hollowed out construction site with bare corridors, workers in an out of the building, the common yard covered in material and debris.

I discount the tenants' complaint about the pool and hot tub. There is no particular evidence that they or their guests would have made use of either had they been fully operational. For the same reason, but to a lesser extent I discount loss of the common room. Had it been fully available I have little doubt the tenants would have made some use of it on occasion.

During this tenancy it was discovered that the landlord was not following proper abatement procedures for the removal and disposal of asbestos containing materials and that at sometime, likely in late December 2016 or early January 2017 these tenants would have become aware of it from the Canada Post notice posted in the building.

It is not being suggested that the tenants or either of them actually inhaled hazardous material. The question of whether or not the landlord's alleged negligence has caused the tenants a physical injury by exposing them to hazardous material is not an issue fairly before this dispute resolution proceeding. The tenants have framed their claim as a recovery of a portion or all of rent paid due to the landlord's failure to ensure their quiet enjoyment of the premises. In that light, the question is whether or not the tenants' enjoyment of their rental unit has been lessened because of the awareness of the threat of exposure; that is: whether the rental unit was reduced in its amenity or was of a lower rental value than what they was paying.

I find that with knowledge of the landlord's possible failure to properly abate the asbestos containing material in the building the tenant Ms. H.P. suffered a level of anxiety about it (there was no evidence from Mr. M.P.). It was an unreasonable disturbance of the tenant's enjoyment of her apartment and outside the scope of the addendum or any notice or acknowledgement. However, after March 2017 and the return of postal service, reasonable inquiry would have satisfied her that the building was safe.

I consider that the tenants are entitled to recover a significant award for damage and loss incurred as a result of the work undertaken by the landlord during this tenancy; work that

resulted in an unreasonable disturbance of these tenants over the life of the 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 a global 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.

In considering an award, I have taken into account the frequency the tenants were actually present during the days when work occurred and I have considered the fact of the work stoppage that occurred starting December 2016.

While I have distinguished the decision of Arbitrator K. dated December 2, 2016, it remains a fact that the tenants were made aware that there would be some disturbance and inconvenience for many months and that they chose to rent the unit with that knowledge. I consider that the tenants' prior awareness of the fact of lengthy renovation work a significant factor in determining what disturbance or inconvenience was reasonable and what was not reasonable in the circumstances.

I award the tenants 20% of the rent they paid over the life of this tenancy; an amount calculated to be $5601.70, plus recovery of the $100.00 filing fee.

Conclusion

The tenants' application is allowed. They will have a monetary order against the landlord in the amount of $5701.70.

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: January 15, 2019

Residential Tenancy Branch