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 tenant applies for compensation for loss of quiet enjoyment of her rental unit as defined by the *Residential Tenancy Act* (the "*Act*"), for loss or reduction of normal facilities and for lack of maintenance and repair to the premises resulting from certain major repair or 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, to maintain the premises and to not remove services or facilities without compensation? 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 ninth floor of a fourteen floor apartment building. The building, known as the north building, is located on property that includes a twin apartment building (the south building).

The tenancy started November 1, 2016. At that time there was significant construction work going on inside and outside the building. The landlord had undertaken a project to repair and renovate all the concrete balconies at this location and to conduct various improvements, common area renovations and suite renovations inside as well.

The tenant saw the construction when she viewed the rental unit. Though she is a swimmer, she did not ask to see the pool which was then out of commission. Her father is in the construction business. He told her that a balcony project such as the one he saw at this building should take about two months. She was unaware of and not warned about any jackhammer work on the building.

The tenant's suite was to be newly renovated for her move-in but the work had not been done when she arrived with her belongings on November 1. As a result, the landlord placed her in a vacant suite for two weeks where she slept on a mattress on the floor and lived amongst her boxes of belongings. The landlord ultimately compensated her for her extra moving expenses but she seeks compensation for being without her apartment for that time. When she did move in the suite was still not finished. It required painting, the appliances had not arrived, the tiling and molding had not been done and the bathroom had not been finished. She says it took two or three weeks to finish the work. Drapes arrived a month or more later.

Once she moved in she was immediately confronted by the noise of jackhammers and heavy tools repairing concrete balconies on the building. A video taken by a tenant living in a different rental unit, shows samples of the noise from the outside work. The video spans a period from late July 2016 to August 2017 taken in another apartment. The sound of a jackhammer and sometimes possibly a sledge hammer invade the rental unit. The clip is over a period of thirteen months and so it cannot be assumed the work was being done immediately outside this tenant's sliding glass door but was the sound from work all over the building. The volume of the sound is overwhelming. A person playing a piano directly in front of the camera is heard to be drowned out by it. The shout of a child sitting at a table perhaps six feet away cannot be heard. The volume of the sound remains as the camera operator travels from room to room or even into the hallway of the building. The noise is not only loud but clearly percussive as well. The tenant testifies that this is what it was like in her rental unit as well.

Mr. R.M. gave evidence for the tenant. He is a person knowledgeable in the area of workplace health and safety. Until recently he was employed for over 25 years by WorkSafeBC. In a previous proceeding involving the same landlord he had been qualified as a person able to give expert opinion in the area of hazardous materials and sound. Ms. H., counsel for the landlord graciously agreed to dispense with the necessity of having him requalified in this dispute.

Mr. R.M. described how a concrete building like this one can conduct sound of this kind. The building envelope acts like a drum. The envelope itself, when a jackhammer operates on it, can emit its own sound. The principle is similar to the effect of an audio speaker. I accept that is what was happening in the video submitted. It should be said that there is no evidence the landlord had any forewarning of this effect or advance knowledge that the outside construction noise would have such an overwhelming effect inside the building.

The outside work was carried on from 8:00 a.m. to about 4:00 or 4:30 each weekday from before this tenancy started in November 2016 up to about mid-December 2016. At that point all work stopped on the building due to a concern in another of the landlord's buildings undergoing similar renovations that asbestos contained in building elements being demolished was not properly captured and disposed of. The outside work restarted in May 2017.

During this tenancy the tenant worked Tuesday to Saturday at a bank. Her hours were 8:30 a.m. to 5:00 p.m. As a result her day at home on Monday would be disrupted by the noise or else by water shut offs necessitated by suite renovations in the building. It was her habit to cook on Mondays for the week, but the noise and occasional lack of water drove her out of the building. The water shut offs most often occurred on Mondays she says. She submits notices from the landlord indicating four separate water shut offs in the month of January 2018 alone.

Her workplace was a five minute walk away. Nevertheless, she stopped coming home for lunch due to the noise and commotion around the building. In addition, outside workmen would gather at a staging area below her windows at 7:00 a.m. on weekdays and disrupt her early morning. She reports they were generally loud and vulgar.

During the outside work the tenant was directed not to open her windows or the sliding door to the balcony in order to reduce the ingress of dust. As a result her rental unit would become overly hot on warm days as there was no air conditioning in her suite and only a stove vent and a bathroom vent. Dust entered her suite anyway, either

through windows or the sliding glass door or having been tramped in from her hallway. She developed a cough for which she sought medical attention. The cough left her after she moved out.

Throughout the tenancy, but for the stopped work period, the landlord was engaged in the renovation of suites. The sound of hammers, grinders and drills formed a constant background noise; sometimes quieter, sometimes louder. The tenant submitted video evidence to display the sort of noise she heard in her rental unit. While not as overwhelming as the jackhammering from outside work, the noise from the interior work tended to be abrupt, for example; a series of hammer blows occurring without warning. The interior work occupied six days a week; weekdays and Saturdays and often ran into the evening hours. The banging would get dogs on her floor to start barking.

The state of the building, basically a construction zone, made her embarrassed to invite guests. Her daughter visited and noted to her that the apartment building was like a “ghetto.” The tenant describes it as “chaos.”

She considered the building manager to be overwhelmed. The building manager would get upset easily. The workers on the site were rude and seemed to her to show no consideration for the people living there. Some workers would occupy the suites being renovated and would party into the evening, make noise accordingly.

The dust and debris from the work would “coat everything” according to the tenant. It was constant. There would be a new coating every morning. The kitchen always had to be wiped down. She found herself cleaning daily rather than weekly.

The exterior of her windows went uncleaned for two years. Photos submitted show the brown streaking and sheen caused by the dirt and dust on the windows.

The tenant was worried about security. The workers would leave the building doors open or jammed open while they worked. People of questionable sensibility frequented the area across the street and could easily have walked into the building.

The carpet in the hallway in front of her door was removed, leaving the bare concrete subfloor exposed for two years of her tenancy. The hallway ceiling had a bare metal sub ceiling installed but not finished.

The tenant describes herself as an avid swimmer and had intended to use the year round pool at this building. It was out of service and remained so until the summer she left.

The landlord's workers monopolized the elevators, locking one out for their exclusive use. According to the tenant they were less than courteous when she encountered them.

The workers would use the parking lot. It does not appear that the tenant was inconvenienced however she testifies that her sister could not find a parking spot on one occasion.

The tenant indicated she was worried about health concerns. She had heard workers talking about asbestos. She could smell noxious odours; paints, solvents and the like. The lack of ventilation in her rental unit heightened the smells.

During her tenancy postal service was discontinued twice for a total of six weeks. The reason was because it had been determined that the building was unsafe for postal workers to enter due to the possibility of airborne hazardous material. WorkSafeBC had discovered the landlord's workers had not been complying with the rules regarding the disturbance of material containing asbestos. The tenant had to pick up her mail at postal stations. One station was a kilometer away, the other was 10 kilometers away.

The tenant indicates that throughout her tenancy the grounds around the building were unsightly; scaffolding, ladders and piles of debris and clutter occupied the area. The hallways were often used as storage areas, lined with construction material.

She says that she left this tenancy as soon as she reasonably could. She secured other accommodation and left months before that new place was ready for occupancy. She is staying with her mother until then.

Mr. P.M. for the tenant adduced three written statements as evidence, with the agreement of Ms. H. for the landlord. The first is a statement of a man who describes himself as site supervisor working on this and the related buildings, overseeing some of the interior renovation work. He expresses his opinion that the workers were untrained and lazy and that no one seemed to be in charge of the overall project. The second statement is from a woman who worked on this and related buildings. She states that the workers were untrained and that some would smoke marijuana during their breaks. She herself is a tenant in one of the buildings and is making her own claim against this

landlord for compensation. The third, unsigned statement is from a worker expressing that he has special knowledge in the area of WorkSafeBC rules and regulations regarding demolition work where hazardous material is involved (there is no dispute but that drywall caulking, some types of ceiling tile and floor tile contained asbestos and required special, regulated care when removed). He says he saw multiple violations of the rules and that it was made clear to him that workers were to maintain only an appearance of compliance in order to maximize efficiency and profitability. He says the quality of the workers was poor. He says many workers showed up drunk or not at all and that some were imported labour paid with liquor and with free accommodation in the rental units that were vacant.

Ms. E.S. testified for the landlord. She is employed by the respondent management company DP. She reviewed the cleaning policy in place and notes the availability of contract cleaners if the employees are unable to meet schedule. Complaints are all dealt with including complaints about workers. New tenants are provided with a schedule outlining the work being done at the building.

The landlord files a copy of the tenancy agreement. It does not mention the work.

The affidavit of Ms. S.G. was presented. She is the building manager at this building and its twin and has been for 18 years. Tenants are encouraged to bring complaints or issues to them. She notes that the landlord posted a notice of the work intended for this building in October 2015. When there were water shut offs the landlord would post notices in advance. Indeed, some 69 notices to tenants were submitted in the landlord's materials referring not only to water shut offs but to work planned for the following week and restrictions that might apply as a result. She notes that some of the balcony work had been completed by mid August 2017. She provides a copy of her schedule of duties regarding regular cleaning including cleaning of halls.

Counsel for the landlord suggests that the pool, a year round pool, was reopened in September 2017 and that the tenants windows were cleaned in November 2017.

Mr. P.M. for the tenant has noted that there were so many complaints about the landlord's work that it was on the local television news.

Analysis

Suite Not Ready

It is clear that the tenant's promised suite was not ready for occupancy for two weeks and was not fully complete for three or four weeks after that. She was provided an alternate suite but clearly it was not of the amenity she was entitled to under her tenancy agreement. In all the circumstances I award her $1000.00 damage and loss for the landlord's failure to meet its contractual obligation.

Loss of Quiet Enjoyment/Loss of Facilities or Services

I consider it appropriate to treat these two items under the same head as, in my view any award for either should be part of a global award.

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. The landlord had a "right to renovate." It is argued that the balcony work was necessary work.

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.

I find that in this case the landlord has not demonstrated that any particular repair or renovation was "needed" in the sense of being required to preserve the integrity of the building. Nor has it been shown that the work, either inside or out was regular maintenance. At best it would appear that the landlord was giving the building a "face lift." Even if the work had been shown to be reasonably required work I find that it far exceeded what a tenant paying full rent for her suite might reasonably be expected to put up with. It did not create merely a "temporary discomfort or inconvenience."

I accept the tenant's evidence, thoroughly corroborated by the documentation presented during this hearing. It shows lengthy and unreasonable disturbance to her occupancy of this rental unit.

I consider that the tenant is entitled to recover a significant portion of the rent she 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 her tenancy agreement. There were no doubt many factors contributing to the why the tenant agreed to pay what she did. Had the work proceeded and finished as she has expected, over a two month or so period, she would have no basis to claim a reduction of his rent.

In considering an award I have taken into account the fact that on four out of five weekdays the tenant was away at work during the time the most egregious noise was being made. I have taken into account that the tenant was aware that some work was ongoing when she rented and I have taken into account the fact that work inside and outside was stopped from about mid December 2016 to May 2017.

The evidence presented in this matter does not prove that the tenant actually had a significant concern about suffering health effects due to the discharge of hazardous waste into the air in the building or her suite such that it would cause what could be considered an unreasonable disturbance of her tenancy.

I find the tenant is entitled to recover 50% of the rent she paid after November 2016. I calculate that to be $14,635.62 as damage and loss suffered as the result of the landlord’s breach of the covenant for quiet enjoyment and for loss of services or facilities provided with this tenancy.

Counsel for the landlord posits that the tenant has failed to mitigate her loss. It was not made clear what form that mitigation should have taken; what the tenant should have done to reduce her damage or loss. Perhaps her best remedy was to move, which she did. I note that “the burden which lies on the defendant of proving the plaintiff failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame."

(*Red Deer College* v. *Michaels and Finn* [1975] 5 W.W.R. 575 at 580). The landlord has not shown the tenant failed to mitigate her damage or loss.

Conclusion

The tenant's application is allowed. She is entitled to a monetary award totalling $15635.62 plus recovery of the $100.00 filing fee for this application.

The tenant will have a monetary order against the landlord in the amount of $15735.62.

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 19, 2019

Residential Tenancy Branch