Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding NATIONAL SOCIETY OF HOPE and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes FFT, MNDCT, OT

Introduction

This hearing convened as a Tenant's Application for Dispute Resolution, filed on December 4, 2018, wherein the Tenant requested monetary compensation from the Landlord for breach of the Tenant's right to quiet enjoyment and recovery of the filing fee.

The hearing was conducted by teleconference at 1:30 p.m. on March 25, 2019. Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised. I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Matters

The Tenant named the Executive Director and Assistant Property Manager as Landlords on her application. A review of the residential tenancy agreement confirms that the Landlord is a society. Pursuant to section 64(3)(c) of the *Act* I amend the Tenant's Application to accurately name the Landlord.

The parties confirmed their email addresses during the hearing. The parties further confirmed their understanding that this Decision would be emailed to them and that any applicable Orders would be emailed to the appropriate party.

Issues to be Decided

1. Is the Tenant entitled to monetary compensation for breach of quiet enjoyment?

2. Should the Tenant recover the filing fee?

Background and Evidence

The Tenant confirmed that she moved out of the rental unit as of September 30, 2018.

The Tenant stated that approximately three months after she moved in the Landlord built a garden right outside her living room window. She stated that it was the minimum distance of 12 feet away, but due to the location of the entrance (which she said was right outside her living room window), people were 10 feet outside her door constantly.

The Tenant described the situation as constant disruption of people socializing and congregating in front of her window from 7:00 a.m. until sunset from March until October. She also claimed that she could not open her blinds because there were people outside constantly, as well as their bicycles, motorized scooters and guests.

The Tenant stated that she did not have a problem with the garden itself, but the location of the entrance impacted her tremendously. The Tenant stated that to her it felt like having someone flipping through the channels constantly from sunrise to sunset. The Tenant submitted that this was an unreasonable disturbance and a breach of her right to quiet enjoyment of the rental unit.

The Tenant stated that she did not want to move and she still wants to live there but she felt she had no choice but to move. She acknowledged that construction workers, or garbage trucks, or other such disturbances are reasonable and affect everyone, but the garden gate location impacted her alone.

The Tenant testified that she asked for a transfer within the rental complex because of the disturbances in August of 2017. She stated that her request for a transfer was denied but the Landlord installed privacy film in her window which prevented others

from looking into her rental unit, but it didn't stop her from seeing the constant comings and goings. It also did not change the noise level.

She stated that when the society denied her request to be transferred she moved out because it was affecting her health. She noted that she suffered from agitation, irritation, anxiety. She also claimed that it was affecting her sleep because she was so anxious which developed into depression due to the constant interruption. In support, the Tenant introduced a letter from her doctor, dated May 2018, wherein they write that they supported a transfer to another unit.

In terms of the amount claimed, the Tenant stated that she requested $3,600.00 because she believed this amount was equivalent to two years of loss of subsidy as well as the cost to move. She stated that she is now waiting for subsidized seniors housing which she was advised is a 2-3 year wait list. She also believes that she will not be able to get housing with the society as she asked and they did not respond.

In response to the Tenant's submissions, the Landlord's Property Portfolio Manager, W.P., testified as follows.

He stated that the rental unit is located in a housing complex with three five storey apartment buildings. The buildings offer greenspace, sitting areas, and three vegetable gardens. W.P. stated that these green spaces are the highlight of the property and that the community gardens are for the beautification of the property for all the residents.

W.P. confirmed that as the rental complex is relatively new. W.P. stated that there were three phases of building, one which was completed in February 2011, one in January 2017 and the final building which was completed in August of 2018. The building in which the Tenant was located was completed January 1, 2017. She moved into her unit January 27, 2017. W.P. confirmed that there are 68 units that face the garden area, 2 of which are on the ground floor.

He testified that the Tenant was informed about the location of the garden when she first showed interest in the rental unit, but not about the location of the entrance. W.P. stated that it was the Tenant's preference that she be located on the ground floor. The Tenant was shown on the map the exact unit and the exact layout.

The Landlord submitted a site plan which clearly showed the location of the gate/entrance as being directly outside of the Tenant's living room window.

W.P. stated that on June 12, 2017 the Tenant asked to be transferred to a different property (one downtown). She mentioned nothing about the gardens or anyone disturbing her. In support the Landlord provided a copy of the telephone log wherein the write notes the Tenant asked for a transfer to another unit in June of 2017. In this document the writer also indicated that the Tenant acknowledged that she was aware of the transfer policy.

W.P. stated that initially the Tenant stated that she wanted to be moved because she didn't like her unit and wanted to be downtown. He stated that it was only in September of 2017 that the Tenant made the first claim that her quiet enjoyment was being disturbed by the garden. W.P. stated that her claims did not seem legitimate, in that she initially wanted to move because she did not like her unit and then it all became about the garden location.

W.P. stated that internal policy dictates that they do not do transfers for *location*. They will transfer for medical or physical needs, financial needs, or change in family configuration. They do not transfer for preference as that would result in constant moving as a lot of people will move in, take any unit feeling that if they get in they can then ask for a transfer.

W.P. stated that in response to the Tenant's request for a transfer the Landlord put the privacy film up; he noted that this was done as a courtesy, not because they believed it was necessary.

W.P. also stated that the Landlord accepted her written notice to end her tenancy four months earlier than they could have even considered a transfer request pursuant to their internal policy.

W.P. submitted that the Tenant accepted the exact unit that she asked for. He argued that when she was not granted a transfer, she then began to build this case.

W.P. further argued that the dispute resolution process was available to her *during* the tenancy, and she did not need to take a more expensive unit, and in fact she moved back to the same building from which she moved when she first moved into the rental unit. W.P. submitted that the Tenant could have asked to be moved within the building at dispute resolution, yet she chose to move.

W.P. also stated that they have not had any complaints from the new renters.

The Tenant replied that the gated entrance affected her suite and her suite only. She stated that when she realized they were not going to accommodate a transfer within the building she had no choice but to move. She stated that she moved when the negotiations failed, almost a year later. She also stated that she did not want to wait until the spring when the disruption would start again.

Analysis

In a claim for damage or loss under section 67 of the *Act* or the tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard, that is, a balance of probabilities. In this case, the Tenant has the burden of proof to prove her claim.

Section 7(1) of the Act provides that if a Landlord or Tenant does not comply with the *Act*, regulation or tenancy agreement, the non-complying party must compensate the other for damage or loss that results.

Section 67 of the Act provides me with the authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

To prove a loss and have one party pay for the loss requires the claiming party to prove four different elements:

- proof that the damage or loss exists;
- proof that the damage or loss occurred due to the actions or neglect of the responding party in violation of the Act or agreement;
- proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
- proof that the applicant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

Where the claiming party has not met *each of the four elements*, the burden of proof has not been met and the claim fails.

In this case, the Tenant alleged that her right to quiet enjoyment was negatively affected as a result of the location of the garden gate outside her rental unit. She described the constant disruption of people congregating outside her window as so severe that it led to anxiety and depression and her ultimate decision to move from the rental unit. The Tenant provided a letter from her doctor confirming that she would benefit from a rental unit with "good light and a quiet environment". In terms of compensation, the Tenant sought $3,600.00 alleging this is the amount her rent has increased due to losing subsidized housing.

The evidence confirms that the Tenant asked for a transfer in the rental building in June of 2017, and that at that time she stated she wanted a transfer to another building in the downtown core. The reasons cited by the Tenant at the time (as evidenced by the call log) were that the Tenant "really does not like her suite". The Landlord's representative alleged that only when her June 2017 request for a transfer was denied did the Tenant express concerns about the location of the garden gate. The Tenant's concerns about the garden gate were first raised by a letter from the Tenant dated September 15, 2017 (which was also provided in evidence).

The documentary evidence confirms that on September 20, 2017 the Landlord responded to the Tenant's request for a transfer, reminded her of the Landlord's transfer policy, and offered to install reflective solar film on the window to prohibit others from being able to look into the rental unit. The parties agreed that this film was installed. The Tenant stated that film was insufficient as while it provided privacy, she continued to be disturbed by the constant traffic at the gate.

The Landlord conceded that the Tenant was not aware of the location of the gate to the community garden when she accepted the rental unit. It is unclear, based on the evidence before me, whether the Landlord was aware of the proposed location of the gate at the time as the gardens were not yet complete when the tenancy began. In any case, I accept the Landlord's evidence that the Tenant specifically requested the rental unit and was aware it would face the community garden.

A tenant's right to quiet enjoyment is protected under section 28 of the *Residential Tenancy Act,* which reads as follows:

> **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.

Residential Tenancy Policy Guideline 6—Right to Quiet Enjoyment provides in part as follows:

> "…
>
> Frequent and ongoing interference by the landlord, or, if preventable by the landlord and he stands idly by while others engage in such conduct, may form a basis for a claim of a breach of the covenant of quiet enjoyment.
> …
> Temporary discomfort or inconvenience does not constitute a basis for a breach of the covenant of quiet enjoyment.
> …
> A landlord would not normally be held responsible for the actions of other tenants unless notified that a problem exists, although it may be sufficient to show proof that the landlord was aware of a problem and failed to take reasonable steps to correct it.
> …
> In determining the amount by which the value of the tenancy has been reduced, the arbitrator should take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use the premises, and the length of time over which the situation has existed.
> …

After careful consideration of the evidence, and the testimony of the parties, I find the Tenant has failed to prove the Landlord breached section 28. I find that the Tenant was aware that her rental unit would face the community garden when she was offered tenancy. While I find that the parties may not have been aware of the location of the entry gate to the gardens at the time, I find that the Tenant accepted that there would be a degree of activity, socializing and use of the community gardens outside her rental unit irrespective of the entry location.

I also find that the Landlord addressed the Tenant's concerns by installing privacy film on her windows such that the Landlord took reasonable steps to ensure the Tenant had reasonable privacy in her rental unit.

The Landlord's representative aptly noted that the Tenant had options available to her during the tenancy, such as making an Application for Dispute Resolution for an Order that she be transferred within the rental complex. The Tenant may also have made an application to reduce her rent pursuant to sections 28 and 65(1).

Although it is possible the Tenant may have been successful in an application to reduce her rent for the devaluation of her tenancy due to the disturbance caused by the gate location, the Tenant failed to make such an application and instead moved from the rental unit. In doing so, I find that the Tenant impacted her ability to obtain subsidized housing, the consequence of which is not the responsibility of the Landlord. In this manner, I find the Tenant has not mitigated her losses as required by section 7 of the *Act.*

Additionally, and although I accept the Tenant's evidence that her rent has increased, I find the Tenant has failed to provide sufficient evidence to support a finding that she suffered a loss of $3,600.00.

For these reasons, I dismiss the Tenant's claim for compensation for breach of quiet enjoyment and recovery of the filing fee.

Conclusion

The Tenant's application is dismissed in its entirety.

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: April 16, 2019

Residential Tenancy Branch