



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding IMH 350 & 360 Douglas Apts
Ltd. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes RR FFT

Introduction

This hearing was reconvened from an adjourned hearing originally scheduled for March 29, 2019. I had allowed the adjournment as it was by mutual request and consent of both parties.

The adjournment decision dated April 1, 2019 noted the requirements for service of the hearing package and evidence. The landlord acknowledged receipt of all hearing documents, and was ready to proceed with this matter. The tenant also acknowledged receipt of the landlord's evidence for this hearing, and was ready to proceed.

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an order to allow the tenant to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72 of the *Act*.

KH, counsel for the landlord, represented the landlord in this hearing. The tenant's agent DL appeared for the tenant. Both parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The landlord had requested that their name be amended in this application to reflect their legal name. As neither party was opposed, the landlord's name was amended to reflect their legal name.

Issues

Is the tenant entitled to an order to allow the tenant to reduce rent for repairs, services or facilities agreed upon but not provided?

Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

This month-to-month tenancy began on August 1, 2015. Monthly rent was set at \$895.00 at the beginning of the tenancy, and the tenant has been issued rent increases in accordance with the *Act*. The tenant is currently paying monthly rent of \$993.23.

The tenant is requesting rent reductions amounting to \$18,012.35 as set out in the table below, as well as a request for an ongoing rent reduction of 20% until the renovations and repairs are complete. I note that the individual amounts total \$18,012.05 despite the total requested amount is \$18,012.35. In consideration of the tenant's claim, I make note of the discrepancy between both amounts, and will adjust the total claim to \$18,012.05 to reflect the correct mathematical total.

Item	Amount
50% Rent Reduction December 2015-June 2016 ($\$895.00 \times 7$)	\$3,132.50
75% Rent Reduction July 2016 to December 2016 (895.00×3 & $\$920.95 \times 3$)	4,085.89
30% Rent Reduction January 2017-February 2017 ($\$920.95 \times 2$)	552.27
65% Rent Reduction March 2017-September 2017 ($\$920.95 \times 7$)	4,190.32
40% Rent Reduction October 2017 to June 2018 (955.03×9)	3,438.11
30% Rent Reduction July 2018-March 2019 (955.03×6 & $\$993.23 \times 3$)	2,612.96
Total Monetary Order Requested	\$18,012.35

Both parties provided written submissions and evidence, as well as sworn testimony in the hearing. While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions

and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

The tenant is seeking the above rent reductions related to the ongoing renovation and repairs that started back in December 2015 to present. The tenant provided the following testimony about how the renovations and repairs have impacted her personally. The tenant's unit is located on the ground floor of the building, across from the property manager's office, and above the boiler room. The tenant testified that a dumpster bin was placed 2 feet away from window during the project in 2016 and 2017, and temporarily after that.

The tenant's evidence is that shortly after her tenancy began she was involved in a serious car accident on October 25, 2015, which affected her ability to walk and required her to be home more than usual as she worked towards recovery and rehabilitation.

The tenant submitted that she was significantly impacted by the repairs and renovations, which caused a reduction in the value of her tenancy. The following examples were given by the tenant:

- a) Although the work was to commence at 8:00 A.M., the workers often gathered earlier than that at 7:00 A.M. and due to the location of the tenant's rental unit, she was subjected to disruptions and noise beyond the usual hours of construction. Not only would the tenant be subjected to construction noise, but the tenant could hear the conversations that took place amongst the workers, which the tenant found extremely unpleasant due to the nature of the conversations and unprofessional language used. The tenant feels that the landlord failed to mitigate the impact the renovations and repairs had on herself and other tenants.
- b) The tenant was subjected to a large amount of dust and debris that covered most of the common areas, and which would transfer into the tenant's living area. The tenant's rental unit was warm due to the fact that it was above the boiler room, and tenant was unable to open windows due to the dust and noise.
- c) The common areas such as the lounge and hallways were used as storage
- d) Up to 2017, the tenant was only able to use the outdoor pool for rehabilitation on one occasion, and then lost use of the pool. The pool was re-opened in 2017, but was shut down again weeks later. The tenant did not regain access to the pool until July 2018. Due to the loss of access to the pool, the tenant had to pay for access to another pool.

- e) From January 2016 to March 2019 workers would leave doors propped open all day, and sometimes at night, leaving the building and tenant vulnerable to thefts, pests, and unauthorized access.
- f) May 2016 to October 2016. Extensive water shut offs, sometimes without proper notice by the landlord, and lasting for long periods of time. Longest was 12 hours.
- g) Stop work orders were issued, and applied to all buildings, due to hazardous materials discovered in another building. The tenant was concerned for her health, especially in light of the fact that mail delivery was diverted due to the possibility of hazardous materials.
- h) The tenant was concerned about the brown water that came out of her tap, and felt the landlord failed to provide instructions on how long to run the taps.
- i) The tenant spent a significant amount of time in her home due to her injury. The tenant testified that the first year was the worst. The tenant testified that she had to do home learning, and was working on her consulting business, which was for more than 8 hours per day.
- j) The tenant was subjected to loud noises such as jackhammering, drilling, as well as noise from the construction workers. The tenant started online consulting in 2018, which included webinars. The tenant testified that you could hear the jackhammering in the background.
- k) The tenant would often hear noise from the workers outside her door, which sounded like body slams. The tenant did not feel safe, and was concerned with the background of the workers and possible threat to her personal safety.

Counsel for the landlord cross examined the tenant in the hearing. The tenant was asked to provide more details of the motor vehicle accident, and her injury. The tenant testified that the accident took place on October 25, 2015, and as a result the tenant was in the hospital for 3 days, which included surgery. The tenant was sent home, and was unable to walk without assistance.

The tenant was also asked to provide more details of her schedule from 2016 through to 2019. The tenant testified that she spent the majority of her time at home, with the exception of the summer of 2017 when she had travelled in order to find work. The tenant testified that she hardly left her home, unless the noise was so great that she had to work at a café. The tenant testified that she worked from home for 8 hours a day, and that her therapy consisted of 1 hour sessions, which was more frequent in 2016 with 5 therapists, averaging about 2 sessions per week.

Counsel asked the tenant to provide more details about what noise the tenant had heard past 7:00 P.M. The tenant testified that since it was summer and there were more

hours of daylight, the workers would remain on site and made a lot of noise. The tenant testified that despite the fact that the workers were no longer working, they still remained on site, and would disturb her. The tenant was also asked to provide the hours of when the jackhammering would occur, and the tenant replied that it varied from day to day.

The tenant was also asked about her receipts that she had submitted in evidence to support the use of an alternate pool. The tenant confirmed that the receipts were for a family pass, which allowed her partner to use the facilities as well. The tenant confirmed that her partner did not reside at the rental unit with her.

The tenant was also asked to clarify on how the renovations and repairs impacted her work, and if she had lost any income. The tenant testified that she did not have the time to do a proper analysis, but that she did suffer a loss of time, energy, and ability to focus. The tenant testified that she felt that she had also lost potential future income, but would require someone to do a proper evaluation and analysis to provide actual figures. The tenant testified that she lost a lot of sleep, which was crucial to her recovery from her accident.

The tenant confirmed that she did not have anything stolen from her. The tenant also confirmed that she did speak to a foreman about her concerns, and after this she did not see the worker in question again. The tenant, however, no longer felt safe and was concerned about the other workers on site.

The tenant was also asked if any glass had been broken, or if she had experienced any specific incidents that led her to believe she was in danger. The tenant testified that she had "flipped homes in high school" and that it was obvious that the work was done in a dangerous manner. The tenant testified that she did not trust that the work was undertaken in a professional manner.

The tenant testified that notices for the water shut offs were often posted in areas where she did not see them, such as the lobby, and most of them were not more than 24 hours in advance. Due to the fact that the tenant did not always see these notices, she often could not plan for water shut offs.

The tenant was asked how she had come up with the amounts in her request for rent reduction. The tenant responded that the intensity of the noise was greatest during the summer months. The tenant's request for compensation corresponded with the amount of noise and disruption, and the periods of time when she felt the most impacted. The

tenant felt that 2016 was a significant period of greater loss as she was recovering from the accident, and building her career.

The landlord feels that the tenant has failed to provide sufficient evidence to support the rent reductions requested in the tenant's application. The landlord feels that they have complied with the *Act* and bylaws during the entire project, including only jackhammering during the allowable hours set by the municipality. The landlord does not dispute the inconvenience that this has caused the tenant, but that the project had been undertaken in order to fulfill the landlord's obligations under the *Act* to repair and maintain the building, without having to terminate any of the tenancies. The landlord testified that although the stop work order applied to another building, they had decided on a self-imposed stop order on the tenant's building as an abundance of caution. The landlord submits that this supports their pro-active concern for the safety and health of occupants and workers, rather than the negligence and unprofessionalism suggested by the tenant.

The landlord feels that the rent reductions requested by the tenant are excessive, and that the tenant has failed to provide sufficient evidence to support what actual losses the tenant has suffered due to the landlord's actions. The landlord disputes that they have put the tenant's safety or health at risk, and that the tenant has failed to support that she had suffered any actual losses or threats due to the landlord's actions. Counsel for the landlord submitted in the hearing that if any compensation was due to the tenant, a nominal amount is sufficient, with a maximum rent reduction of 5 percent.

Analysis

The tenant's application for rent reduction was made in accordance with the following provisions of section 65 of the *Act* which allows me to make an order regarding past and future rent:

65 (1) *Without limiting the general authority in section 62 (3) [director's authority respecting dispute resolution proceedings], if the director finds that a landlord or tenant has not complied with the Act, the regulations or a tenancy agreement, the director may make any of the following orders:...*

(f) that past or future rent must be reduced by an amount that is equivalent to a reduction in the value of a tenancy agreement;...

The landlord's obligations to maintain and repair facilities in a rental property are set out in section 32(1) of the *Act* which reads in part as follows:

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,...

Section 27 of the *Act* establishes the basis for a landlord to terminate or restrict services or facilities with respect to a tenancy:

27 (1) *A landlord must not terminate or restrict a service or facility if*

(a) the service or facility is essential to the tenant's use of the rental unit as living accommodation, or

(b) providing the service or facility is a material term of the tenancy agreement.

(2) A landlord may terminate or restrict a service or facility, other than one referred to in subsection (1), if the landlord

(a) gives 30 days' written notice, in the approved form, of the termination or restriction, and

(b) reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility.

I find that the landlord's closure of the pool and hot tub has not contravened either section 27(1)(a) or (b) of the *Act*. I find that the pool and hot tub is not an obligatory service or amenity.

Section 27(2) of the *Act* allows a landlord to terminate a service or facility provided during a tenancy as long as it is not a material term of the tenancy. I find it undisputed by both parties that the tenant did lose access to the pool and hot tub for a period of time, and the landlord did not reduce the rent in an amount equivalent to the reduction in value of the tenancy agreement resulting from the closure of the pool and hot tub. As such, I have considered whether the tenant has demonstrated her entitlement to an order pursuant to section 65(1)(f) of the *Act* with respect to her past rent.

In assessing her claim, I first note that the party applying for dispute resolution bears the responsibility of demonstrating entitlement to a monetary award. Based on the evidence

before me, I accept that the landlord has withdrawn a facility that was part of the original package of services and facilities that the landlord committed to provide to the tenant. I accept the testimony of the tenant that due to her circumstances where she was rehabilitating from a serious injury, she would have made use of the pool and hot tub on a regular basis. I find that the tenant did provide some evidentiary materials to support the fact that she had to use an alternate facility that she had to pay for, when the same or similar facility would have been included in her monthly rent if it was available. Although I acknowledge that the receipts submitted are for a family pass that allowed both the tenant and her partner use of the facilities, I am satisfied that the tenant had provided sufficient evidence to support that she did truly suffer a monetary loss due to the loss of pool. I find that the tenant did not have use of the pool from January 2016 through to July 2018, for a total of 31 months. Although the tenant did submit receipts to support her claim, the receipts were for a family pass, and which was not for the entire duration of the pool closure.

Residential Tenancy Branch (“RTB”) Policy Guideline 16 states the following with respect to types of damages that may be awarded to parties:

An arbitrator may only award damages as permitted by the Legislation or the Common Law. An arbitrator can award a sum for out of pocket expenditures if proved at the hearing and for the value of a general loss where it is not possible to place an actual value on the loss or injury. An arbitrator may also award “nominal damages”, which are a minimal award. These damages may be awarded where there has been no significant loss or no significant loss has been proven, but they are an affirmation that there has been an infraction of a legal right.

As I accept the tenant's evidence that she was required to purchase a pass to use the pool at a different facility, I am not satisfied that the tenant had supported the true value of her loss. As per RTB Policy Guideline 16, where no significant loss has been proven, but there has been an infraction of a legal right, an arbitrator may award nominal damages. Based on this principle, I award the tenant nominal damages of \$500 for the loss of use of the pool.

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...

(b) freedom from unreasonable disturbance;...

(d) use of common areas for reasonable and lawful purposes, free from significant interference.

I have considered the testimony of both parties, and while it was undisputed that the tenant has been subjected to the disturbance of the ongoing construction, the onus still falls on the applicant to support their claim. I find that the landlord has provided several detailed examples of how they have been in compliance with the *Act* and municipal bylaws, including abiding by stop work orders, and working within designated work hours. Although I am sympathetic to the tenant and her concerns for her personal health or safety, I find that the tenant's evidence does not sufficiently support how the landlord's actions had put her health or safety at risk. The belief that something may happen is not sufficient to support a monetary claim for loss.

I find that that the landlord has a duty to maintain the property in a state of repair as required by section 32 of the *Act*. I find that the landlord is obligated to balance their duty to repair and maintain the property with their obligation to protect the tenant's right to quiet enjoyment. Although I find that the tenant did provide detailed evidence of the disturbance the repairs have caused her, including noise that occurred outside of the regular working hours by the workers on site, I am not satisfied that the tenant provided a reasonable break down of the rent reductions requested, and why she should be entitled to those amounts in her application. Although the tenant referenced the impact to her rehabilitation and career, I find that the tenant did not establish how the amounts were obtained, either referenced and supported by similar claims of this nature, or by providing pay stubs, receipts, statements or other documentation to support the reductions the tenant is seeking in this application. As stated earlier above, under RTB Policy Guideline 16, where no significant loss has been proven, but there has been an infraction of a legal right, an arbitrator may award nominal damages. Based on this principle, and the fact that the tenant was impacted at various degrees during this tenancy, with the most impact between December 2015 through to December 2016, I award the tenant nominal damages of \$2,000.00 for the loss of peaceful enjoyment.

The tenant also requested an ongoing rent reduction of 20 percent until the renovations are completed. I am not satisfied that the level of impact the renovations have had in the past are the same as they are currently. Furthermore, I am not satisfied that the tenant has supported this portion of her claim by providing a basis for how she had determined this entitlement. As the burden of proof is on the tenant to support her claim, I dismiss the tenant's application for an ongoing rent reduction without leave to reapply.

As the filing fee is normally awarded to the successful party after a hearing, and the tenant was only partially successful with her claim, I allow the tenant to recover half of the filing fee for this application.

In order to implement the monetary awards granted in this application, I order the tenant to reduce her future monthly rent payments until the full amount is paid.

Conclusion

I issue the tenant a monetary order in the amount of \$2,550.00. In order to implement the monetary awards granted in this application, I order the tenant to reduce her future monthly rent payments until the full amount is paid.

The remainder of the tenant's application is dismissed without leave to reapply.

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: July 12, 2019

Residential Tenancy Branch