Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding bcIMC REALTY CORPORATION c/o QUADREAL RESIDENTIAL PROPERTIES LP
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCT, FFT

Introduction

The tenant applies for a monetary award for damages resulting from the construction of an apartment building directly outside his apartment, from renovation or repair work done inside his apartment building, from alleged wrongful entries by the landlord, from a failure to provide him with proper cooling for his apartment and from the removal of visitor parking at his apartment building.

Both parties attended the hearing, the corporate landlord by its representative CM, 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.

Issue(s) to be Decided

Has the landlord breached its obligations under the law or the tenancy agreement resulting in damage or loss to the tenant? If so, what is the appropriate measure of damages?

Background and Evidence

The rental unit is a one bedroom, ground floor apartment in a seventeen-storey apartment building. The tenancy started May 1, 2019 for a fixed term to April 30, 2020 at a monthly rent of $1700.00. The landlord received an $850.00 security deposit which has been returned to the tenant.

In January 2020 the tenant gave notice he was leaving his apartment due to the disturbance being caused by construction nearby. He vacated on February 29.

The tenant provided a three page outline of his complaint and read it in as part of his testimony.

At initial viewing of the apartment in March 2019 there was no construction activity on the property outside his balcony but it was apparent that some was underway. A representative of the landlord indicated to him that the construction work was usually started around 9:00 a.m. and finished around 4:00 p.m. on weekdays. He was a "9 to 5" office worker during the week and so he thought he would not notice the construction activities.

The tenant had viewed the construction site from the street and at that time it was just a big hole in the ground. From that he judged that the new apartment building, a 31 storey rental unit apartment, would be located some distance from his balcony. He was mistaken. In fact two buildings were under construction in the hole. One, the closest to his apartment was being built by this landlord. A second, owned by others, was being built directly behind it. As a result, the landlord's new building ended up being constructed about thirty or forty meters from the balcony of his apartment.

Construction picked up near the end of August 2019. A fence or hoarding had been erected before the start of the tenancy about ten or fifteen meters in front of his balcony and the lower parts of the new building began to rise above it. As a result, noise increased and workmen could see directly over the hoarding and into his living room and bedroom. He kept the blinds drawn in both rooms so that no one could see into his apartment either when he was there or when he was away.

Further, he suffered an ingress of dust and wind-blown debris so he kept his balcony door and windows closed at all times. Because of that or perhaps because he thought his suite was located directly over the boiler room, he testified that his apartment became very hot on some days; perhaps up to 30 degrees. He did not keep track of these days nor did he use a thermometer to check the true temperature. In his view, anytime the outside temperature was over about 20 degrees, his suite would be hot.

He testified that he spoke to the landlord about the heat, wanting an air conditioner. Nothing was done and so he bought a fan, the cost for which he seeks to recover from the landlord.

Further, he says, as the building rose higher it blocked the western sun and so he lost daylight hours in his unit.

By the end of November the tenant was complaining to the landlord about the construction activities and was seeking a rent reduction. No satisfactory resolution was forthcoming and so in late January, he gave his notice for February 29.

After he gave his notice the landlord attempted to show the premises on short notice. The tenant declined to permit entry without the proper 24 hour notice required by the *Residential Tenancy Act* (the "*RTA*").

As a result, on February 11 slipped a "stack" of Notice to Enter forms under the tenant's door. The notices indicated that the landlord would be conducting viewings of the apartment between 10:00 a.m. and 5:30 p.m., Monday through Saturday, between February 13 and 22.

Again on February 21 a new "stack" of Notices were given to the tenant for the same times, Monday through Saturday, between February 24 and 29. In all there were fifteen notices.

The landlord began to show the apartment. On some occasions the tenant was forewarned and permitted entry. However, he determined that the landlord had been showing the apartment when he was not there and so he installed a motion activated camera in the suite. He produced video evidence of at least three entries by the landlord while he was away. He considers the entries to be violation of his right to privacy.

The tenant also complains of being disturbed by work being carried on by the landlord inside the apartment building. He produces videos in which one can hear the sound of drilling or buzzing. His documents might be taken to indicate such noise occurred monthly after April 2019 however the video evidence captures only the sounds on December 14, 2019 and on February 25, 2020.

Last, the tenant testifies that on move out his helper received a $40.00 ticket which would not have been issued had he been able to use a visitor parking area closed down by the landlord during construction of the adjacent building.

In response CM for landlord points to a addendum to the tenancy agreement in which the tenant acknowledges being informed about the construction to take place outside his suite and which indicates that the parties have adjusted the rent accordingly to take into account the disturbance that will be created.

She denies knowledge of any request by the tenant for an air conditioner or for better, more soundproof windows. She notes that the landlord was providing written updates to the building's tenants informing them of the progress of the work and what they might expect, including some work on Saturdays. These notices were posted in the lobby and the elevator (though the tenant, living on the ground floor, did not use the elevator).

She indicates that at one time during this tenancy the landlord carried out some work on the boiler and that it was regular maintenance. Notice of that work was posted. Similarly, some suites were renovated during this tenancy and the tenant might have heard noise coming from that work.

She is of the view that all entries by the landlord into the suite were lawful.

She notes that even though the tenant left before the end of his fixed term tenancy the landlord did not charge him the $500.00 liquidated damages fee in the tenancy agreement nor claim the loss of March and April rent it suffered before finding a new tenant for the suite.

It should be noted that the documentation filed in this matter refers to an end of tenancy agreement in which the tenant is alleged to have agreed to showings without statutory notice. Neither party appears to have produced that purported agreement nor could they provide any detail about it. I note that the *RTA* does not permit parties to contract out of the rights and obligations contained in the *RTA.*

Analysis

Claims Flowing From the New Construction

The addendum to the tenancy agreement reads:

ADDENDUM TO RESIDENTIAL TENANCY AGREEMENT
CONSTRUCTION DISCLOSURE AND ACKNOWLEDGEMENT

Attached to and forming part of the Residential Tenancy Agreement dated the 21st day of March, 2019 for the Premises known as Suite M1-T1, 4769 Hazel St in the city of Burnaby, British Columbia.

The Landlord discloses and the Tenant(s) acknowledge(s) that the rental property known as “Parkview Towers” (located at 4769 Hazel Street, Burnaby (“Tower 1”) and 4758 Grange Street, Burnaby (“Tower 2”) has been rezoned by the City of Burnaby permit construction of a new 31-storey rental apartment building situated to the west of Tower 1 (the “New Tower 3”), and six new townhomes situated to the east of Tower 2 (the “Townhomes”), where the Agent will be acting as development manager.

The New Tower 3 will be situated on the site currently utilized as an outdoor amenity space consisting of a basketball/games court, green space and BBQ area. The New Tower 3 will offer the following new amenities to residents of Parkview Towers: garden terrace with BBQ area; interior meeting rooms; a spacious fitness center; and interior social/recreational rooms). It is anticipated that construction of the New Tower 3 will commence in early 2018.

The Townhomes will be situated on the unused site currently designated for oversized vehicle surface parking and the adjacent green space area. The Townhomes will offer new residences and adjacent green space areas. It is anticipated that the construction of the Townhomes will commence in early 2018.

Through the course of construction, all applicable laws, including but not limited to municipal bylaws will be followed. As such, there may be potential impacts on Tower 1 and Tower 2 which may include but are not limited to increased noise during regular day-time construction hours, excessive dust, partial closure of sidewalks, laneways, and roadways, and temporary closure of the outdoor seasonal swimming pool. These possible disruptions have been accounted for in the agreed upon rent payable in the Residential Tenancy Agreement and a proportionate rental reduction has been applied at the commencement of the residential tenancy in consideration of these disruptions and/or temporary property use restrictions.

The permit approval process is expected to continue in phases through mid-2018. This process may result in changes to the development proposal as described in this document. More information on the proposed development, the

rezoning process and related planning policies can be found by contacting the City of Burnaby Planning Department:

https://www.burnaby.ca/City-Services/Planning.html

Unless otherwise defined in this addendum, the defined terms used in this addendum have the meaning given in the Agreement to which this addendum is attached.

I find that this addendum agreement, signed by the tenant, is a complete answer to his claim of disruption and loss of quiet enjoyment caused by construction of the new apartment tower. I do not accept the tenant's claim that it is vague or that it does not indicate where the new building is going to be.

The tenant misjudged the location of the new building, not the landlord. Had he wished, he could have consulted the landlord or the City for a clear determination.

The addendum was fair warning that there would be significant disruption, noise and dust. The location of the 31 storey complex was clearly to be directly west of the tenant' suite, allowing him to calculate that it would result is a significant diminishing of his view of the skyline and the setting sun.

Despite what the landlord's representative might have opined about the days and hours of the day work would be carried out, the addendum, the written document, states that the work would be carried out "during regular day-time construction hours." The written document governs the agreement between the parties and subsumes any representations leading up to the making of it. The tenant has not shown that the work was carried out other than "during regular day-time construction hours" which perhaps might run into the evening or on a Saturday.

As a result the tenant's claim for damage and loss resulting from the new construction is dismissed.

In-Building Work Noise

A landlord is required to carry out regular maintenance of its equipment and its rental units. A tenant in an apartment building is obliged to suffer the occasional inconvenience related to this maintenance. The tenant in this case has not shown that

the intrusions complained of were beyond what might reasonable be expected in this building.

I dismiss the tenant's claim for disruptions related to work carried out by the landlord inside the apartment building.

Landlord Entry

A tenant is entitled to exclusive possession of his rental unit subject to a limited right of the landlord to enter on at least 24 hours written notice stating the purpose of entry and the date and time of entry. It is a tenant's fundamental right.

In this case the landlord has abused that right by issuing two series of entry notices covering almost the entire daylight period of consecutive days. The notices were so broad that the tenant lost his right to exclusive possession for a significant period of time on fifteen days during the month of February, whether or not the landlord actually showed the rental unit at any times on any of those days. I award him the equivalent of one half the rent for each of those days; the amount of $439.66.

Overheated Apartment

A landlord is responsible maintaining a rental unit in a state that makes it suitable for occupation by a tenant. This can include an obligation to regulate temperature. Most often this is by providing adequate heating to a rental unit but it may include providing adequate cooling.

In this case, CM denies that the landlord was informed of any overheating problem in the suite. The tenant has not provided proof of any formal complaint to the landlord and cannot provide objective evidence about the dates or number of days or the actual temperature in his suite.

In these circumstances I dismiss this item of the tenant's claim, including the request for reimbursement for a fan, which he still possesses.

Rental Offers

The tenant indicated that near the end of his tenancy the landlord was offering new tenants one month's free rent as an incentive and he should get it too. CM indicated it

was to attract tenants because the market for tenants had been diminished by the CoVid-19 pandemic.

The tenant offers no basis for why he should be entitled to the benefit of this offer. I dismiss this item of the claim.

Parking Ticket

I dismiss this item of the claim. The lack of visitor parking or loading zone access was not the direct cause of the tenant's helper receiving a parking ticket. It was the tenant's helper not "plugging" the parking meter or otherwise violating the local government's parking rules.

Conclusion

In result the tenant is entitled to a monetary award of $439.66. Since he has been at least partially successful I award him recovery of the $100.00 filing fee for this application. As noted at hearing, I consider the *RTA* does not provide authority to award costs in the nature of disbursements incurred in pursuing this claim.

The tenant will have a monetary order against the landlord in the amount of $539.66.

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: September 15, 2020

Residential Tenancy Branch