Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC FF

Introduction

This hearing was convened as a result of the Tenants' Application for Dispute Resolution. The participatory hearing was held, by teleconference, on February 12, 2021, by conference call. The Tenants applied for the following relief, pursuant to the *Residential Tenancy Act* (the "*Act*"):

- A monetary order for compensation for damage or loss under the Act.

The Landlords and the Tenants were both present at the hearing.

The Landlord was around 25 minutes late for the hearing. Service of the documents was confirmed with the Tenants at the outset of the hearing and again when the Landlord appeared. However, in the first 25 minutes of hearing, the Tenant provided testimony to support their claim, which was not repeated/summarized for the Landlord when she showed up late. The Tenants finished their submissions about 5 minutes after the Landlord arrived, and then the Landlord was given a chance to respond. The Landlord's tardiness led to me having to go through evidence and document service twice, which impacted how much time she had to respond to the Tenant's claim.

The Landlord confirmed receipt of the Tenant's application and evidence package back in October of 2020. The Tenants also delivered a second evidence package to the Landlord's front door on January 27, 2021. Pursuant to section 88 and 90 of the Act, I find this package was deemed served 3 days after it was left at the front door, January 30, 2021. As stated in the hearing, Rule of Procedure 3.14 and 3.15 stated that all evidence to be relied upon by the applicant must be received by the respondent no later than 14 days before the hearing. As the Tenants failed to serve their second evidence package in accordance with the Rules, I find it is not admissible for this hearing. Further,

the Tenants presented no compelling reason as to why they submitted this evidence so late, given the hearing has been scheduled for months.

The Tenants confirmed receipt of the Landlord's first evidence package in late December 2020. No issue was raised with the service of this package. I find this package was sufficiently served for this hearing. The Landlord provided a second evidence package to the Tenants by leaving it on the doorstep on February 5, 2021, and again by process server on February 9, 2021. The package left on the door is deemed served on February 8, 2021, 3 days after it was left. However, as stated in the hearing, the Landlord had to ensure the Tenants received this package no later than February 5, 2021 (7 days before the hearing). It appears the Landlord submitted late evidence because the Tenants did. However, neither of the late evidence packages by either party are admissible for this hearing. I find it would be prejudicial, for both parties, to admit the late evidence, as neither party had sufficient time to review and respond to the evidence prior to the hearing.

The Landlord asked for an adjournment so that she could go through her late evidence package, and have a chance to have it admitted into evidence. However, I note the Landlord was 25 minutes late for the hearing, and at the outset of the hearing, I made determinations about the Tenant's late evidence, and the Tenant was not permitted to rely on evidence that was served late, and without a good reason. At the end of the hearing, it would be unfair to grant an adjournment so that the Landlord can speak to her late evidence, when the Tenants late evidence was already found to be inadmissible. Further, it appears that part of the reason an adjournment was requested was because the Landlord did not have enough time to explain and speak to what was contained in her late evidence, which is an issue that was exacerbated by her being substantially tardy. The request for an adjournment was denied.

Both parties were provided the opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

1. Are the Tenants entitled to compensation for damage or loss under the Act?

Background and Evidence

General Background Information

The Tenants explained that monthly rent was set at $2,500.00 per month, and was due on the first of the month. The tenancy agreement was signed, effective May 1, 2020, but the Tenants were given access to move some of their belongings in in mid-April, and they fully moved in around April 26, 2020. The Tenants moved out around September 30, 2020, after being unhappy with the rental unit, and the disruptions they experienced.

The Tenants lived in the main part of the house, and the Landlord (who recently bought and took possession of the house in April 2020) was in the process of putting in a legal suite in the basement.

General summary of claim

The Tenants are seeking the following 2 items:

1) $5,000.00 – 100% rent refund for August and September 2020 for loss of quiet enjoyment
2) $1,601.90 – Moving costs

The Tenants explained that when they spoke with the Landlord in March, she agreed that the secondary suite that was being constructed next to the rental unit would be mostly finished by the time the Tenants moved in at the start of May 2020. However, the Tenants stated that the Landlord didn't even start doing the suite construction until August. Although the Tenants had a few things they were unhappy with leading up to the month of August, they explained that it was when suite construction started that their lives were most impacted. The Tenants explained that it was during August and September that they decided they had to move due to all the noise and disruption, which is why they are seeking full rent rebate for August and September 2020, as well as the costs they incurred to move away.

The Tenants explained that the Landlord was working on building the suite 6-7 days a week for nearly 10 hours a day for all of August and September 2020. The Tenant stated that there were 3-5 days where there was jackhammering for a few hours at a time, in the adjacent unit.

The Tenants explained that the most upsetting and influential incident was on August 15, 2020, when they had gone up to Tofino for the day. The Tenants confirmed the Landlord had sent them a text message in the days leading up to the weekend of August 15, 2020, stating that they would need access to the unit for some work that had to be done relating to the suite they were constructing next door. The Tenants were under the impression that the Landlord only needed to enter their suite briefly, to access some utility related items, but when they came home at around 10:30 pm on Saturday August 15, 2020, they found a mess in their rental unit. The Tenants stated that they came home to drywall dust over some of their belongings, their washer and dryer was moved and disconnected, and some furniture was moved.

The Tenants pointed to a text message, whereby the Landlord asked to gain access to the rental unit on Saturday August 15, 2020, for some electrical panel work. The Tenant responded by saying that would not be a problem, as they were going to be in Tofino "for the day". The Landlord mistakenly interpreted this as meaning that the Tenants would not be home until later on Sunday, August 16, 2020. So, when the Tenants arrived home late on Saturday, the Landlord had not finished, and tidied up.

The Landlord explained that they honestly believed the Tenants were going to be gone for the weekend, so they scheduled a couple different jobs to be done, above and beyond their initial request for just the panel access. The Landlord completed some of the work on the Saturday while the Tenants were in Tofino, but did not complete the jobs. The Tenants stated that they denied the Landlord access on Sunday, since they never gave formal notice, and it was never agreed upon. The Tenants stated it was the Landlord's fault for misinterpreting their text message and assuming they would be out of town until Sunday.

The Tenants stated that following this, the Landlord gave them proper Notice to Enter, when access to their suite was required. The Tenants provided text messages which suggest that they wanted to receive "notice" for work that was being done on the property, even if no access to their unit was required. The Tenants stated that they also had concerns that the yard was not safe for their children to play in, because of the construction materials and equipment. The Tenants stated that they work from home, part time, and since much of this construction was done during the day, it was hard to get work done. The Tenants also stated that their kids were home all day for the month of August, so there was always someone home during the day when all the construction was being done in the suite next door.

The Tenants stated that they were so upset by the events surrounding their Tofino trip, that they decided to start looking for other accommodation immediately following that incident.

The Landlord stated that she rented this rental unit to the Tenants, starting only a matter of days after she took possession of the house. The Landlord stated that she made it clear from the start that they would be working on building a secondary suite in the house, and they deny that they promised for it to be done before the Tenants moved in. The Landlord stated that she applied for permits as soon as she could, and they were not granted the permits such that they could start working on the suite until late July/early August. The Landlord stated that they worked hard, and managed to complete the suite by the end of September 2020.

The Landlord stated that they tried to be as accommodating as possible for these Tenants, such as letting them move in early, and repainting a wall for them at their request. The Landlord stated that they were always available if there was an issue. The Landlord stated that, out of courtesy, they would provide the Tenants with a construction timeline, so that they would know what was happening in the unit next to them. The Landlord stated that she only required access to the rental unit a handful of times, as 99% of the work was done in the suite next door, and was contained to the patio of the other suite, and the parking spot for the suite. The Landlord stated that they installed construction fences in mid-August to clearly distinguish the work zone from the Tenants' yard space.

The Landlord explained that all WorkSafe protocols were followed, as were building codes and laws.

The Landlord provided several statements, including one from the electrician and the drywaller, stating they observed the Tenants' children using the backyard, and playing on the trampoline, apparently without any issue, despite their "safety concerns." The Tenants stated that prior to the fence going up, separating the work area, they had concerns about safety.

The Landlord stated that right at the start, they put up walls between the construction in the suite, and the subject rental unit. These walls were soundproofed as best they could. The Landlord also pointed out that although they worked on the suite next door, almost daily, they kept it mostly within business hours.

The Tenants also stated that there was a silverfish infestation, but they did not refer me to any evidence in support of this. The Landlord stated that there was no silverfish issue, and they provided a statement from the new Tenants renting out the unit, which speaks to the fact there is not currently a silverfish problem. The Landlord stated the Tenants need to provide more than just a photo of a silverfish.

The Tenants stated that, overall, due to how the construction was progressing in the unit next door, and due to their lack of enjoyment of their space, they felt they were forced to move.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim.

In this instance, the burden of proof is on the Tenants to prove the existence of the damage/loss and that it stemmed directly from a violation of the *Act,* regulation, or tenancy agreement on the part of the Landlord. Once that has been established, the Tenants must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the Tenant did everything possible to minimize the damage or losses that were incurred.

When two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim.

I note the Tenants are seeking the following 2 items, totaling $6,601.90, plus the filing fee:

1) $5,000.00 – Loss of Quiet Enjoyment – August and September 2020
2) $1,601.90 – Moving expenses

Loss of Quiet Enjoyment

First, I turn to the Tenant's claim for loss of quiet enjoyment. I note that Section 28 of the Act, states that 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
(d) use of common areas for reasonable and lawful purposes, free from significant interference.

The Residential Tenancy Branch Policy Guideline # 6 Entitlement to Quiet Enjoyment deals with a Tenant's entitlement to quiet enjoyment of the property that is the subject of a tenancy agreement. The Guideline states that:

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.

[…]

A tenant may be entitled to compensation for loss of use of a portion of the property that constitutes loss of quiet enjoyment even if the landlord has made reasonable efforts to minimize disruption to the tenant

[…]

Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. However, 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.

Based on the documentary evidence and oral testimony provided during the hearing, and on a balance of probabilities, I make the following findings with respect to quiet enjoyment:

I note the Tenants are seeking $5,000.00, for their loss of quiet enjoyment for August and September 2020, which is 100% of the rent they paid over that period of time. I note the Tenants rental unit adjoined a secondary suite, which the Landlord was constructing, mostly between the beginning of August and the end of September.

Although I accept the Tenants were aware, prior to moving in, that there would be *some* construction adjacent to their unit, I accept that they were not aware of the extent of the work and that they believed it would be largely completed before moving. Although the Tenants were unhappy with a few smaller items prior to August 2020, it appears their application targets the months of August and September 2020, as this is when most of the construction of the secondary suite took place. The Tenants assert that this is when their lives were most impacted, as the Landlord was working almost every day, for nearly 2 months.

As stated above, a Tenant's right to quiet enjoyment must be balanced with the Landlord's rights to maintain and work on the property. I do not find the Landlord had any intentions to disrupt the Tenants, and in fact, it appears they took significant steps to keep the Tenants apprised of work that was being done, even when access to the unit was not required.

It appears the parties were not averse to communicating by text message, up until mid-August, and this was how the Landlord signalled to the Tenants that they needed access to the unit. However, I note a text message is not proper notice to enter, and the Landlord could have substantially reduced the conflict in and around August 15th, 2020, had proper notice been given, with a clear and defined timeframe surrounding access to the rental unit.

I accept that the Tenants work from home part time, and also had children who were home for a significant portion of the time given this was summertime, and due to COVID. I accept that in the current pandemic environment, people often spend more time at home, and are likely more affected by disruptions that would otherwise have been less of a problem, had there not been a pandemic lockdown. I also accept that the Tenants would have likely felt a substantial interference with their ordinary enjoyment of the rental unit, due to construction noise throughout the day, on most days of the week. The Landlord does not refute that they were working hard, and heavily throughout August and September in order to complete the suite in good time.

That being said, based on the testimony and evidence, I find it more likely than not that the bulk of the disruption to the Tenants was during the day, as they had to listen to construction noise. I also accept that the Tenants felt they lost some of the aesthetic value of their yard and house and had minor service interruptions along the way, to utilities and appliances. In any event, many of the interruptions of appear to be shortlived, and are more of a temporary discomfort, rather than a basis for loss of quiet

enjoyment. I find the Tenants' allegations of the unit/yard being unsafe are largely unfounded.

Even though the Landlord took steps to complete the renovation as fast as possible, to keep the noise level low for the Tenants (put up sound insulation), and to keep the renovation mess contained to a small fenced area, I accept that the ongoing and substantive nature of the renovations occurring next to the rental unit would likely have caused a substantial interference with their day-to-day use of the premises over the course of the two month period of intensive renovations. I find this was a breach of the Tenant's right to quiet enjoyment.

That being said, I do not find the Tenant's claim for a rent reduction of 100% is reasonable, as they still resided in the unit, had use of most of the yard, the appliances and utilities (except for brief interruptions), and all the bedrooms/living rooms. I find a more reasonable amount is 20% of rent over the months of August and September. This amounts to $1,000.00.

With respect to the Tenant's claim for recovery of their moving expenses, I do not find they are entitled to this amount. I do not find there is sufficient evidence to demonstrate that the noise or construction was such that the Tenants had no other choice but to move out. There is insufficient evidence showing the living conditions or the immediate environment were such that the Tenants had to vacate, prior to applying for dispute resolution. There is also no evidence the Landlord acted in any high-handed or negligent manner. It appears the Tenants made the decision to leave shortly after August 15, 2020, the day they came home from Tofino to find a mess. The bulk of the loss of quiet enjoyment occurred after the Tenants had already decided they wanted to leave. In any event, I am not satisfied the Tenant's have sufficiently proven the Landlord's ought to be responsible for the moving costs. I dismiss this item, in full.

Section 72 of the Act gives me authority to order the repayment of a fee for an application for dispute resolution. As the Tenants were partially successful with their application, I order the Landlord to repay the $100.00 fee that the Tenants paid to make application for dispute resolution.

In summary, I find the Tenants are entitled to a monetary order in the amount of $1,100.00.

Conclusion

The Tenants are granted a monetary order pursuant to Section 67 in the amount of **$1,100.00**. This order must be served on the Landlord. If the Landlord fails to comply with this order the Tenants may file the order in the Provincial Court (Small Claims) and be enforced as an order of that Court.

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: February 16, 2021

Residential Tenancy Branch