Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Westsea Construction Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes RR, OLC, FFT

Introduction

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

- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- 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.*

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. Both parties were clearly informed of the RTB Rules of Procedure about behaviour including Rule 6.10 about interruptions and inappropriate behaviour, and Rule 6.11 which prohibits the recording of a dispute resolution hearing. Both parties confirmed that they understood.

The landlord confirmed receipt of the tenant's dispute resolution application ('Application') and amendment. In accordance with section 89 of the *Act*, I find that the landlord duly served with the Application and amendment. As all parties confirmed receipt of each other's evidentiary materials, I find that these were received in accordance with section 88 of the *Act*.

Preliminary Issue- Authorization to Change the Locks

The tenant requested an order to be able to change the locks. I note that the tenant did not file an application pursuant to section 70 of the *Act* for authorization to change the locks, or an amendment requesting this order.

Rule 4.6 states the following:

***As soon as possible**, copies of the Amendment to an Application for Dispute Resolution and supporting evidence must be produced and served upon each respondent by the applicant in a manner required by the applicable Act and these Rules of Procedure.*

The applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Amendment to an Application for Dispute Resolution and supporting evidence as required by the Act and these Rules of Procedure.

***In any event, a copy of the amended application and supporting evidence must be received by the* by the respondent(s) not less than 14 days before the hearing.**

No amendments were received in accordance with RTB Rule 4.6 pertaining to an application to change the locks. Rule 4.6 exists to ensure that a respondent is aware of the scope of the hearing and is prepared to respond, if they chose to do so. Given the importance, as a matter of natural justice and fairness, that the respondent must know the case against them, this issue will not be considered as part of this application as no proper application or amendment was filed to request this order.

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 an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement?

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

Background and Evidence

I note that both parties provided detailed and extensive evidence and testimony for this 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.

This tenancy originally began on July 1, 2019 as a fixed-term tenancy. The tenancy continued on a month-to-month basis after November 30, 2019. Monthly rent is

currently set at $1,900.00, payable on the first of the month. The landlord collected a security deposit in the amount of $950.00, which the landlord still holds.

The tenant filed this application requesting a 100 percent rent reduction for the period beginning October 1, 2020, and which is to be applied until the scaffolding is removed and the hallways are returned to normal. In addition to the request for a rent reduction, the tenant also requested an order for the landlord to comply with the *Act* and tenancy agreement, specifically for the landlord to give proper notice before entry into the tenant's suite, and with at least 5 day's notice, an order that the landlord, agent, or worker not enter the rental unit unless when the tenant is present, and for the landlord to deal with the mice in the rental unit.

The tenant testified that when the tenant had signed the tenancy agreement on June 12, 2019, the onsite manager had only casually mentioned that there would be repairs, and not to the extent of the repairs that commenced in October 2020.

It is undisputed that the landlord provided the tenants in the building with notice of the repairs by way of a letter dated September 2, 2020 that work was expected to commence on October 1, 2020. The letter described the work, which was to include "demolition and replacement of the cladding, windows, sliding doors, guardrails, balconies, bathroom fans, and associated work". The letter also advised tenants that "interior inspections and construction activities will require access into your suite at various stages of construction and for varying durations." The letter also warned tenants that due to the scaffolding, the tenants may lose privacy, and suggested that tenants cover their windows. The tenants were also informed that vibration from the demolition and restoration may cause items on the walls to fall or be damaged, and thus should be removed. The tenants were also asked to remove their personal belongings from the balconies for the project.

The tenant testified that since October 1, 2020, the tenant had received over 108 Notices of Entry at the time of the application, and the repairs had yet to be completed at the time of the hearing. The tenant testified that the landlord or their workers had also entered the rental unit without proper notice on at least five occasions.

The tenant testified that the repairs involved scaffolding which blocked light from entering the rental unit, and from October 7, 2020 to the hearing date, the tenant has not been able to see outside his windows.

The tenant was also required to pull his furniture out from the walls by four feet, for two months, and the tenant is still subject to this request on short notice if required by the landlord. The tenant testified that he had to remove the bicycles and barbecue that was stored on the deck, and store these items in his living room. In addition to the lack of

light and reduced useable space that is included in the tenant's rent, the tenant has had to endure significant and unreasonable disturbance which included the time to move his belongings, the associated noise, mess, and breach of the tenant's privacy and security. The tenant testified that he also lost enjoyment of his private deck, which the tenant had often used and enjoyed. The tenant testified that the deck still had no railing as of the hearing date.

The tenant submitted documents to submit the claim including photos, a detailed log of the work and incidents, as well as copies of the notices to enter. In addition to the testimony and written evidence, the tenant also a called a witness in the hearing who testified about the impact of the construction and the multiple entries into the rental unit.

In addition to referenced disturbance directly from the repairs, the tenant testified to other issues caused by the repairs and the workers. The tenant testified that a worker had unplugged the tenant's freezer during the window repairs, causing the tenant's food to spoil. The tenant testified that the workers had taped a door latch on several occasions, jeopardizing the security of the building. The tenant testified that there were also issues with the buzzer and having to go to the post office to retrieve his mail as the mailboxes were covered, as well as issues with an unlit hallway and staircase during a power outage.

The tenant testified that he was unable to move due to the pandemic and the fact that the hallways and stairs in the common areas were covered in plastic.

In addition to the above issues, the tenant testified that there was also a problem with mice which has not been resolved.

The tenant testified that he has not been provided with any financial compensation or a rent reduction, and that other renters were provided alternative accommodation in a hotel.

The landlord disputes the tenant's claims, stating that they had to fulfill their obligations to maintain and repair the building, and that they did give notice to the tenants on September 2, 2020. The landlord testified that the repairs were required as part of an envelope remediation project, and that the project was planned by and overseen by engineers. The landlord does not deny the invasiveness of the project, but that it was necessary to maintain and repair the building. The landlord testified that the tenant's submissions were incorrect, and that the space required was three, and not four, feet as the tenant testified to, and it was only applicable to some areas in the rental unit. The

landlord also feels that they have not breached any part of the *Act* or the tenancy agreement, and maintain that work was done with proper notice, and within the hours allowed. The landlord maintains that the rental unit is still liveable, and the repairs did were not so extensive that it required the tenant to vacate the rental unit. The landlord testified that there were delays due to issues beyond their control that have prevented the landlord from completing the project by the completion date.

The landlord submits that they had given proper notices to enter the tenant's rental unit, with the exception of a misunderstanding and error between December 21-23, 2020 when the landlord's new building managers had issued the contractors keys without giving proper notice. The landlord testified that there was been no breach of the tenant's security, and that access was only for legitimate repairs.

The landlord testified that the repairs did not require continuous access to the tenant's rental unit, and that the schedule was set by the engineers and contractors.

The landlord testified that the tenant referenced issues that were not caused by the landlord. In response to the mice issue, the landlord testified that they had dispatched pest control to deal with the issue as it was reported by tenants, and that mice was an ongoing issue due to the location of the building.

The landlord testified that they were not responsible to power outages caused by vehicle accidents, or outages by the hydro company. The landlord argued that they should be given the opportunity to address issues and complaints, and that specific issues should be reported.

Analysis

Section 65(1)(c) and (f) of the *Act* allow me to issue a monetary award to reduce past rent paid by a tenant to a landlord if I determine that there has been "a reduction in the value of a tenancy agreement."

Section 28 of the Act speaks to a tenant's right to quiet enjoyment:

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.

Residential Tenancy Policy Guideline #6 gives further clarification on the tenant's entitlement to quiet enjoyment and related compensation:

A. LEGISLATIVE FRAMEWORK

Under section 28 of the *Residential Tenancy Act* (RTA) and section 22 of the *Manufactured Home Park Tenancy Act* (MHPTA) a tenant is entitled to quiet enjoyment, including, but not limited to the rights to:

- reasonable privacy;
- freedom from unreasonable disturbance;
- exclusive possession, subject to the landlord's right of entry under the Legislation; and
- use of common areas for reasonable and lawful purposes, free from significant interference.

B. BASIS FOR A FINDING OF BREACH OF QUIET ENJOYMENT

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.

A landlord can be held responsible for the actions of other tenants *if* it can be established that the landlord was aware of a problem and failed to take reasonable steps to correct it.

Compensation for Damage or Loss

A breach of the entitlement to quiet enjoyment may form the basis for a claim for compensation for damage or loss under section 67 of the RTA and section 60 of the MHPTA (see Policy Guideline 16). In determining the amount by which the value of the tenancy has been reduced, the arbitrator will take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use or has been

deprived of the right to quiet enjoyment of the premises, and the length of time over which the situation has existed.

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 in making repairs or completing renovations.

In this case, I am not satisfied that the tenant was made aware of the extensiveness of the repairs that were to begin in October 2020. However, I do accept the testimony of the landlord that in June of 2019, the landlord may not have been aware of the true scope of the work that was to begin sixteen months later. I find that the landlord did give the tenants proper notice of the pending work in September 2020, which I find to be an extensive project undertaking by the landlord in order to fulfil their obligations to maintain and repair the building.

In assessing the tenant's application for a rent reduction under section 65 of the *Act,* the tenant has the right under the *Act a*nd Policy Guidelines to file a monetary claim related to a reduction in the value of the tenancy agreement. Although it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises under section 32 of the *Act,* the tenant still has the right to claim for loss of enjoyment of the space he had paid rent for. In this case, I am satisfied that the tenant did suffer a reduction in the value of the tenancy agreement, and that this reduction is ongoing.

The tenant applied for a one hundred percent rent reduction effective October 2020. I find that a one hundred rent reduction would only be justified in the case that the tenant had to completely vacate the rental unit, such as in the case of a frustrated tenancy.

Residential Tenancy Policy Guideline 34 states the following about a Frustrated Tenancy:

A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.

The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to

have been frustrated so long as the contract could still be fulfilled according to its terms.

A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been frustrated if the frustration is the result of their own deliberate or negligent act or omission.

The Frustrated Contract Act deals with the results of a frustrated contract. For example, in the case of a manufactured home site tenancy where rent is due in advance on the first day of each month, if the tenancy were frustrated by destruction of the manufactured home pad by a flood on the 15th day of the month, under the Frustrated Contracts Act, the landlord would be entitled to retain the rent paid up to the date the contract was frustrated but the tenant would be entitled to restitution or the return of the rent paid for the period after it was frustrated.

In consideration of the evidence and testimony before me, I am not satisfied that this tenancy could be considered Frustrated. However, I find that the tenant did demonstrate a significant loss in the value of this tenancy since October 2020, and as of the hearing date the tenant still did not have relief from. Although the landlord may have done their best to mitigate the issues and loss of quiet enjoyment for the tenant, the undisputed fact is that the tenant paid full monthly rent in the amount of $1,900.00, and was not able to enjoy the rental unit and included facilities to the extent that the tenant is entitled to under the tenancy agreement and the *Act*.

I am satisfied that the tenant provided extensive evidence to support the ongoing loss of enjoyment that started in October 2020, and that the tenant was still experiencing at the time of the hearing date. At the hearing date, it was confirmed that the project had yet to be completed.

I find that the tenant was deprived of the use of his space, privacy, and enjoyment, and this spanned a period of at least nine months as of the hearing date. I do not consider this to be insignificant. Despite the landlord's claims that the tenants were provided notices and communication, and the fact that the project was professional managed as part of an extensive and necessary remediation project, these facts do not relieve the landlord of their obligations to compensate the tenant if the tenant had suffered a loss in the value of the tenancy agreement.

In calculating the value of the loss, I find that the tenant had established that they had previously enjoyed the use of the areas that they had been deprived full use of as of

October 2020. This included the deck as well as the living space inside the rental unit. I have considered the tenant's duty to mitigate, and find the tenant's explanation for why he could not move to be reasonable. I find that the state of the hallways and stairwells, combined with the fact complications that came with moving during a pandemic, left the tenant with less options than normal. I find that the tenant had attempted to continue to reside in the rental unit given the difficult circumstances, and continued to pay his rent in full.

Accordingly, I find that the tenant is entitled to a 50% rent reduction beginning in October 2020. I find that the tenant has been deprived of not only liveable space due to the fact that he had to store items that he normally stored outside, but significant loss of enjoyment due to the scaffolding which blocked out a significant amount of light. I find that the tenant had to accommodate at least 108 notices of entry over the 9 months, which I find to be significant, whether the notices were for justified reasons or not. The impact on the tenant was significant, and I am satisfied that the tenant had supported this. The state of the tenant's rental unit as shown in the photos supports that the tenant was not able to use the rental unit in a manner a tenant under normal circumstances would. Furthermore, I find that the tenant often enjoyed the use of his deck, and as of the hearing date was not able to. I find that the outside space was an important extension of his space, and should also be considered in the calculation. I find that 50% rent reduction is fair, and justified, and accordingly, I order that the landlord provide the tenant with a monetary order equivalent to 50% of the rent from October 2020 to June 2020 in the amount of $8,550.00. I also order that the tenant is entitled to an ongoing 50% rent reduction from July 1, 2021 until the tenant has enjoyment of his rental unit without the obstruction of the scaffolding. If the tenant continues to suffer a reduction in the use of his rental unit or deck after the scaffolding is removed, I order that the tenant be provided with a 25% rent reduction until the work is completed. Although I note that the hallways have been altered to accommodate the construction, I do not find that a rent reduction is justified for a reduction in the value of this common space, which although the tenant must use to enter and exit his suite, does not form a major part of the tenant's rental space.

In consideration of the other issues raised by the tenant tin this application, I am not satisfied that the landlord failed in their obligations to deal with the mice. I am also not satisfied that there has been a contravention of the *Act* or tenancy agreement that justifies the issuance of any orders, including an order that landlord, agent, or contractor attend only in the presence of the tenant. Although the tenant did reference actions that could have put the tenant or his belongings at risk, I am satisfied that the landlord has acknowledged these issues, and there is no current risk to the tenant's safety or

security that necessitates any further orders. Accordingly, I dismiss the tenant's application under section 62 of the *Act* for any further orders.

I allow the tenant to recover the filing fee for this application.

Conclusion

I issue a monetary order in the amount of $8,650.00 in the tenant's favour which allows the tenant a 50% rent reduction for the period of October 2020 through to June 2021, plus recovery of the filing fee.

The landlord(s) must be served with this Order as soon as possible. Should the landlord(s) fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

I further order that the tenant be provided with a rent reduction in the amount of 50% of the monthly rent for July 2021, and each month onwards until the scaffolding is no longer obstructing the tenant's rental unit. I order that this rent reduction be reduced to 25% of the monthly rent if the tenant continues to suffer a reduction in the use of his rental unit or deck after the scaffolding is removed. I order that the tenant be allowed to deduct from future rent these amounts.

I dismiss the remainder of the tenant's application 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 28, 2021

Residential Tenancy Branch