Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **RR, RP, OLC, FFT**

Introduction

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

- an order that landlords make repairs to the rental unit pursuant to section 32;
- an order requiring the landlords 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 landlords pursuant to section 72.

The tenant attended the hearing. Landlord BCH was represented by an agent ("**CK**") and landlord RPS was represented by its general manager ("**NL**").

The tenant testified, and the landlords confirmed, that the tenant served the landlords with the notice of dispute resolution form and supporting evidence package. NL testified, and the tenant confirmed, that RPS served the tenant with its evidence package. BCH did not submit any documentary evidence in response to the tenant's application. I find that all parties have been served with the required documents in accordance with the Act.

During the hearing, the parties referred to a document of the tenants that had not been uploaded to the RTB evidence submission site. The landlords acknowledged receipt of this document. With consent of the parties, I allowed the tenant to upload this document to the RTB site after the hearing. I have reviewed it and considered it when writing this decision.

Preliminary Issue – Amendment

At the hearing, the tenant stated that she was also seeking monetary compensation for loss of quiet enjoyment. (Her application for an order that the landlords comply with the Act stemmed from this loss of quiet enjoyment).

In a May 18, 2021 email to the landlords, the tenant demanded compensation equal to free rent for May and June 2021 as compensation for the loss of quiet enjoyment caused by repairs to the residential property. She testified that the repairs were

completed on July 26, 2021. She sent this letter in response to RPS's offer to reduce her rent by 30% for the time that her quiet enjoyment would be disturbed. The landlords, notwithstanding this counter-offer, applied the 30% reduction to the tenant's rent for May, June, and July 2021.

As such, at the hearing she sought to amend her claim to include a claim for a monetary order before an amount equal to the amount of rent she paid for May, June, and July 2021 ($2,700).

The landlords confirmed receipt of the May 18, 2021 letter and stated that they were aware of the tenant's intention to seek monetary compensation in connection with her loss of quiet enjoyment.

Rule of Procedure 4.2 states:

> **4.2 Amending an application at the hearing**
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> In circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing.
>
> If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

As the tenant had notified the landlord of her desire for monetary compensation for loss of quiet enjoyment in advance of the hearing, and as the landlords were aware of this demand, I find that the amendment sought by the tenant could have been reasonably anticipated by the landlords. As such, I order that the application be amended to include a monetary claim for $2,700.

Additionally, as the work to the residential property which deprived the tenant of quiet enjoyment was completed in July 2021, the tenant no longer requires an order that the landlord comply with the Act by providing her with quiet enjoyment of the rental unit. As such, I dismiss this portion of the tenant's application without leave to reapply.

Finally, the parties advised me that the tenant vacated the rental unit on September 24, 2021. As she no longer resides in the rental unit, she no longer entitled to an order that the landlord make repairs.

Issues to be Decided

Is the tenant entitled to:

1) a monetary order of $2,700;

2) an order to retroactively reduce monthly rent by $100 per month for failure to make the repairs to the interior of the rental unit; and
3) recover the filing fee?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The tenant and the prior owner of the residential property entered into a written tenancy agreement starting July 19, 2017. BCH acquired the residential property in June 2019. RPS manages the residential property. The rental unit is located on the first floor of a three-floor residential property. Monthly rent is $1,000 and is payable on the first of each month. The tenant paid the prior owner a security deposit of $500 and a deposit on TELUS equipment of $250. The landlords acknowledged their liability for these amounts.

Since BCH assumed ownership of the residential property, it has undertaken significant repairs of the residential property.

In 2020, it started renovating vacant units, as well as the entire exterior envelope of the building, which included replacing the roof replacing all of the siding, fixing all the decks and railings, installing all new exterior windows, reengineering the drainage and waterproofing around the building (the "**2020 Work**").

BCH offered, and the tenant accepted, a 30% rent reduction for months in which the 2020 Work was done as compensation for the loss of quiet enjoyment caused by the work.

At the same time the 2020 Work was being undertaken, BCH made cosmetic repairs to the occupied units of the residential property. These cosmetic repairs included painting on the drywall and trim around the windows and patio doors that had been replaced as part of the 2020 Work as well as applying caulking and filling holes in the walls (the "**Interior Repairs**").

On May 10, 2021, BCH undertook additional exterior renovations to waterproof the residential property (the "**2021 Work**").

On May 6, 2021, CK, on behalf of BCH, sent a letter to all residents of the residential property in which it advised them that:

- Construction hours [for the 2021 Work would be] Monday to Saturday 8:00 AM to 5:00 PM.
- Waterproofing work will take approximately 6 weeks to complete. Tenants on the ground floor will not be able to access their patios while the work is happening.

- Tenants who cannot access their patios will be offered a 30% rental rebate for two months.
- BHC offered these tenants a 30% reduction of their monthly rent for two months

On May 31, 2021, CK, on behalf of BCH, sent a letter to all occupants on the second and third floor of the residential property. He wrote:

> Dear 2nd and 3rd Floor Tenants,
>
> We are writing to update you as we continue our work on the waterproofing to the exterior of the building. We understand this is a difficult situation for tenants and in recognition of the impact this may have on you, we are offering a 20% rental rebate for the months of May and June.

This letter was not delivered to the tenant (as she lives on the first floor).

The tenant testified that the 2021 Work caused a greater loss of quiet enjoyment of the rental unit than the loss of quiet enjoyment she suffered as a result of the 2020 Work. She testified that, in additional to the noise and inconvenience caused by the both, the machinery used during 2021 Work emitted noxious odours which required her to keep her windows closed at all times. This caused her unit to become extremely hot, as the 2021 Work was undertaken during the summer.

Similarly, the tenant lost the use of her exterior patio while the 2021 Work was being done. The timing of the work being done caused this loss to be greater than it otherwise would have been, as the tenant used the patio most often during the summer.

Additionally, she testified that the noise caused by the 2021 Work was greater than that caused by the 2020 Work. She submitted audio recordings taken on May 10-13 and 17-20, 2021. They capture included loud, unmuffled jackhammering sounds and a muffled, but still loud, thumping sound. Each of these recordings were under two minutes in length and the sound continues throughout the recordings. I do not know what time they were taken at. The tenant stated that the noise was “constant”.

The 2021 Work was not completed until July 26, 2021.

The tenant argued that she would be entitled to a full rent indemnification for May, June, and July 2021 as the result of the significant loss of quiet enjoyment caused by the 2021 Work. In the alternative, she argued that if she is entitled to a lesser amount, that the May 6, 2021 letter stands for the proposition that the landlord agreed to reduce her rent by 30% for the loss of use of her patio only, and that, the May 31, 2021 letter stands for the proposition that she should receive at least a further 20% reduction for the “impact” the 2021 Work has on her. She suggested that, since her unit is on the first floor, the amount of rent reduction for the 2021 Work’s impact on her should be greater than that

for the unit on the second or third floor, since she was closer to the noise caused by this work.

The parties confirmed that the tenant received a 30% rent reduction for May, June, and July 2021.

CK argued that the 30% rent reduction adequately compensates the tenant for her loss of quiet enjoyment caused by the 2021 Work. He argued that the offer to reduce rent by 30% in the May 6, 2021 letter was intended to compensate tenants who have patios (that is, tenants on the first floor) for their loss of quiet enjoyment in totality, and not, as the tenant argued, solely for the loss of use of the patio.

CK stated that 30% reduction offered for the 2021 Work was in line with the amount the landlord offered, and the tenant accepted, for the 2020 Work. He stated that the May 31, 2021 letter was only sent to the second and third floor unit because it contained an offer for a lesser amount of compensation (20%) for the loss of quiet enjoyment, as the occupants of these units were not deprived the use of their patios.

In addition to the tenant's claim for compensation for loss of quiet enjoyment caused by the 2021 Work, the tenant seeks a retroactive rent reduction of $100 per month for 10 months (November 2020 to August 2021) as compensation for the landlords' failure to make the Interior Repairs in a timely fashion.

On August 21, 2020, the landlords posted a notice on the door of the rental unit stated:

> This is notice for access to your unit on the following dates: Monday August 24th and Tuesday Aug 25 from 8:00 AM to 5:00 PM. Every effort will be made by the contractor to finish their work in a timely manner.
>
> - The contractor will require access to your unit to complete the installation of the new window and door trim encasings. Please provide a minimum of two feet of clearance for access to the windows and patio door on the inside of your unit.
> - You will be provided with notice for the painting and touch ups in your units in relation to the new window and door installations at a later date.
> - Workers will be wearing gloves and masks during the time they are accessing your unit and will clean up the work area before leaving your unit

On August 24, 2020, the tenant denied the landlord's contractors' entry into her rental unit. She posted a copy of the August 21 notice on her door and wrote on it "the is no need for you to disturb me! Thank you." She circled the first bullet point listed above and wrote "has already been installed in this unit".

The tenant testified that the landlord never contacted her to do further painting and touch ups in the rental unit, as indicated on the August 21, 2020 notice. She testified that she contacted the then-building manager ("**E**") by phone in November 2020 and asked that the painting and touch ups be completed and made further verbal requests in the following months. NL denied that these verbal requests occurred. He testified that E stopped working for RPS in October 2020, so it would have been impossible for the tenant to have spoken with her about the painting and touch ups in November 2020.

The tenant sent the landlord a written request for the painting and touch ups to be done on March 29, 2021. NL stated that this was the first time the tenant requested the work be done. In his written statement provided prior to the hearing, NL wrote:

> Because the finishing carpenters who attempted to perform the work were long gone, the work would need to be coordinated through WSP, and the province was at the peak of the 3rd wave of the Pandemic, there were unfortunate delays from the time the applicant made her request to get the work finished, until it was eventually completed in July 2021.
>
> It should be noted that a decision was made by WSP and BCH that due to soaring COVID-19 infections during this 3rd wave and a local outbreak had infected an alarming number of residents, that they would not enter any tenanted units in the building unless it was necessary under emergency circumstances. Because the repairs the applicant was complaining about were purely cosmetic and in no way affected her the health or safety, it was determined that it was in the best interest of the health and safety of all parties that the work be postponed.
>
> As mentioned, the work was completed in July 2021 when the finishing carpenters had returned to the job site to deal with her unit and other deficiencies from the renovation process in the building.

The tenant testified that the painting and touch ups were completed on July 29, 2021. She stated that RPS gave her notice that it would be done on July 14, 2021, but then cancelled the repairs the day of.

The tenant argued that her refusal to allow the landlords' contractors into the rental unit on August 24, 2020 should not have prevented the landlord from completing the painting and touch ups, as the work that was to have been done on August 24, 2020 had already been completed. She argued that she should have received a further notice from the landlord to complete the painting and touch ups shortly after August 24, 2020, as per the August 21, 2020 notice.

Analysis

Loss of Quiet Enjoyment

The landlords do not dispute that the 2021 Work deprived the tenant of her quiet enjoyment of the rental unit. Rather, they argue that the 30% rent reduction is sufficient to compensate the tenant for this loss.

Policy Guideline 6 discuss compensation for loss of quiet enjoyment. Its states:

> **Compensation for Damage or Loss**
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> 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.

I accept that the tenant was subjected to frequent loud noises and foul odours as a result of the 2021 Work. I also accept that as a result of this, she needed to keep her windows and doors closed to dampen its effects. As the 2021 Work was undertaken during the summer, I find that the necessity to keep the windows and doors or the rental unit closed caused the rental unit to become unduly hot. This compounded the tenant's loss of quiet enjoyment, as not only did she have to contend with the noise and smells, but she also had to contend with the heat. For this reason, I accept the tenant's submission that the 2021 Work caused the tenant a greater loss of quiet enjoyment than the 2020 Work did.

I accept the landlord's position that the 30% rent reduction set out in the May 6, 2021 letter was intended to compensate the first-floor residents for the loss of quiet enjoyment caused by the 2021 Work in its totality. I reject the tenant's argument that it was intended to compensate solely for the loss of use of the patio. I come to this conclusion based on the language of the letter, which states: "Tenants who cannot access their patios will be offered a 30% rental rebate for two months" and the fact that occupants on the second and third floor were given a 20% reduction "in recognition of the impact" the 2021 Work had on them (as per the May 31, 2021 letter).

I understand the May 6, 2021 letter to use the existence of a patio as a marker of a particular class of resident (i.e. those on the first floor) rather than as a facility being lost that some residents are being compensated for. It makes little sense to me that the landlords would set out to compensate the first-floor residents 30% for the loss of use of

their patios, but 0% for the loss of quiet enjoyment, and compensate the second and third floor residents 20% for the loss of quiet enjoyment. I cannot see any reason why they would intend to deny compensation for loss of quiet enjoyment to all residents of the first floor. Rather, I find the landlords intended to compensate the first-floor residents at a higher level than second and third floor residents, as the first-floor residents had the additional burden of losing the use of their patio.

So, I must determine if a 30% rent reduction is sufficient compensation for the tenant's loss of quiet enjoyment caused by the 2021 Work.

In light of the facts that the tenant received a 30% rent reduction for the 2020 Work, and that the 2021 Work caused a greater loss of the tenant's quiet enjoyment than the 2020 Work, I find that 30% is not adequate compensation. I find that the tenant should be compensated by way of an additional 10% rent reduction for the period of time the 2021 Work took place.

As the 2021 Work took approximately 2.5 months (May 10 to July 26, 2021), I order the landlords to pay the tenant $250.

Rent Reduction

I agree with the tenant's argument that her barring the landlords' contractors from the rental unit on August 24, 2020 should not have prevented the landlords from completing the painting and touch ups shortly thereafter. The August 21, 2020 notice clearly states the purpose of the August 24, 2020 entry, and that purpose does not include painting or touch ups. This work was to be done at a later date, and I gather was done on other units before the contractors completed the 2020 Work.

However, I agree with the landlords that these repairs were cosmetic in nature and did not affect the tenant's health or safety. However, this does not mean that the landlords can shirk their obligation to "maintain residential property in a state of decoration and repair that […] makes it suitable for occupation" (as set out at section 32 of the Act). Cosmetic repairs go to a rental unit's "state of decoration". As such, I find that by not making these repairs, the landlords breached the Act. Additionally, based on the August 21, 2021 letter, I find that the landlords could have made them while the 2020 Work was being undertaken and that the tenant's refusal to allow the contractors into her rental unit on August 24, 2021, while being a breach of the Act, did not prevent the painting and touch ups from being done.

However, I do not find that the amount of compensation sought by the tenant ($100 per month or a roughly 10% reduction) to be reasonable, in light of the minor and cosmetic nature of needed repairs. Rather, I find that nominal damages are appropriate. Nominal damages are discussed in Policy Guideline 16, which states:

> "Nominal damages" are a minimal award. Nominal damages may be awarded where there has been no significant loss or no significant loss has been proven, but it has been proven that there has been an infraction of a legal right.

In the circumstances, I find that nominal damages of $100 are appropriate.

Filing Fee

Since the landlords have mostly been successful in defending against the tenant's application, I decline to order that they reimburse the tenant her filing fee.

Conclusion

Pursuant to sections 62, 65, 67, and 72 of the Act, I order that the landlords pay the tenant $350, representing compensation for loss of quiet enjoyment and for nominal damages.

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: October 27, 2021

Residential Tenancy Branch