Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding WESTBANK
and [tenant name suppressed to protect privacy]

DECISION

Dispute Code MNDCT, FFT

Introduction

This hearing was convened as a result of the Tenant's Application for Dispute Resolution, made on November 9, 2021. The Tenant applied for the following relief, pursuant to the Residential Tenancy Act (the "Act"):

- a monetary order for money owed or compensation for damage or loss; and
- an order granting recovery of the filing fee.

The Landlord named in the application does not match the name of the landlord that appears in the tenancy agreement. Therefore, with the agreement of those in attendance, and pursuant to section 64(3) of the Act, I amend the application to reflect the name that appears in the tenancy agreement.

The Tenant attended the hearing on his own behalf. The Landlord was represented at the hearing by AO, DB, TP, and MS. All in attendance provided affirmed testimony.

The Tenant testified the application package was served on the Landlord by registered mail on November 18, 2021. The Landlord acknowledged receipt.

On behalf of the Landlord, AO testified that the documentary evidence relied on by the Landlord was served on the Tenant by email on March 29, 2022. The Tenant acknowledged receipt.

No issues were raised with respect to service or receipt of these packages during the hearing. The parties were in attendance or were represented and were prepared to proceed. Therefore, pursuant to section 71of the Act, I find the above documents were sufficiently served for the purposes of the Act.

The parties were advised that Rule of Procedure 6.11 prohibits the recording of dispute resolution hearings.

The parties were given a full 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, and to which I was referred. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Is the Tenant entitled to a monetary order for money owed or compensation for damage or loss?
2. Is the Tenant entitled to recover the filing fee?

Background and Evidence

The parties agreed the fixed-term tenancy began on November 1, 2020, and ended on October 31, 2021, at which time the Tenant vacated the rental unit. The parties agreed the Tenant paid $4,200.00 per month for the first six months and $2,100.00 per month for the final six months. Rent was due on or before the first calendar day of each month. The parties agreed the Tenant paid a security deposit of $2,100.00, which was returned to the Tenant.

The parties confirmed during the hearing that the rent reduction described above was an incentive agreed to at the beginning of the tenancy and was unrelated to the issues complained of by the Tenant.

The Tenant seeks a monetary order for $5,000.00 related to issues that arose during the tenancy. The Tenant testified that he went to great lengths to find a top floor apartment so he would not be disturbed by noise from above. However, after about six months, construction of a dog park commenced on the roof that lasted for “many weeks”. The Tenant described heavy construction, drilling, banging, and bumping. The Tenant advised that he was not told about the construction of a dog park when he moved in and maintained that he was not given sufficient notice of the construction before it began. Indeed, the Tenant testified he was “in shock” when the construction

began because the rental property was newly constructed, and he did not expect the construction of a dog park on the roof.

The Tenant also referred to secondary issues with the air conditioning and windows. The Tenant also described issues with the elevator during the last six weeks of the tenancy. The Tenant submitted copies of email correspondence sent to and from the Landlord. However, the Tenant confirmed that noise from above was his primary concern.

The Tenant testified that he complained about the above issues but that his concerns appear to have been ignored. The Tenant testified that these issues caused inconvenience and suffering.

In support of his testimony, the Tenant refereed to email correspondence sent to and from representatives of the Landlord. These emails describe noise complaints related to construction of the dog park made from April 24 to July 14, 2021, a period of about three months. In an email dated September 16, 2021, the Tenant complained of issues related to the use of the dog park: “bombarded with significant rattling/banging/bumping disturbances from the new dog park above my apartment all day long”.

On behalf of the Landlord, AO testified that the lease signed by the Tenant refers to an Amenity Rooftop, which is a common space available for tenants. Submitted into evidence was a copy of the description of the Amenity Rooftop which sets out the hours of operation, prohibits the consumption of alcohol, and limits the number of users to sixty. AO submitted that there was no promise of quiet above. In an email submitted by the Tenant, RS states: “the dog park was well known and a planed addition to the building for quite some time. So, I am unsure as to whom would have misinformed you about this roof space being non-accessible.”

AO also referred to several notices submitted with the Landlord’s evidence. She testified the notices were sent to all tenants regarding construction by email. One notice dated March 31, 2021, referred to excavation work scheduled on April 1, 2021. Another notice dated June 15, 2021, referred to the installation of “railing work for the dog park” on June 16, 2021. Finally, AO referred to a notice dated July 22, 2021, announcing the opening of the rooftop dog park on July 26, 2021.

AO also responded to the Tenant's claims about deficiencies. She described an online system whereby tenants can advise the Landlord of concerns. The Landlord submitted copies of work orders into evidence. These indicate that the Tenant's concerns about door handles made on July 14, 2021, were addressed on August 6, 2021, and that the Tenant's concerns about a faulty air conditioner were received on September 22, 2021, were addressed on October 5, 2021.

In reply, the Tenant reiterated that he had no notice that the dog park would be built. He stated there "may have been a vague notice of some landscaping" but that does not excuse months of construction work above his unit. As far as the Tenant is concerned, he did not receive adequate notice. The Tenant asserted that he would not have rented the unit if he had known about the construction and may have stayed in the rental unit if not from the ongoing noise above.

Analysis

Based on the affirmed oral testimony and documentary evidence, and on a balance of probabilities, I find:

Section 67 of the Act empowers the director to order one party to pay compensation to the other if damage or loss results from a party not complying with the Act, Residential Tenancy Regulation, and/or a tenancy agreement.

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided for in sections 7 and 67 of the Act. An applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss because of the violation;
3. The value of the loss; and
4. That the party making the application did what was reasonable to minimize the damage or loss

In this case, the burden of proof is on the Tenant to prove the existence of the damage or 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 Tenant must then provide evidence that can verify the value of the loss or damage. Finally, it must be proven that the Tenant did what was reasonable to minimize the damage or losses that were incurred.

Section 28 of the Act confirms that tenants are entitled to quiet enjoyment including, but not limited to, rights to freedom from unreasonable disturbance.

Policy Guideline #6 describes a landlord's obligation to ensure a tenant's right to quiet enjoyment is protected. It states:

> …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.
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> 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.
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> 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.

Policy Guideline #6 describes how to determine if compensation may be due for loss of quiet enjoyment:

> 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 find it is more likely than not that the construction of the dog park above the Tenant's rental unit breached the Tenant's right to quiet enjoyment. I find it is more likely than not that the Landlord intended to construct the dog park when the tenancy began but did not adequately communicate this to the Tenant at the time the tenancy agreement was signed. The construction of the dog park continued for about three months.

However, I agree with the Landlord with respect to the Amenity Rooftop. The Tenant signed a document acknowledging proper use of the Amenity Rooftop on October 2, 2020. Therefore, I find it is more likely than not that the Tenant was aware this space may be used and that some noise from above was possible. Although the Tenant testified that he selected a top floor unit to avoid noise from above, I find the Tenant was not entitled to absolute silence.

With respect to the Tenant's concerns about air conditioning, windows, and the elevator, I find the Landlord took reasonable steps to resolve these issues in a timely manner and are not compensable.

Considering the above, I find the Landlord breached the Tenant's right to quiet enjoyment. Considering the seriousness of the situation and the degree to which the Tenant was deprived of the right to quiet enjoyment of the premises, and the length of time over which the situation existed, I find that a fair and reasonable award for the Tenant is $500.00 for each of the roughly three months that he was disturbed by construction of the dog park, or $1,500.00. I find the Tenant is not entitled to compensation for the normal use of the Amenity Rooftop or the dog park by other occupants of the rental property during the tenancy.

Having been successful, I also find the Tenant is also entitled to recover the $100.00 filing fee paid to make the application.

Conclusion

The Tenant is granted a monetary order of $1,600.00 as compensation for loss of quiet enjoyment and in recovery of the filing fee. The monetary order must be served on the Landlord. The monetary order may be filed in and enforce as an order of the Provincial Court of British Columbia (Small Claims).

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: May 18, 2022

Residential Tenancy Branch