



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding FIRST SERVICE RESIDENTIAL BC LTD. and CHARD
DEVELOPMENT LTD. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OLC, FFT

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Tenants March 01, 2022 (the “Application”). The Tenants applied as follows:

- For an order that the Landlord comply with the Act, regulation and/or the tenancy agreement
- To recover the filing fee

Tenants L.C. and A.E. (the “Tenants”) appeared at the hearing and appeared for Tenant R.C. A.U., G.L., B.S. and D.L. (the “Agents”) appeared at the hearing for the Landlords. I explained the hearing process to the parties. I told the parties they are not allowed to record the hearing pursuant to the Rules of Procedure (the “Rules”). The parties provided affirmed testimony.

This matter involves three separate tenancies. Although the Application should not have included three separate units and tenancies, the parties all agreed to proceed with the Application as is and I allowed this because the issue raised is the same for all three tenancies.

At the start of the hearing, the Tenants said they are seeking compensation and not an order that the Landlords comply. There was a discussion about the compensation request, and the parties all agreed to proceed with this request. Further, the Landlords had received Monetary Order Worksheets and a summary of the compensation claimed; however, I had not. I ordered the Tenants to submit the Monetary Order Worksheets and a summary of the compensation claimed after the hearing and the Tenants did so.

Both parties submitted evidence prior to the hearing. I confirmed service of the hearing package and evidence and no issues arose.

The parties were given an opportunity to present relevant evidence and make relevant submissions. I have considered all relevant evidence provided. I have only referred to the evidence I find relevant in this decision.

Issues to be Decided

1. Are the Tenants entitled to compensation?
2. Are the Tenants entitled to recover the filing fee?

Background and Evidence

Three separate written tenancy agreements were submitted, and the parties agreed they are accurate.

The tenancy agreement for Tenant L.C. started November 01, 2020. Rent in the agreement is \$3,175.00 due on the first day of each month.

The tenancy agreement for Tenant A.E. started July 01, 2021. Rent in the agreement is \$3,800.00 due on the first day of each month.

The tenancy agreement for Tenant R.C. started October 15, 2020. Rent in the agreement is \$2,300.00 due on the first day of each month.

The Tenants sought 50% of their rent back for the following periods:

- March 2021 to November 2021 for Tenants L.C. and R.C.
- July 2021 to November 2021 for Tenant A.E.

The Tenants provided the following testimony and submissions. The Landlords did not inform the Tenants prior to them renting their units that there would be ongoing construction of a school and playground on the property, despite being aware of this. Tenant A.E. rented their unit online because they were in a different province at the time. The value of the tenancies was reduced due to the Tenants' loss of quiet enjoyment caused by the construction. The Tenants had to deal with daily noise, dust

and debris and suffered significant loss, damage and inconvenience as a result. Tenants L.C. and A.E. have children who are college students who could not do schoolwork at home due to the constant construction noise in the units. Tenant R.C. had a newborn baby who was continually woken up by banging, drilling and noise which caused loss of sleep and emotional distress. The Tenants and their families had to leave their units to find a quiet place to do their daily chores and business. The Tenants could not use their balconies or open their windows due to the construction noise and number of construction workers on the property. The Tenants tried to address the issues with the Landlords; however, their attempts were unsuccessful.

In the written summary, the Tenants state that they would not have rented their units if they were aware of the construction that was going to occur.

The Tenants provided the following supporting evidence:

- Videos showing construction workers close to their units as well as construction noise
- Correspondence between the parties outlining concerns about the disturbance of the construction
- Audio recordings of noise including workers talking and general construction noise

The Agents for the Landlords provided the following testimony and submissions. The Landlords had the proper permits for the construction and followed the City's bylaws in relation to the construction. The City never brought any issues to the Landlords' attention in relation to the construction. The construction occurred within the hours permitted by the City. Section 24 of the tenancy agreements states that there would be a daycare running from 7:00 a.m. to 7:00 p.m. which addresses the construction that occurred because the daycare was operating at that point by preparing their facility. The property was an active construction site when the Tenants moved into the building.

The Landlord provided the following supporting evidence:

- A noise bylaw from the City
- The tenancy agreements with a reference to section 24 which states:

24. Acknowledgement in Respect of Daycare Facility. The Tenant acknowledges that the lands containing the buildings (being Tower 1 and Tower 2) within which the rental unit is either located or in the vicinity of, as the case may be, contains a licensed daycare facility, which facility is located on the first and second floors of the Tower 1 building (the "Daycare"). The Daycare will operate during weekdays between the hours of 7a.m. and 7p.m. and on occasional weekends (which hours are subject to change at the discretion of the Daycare operator without notice) and will involve the presence of children, noise associated therewith (including, but not limited to, noise emanating from the outdoor deck located on second floor of the Daycare facility), and traffic of children and their parents in the buildings and common areas. The Tenant acknowledges that these conditions may create inconveniences and that despite these inconveniences, the obligations of the Tenant, including the payment of rent, as set forth in this Agreement will continue in effect. The Tenant agrees that any inconvenience associated with the operations of the Daycare, such as, but not limited to, those disclosed herein, to the extent that such inconvenience results from normal daycare facility activities performed in compliance with applicable laws, will not constitute an unreasonable disturbance or a breach of the tenant's right to privacy, will not be deemed to give the Tenant any right to an offset or reduction of rent, nor will it be the basis for a claim against the Landlord for constructive eviction, breach of the Tenant's right to quiet enjoyment, nuisance, or any other claim, right or remedy.

Analysis

Section 7 of the *Residential Tenancy Act* (the "Act") states:

7 (1) If a landlord...does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord...must compensate the [tenant] for damage or loss that results.

(2) A...tenant who claims compensation for damage or loss that results from the [landlord's] non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Policy Guideline 16 deals with compensation for damage or loss and states in part the following:

It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

Section 28 of the *Act* sets out a tenant's right to quiet enjoyment and states:

28 A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

- (a) reasonable privacy;
- (b) freedom from unreasonable disturbance...

RTB Policy Guideline 06 deals with the right to quiet enjoyment and states in part:

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.**

(emphasis added)

Pursuant to rule 6.6 of the Rules, it is the Tenants as Applicants who have the onus to prove the claim. The standard of proof is on a balance of probabilities meaning it is more likely than not the facts occurred as claimed.

I accept that the Landlords did not inform the Tenants prior to them renting their units that there would be ongoing construction of a school and playground on the property which could interfere with their right to quiet enjoyment. The Agents relied on section 24 of the tenancy agreements; however, I do not agree that this section informs the Tenants about construction. Section 24 of the tenancy agreements informs the Tenants about the operation of a daycare and playground, not the construction of these. Section 24 of the tenancy agreements informs the Tenants about noise associated with the daycare and playground, not with construction of these. I find noise associated with a daycare and playground to be very different from noise associated with construction.

I accept that the Tenants had to deal with daily disturbances caused by the construction which occurred from March 2021 to November 2021 for the following reasons. The Tenants provided numerous video and audio recordings of substantial construction noise. The Tenants provided correspondence in which they outline their concerns about disturbances caused by the construction. The Agents for the Landlords did not dispute the time period of the construction outlined by the Tenants. I find March 2021 to November 2021, nine months, to be a lengthy period of time to have to deal with disturbances caused by construction. I also find July 2021 to November 2021, five months, to be a lengthy period of time to have to deal with disturbances caused by construction.

I accept that the disturbances caused by the construction were significant given the numerous audio and video recordings provided which demonstrate how loud and irritating the construction noise was.

I do not find it particularly relevant that the Landlords complied with the noise bylaw of the City. The RTB does not deal with City bylaws. The RTB deals with and enforces the *Act*. Based on the highlighted statements in RTB Policy Guideline 06, I find the Landlords could comply with City noise bylaws but still breach section 28 of the *Act*. The requirements under the *Act* are not the same as the requirements under City bylaws which are separate laws enforced by separate government bodies. The issue before me is whether the Landlords breached section 28 of the *Act*, not whether the Landlords breached a City bylaw.

Further, I acknowledge the Landlords were entitled to complete the construction. However, being entitled to complete the construction does not mean the Landlords are not responsible to compensate the Tenants for any loss of quiet enjoyment caused by the construction.

I accept that the Landlords did breach section 28 of the *Act* because I am satisfied based on the testimony of the parties and supporting evidence of the Tenants that the Landlords completed construction which caused substantial interference with the Tenants' enjoyment of their rental units due to noise. As stated, I accept that the construction noise occurred frequently over a lengthy period of time. I have considered the Landlords' right to complete construction on the property; however, I continue to find a breach of section 28 of the *Act* given the significance and frequency of the disturbances as well as the period of time over which they occurred.

I accept that the Tenants experienced significant loss in relation to the construction disturbances based on the testimony of the Tenants and audio and video recordings of the disturbances. I accept that the construction noise made it difficult to enjoy the rental units and to do daily activities within the rental units. Given the issue is noise, I accept that the disturbance affected the Tenants throughout the entirety of their units.

I find the Tenants mitigated their loss by advising the Landlords of the issue because I accept the Tenants' testimony on this point. The Tenants' testimony is supported by the documentary evidence. Further, the Agents did not dispute the Tenants' testimony on this point.

I do not accept that the Tenants are entitled to 50% of their rent back for the periods noted. I find returning 50% of rent unreasonable because the Tenants were not physically stopped from using their rental units and were technically able to use their entire rental units. Further, the construction would have occurred during daytime hours and therefore the Tenants' nighttime hours would have been unaffected by the construction noise. In the circumstances, I award the Tenants $\frac{1}{4}$ of their rent for the periods noted. I find awarding the Tenants $\frac{1}{4}$ of their rent sufficiently addresses the affects of the construction on the Tenants' right to quiet enjoyment of their rental units, does not overcompensate the Tenants and accounts for the Landlords' right to complete construction on the property.

Given the Tenants have been successful in the Application, I also award them reimbursement for the filing fee pursuant to section 72(1) of the *Act*. The Tenants were only required to pay one filing fee and therefore I award each of the Tenants $\frac{1}{3}$ of the \$100.00 being \$33.33 each.

I have arrived at the amounts awarded by dividing the amounts sought by two and adding \$33.33 to each. The Tenants are awarded the following pursuant to section 67 of the *Act*:

- Tenant L.C.: \$6,733.33
- Tenant A.E.: \$4,883.33
- Tenant R.C.: \$5,334.83

Conclusion

The Application is granted. The Tenants are awarded the following:

- Tenant L.C.: \$6,733.33
- Tenant A.E.: \$4,883.33
- Tenant R.C.: \$5,334.83

The Tenants are each issued a Monetary Order for the above amounts. These Orders must be served on the Landlords. If the Landlords fail to comply with these Orders, they may be filed in the Small Claims division of the Provincial Court and enforced as orders 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 *Act*.

Dated: July 11, 2022

Residential Tenancy Branch