



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Ocean Park Enterprises Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OLC, RP, FFT, MNDCT

Introduction

This hearing dealt with an Application for Dispute Resolution (the Application) and an Amendment to the Application for Dispute Resolution (the Amendment) that were filed by the Tenants under the Residential Tenancy Act (the Act), seeking:

- An order for the Landlord to comply with the Act, regulation or tenancy agreement;
- Repairs to the unit, site or property;
- Compensation for monetary loss or other money owed; and
- Recovery of the filing fee.

The hearing was convened by telephone conference call and was attended by the Tenant and two agents for the Landlord, all of whom provided affirmed testimony. The Agents acknowledged receipt of the Application, Amendment and the Notice of Hearing and the parties acknowledged receipt of each other's documentary evidence. Neither party raised concerns regarding service, timelines, or my acceptance of the Application, Amendment, or documentary evidence for consideration. As a result, I accepted the documentary evidence before me from both parties for consideration and the hearing proceeded as scheduled. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

Although I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Rules of Procedure, I refer only to the relevant and determinative facts, evidence and issues in this decision.

At the request of the parties, copies of the decision and any orders issued in their favor will be emailed to them at the email addresses provided in the Application.

Preliminary Matters

At the outset of the hearing, the parties agreed that repairs had been sufficiently completed. As a result, the Tenant withdrew the request for repairs and an order for the Landlord to comply with the Act, regulations, or tenancy agreement. The hearing therefore proceeded only on the Tenants' Application seeking compensation for monetary loss or other money owed and recovery of the filing fee.

Issue(s) to be Decided

Are the Tenants entitled to compensation for monetary loss or other money owed?

Are the Tenants entitled to recovery of the filing fee?

Background and Evidence

The tenancy agreement in the documentary evidence before me, signed on June 18, 2020, states that the one year fixed term of the tenancy agreement commenced on July 1, 2016, and ended on June 30, 2017, after which time the tenancy continued on a month to month basis. The tenancy agreement states that rent in the amount of \$1,135.00 is due on the first day of each month, and that that a security deposit in the amount of \$618.00 was to be paid. During the hearing the parties confirmed that these are the correct terms for the tenancy agreement, that the tenancy is currently month to month, that current rent is \$1,261.00, which includes \$20.00 for parking, and that the above noted security deposit was paid, which is still held in trust by the Landlord.

Although the parties were in agreement that woodpecker activity had been occurring at the building in which the rental unit was located since early 2020, they disagreed about whether or not the Landlord had acted diligently in addressing the issue, whether the Tenants had been disturbed or disturbed to the extent that they are claiming by the woodpeckers, whether the Tenants mitigated their loss by attempting to address the issue or dissuade the woodpeckers from pecking, and the amount of compensation the Tenant's should be entitled to, if any, for loss of quiet enjoyment of the rental unit.

The Tenant stated that since January of 2020, woodpeckers have been pecking at a chimney, vent, and window screen attached to the rental unit or located in close proximity to it, causing significant disturbance to their quiet enjoyment of the rental unit.

The Tenant stated that the pecking begins between 5:30-6:30 A.M. and continues for up to 4 hours, then resumes intermittently in the evening up to 7:00 P.M. The Tenant described the noise as “persistent jackhammering” and exceptionally disruptive to their lives and their use and enjoyment of the rental unit, given the areas in which the disturbances occurred (near the living room and bedroom), the hours of the disturbances, their frequency and their length.

The Tenant stated that although they sent their Landlords a written request to have the issue dealt with at the end of February 2020, and subsequent text messages and phone calls in April and May regarding the issue and lack of resolution, spikes were only installed in the chimney area in March 2020, and repairs to the vent, fascia, and window screen were not completed and sufficient deterrent mechanisms to prevent the ongoing issue were not installed until approximately two weeks prior to the hearing. The Tenant stated that although they attempted to dissuade and redirect the woodpecker activity themselves, by hanging deterrents such as reflective strips and placing suet on the balcony, nothing worked.

The Tenant stated that the persistent jackhammering and the flapping of wings inside the vent was damaging to their health, and the health of the other Tenant, resulting in the prescription of anxiety and sleep medication. Overall the Tenant argued that the Landlord had failed to repair and maintain the property as required by section 32 of the Act, and had failed to act diligently in addressing their concerns, resulting in a breach of their right to quiet enjoyment of the rental unit prescribed in section 28(b) of the Act. The Tenant also argued that the Landlord had breached section 28(a) of the Act by erecting scaffolding directly outside their bedroom window and having workers on that scaffolding without first notifying them.

As a result of the above, the Tenants sought \$5,000.00 for breach of their right to quiet enjoyment of the rental unit, plus recovery of the \$100.00 filing fee. When asked how they arrived at this amount of monetary compensation, the Tenant stated that it is exceptionally hard to quantify a loss of quiet enjoyment over an 8 month period which has also impacted your health and that this amount represents a portion of the rent paid for each month. The Tenant also stated that they would have claimed a higher amount but incorrectly thought that the monetary jurisdiction of the Residential Tenancy Branch was \$5,000.00.

In support of their position the Tenants submitted photographs, copies of text message and email correspondence between themselves and agents for the Landlord, a Dr.'s note, copies of prescriptions, articles regarding woodpecker behavior, deterrence, and

the level of disturbance caused by them, copies of the relevant sections of the Act, and a monetary order worksheet.

The Agents for the Landlord denied failing to act diligently and stated that after the first complaint was received at the end of February 2020, bird spikes were installed on the chimney a few days later. The Agents stated that after these spikes were installed, they received several more complaints from the Tenants in March 2020, and as a result, they consulted a pest control company. As a result of the pest control consultation, the Agents stated that they learned that woodpeckers are a protected species and that deterrence was the only option. The Agents stated that they therefore had additional bird spikes installed on March 18th and 19th, which they believed had resolved the issue.

The Agents denied receiving any complaints from the Tenants in April and stated that the next time they heard from the Tenants regarding the woodpeckers was July 23, 2020. As a result, they argued that the Tenants had not likely experienced any disturbance from the woodpeckers between April 1, 2020 – July 22, 2020, as no complaints had been received. Further to this, they called into question the validity of the Tenant's claims regarding the level of disturbance suffered as they live in the neighbouring rental unit themselves and have not been disturbed and argued that the Tenants could have made attempts to shoo the birds away while they were pecking, therefore reducing the level of disturbance suffered. They also stated that they have not received complaints from any other occupants of the building and have never had a Tenant complaint that could not be resolved.

The Agents stated that after the July 23, 2020, complaint was received, they made arrangements to complete repairs and install additional bird spikes in other areas, but delayed this installation to coincide with another project already scheduled for August 2020, as both projects would involve scaffolding. The Agents stated that the construction of the scaffolding was unintentionally delayed due to the pandemic and a shortage of staff and the additional bird spikes were not installed until September 14, 2020. The Agents stated that an electronic bird repeller was also ordered on September 3, 2020, which was installed September 18, 2020, and that to their knowledge, no further woodpeckers have been seen.

Although the Agents acknowledged that they failed to notify the Tenants that workers would be on the scaffolding directly outside of their window, they stated that no notice was given as this was a sudden decision to have work in that location done and unfortunately the ability for workers to see into the Tenants' bedroom was overlooked.

Based on the above, the Agents argued that the Tenants should not be entitled to any compensation as the Landlord acted diligently in addressing complaints and repairs, that any delay in completing additional repair and repellent measures was a result of their understanding that the issue had been resolved in March and circumstances beyond their control related to the pandemic, and their position that the Tenants have overexaggerated the level of disturbances suffered. The Agents also argued that if I find that any compensation is due to the Tenants, it should only be for July to September, as the Landlord and Agents truly believed the issue was resolved in March and had acted diligently after the first complaint was received at the end of February 2020.

In support of their position the Agents submitted written statements, copies of text messages, receipts and a copy of a building floorplan.

Although the parties agreed that a pest control company was retained by the Landlord in relation to the woodpeckers, the Agents argued this was in March and the Tenant argued this was in April. As a result, the Tenant argued that it is not correct to say that the Landlord believed that the issue was resolved in March.

Analysis

Rule 6.6 of the Rules of procedure states that the standard of proof in a dispute resolution hearing is on a balance of probabilities and that the onus to prove their case is on the person making the claim. As a result, I find that the Tenants bear the burden of proof in relation to their monetary claims.

Section 28 of the Act states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to reasonable privacy and freedom from unreasonable disturbance. Section 32(1) of the Act states that a landlord must provide and maintain residential property in a state of decoration and repair that complies with the health, safety and housing standards required by law, and having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

Further to the above, section 7 of the Act states that if a landlord or tenant does not comply with the Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Residential Tenancy Policy Guideline (the Policy Guideline) 16, section C, states that the purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred and that it is up to the party

who is claiming compensation to provide evidence to establish that compensation is due. Policy Guideline 16 states that in determining whether compensation is due, or the amount of compensation, the arbitrator may determine whether:

- Whether there has been a breach of the Act, regulation or tenancy agreement;
- Whether loss or damage has resulted from this breach;
- Whether the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- Whether the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

Based on the documentary evidence and testimony before me from the parties, I am satisfied that the Landlord was first notified by the Tenants about the woodpecker issue at the end of February 2020, and that the issue was not fully remediated until approximately September 18, 2020, when the electronic bird repeller was installed.

Although the Agents argued that the Tenants have overexaggerated the level of disturbance suffered by them as neither they, nor other neighbouring residents experienced a disturbance from woodpeckers, I do not accept this argument. Given that the hammering of the woodpeckers was happening on the chimney and vent connected to the Tenant's rental unit, and the screen attached to the Tenant's window, I give little weight to the position of the Agents that no other Tenants were disturbed or that they themselves were not disturbed by the woodpeckers, even though they live in the next rental unit. Further to this, the Tenants submitted several articles detailing the extreme level of disturbance that can be caused by woodpeckers, as well as photographs showing woodpeckers in the areas described, and at the hearing the Tenant testified that they were disturbed daily, often for several hours at a time, and in the early hours of the morning as well as in the evening.

Based on the above, I accept as fact that the Tenants were routinely and significantly disturbed by woodpecker activity. Having made this finding, I will now turn my mind to whether or not this disturbance constitutes a breach to section 28 of the Act and whether the Landlords breached section 32 of the Act by failing to have repairs completed in a timely manner.

Both parties agreed that shortly after the initial complaint was received by the Agents regarding woodpeckers, bird spikes were installed on the Tenant's chimney and that additional bird spikes were installed at the end of March. Although the parties disputed whether the pest control company was retained in March or April, they agreed that one was retained by the Landlord.

Based on the above, I am satisfied that the Landlord and/or their agents initially dealt with the Tenants' complains seriously and expediently. While I appreciate that the Tenants would have liked swifter and more successful resolution at the beginning, I find that the Landlord cannot reasonably have been expected to resolve such a pest issue more expediently at the outset, given that deterrence was the only available option and the fact that the deterrence of pests can be a difficult issue to control. I also find that the measures used to repel the woodpeckers needed to be given time to work after their installation in March. As a result, I am not satisfied that there was any breach of either section 32 or 28 at either the end of February 2020 or in March of 2020, and I therefore dismiss the Tenants' claim for any compensation for loss of quiet enjoyment during this period without leave to reapply.

Although the Tenants argued that they contacted the Agents in April regarding the ongoing woodpecker issue, the Agents denied receiving any such complaints and argued that they thought the issue had been resolved until they received a subsequent complaint on July 23, 2020. As the Tenants did not submit any documentary evidence to corroborate their testimony that the Landlord or the Agents were notified of the ongoing issue in April, or anytime between April and July, and the Agents denied receiving any such communication, I find that I am not satisfied that the Tenants did in fact notify the Landlords that the woodpecker issue was a continuing concern in April, or in the subsequent months May and June. As a result, I find that the Landlord was next contacted by the Tenants regarding the woodpecker issue on July 23, 2020.

As I am not satisfied that the Tenants contacted the Landlord or their agents to advise them of ongoing noise concerns between April 1, 2020 – July 23, 2020, I find that the Landlord cannot reasonably be held responsible for any loss of quiet enjoyment suffered by the Tenants during this period as a result of woodpecker activity, as they were not notified that the woodpecker disturbances continued after the Landlord took action in March. As a result, I dismiss the Tenants' claim for compensation for loss of quiet enjoyment between April 1, 2020 – July 22, 2020, without leave to reapply.

As the parties were all in agreement that the Tenants raised concerns regarding ongoing woodpecker noise again on July 23, 2020, and that this issue was not resolved until after September 18, 2020, when the last deterrence devices were installed, I will now turn my mind to the Tenants' claim for loss of quiet enjoyment during this time period. While I appreciate the Agents' desire to schedule further repairs and the installation of further deterrence measures until later in August 2020, when another project requiring scaffolding at the building was already scheduled to take place, I do

not find this an acceptable reason for delaying action. The Tenants were experiencing an ongoing pest issue which was significantly impacting their right to quiet enjoyment and I therefore do not find that it was either reasonable or acceptable for the Landlord to have delayed dealing further with the issue, which was already known to them, because it was either cheaper or more convenient to do so, or both. This is further compounded by the fact that the other project was delayed, resulting in a delay to the installation of the remediation measures for the Tenants.

Policy Guideline 1 states that landlords are generally responsible for pest control and Policy Guideline 6, section B states that a landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected and defines a breach of the entitlement to quiet enjoyment as substantial interference with the ordinary and lawful enjoyment of the premises, including situations where the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these. Although Policy Guideline 6 states that temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment, I have already found above that the level of disturbance suffered by the Tenants as a result of woodpecker noise was significant and that the frequency, duration, and the hours at which the disturbances occurred rendered them unreasonable disturbances.

I therefore find that it was incumbent upon the Landlord and their agents to deal with the ongoing pest control issue expediently when they became aware on July 23, 2020, that the previous measures had not been successful in deterring the woodpecker activity. Based on the above, I am satisfied that the Landlord therefore breached section 32 of the Act when they failed to act expediently to address the Tenants' complaint of ongoing woodpecker disturbance on July 23, 2020, and that the Tenant's suffered a significant loss of quiet enjoyment between July 23, 2020 and September 18, 2020, as a result. I am also satisfied that the Tenants suffered a loss of privacy when the Landlord or their agents scheduled workers to work on scaffolding directly outside the Tenants' bedroom window without first notifying them.

Although the Agents questioned whether the Tenants had acted reasonably to mitigate the loss suffered by woodpecker noise, I am satisfied based on the Tenant's affirmed testimony that they hung deterrent devices and placed suet on the balcony, that they did. In their Application the Tenant's sought \$5,000.00 for the 8 month period from February 2020 – September 2020. As I have dismissed the Tenant's claim for compensation for loss of quiet enjoyment for the period before July 23, 2020, I do not find it appropriate to award the Tenants the full amount claimed. Instead, I find 50% of the rent paid per day between July 23, 2020, and September 18, 2020, more

appropriate, as the woodpecker noise was restricted primarily to several hours in the early morning and intermittent times throughout the evening but also caused the Tenants other types of discomfort such as anxiety and sleep disturbance. As a result, I award the Tenants \$182.97 for July, \$1,261.00 for August and \$378.18 for September, for a total of \$1,822.15 for loss of quiet enjoyment from July 23, 2020 – September 18, 2020. I also award the Tenants \$100.00 for the Landlord's failure to properly notify them of workers on scaffolding directly outside of their bedroom window, which I find to be a breach of their right to reasonable privacy under section 28(a) of the Act.

As the Tenants were at least partially successful in their Application, I also award them recovery of the \$100.00 filing fee pursuant to section 72(1) of the Act.

Pursuant to sections 7 and 67 of the Act, I therefore grant the Tenants a Monetary Order in the amount of \$2,022.15 and I order the Landlord to pay this amount to the Tenants.

Conclusion

Pursuant to section 67 of the Act, I grant the Tenants a Monetary Order in the amount of **\$2,022.15**. The Tenants are provided with this Order in the above terms and the Landlord must be served with this Order as soon as possible. Should the Tenant 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.

In lieu of serving and enforcing the Monetary Order, the Tenants are also authorized to deduct the amount owed from rent pursuant to section 72(2)(a) of the Act as follows: one lump sum deduction for a full month rent, and one lump sum deduction the following month for any remaining balance owed.

I believe that this decision has been rendered in compliance with the timelines set forth in section 77(1)(d) of the Act and section 25 of the Interpretation Act, as the 30th day after the conclusion of the proceeding was Saturday November 7, 2020, a date the office is closed. In the event that my calculation is incorrect, I note that section 77(2) of the Act states that the director does not lose authority in a dispute resolution proceeding, nor is the validity of a decision affected, if a decision is given after the 30 day period in subsection (1)(d).

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: November 9, 2020

Residential Tenancy Branch