# Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

## DECISION

Dispute Codes:

MNDC and FF

Introduction

This hearing was convened in response to the Tenants' Application for Dispute Resolution, in which the Tenants applied for a monetary Order for money owed or compensation for damage or loss and to recover the fee for filing this Application for Dispute Resolution.

The female Tenant stated that copies of the Application for Dispute Resolution and Notice of Hearing were sent to the Landlord via registered mail at the service address noted on the Application, on June 25, 2010 and that the package was returned to them with Canada Post markings that indicate the package was refused by the recipient. The returned envelope and contents were submitted in evidence, and this evidence corroborates the Tenant's testimony. In the absence of evidence to the contrary, I find that these documents have been served in accordance with section 89 of the *Residential Tenancy Act (Act),* however the Landlord did not appear at the hearing. The hearing was conducted in the absence of the Landlord.

The female Tenant stated that a package of evidence was sent to the Landlord via registered mail at the service address noted on the Application, on October 14, 2010. I find that this evidence was properly served to the Landlord and it was considered when making a determination in this matter.

Issue(s) to be Decided

The issues to be decided are whether the Tenants are entitled to compensation for the loss of the quiet enjoyment of their rental unit; a reduction in rent; compensation for pain and suffering; and to recover the cost of filing this Application for Dispute Resolution.

Background and Evidence

The Tenants submitted a copy of a tenancy agreement and a three page addendum that indicates this was a 14 month fixed term tenancy that began on May 09, 2009 and was scheduled to end on June 30, 2009. The male Tenant stated that the tenancy agreement should have declared the end date of the tenancy to be June 30, 2010 and that they moved into the rental unit prior to the scheduled start of the fixed term. The

tenancy agreement indicates that the Tenants were required to pay monthly rent of $2,700.00. The Tenants advise that the tenancy agreement relates to the upper portion of this residential complex and that the basement was vacant when they moved into the rental unit. The male Tenant stated that the tenancy ended, by mutual consent, on April 30, 2010.

The Tenants are seeking compensation, in the amount of $4,800.00, for the loss of quiet enjoyment of their rental unit as a result of construction in the lower portion of the residential complex for a period of approximately five months; $5,000.00 for pain and suffering arising from the construction; a rent reduction of $4,900.00 for disruptions caused by the tenant living in the lower unit; and $10,000.00 for pain and suffering arising from the tenant living in the lower unit.

The Tenants contend that the quiet enjoyment of their rental unit that was impacted by the Landlord renovating the lower portion of the residential complex. In support of the claim for compensation the Tenants contend that the Landlord advised them that he was contemplating making a suite in the lower portion of the house but he advised them it would not happen for a year.

The Tenants submitted a copy of an email from the Landlord, dated March 08, 2009, in which the Landlord informed the Tenants that it would take about a year “if I duplex”. The Tenants submitted a copy of an email from the Landlord, dated March 16, 2009, in which the Landlord informed the Tenants that he intends to proceed with the duplex application ; that it would take “up to a year” to get the duplex change; and that he would then rent out the lower portion of the residential complex. The Tenants submitted a copy of an email from the Landlord, dated March 17, 2009, in which the Landlord informed the Tenants of the nature of the repairs needed to complete the lower portion of the residential complex; that the duplexing would likely be approved by City Counsel; that he wants the project finished by next year; and that he is not certain how long it will take.

The addendum to the tenancy agreement indicates that the Landlord is in the process of applying to duplex the upstairs from the downstairs, with the intention of renting out the lower portion of the residential complex. The addendum outlines the nature of the intended renovations and that measures will be taken to ensure the work site is safe for children. The addendum also provides the Tenants with sole use of the back yard, subject only to fire exits and garbage disposal.

The Tenants contend that the use of the back yard was limited between the end of June of 2009 and August 07, 2009 due to the fact that siding was piled in the yard. They submitted a photograph of the siding, which is neatly stacked and covered with a tarp.

The Tenants contend that the use of the back yard was limited between July 27, 2009 and August 07, 2009 due to the fact that siding was piled in the yard, some of which had nails protruding. They submitted photographs of the siding, which is neatly stacked against a fence.

The Tenants contend that the use of the back yard was limited between July 27, 2009 and August 25, 2009 due to the fact that construction materials were left in the yard. They submitted photographs of the materials left in the yard, which include tiling materials, hammers, a tape measure, and construction debris.

The Tenants contend that the use of the back yard was limited between July 27, 2009 and August 07, 2009 due to the fact that a gate had been removed, which limited their ability to leave their children unattended in the yard.

The Tenants contend that the noise from the construction, which included installing siding on the exterior of the house, dry walling, tiling, installing cupboards, and related construction disrupted their quiet enjoyment. The Tenants contend that they were disturbed by construction noise between the end of June of 2009 and August 25, 2009. The Tenants contend that the construction occurred primarily during daytime hours, although on July 27, 2009 it lasted past 8:00 p.m.

The Tenants contend that while the siding was being attached to the exterior walls, between July 27, 2009 and August 25, 2009, they had to remove personal items from their walls and they had to clean more frequently due to dust and debris in the rental unit. The Tenants submitted a photograph that shows a small amount of dust and debris, which they contend was a result of attaching exterior siding.

The Tenants contend that scaffolding that was erected and remained in the yard from July 27, 2009 and August 25, 2009 violated their right to quiet enjoyment because it allowed contractors to see inside their home.

The Tenants contend that their security was compromised because keys used by various contractors, which provided access to the rental unit, were not properly safeguarded. They contend that the keys were often left in an insecure manner and that the lower portion of the complex was found unlocked on six occasions. There is no evidence that their rental unit was broken into as a result of this security breach.

The Tenants contend that there was no electricity in the rental unit on August 18, 2009; that they vacated the home between 8 a.m. and 6 p.m. on that date as a result of the lack of electricity and that one room was being painted in the rental unit; and that when they returned home the house had not been properly cleaned. They contend that one of their children choked on a piece of electrical wire casing and that another of her children stepped on a screw. They contend that they were unable to use the painted room for a period of five days due to the smell of paint.

The Tenants contend that the inconveniences of the construction were more difficult for them because the female Tenant was pregnant. The Tenants contend that they elected to vacate the rental unit on August 25, 2009 in an attempt to avoid the disruption of construction and they did not return to the rental unit until October 18, 2009. The Tenants went to Barbados which is the birthplace of their other children, and where they

could receive support from family during the birth of their child. The Tenants contend that neighbors advised them that several contractors were working at the residential complex during this period; that contractors entered their rental unit on several occasions; and that the home was periodically left insecure.

The Tenants contend that they returned to the rental unit on October 18, 2009 to find five base board heaters were not working; that the heaters did not work for approximately 36 hours; that they had intermittent power on October 18, 2009 and October 19, 2009, and that they had to take a day off work to supervise electrical repairs in their rental unit.

The Tenants contend that the Landlord denied them the opportunity to participate in the selection of the tenant for the lower rental unit and that the person he selected was incompatible with them because she smoked, she had pets, and she worked evenings. The addendum to the tenancy agreement indicates that the landlord "will consult with the upstairs tenants before renting out the basement and introduce the tenants before signing any lease for the basement". The Tenants contend that the Landlord rented the lower unit while they were out of the country between August 25, 2009 and October 18, 2009.

The Tenants contend that the occupant of the lower suite smoked on the residential property, although they do not know whether they occupant smoked in her rental unit. They contend that the smoke entered their rental unit; that they suffered from the effects of the second hand smoke; and that the Landlord did not take appropriate action in response to their concerns about the smoking.

The Tenants submitted numerous emails that they exchanged with the Landlord regarding the issue of smoking. It is apparent from these emails that the Landlord has discussed the smoking concerns with the occupant of the lower rental unit; he has asked the occupant not to smoke inside the house; he has asked the occupant to smoke only in the front patio area; that he welcomes suggestions from the Tenants on how to reduce the impact smoking outside would have on them; he offered to build a covered smoking area that is ten meters from the Tenants' door in an attempt to encourage the occupant to smoke away from the house; that he has never smelled smoke inside the lower rental unit; and that he has not smelled smoke inside the Tenant's rental unit on the few occasions he visited.

The Tenants contend that the occupant of the lower suite disturbed them on one occasion by having a noisy party on December 03, 2010, which ended when the police attended. The Tenants submitted an email from the Landlord, dated December 06, 2009, in which the Landlord advises that the occupant of the lower suite disputes the allegations that she made excessive noise and that he is unable to corroborate the Tenants' version of events because they would not sign a waiver that would allow him to access to police report of the incident.

The Tenants submitted a variety of emails that indicate that the Tenants and the occupant of the lower rental unit had all raised noise concerns with the Landlord and that that the Landlord had brought the concerns to the attention of the other party.

The Tenants contend that the Landlord behaved in a threatening manner towards them, which they believe is evidence by the tone of his correspondence and by the fact that he wrote to them on letterhead from his law office.

Analysis

Based on the evidence provided by the Tenants and in the absence of evidence to the contrary, I find that the Landlord and the Tenants entered into a fixed term tenancy, for which the Tenants were required to pay monthly rent of $2,700.00.

In emails exchanged between the parties prior to the beginning of this tenancy the Landlord clearly advises the Tenants that he intends to make renovations to the rental unit. In the emails the Landlord speculated about the timelines for the permits and renovations but he does clearly advise the Tenants that he wants to “finish it by next year”. On the basis of the emails exchanged between the parties and the reference in the addendum to the tenancy agreement which refers to the Landlord’s intent to duplex the residential complex, I find that the Tenants were given reasonable notice that there could be renovations in the residential complex during their tenancy.

On the basis of the photograph submitted in evidence, I find that the siding piled in the rear yard for a period of approximately six weeks was a minor inconvenience. In my view the siding was neatly piled, it was a relatively small pile, it was neatly covered with a tarp, and it did not constitute a significant safety hazard.

On the basis of the photographs submitted in evidence, I find that the siding that was piled beside the fence and the tiling materials that were left in the yard for approximately eleven days were a minor inconvenience. In my view the siding was neatly piled and although it does have nails protruding, the nails are facing downward and do not constitute a significant safety hazard. In my view the tiling materials, hammers, and construction debris do not present a significant hazard. I do accept that having a yard without a gate for a period of approximately eleven days did reduce the value of the rear yard, due to the fact that the children could not be left unattended for any period of time.

In the absence of evidence to the contrary, I accept that living in a residential complex where construction is occurring one floor below and where siding is attached to the exterior of the house can be noisy and can disrupt the quiet enjoyment of a rental unit, although I note that repairs such as tiling, dry walling, and making cabinets are not typically excessively loud.

In the absence of evidence to the contrary, I accept that the Tenants had to clean more frequently during the construction period, as a result of this construction. On the basis

of the photographs submitted in evidence, I find that the amount of cleaning was not extensive.

In the absence of evidence to establish that contractors were intentionally and maliciously looking into the rental unit during construction, I find that the presence of scaffolding is an extremely minor invasion of the Tenants' privacy.

In the absence of evidence to the contrary, I accept that the Tenants' security was breached when contractors left keys to the rental unit in insecure places. Although the Tenants found this to be particularly troubling, it is not something that I find to be a significant breach of the Tenant's right to quiet enjoyment, particularly because it did not result in anyone entering their home for a malicious purpose.

In the absence of evidence to the contrary, I find that the Tenants acted reasonably when they vacated the rental unit during the day on August 18, 2010, as it would be highly inconvenient to stay in the rental unit while a portion of it was being painted and while there was no electricity. In the absence of evidence to the contrary I accept that the Tenants had to clean after the contractors left on August 18, 2010 and that debris left behind presented a safety hazard to the Tenants' children, although there is no evidence to establish that the children suffered any significant harm. While I accept that a newly painted room has some unpleasant odours, I find that a room typically can be used within two days of painting. I therefore find it unreasonable for the Tenants to refrain from using the painted room for a period of five days.

Every tenancy agreement contains an implied covenant of quiet enjoyment. Historically a tenant had to show that there had been a substantial interference with the ordinary and lawful enjoyment of the premises by the landlord's actions that rendered the premises unfit for occupancy for the purposes for which they were leased in order to prove the covenant of quiet enjoyment had been breached. Temporary discomfort or inconvenience generally does not constitute a basis for a breach of the covenant of quiet enjoyment.

It is always necessary to balance a tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the residential complex. In these circumstances, where the Landlord advised the Tenants that renovations may occur during the fixed term of their tenancy, I find that the Tenants should have anticipated some disruptions related to construction.

A tenant may be entitled to reimbursement for loss of quiet enjoyment of the rental property even if the landlord has made every effort to minimize disruption to the tenant in making repairs or completing renovations. Regardless of the advance notice the Tenants were given, I find that the value of their tenancy was impacted as a result of the renovations to the residential complex, although not significantly.

As a result of construction noise, a minor amount of cleaning, and not having complete and private access to a fenced rear yard, I find that the value of this tenancy was

reduced by 10% during July and August of 2009. Although it is always difficult to quantify loss of quiet enjoyment, I base this award on my understanding of the inconvenience that renovations can have for Tenants. Although the Tenants contend that the renovations significantly impacted the quiet enjoyment of their rental unit I do not find that the photographs submitted in evidence support their perceptions. On this basis, I find that the Tenants are entitled to compensation, in the amount of $270.00, for the month of July of 2009 and $270.00 for the month of August of 2009.

As I have not determined that the renovations rendered this rental unit uninhabitable for any significant period during this tenancy, I find that the Tenants decision to vacate the rental unit between August 25, 2009 and October 18, 2009 was not warranted. Although I accept that the Tenants elected to vacate the rental unit during this period I am not convinced that the decision to vacate was related to the construction in the residential complex. As the Tenants did not occupy the rental unit during this period, their quiet enjoyment of the rental unit was not impacted by any construction that occurred during this period. On this basis, I decline to award compensation for this period.

I do find that the quiet enjoyment of the rental unit was significantly disturbed on August 18, 2009, as a result of painting and power outages; and on October 18, 2009 and October 19, 2009 as a result of problems with the heaters and power in the unit. For each these specific days I find that the Tenant is entitled to compensation of $135.00, which is 50% of the per diem rental rate of $90.00 for each day.

I do not find that the photographs submitted in evidence support the Tenants' perception that they should be entitled to pain and suffering. I find that no occupant of this rental unit suffered a significant physical injury and that an average, reasonable person would not have suffered significant emotional distress from these renovations. On this basis, I dismiss the Tenants' claim for compensation for pain and suffering arising from renovations to the residential complex.

The evidence shows that the Landlord declared, in writing, that he would "consult" with the Tenants and introduce them to prospective tenants before leasing the lower rental unit. While this term of the tenancy agreement was relatively innocuous when the parties entered into this agreement, the Tenants' decision to leave the rental unit for a period of seven weeks created a significant hardship for the Landlord. Has the Landlord waited until the Tenants returned to the rental unit he would have experienced a loss of revenue of at least one month. I find this to be grossly unfair to the Landlord and, in these circumstances, is an unconscionable term of the tenancy agreement and, therefore, unenforceable.

Even if I were to find that the Landlord was obligated to wait until the Tenants returned to Canada before he leased the lower unit, I find that this term of the tenancy agreement was largely ineffective. Although the Landlord agreed to introduce any prospective tenants and to consult with the Tenants, he did not provide them with veto power in the selection process. Regardless of this term in the tenancy agreement the Landlord

retained the right to rent the unit to anyone, even if the Tenants did not approve of that individual.

There is no evidence to show that any occupant of the residential complex was restricted from smoking on the residential property, either by the *Act* or as a term of their tenancy agreement. The Tenants submitted no evidence that would cause me to conclude that the Landlord has any other legal right to restrict smoking on the property. In reaching this conclusion I was heavily influenced by the absence of evidence to establish that the front patio area where the Tenant commonly smokes is considered common property. I can, therefore, not conclude that the Landlord had the ability to restrict smoking on this area. It is apparent from emails submitted that the Landlord informed the Tenants that he did not have the authority to stop the Tenant from smoking, although he did speak with the occupant in the lower suite in an attempt to find an amicable solution to the issue.

Residential Tenancy Branch Policy suggests that a landlord would not normally be held responsible for interference by an outside agency that is beyond his or her control, except that a tenant might be entitled to treat a tenancy as ended where a landlord was aware of circumstances that would make the premises uninhabitable for that tenant and withheld that information in establishing the tenancy. I find this suggestion to be reasonable. In my view, the Landlord did not have the legal right to stop the occupant in the lower rental unit from smoking on the residential property.

I find that the Landlord did make reasonable efforts to have the occupant in the lower rental unit smoke in an area that would not bother the Tenants, although these efforts did not appear to resolve the Tenants' concerns. As the Landlord made reasonable efforts to reduce the impact smoking outside would have on the Tenants and he did not have authority to ask the occupant of the lower suite to refrain from smoking outside, I find that the Tenants are not entitled to compensation for the loss of quiet enjoyment of the rental unit that is related to smoking on the property. On this basis, I dismiss the Tenants' claim for a rent reduction or compensation for pain and suffering arising from smoking.

I find that the Landlord has made appropriate responses to the noise complaints made between the two parties and that the Landlord's ability to resolve the noise concerns was limited, as he did not have any evidence to corroborate the alleged noise levels. I find that the Landlord made responsible, reasonable efforts to resolve these concerns but that it would have been unlikely that the Landlord could have ended either tenancy on the basis of the complaints, given that they were disputed by the party allegedly making the noise and they were not corroborated by an independent source. As the Landlord made reasonable efforts to resolve the noise concerns but he did not have the ability to remedy this problem, I find that the Tenants are not entitled to compensation for the loss of quiet enjoyment of the rental unit that is related to noise from the lower unit. On this basis, I dismiss the Tenants' claim for a rent reduction or compensation for pain and suffering arising from noise emanating from the lower rental unit.

After reviewing the abundance of correspondence that was exchanged between the two parties, I cannot agree with the Tenants' perception that the Landlord's correspondence has been threatening or inappropriate. Rather, I find that the Landlord has demonstrated a willingness to mediate the conflict between the tenants living in the residential complex; that he has clearly and concisely expressed his opinion about his legal rights and obligations; and that he has warned the Tenants of possible practical and legal consequences of the parties not being able to cohabitate in a manner which meets the needs of both parties. Given the volume of correspondence between these parties, I find that the Landlord's responses have been reasonable and respectful. I do not find that the Tenant's are entitled to any form of compensation in regards to the nature of the Landlord's communication.

Conclusion

I find that the Tenants' Application for Dispute Resolution has some merit and that they are entitled to the cost of filing an Application for Dispute Resolution for a monetary claim of less than $5,000.00, which is $50.00. I decline the award the cost of filing an Application for Dispute Resolution for a monetary claim of more than $5,000.00, which is $100.00, as I find the Tenant's application for compensation of over $5,000.00 to be highly unreasonable.

I find that the Tenant has established a monetary claim of $725.00, which is comprised of $270.00 for the loss of quiet enjoyment of the rental unit in July of 2009; $270.00 for the loss of quiet enjoyment of the rental unit in August of 2009; $135.00 for the disruptions occurring on August 18, 2009, October 18, 2009, and October 19, 2009; and $50.00 as compensation for the cost of filing this Application for Dispute Resolution, and I am issuing a monetary Order in that amount. In the event that the Landlord does not voluntarily comply with this Order, it may be filed with the Province of British Columbia Small Claims Court and enforced as an Order 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 *Residential Tenancy Act*.

Dated: November 18, 2010.

Dispute Resolution Officer