

DECISION

Dispute Codes: MNDC and FF

Introduction

This application was brought by the tenant on October 20, 2010 seeking a monetary order for \$4,392 for loss or damage under the legislation or rental agreement, comprised of loss of facility and diminishment of quiet enjoyment resulting from remediation of the rental building's balconies. The tenant withdrew a request that she be exempted from an imminent rent increase as none had been imposed at the time of the hearing.

Issues to be Decided

This matter requires a decision on whether the tenant is entitled to a monetary order for the loss of use of the balcony and diminishment of quiet enjoyment.

Background and Evidence

This tenancy began on March 1, 2003. Rent is \$732 per month and the landlord holds a security deposit of \$305 paid on March 1, 2003.

During the hearing, the tenant gave evidence that her claim was for return of six month's rent as a result of disturbance due to construction that took place from February 2010 to November 2010.

Documentary evidence submitted by the landlord's legal counsel from the landlord's building restoration consultants and the municipality demonstrated that the remediation of the nearly 50-year-old balconies was essential for the safety of residents and passersby due to failing brick work railings among others.

The tenant stated that she:

1. Works as a yoga instructor and does most of her research and training at home;
2. Has diabetes;
3. Broke her leg on March 17, 2010 and was in a cast for four months making it extremely difficult for her to get out of the rental unit for respite from the noise;
4. Was unable to open windows for fresh air much of the time, a matter to which she is particularly sensitive given her yoga practice;
5. Lost revenue because she was unable to hear the telephone on many occasions due to construction noise;
6. Was unable to receive packages on some occasions because she could not hear the buzzer;
7. Suffered sleep deprivation due to chronic anxiety resulting from the daily noise, a matter verified by her counsellor;
8. Was deprived of the use of her balcony for the two week period during which it was being remediated;
9. Had constant dust from the construction ;
10. Was deprived of some assistance as friends were reluctant to visit during the construction period;
11. Has suffered some loss of hearing due to the incessant noise during the day.
12. Had trouble adjusting her insulin and problems with blood pressure due to the stress.
13. Had difficulty sleeping.

Counsel for the landlord gave evidence that the remediation project was absolutely essential for the landlord to meet its obligation to maintain and repair the rental building under section 32 of the *Act*. He stated that, of approximately 400 residents of the building, only three or four had raised complaints about the project.

He noted that the location is somewhat noisy by nature as it is on the harbour with heavy aircraft and boat traffic and had been worsened during the material times by the project in question, work on a building across the street and municipal road work.

He stated that the prevailing wind off the harbour had generally been effective in carrying the dust away from the building. While work had gone on from February to November, he pointed out that it was conducted only from 8 a.m. to 4 p.m. Monday to Friday, and that it had taken place on four sides of the building. Therefore, the impact was considerably shortened for residents of each side.

Counsel for the landlord noted that the tenant appeared to have done nothing to minimize her loss as required of claimants under section 7 of the *Act*.

Analysis

I find no negligence on the part of the landlord that would justify return of six month's rent to the tenant.

Due to the health challenges faced by the tenant, her broken leg during material times, and perhaps her chosen profession in yoga study and teaching, she may well have been hyper sensitive to the noise and air pollution associated with the construction project. However, I find it would not be reasonable to hold the landlord accountable for accommodating those circumstances and the tenant's inability to reasonably adapt.

I further find that the tenant did little to minimize her losses. Tenants were advised in writing in advance of the magnitude of the project and certainly relocation was an option available to the tenant. In addition, the tenant might have purchased and appealed to the landlord for the cost of a replacement telephone with a louder ring, an air cleaner, a music player with high quality earphones or earplugs, arranged for alternative delivery of packages, etc.

Nevertheless, I find that the tenant is entitled to some compensation for loss of quiet enjoyment under section 28(b) of the *Act* and set the amount at \$300.

I further find that the tenant is entitled to compensation for the temporary loss of the balcony under section 27(2) of the *Act* and set the amount at \$50.

In addition, as I find that the tenant's claim is inordinately high, I find she is entitled to recover only \$25 of the \$50 filing fee for this proceeding.

Conclusion

As authorized under section 72(2)(a) of the *Act*, I hereby authorize and order that the tenant may, one time only, retain \$375 from the next rent payment due following receipt of this decision.

December 30, 2010