Dispute Resolution Services

Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes MNDC, RR, FF

Introduction

This hearing dealt with 40 joined tenants' Applications for Dispute Resolution seeking a monetary order and a rent reduction for repairs, services or facilities agreed upon but not provided.

The hearing was convened in person at 1019 Wharf St, Victoria, BC and was attended by three tenants from the residential property who are a party to this dispute and two agents and two witnesses for the landlord.

At the outset of the hearing the parties confirmed that two of the applicants (XXXXX and XXXXXX) had signed settlement agreements with the landlord regarding these issues. As the parties have settled, I amend the joined application to exclude these parties from this application.

The tenants raised an issue of privacy regarding the landlord's provision of evidence to all applicants of this dispute that included individual rent amounts of all of the individual applicants. I declined any jurisdiction on this matter but note the tenants' concerns.

In addition, at the outset, the tenants raised the issue that the landlord's evidence submitted to the Residential Tenancy Branch (RTB) was different than that provided to the tenants. In particular the details of and the signed acceptance letters of all tenants who have accepted the landlord's voluntary settlement offer provided to the RTB included details of each party and what settlement they accepted but the evidence provided to the tenants did not include those specific details.

Any consideration of that evidence in this decision included only those particulars that the tenants presented that they were aware of through other sources such as the details of the settlements reached by two of these applicants or was gleaned from the redacted information provided.

Prior to the hearing date and in his opening remarks the landlord sought to have these applications severed and dealt with on an individual basis. However, the landlord did later in the hearing acknowledge that as a lot of effort had already been made by both parties to address these issues in this joined format he would not pursue this request. As such, I have made no findings on this matter.

Issue(s) to be Decided

The issues to be decided are whether the tenants are entitled to a monetary order for compensation for the loss of quiet enjoyment in contravention of the *Residential Tenancy Act (Act)*, regulation or tenancy agreement; to an order to reduce rent for repairs, services or facilities agreed upon but not provided; and to recover the filing fee from the landlord for the cost of the Application for Dispute Resolution, pursuant to Sections 27, 28, 67, and 72 of the *Act.*

Background and Evidence

The residential property is a 43 year old reinforced concrete apartment building with 84 units over 15 floors on top of a four-level split parkade. The landlord describes the location of the property to be a quiet, out of the way destination point.

In October 2007 the landlord engaged a consulting engineer to determine how they could "restore occupant comfort and enhance the long term performance of the building envelope." Based on the engineer's report received in May of 2008 the landlord initiated a window replacement project in 2010.

From the evidence and testimony provided by the landlord and their witnesses the landlord sought out contractors with experience retrofitting large residential properties. Specifically, the landlord was looking for a contractor who could deliver on the landlord's expectations of a fast installation, sensitive to the needs of the tenants of the property and able to work directly with tenants if and when required.

The tenants assert three statements for record in their documentary evidence:

1. The residential property is their home. This is where they live, sleep, eat, rest from the world and enjoy their safety and security from harm of the elements. Some tenants have lived there for 35 years;
2. All tenants party to this joint application are in absolute agreement that the windows at the residential property needed to be replaced and were happy to see the project finally take place; and
3. The construction workers were courteous, professional and worked in conditions that were demanding on them. This dispute, in no way, involves them, or reflects on them.

Each of the tenants, in their individual applications, provided a statement that since June 21, 2010 they have experienced interference with the "right to quiet enjoyment" of their rental unit. They state the project has spanned 4 months over the summer and are seeking compensation in an amount calculated as 50% of the monthly rent for a period of 3 months each.

Each of the tenants also included a copy of a letter, signed by each of them and sent to the landlord dated August 16, 2010. The letter outlines the tenants' specific complaints and request compensation for loss of quiet enjoyment.

The tenants have also provided the following documents as evidence through their lead applicant:

- An outline of the window installation sequence including a specific example experienced by tenant applicant XXXXXX;
- Copies of correspondence from the landlord to all tenants and individual tenants including the landlord's announcement of the project; an update on the project; offers to meet with individual tenants; compensation offers (offered on two separate occasions); notices of entry;
- Copies of correspondence between tenants to set up meetings and follow up from previous meetings relating to the issues under dispute; minutes from two meetings held between the tenants' agent and the landlord's agents;
- A copy of a letter from an applicant tenant dated November 27, 2010 regarding a crack in one of her new windows and a response notice of entry from the landlord; and
- 51 photographs showing the conditions on the residential property and within individual rental units during the project.

The tenants contend that throughout the project timeline the work by its very nature created a total disruption to the quiet enjoyment of their rental units. The tenants indicate that work commenced some days as early as 7:00 a.m. and continued 5 days per week. The tenants note that on average each unit took 3 to 5 weeks to complete and that during that time workers would need to enter some units as many as 11 times.

The tenants cite that, in addition to the times where workers needed to complete work in their specific units, there were times that the noise was such that they could not conduct a phone call; it prevented their ability to have guests visit; required them to wear earplugs; leave their unit and go to the lounge or leave the building altogether.

The tenants describe the noise disruptions as continuous regardless of where in the building the workers were at any given time. The tenants assert that the noise was excruciating for several hours at a time and that although it did lessen at times it was still a constant construction noise throughout the entire concrete building. This made the lounge, at times, an unsuitable location for any respite.

The tenants also assert that there were times that the elevators were unavailable as they were being used to transport supplies, equipment and workers to the various floors. They note that there was an almost constant (during the work day) compromised security throughout the building as all entrance points remained open during the work day and workers did not have any identification.

The tenants also noted that as the project progressed there was additional contractor staff on site which led to greater disruptions such as inaccessibility of the elevators.

The landlords submitted the following additional documents into evidence:

- Several excerpts from their Building Envelope Condition Assessment Report;
- Copies of some complaints from tenants over a period of years regarding the condition of the windows;
- Copies of Site Review Reports completed by the landlord's consulting engineers for the duration of the project;
- Copies of instructions provided to tenants on the use of the new windows; a form provided to tenants to ensure all who required screens for their windows received them;
- A copy of the Occupancy/Completion Permit issued by the local authourities dated November 15, 2010;
- Copies of several completed customer surveys from tenants regarding the work completed by the installation contractor;
- An outline of how assigned parking stalls were temporarily reallocated; map and photographs;
- Copies of Material Safety Data Sheets for products used during the installation;
- Copies of letters sent to each applicant with the landlord's individual voluntary settlement offers;
- A chart of current rent amounts for each of the applicants; and
- Copies of settlement agreements reached with 29 tenants in the building including the two applicants noted above.

The landlord's consulting engineer testified that the landlord sought to upgrade and replace windows to 2011 standards and to do so in the most efficient manner possible. The landlord sought advice from the engineer on how to schedule such a massive project in a manner the provided the fastest and least disruptive installation possible.

Based on these requirements the landlord opted for a multiple stage approach that allowed the installation to be started and staged on several units at one time to shorten the overall project duration. The witness indicated that this would likely shorten the project from one that might take a year to complete to one that would be completed within 2 to 3 months.

This witness noted that in a perfect world all the work would have been completed from the exterior but that was not the case here. He also noted that this process was invasive and intensive, however as a result of the intensity the landlord was able to minimize the duration of the project.

The landlord acknowledges that the mobilization of the project began on June 7, 2010 and all was substantially completed by September 28, 2010 with final clean up

completed by the end of October 2010. Both parties acknowledge there are some lingering, individual issues that are being worked upon as they arise.

The landlord's project site manager testified that work was carried out during weekdays only (with the exception of July 1, 2010) and that work began at 7:00 a.m. Where entry to rental units was required it did not occur earlier than 7:45 a.m. and that while on some occasions they did work as late as 7:00 p.m. work was usually ended by 4:00 p.m. each day.

This witness also noted that because the building was reinforced concrete and in order to install the windows to current code they required the use of hammer drills and that this equipment is accountable for the worst noise during the project. He noted that their usage was usually restricted to 2 hours in the morning and 2 hours in the afternoon with a lull between 10:00 a.m. and 12:00 noon.

The witness went on to say that the crews took every precaution to ensure no damages were suffered by tenants to the condition of their units or possessions when crews were in the individual rental units and that if any problems were identified by tenants after a crew had been inside they were dealt with promptly. The lead tenant acknowledged that there were significant issues in his unit and that the contractor dealt with them very expeditiously.

This witness also described the four phases of each installation as preparation taking up to 2 hours; removal and new installation (two separate phases) completing 2 rental units per day; trim installation and painting. The time to complete all phases was a maximum of 6 days.

This witness spoke to the concern raised by the tenants that many of the access points to and around the building were posted as dangerous and hard hat areas and that all the workers wore hard hats and yet the tenants were not provided any protection. He noted that although these areas were posted that way tenants were never in any danger and that when workers were engaged in activity that presented some risk they used spotters to ensure no one was below the area they were working.

While the landlord acknowledges access points were left open during the work day the landlord had onsite staff in the lobby area and had conveyed an expectation on the installation contractor to monitor the area for suspicious activity. The landlord noted that there were no reports of unauthorized access or theft of working materials or tenant belongings.

The landlord asserts that the application of Section 28 of the *Act* requires a component of reasonableness and that the right to quiet enjoyment is not absolute. The landlord contends that there must be a balance between the landlord's obligations to maintain and repair rental units and residential properties and the provision of quiet enjoyment.

The landlord states they provided the tenants with 80 days notice of the project; all entries to individual rental units were in accordance with the *Act*; the use of common areas was not significantly obstructed; there was no restriction to any services; and that the noise endured lessened when the distance between where work was being completed and individual units were located increased. The landlord also asserts the tenants had a duty to mitigate any losses they may have suffered in accordance with Section 7 of the *Act*.

The landlord contends that they believe that they minimized the impact on each tenant through the approach they took to the installation and feel the applications should be dismissed as it will impact landlords' willingness to make major repairs if it means that individual tenants would need to be compensated anytime repairs or renovations are made.

The landlord notes that while they had been under no obligation they did offer compensation to all tenants in the building in recognition of disturbances during the installation. The landlord explained the compensation was determined on the basis of the level of inconvenience to each tenant and did include offers being made to the penthouse tenants because their units had been accessed as part of the project despite not receiving any new windows.

The landlord further explained the compensation was based on the number of times the rental unit was entered, the extent to which personal belongings had to be displaced and the period of time that access was required. The landlord acknowledged that they did not take into account individual tenants schedules or absences (such as vacation or work related travel) in their consideration.

The amount of compensation offered to the applicants is outlined in the following table:

Applicant	Amount	Applicant	Amount	Applicant	Amount
XXXXX	$525.00	XXXXX	$500.00	XXXXX	$250.00
XXXXX	$525.00	XXXXX	$500.00	XXXXX	$225.00
XXXXX	$325.00	XXXXX	$650.00	XXXXX	$550.00
XXXXX	$325.00	XXXXX	$525.00	XXXXX	$600.00
XXXXX	$500.00	XXXXX	$450.00	XXXXX	$300.00
XXXXX	$375.00	XXXXX	$475.00	XXXXX	$500.00
XXXXX	$625.00	XXXXX	$350.00	XXXXX	$675.00
XXXXX	$450.00	XXXXX	$775.00	XXXXX	$300.00
XXXXX	$250.00	XXXXX	Withdrawn	XXXXX	$500.00
XXXXX	$400.00	XXXXX	$275.00	XXXXX	$400.00
XXXXX	$550.00	XXXXX	$175.00	XXXXX	$500.00
XXXXX	$650.00	XXXXX	$225.00	XXXXX	$275.00
XXXXX	$200.00	XXXXX	Withdrawn	XXXXX	$525.00
XXXXX	$425.00	XXXXX		XXXXX	

Analysis

Section 32 of the *Act* requires a landlord to 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.

Neither party disputes that the windows throughout the residential property required replacement, in fact some of the tenants who are party to this dispute had previously complained to the landlord of problems with the windows. As such, I make no findings on the matter of the necessity of the work.

However, I note that as a result of the landlord making the determination to go forward with the project the installed windows had to comply with health, safety and housing standards required by law. I accept, based on the landlord's submission of the Occupancy/Completion permit issued by the local authourities that the replaced windows comply with health, safety and housing standards required by law.

Section 27 stipulates that a landlord must not terminate or restrict a service or facility if that service of facility is essential to the tenant's use of the rental unit as living accommodation or providing the service or facility is a material term of the tenancy agreement.

If the landlord terminates or restricts a service or facility, other than one that is essential or a material term of a tenancy the landlord must provide 30 days notice and reduce the rent in an amount that is equivalent to the reduction in the value of the tenancy.

Although the tenants had applied for a rent reduction based on Section 27, I find they have provided no evidence indicating that the landlord had breached this section of the *Act*.

I accept that during the project there may have been times that services or facilities may have been restricted, such as the elevators, but that those restrictions were temporary in nature and not intended by the landlord to be a permanent withdrawal or restriction of those services.

As a result, I dismiss this portion of the tenant's application.

Section 28 of the *Act* states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to reasonable privacy; freedom from unreasonable disturbance; exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with the *Act*; use of common areas for reasonable and lawful purposes, free from significant interference.

In many respects the covenant of quiet enjoyment is similar to the requirement on the landlord to make the rental units suitable for occupation which warrants that the landlord keep the premises in good repair. For example, failure of the landlord to make suitable repairs could be seen as a breach of the covenant of quiet enjoyment because the continuous breakdown of the building envelop would deteriorate occupant comfort and the long term condition of the building.

I accept the landlord's evidence and testimony that they took all reasonable steps to ensure the project would minimize the impact to tenants. I also acknowledge that the landlord understood that the work and its schedule was intensive and required intrusion into individual rental units.

Residential Tenancy Policy Guideline 6 stipulates that "it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises, however a tenant may be entitled to reimbursement for loss of use of a portion of the property even if the landlord has made every effort to minimize disruption to the tenant in making repairs or completing renovations."

While the landlord indicated that he had a building manager on site and the project manager acknowledged that part of his role was to monitor the site for suspicious activity, I accept the tenant's assertion that there was not always a building manager available and that anyone could enter the residential property and go unnoticed at any time.

From the evidence, I accept that project crew required access to the building and to individual units each day and all day long. I also note that the landlord chose to provide this access by leaving secured access points unsecured and wide open. I am not satisfied that this was the only alternative available to the landlord and/or project crew.

Contrary the landlord's assertion that quiet enjoyment is not intended to mean silence I find that when the residential property is valued somewhat based on its quiet location in an urban centre and the legislation indicates that a tenant is entitled to quiet enjoyment including "freedom from unreasonable disturbance" the right, in this case, is intended to include freedom from unreasonable noise.

While I accept that the landlord took great efforts to minimize the disturbances and noise for the tenants by engaging in a project that would normally take as much as a year to complete and compacting that time to a few months, I find it undeniable that the tenants suffered a loss of quiet enjoyment, and therefore a subsequent loss in the value of the tenancy for that period. As a result, I find the tenants are entitled to compensation for that loss.

I accept the amounts of compensation proposed by the landlord reasonably take into account the specific disturbances to tenants in the building based on the physical intrusion into their respective rental units. In addition, I accept the tenants' position that

the landlord failed to take into account any compensation for the general disturbances and loss of security experienced by the tenants for the duration of the project.

Neither party provided evidence of how each applicant was specifically impacted or how they mitigated any potential loss except for the basis of the landlord's voluntary compensation, as such it makes it difficult to assess whether some tenants were impacted more by the disturbances and lack of security.

I must, for example, consider that a tenant who worked in a job that required them to be absent from the residential property every week day between the hours of 8:00 a.m. and 5:00 p.m. would be impacted by the daily project activities less than a tenant who was for some reason not able to leave the rental unit for any significant duration during weekdays.

However the lead tenant indicated that all the applicants agreed to accept a generalized amount of compensation regardless of the degree to which they were disrupted. I note the tenants are seeking compensation equivalent to ½ month's rent for a period of 3 months (amounts ranging from $1,377.00 to $3,682.50).

Policy Guideline 6 states: "in determining the amount by which the value of the tenancy has been reduced, the arbitrator should take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use the premises, and the length of time over which the situation has existed".

As such, I make note that the project work was completed Monday to Friday normally from between 7:00 a.m. and 4:00 p.m. leaving the residential property undisturbed for all evenings, nights and weekends.

I also accept that while the building is concrete it is likely that the noise disturbances continued throughout the day, however, I accept the landlord's position that these disturbances would have lessened for each individual tenant depending upon what side and floor of the building their unit was on in relation to the work being completed.

Conclusion

For the reasons noted above, I find individual tenants are entitled to monetary compensation pursuant to Section 67 for the loss of quiet enjoyment. The total amount is comprised of the amounts offered by the landlord to each of the tenants for specific entries to each unit; plus $100.00 for the more general loss of quiet enjoyment and security; and the fee amount paid by the individual tenants for their application ($50.00 for the lead applicant and $25.00 for each joined applicant).

I grant monetary orders in the following amounts:

Applicant	Amount	Applicant	Amount	Applicant	Amount
XXXXX	$675.00	XXXXX	$625.00	XXXXX	$375.00
XXXXX	$650.00	XXXXX	$625.00	XXXXX	$350.00
XXXXX	$450.00	XXXXX	$775.00	XXXXX	$675.00
XXXXX	$450.00	XXXXX	$650.00	XXXXX	$725.00
XXXXX	$625.00	XXXXX	$575.00	XXXXX	$425.00
XXXXX	$500.00	XXXXX	$600.00	XXXXX	$625.00
XXXXX	$750.00	XXXXX	$475.00	XXXXX	$800.00
XXXXX	$575.00	XXXXX	$900.00	XXXXX	$425.00
XXXXX	$375.00	XXXXX	Withdrawn	XXXXX	$625.00
XXXXX	$525.00	XXXXX	$400.00	XXXXX	$525.00
XXXXX	$675.00	XXXXX	$300.00	XXXXX	$625.00
XXXXX	$775.00	XXXXX	$350.00	XXXXX	$400.00
XXXXX	$325.00	XXXXX	Withdrawn	XXXXX	$650.00
XXXXX	$550.00	XXXXX		XXXXX	

This order must be served on the landlord by each tenant and may be filed in the Provincial Court (Small Claims) 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: January 25, 2011.

Residential Tenancy Branch