Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Devon Properties Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes:

MNDC, RR, FF

Introduction

This hearing was scheduled in response to the tenants' Application for Dispute Resolution, in which the tenant has requested compensation for damage or loss under the Act, an order the tenant be allowed 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 this Application for Dispute Resolution.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the included evidence and testimony provided.

Preliminary Matters

The parties confirmed receipt of documents provided by the other, within the time limit required by the Rules of Procedure, with the exception of a six page submission made by the landlord. The landlord has served the tenant with a six page submission, sent by regular mail on December 1, 2017. The tenant has yet to receive that mail. Pursuant to section 90(a) of the Act, documents sent via mail on December 1, 2017 would be deemed served on the fifth day after mailing; December 6, 2017.

Section 3.15 of the Residential Tenancy Rules of Procedure requires that a respondents' evidence be served on the applicant not less than seven days before a hearing. As the mail would be deemed served four days before the December 11, 2017 hearing, the six page submission was set aside. The landlord was at liberty to make oral submissions.

By agreement the application was amended to include the current legal name for the respondent.

Issue(s) to be Decided

Is the tenant entitled to compensation for damage or loss under the Act?

Should the tenant be allowed to reduce rent for repairs, services or facilities agreed upon but not provided?

Background and Evidence

The tenancy commenced on May 1, 2007; rent is currently $1,301.83 due on the first day of each month. A security deposit in the sum of $517.50 was paid. A copy of the tenancy agreement was supplied as evidence.

The tenant resides on the eighth floor of a multi-unit building. The rental unit has two bedrooms and a balcony that is approximately 162 square feet in size.

In December 2015 the building was sold and new property management was hired. At this point the tenant began to experience a loss of quiet enjoyment and loss of use of the balcony.

The tenant has made the following claim for compensation:

	Rent Payable	Claim calculation	Total
December/15 – July/16	1,245.00	50% (622.50 X 8 months)	4,980.00
August/16 – July/17	1,255.38	50% (627.94 X 12 months)	7,532.28
August/17 – September/17	1,301.83	50% (650.92 X 2 months)	1,301.84
		TOTAL	13,814.12

The claim of rent reduction reflects 20% of rent paid from December 2015 to September 2017 for loss of the balcony and a 30% rent reduction for the same period, representing a loss of quiet enjoyment. The tenant makes a further claim of a 50% rent reduction until the renovations are completed.

The tenant suffers from health problems that result in breathing and mobility difficulty. The value of the outdoor space in the rental unit goes beyond the calculated square footage value. The tenant explained that without use of the balcony the tenant must leave the residential property and drive to another location, as construction has taken over any green space around the building.

There was no dispute that effective December 3, 2015 an extensive renovation project commenced that was expected to be completed within two years.

The tenant supplied copies of some notices issued by the landlord:

- December 3, 2016: indicating renovation work would commenced and was expected to be completed in 24 months; that noise, vibration, dust and inconvenience to access and egress could be expected;
- That effective July 25, 2016 interior work would create dust and noise between 7 a.m. and 8 p.m. on Monday to Saturday;
- That effective June 27, deck replacement on the balconies would commence, patio doors would be locked from the outside, with an expected period of two to three weeks during this phase. Tenants were advised not to open windows during this time; and
- January 31, 2017: informing tenants that testing for asbestos indicated no exposure issues in the building.

The tenant submits that since December 2015 access to the balcony has been denied. By January 2016 the tenant had to request that the windows next to the balcony be sealed, as dust was entering the home, aggravating a pre-existing health issue.

In June 2016 the tenant contacted the agent for the landlord, to express his concern about the renovations. The tenant was advised to write a letter setting out his concerns. The tenant did write a letter, but failed to retain a copy. A response was not issued by the landlord.

On December 14, 2016 the renovation work ceased as the result of an order issued by WorkSafe BC. The work did not commence again until mid-September 2017. The tenant continued to experience a loss of use of the balcony during this time. The tenant supplied photographs taken of the balcony, showing it as unusable since December 2015 as it had been partially deconstructed and did not have a railing.

The tenant pointed to a previous decision issued in relation to another unit in the building. In that decision the landlord testified that jack-hammering commenced in mid-June 2016 and ceased mid-December 2016.

Since July 15, 2016 the hallways and entrances and lobby have been scenes of construction. The demolition is at various stages and not yet completed. The tenant's access to the mailboxes has been impeded and construction personnel are often occupying the furniture in the lobby. The front door leading into the lobby is often propped open, which presents a security issue. The tenant supplied a photograph of the exterior staircase that leads to the parking lot. There are three steps which the tenant finds difficult to navigate without the use of a railing. The railing was removed in July 2016 and has yet to be replaced.

Effective December 14, 2016 the tenant was forced to travel to a downtown post office to retrieve mail as postal workers could not enter the building as a result of the

WorkSafe BC stop work order. This posed a difficulty for the tenant; he had to travel to the post office twice weekly.

The common areas outside of the building have become a storage area for construction materials, which pose a problem for the tenant, given his mobility challenges. The tenant explained that there is lumber stored in the corridors by the exits.

The tenant pointed out that the building did have resident manager but that the new owners dismissed that person. The absence of a building manager who could respond to problems has had a negative impact on the ability to communicate with the landlord regarding problems in the building.

The tenant explained that he used the balcony every day, year round; that it was "magnificent." The tenant said he hopes to turn 87 next year and that it is a lot of effort for him to leave the home in order to access fresh air and experience the outdoors. The tenant must now drive to use any green space as the property around the building is not accessible due to construction materials.

The tenant stated the most significant issue has been the noise and a loss of quiet enjoyment. The jack-hammering from 8:30 a.m. to 3:30 p.m. is like torture. While the noise is not constant there is the on-going stress of wondering when it will commence next. The tenant stated that since September 2017 he has kept a written record and of 60 work days, jack-hammering has occurred on 58 of those days. There have been at least 12 occasions during construction when the water to the building was turned off without notice; causing further stress.

The advocate stated that on one occasion a telephone call between the advocate and tenant had to be terminated as the noise from the jack-hammering was too loud to allow the conversation to continue.

The tenant provided evidence of four notices of entry given by the landlord, but the landlord did not enter. In January 2017 the landlord did write a letter of apology for the repeated notices that did not result in entry.

The tenant submits that all of the disturbances and stress caused by this lengthy construction project supports a claim for compensation. The tenant was in regular communication with the building manager who was dismissed and has communicated with the current agent for the landlord, expressing his concerns. The tenant submits that the project may continue for another two years and that section 28 of the Act would entitle the tenant to be compensated for the loss of use and loss of quiet enjoyment suffered.

The landlord stated that that the tenant was given notice of a construction project that would last 24 to 36 months. The repairs were required and completed as part of the landlords' obligations under section 32 of the Act. The landlord stated that the right of

the tenant to compensation must be balanced against the right of the landlord to maintain and repair the rental building. The tenant was warned that there would be disturbance due to noise, dust and vibration and inconvenience.

The landlord did not dispute the construction working hours set out by the tenant and confirmed that a stop-work order was issued on December 14, 2016, with work not recommencing until September 2017. During this time no exterior work, such as jack-hammering, took place. The landlord finds the claim of 50% excessive. Workers were on site cleaning and carrying out non-disruptive activities. On January 13, 2017 the stop work order was lifted and mail delivery and cleaning was able to resume in the building. No asbestos was found to be present in this building.

The landlord stated there have been many inconveniences for the tenant and that the tenant lost the use of the balcony, but that there were time line differences. The landlord submits the loss of the balcony did not commence until June 27, 2016, when notice was given asking tenants to clear their balconies. A copy of the Notice asking tenants to remove items from the balconies was supplied as evidence.

The landlord stated there is personnel at a neighbouring building owned by the landlord, who the tenants may contact for assistance; the landlord is not required to have a live-in caretaker. No security issues have been reported to the landlord and at times tenants have been known to prop doors open.

The landlord stated that the tenant has not provided any dates of water loss, but the landlord did not dispute that water has been shut off. Some inconvenience has occurred and some water loss was unplanned. The landlord had sent the tenant a letter apologizing for the notices of entry that was not necessary.

The landlord stated that they did everything they could to minimize disturbances. The landlord understands the tenant was anxious but any monetary award should be based on actual loss. The landlord objected to any order for future loss. The landlord also objects to compensation for balcony loss that is not based solely on square footage. The living space has a higher value than the balcony.

The landlord responded to the tenant that the work stopped as a result of the work order and that the landlord had to deal with Health Authority issued. The landlord then had to acquire a different construction team.

The landlord testified that the past decisions provided by the tenant should not have any weight.

The tenant responded that the date of balcony loss cannot be pinpointed but the tenant was told in advance to clear the balcony.

The tenant summarized that the loss and disturbance has not been temporary; that there was always something such as water loss, debris in the halls, mail delivery issues, doors left open and jack-hammering. The claim should be viewed holistically. The anxiety experienced by the tenant has had a real impact and is not speculative. The project has been unwieldy and even though the noise stopped for a period of time the construction was not completed and inconveniences continued.

I note that 32 minutes into the hearing the agent for the landlord had to exit the hearing due to an emergency. Legal counsel for the landlord was willing to proceed. The applicant preferred to proceed, with the caveat of having the right to reconvene to cross-examine the agent. The hearing was ended without any subsequent request for adjournment.

Analysis

Residential Tenancy Branch policy requires a landlord to ensure the rental unit meets health, safety and housing standards established by law. This policy is based on section 32 of the Act, which provides:

> ***32*** *(1) A landlord must provide and maintain residential property in a state of decoration and repair that*
>
> > *(a) complies with the health, safety and housing standards required by law, and*
> >
> > *(b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.*

I can find no evidence that the renovation project that is underway is not required. Some of the work may be cosmetic, but a landlord possesses the right to repair and maintain a rental unit. The landlord purchased the building in 2015 and has determined that the work being completed was required.

The tenant submits that the balcony is a service or facility; however, section 1 of the Act does not define a balcony as a service or facility. A landlord cannot issue notice to eliminate the use of a balcony, which I find forms an essential part of the rental unit, pursuant to section 27(1) of the Act.

Residential Tenancy Branch (RTB) policy #6 provides:

> *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.*

I find this policy is reasonable and provides a basis for compensation in this case.

In relation to the tenants' obligation to mitigate any loss, I find that the tenant did notify the landlord, in writing, of his concerns. This was not in dispute. The tenant also expressed his concerns to the past care taker and current agent. There is little the tenant could expect from the landlord, as the project, as described, was not going to take place without significant disturbance. The landlord had notified the tenant of this likelihood.

Given the uncertainty on the part of the tenant, who has the burden of proving a claim, I must rely on the Notice issued by the landlord on July 27, 2016 as the date the loss of use of the balcony commenced. There was evidence of written notice provided to the tenant, indicating the balcony would be closed effective June 27. While the year was not indicated I have accepted that this Notice was issued in 2016. Therefore, I find that the tenant has not had use of the balcony for a period of 18 months (July 2016 to December 2017, inclusive.)

The landlord provided no indication how long the tenant could reasonably expect a loss of use, other than the notice issued on June 27, 2016 which indicated the initial phase would take two to three weeks. There was no evidence before me that the landlord has purposely delayed the repair project, but the fact remains that the tenant has been barred from using the balcony for an extended period of time.

I have considered compensation from the perspective of both parties; that the balcony provides this elderly tenant with easy access to the outdoors, versus the landlords' submission that any calculation of compensation be made according to square footage and with a lower value applied to balcony space when compared to interior living space.

I find, on the balance of probabilities, that the value of the balcony space does in fact represent an intrinsic and important portion of the rental unit that goes beyond that which could be assigned to an able-bodied individual. The tenant experiences challenges with mobility and breathing and had relied on his balcony for fresh air and the comfort of being exposed to the outdoors. The tenant has gone from the use of what he described as a magnificent space to a loss of any outdoor space and the use of windows. This causes me to accept that in this instance the value of the balcony does go beyond a simple square footage calculation. As a result, given the circumstances for this tenant, I find the claim of 20% rent paid reasonable.

Therefore, pursuant to section 65(1)(f) of the Act, I find that the tenant is entitled to compensation in the sum of 20% of rent paid from July 2016 to December 2017, inclusive. Total compensation for this period of time will be **$4,052.36.**

Further, I find that the tenant will be entitled to compensation in the sum of $260.37 per month for each month or portion of month that the loss of the balcony continues beyond December 2017. The sum of compensation represents 20% of current rent payable. If the landlord issues a notice of rent increase, then at the point of any rent increase the rent abatement will be altered to represent 20% of the total rent owed.

The rent abatement for loss of the balcony shall continue until such time as the landlord issues written notice to the tenant that the balcony is fully remediated and the doors may be unlocked. If there is a dispute in relation to the completion date the landlord

may apply requesting an order the abatement cease. The tenant is warned that any rent reduction made beyond the time proper notice of completion is given could be considered as unpaid rent.

The tenant has requested a further 30% rent abatement in relation to the loss of quiet enjoyment as a result of the on-going, unreasonable disturbances caused by the remediation work.

Section 28 of the Act provides:

> ***Protection of tenant's right to quiet enjoyment***
>
> ***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;*
>
> *(c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted];*
>
> *(d) use of common areas for reasonable and lawful purposes, free from significant interference.*

From the evidence before me I find that the landlord understood that significant, on-going disturbances and disruption would occur. The landlord informed the tenant, by way of the notice issued on December 3, 2015, that this 24 month project could cause noise, vibration, dust and inconvenience to access and egress. I find that is in fact what occurred.

While the landlord must repair and maintain, the tenant also possesses a right to be free from on-going disturbances. A tenant should expect some level of inconvenience when a landlord undertakes such a remediation project; however, I find that the period of time the tenant has been expected to endure the impact of the remediation, combined with the number of inconveniences, pushes the limits of what any reasonable person could tolerate.

From the evidence before me I find that the remediation has resulted in significant disturbance, particularly during the period of time when the jack-hammering has occurred. The tenant describes stress and upset at the constant sound that comes and goes without notice. The tenant has had problems speaking on the phone due to the noise, which I find lends credence to the submission that the impact of the noise is significant. There was no dispute that the jack-hammering commenced in mid-June 2016 and ended December 2016 at the time the stop work order was issued. The jack-hammering commenced again in September 2017 and continues.

The tenant has had to tolerate noise, water losses, the loss of use of the grounds around the building and doors being left open that leave the tenant feeling less secure, lumber left by points of egress, the loss of postal service for a period of time, the

absence of fresh air in the unit, and the loss of a railing to the parking area. All of these factors provide what I find, on the balance of probabilities, represents evidence of a significant and unreasonable disturbance and loss of value of the tenancy. There is no end in sight for the tenant, which has caused further anxiety for the tenant.

Therefore, pursuant to section 65(1)(f) of the Act I find that the tenant is entitled to compensation in the sum of 30% of rent paid from June 2016 to December 2016 and September 2017 to December 2017, inclusive, representing the period of time jack-hammering has occurred, combined with all other disturbances described by the tenant. Total compensation for this period time is **$4,192.25**.

I have reduced the sum claimed for loss of quiet enjoyment during the months of December 2015 to May 2016 and January 2017 to August 2017, inclusive, to 10% of rent paid. This represents the period of time that jack-hammering was not taking place; thus reducing the disturbances significantly. Total compensation for this period of time is **$1,755.89**.

Therefore, the tenant is entitled to total compensation in the sum between December 2015 and December 2017, inclusive in the sum of **$10,000.50**.

The balance of the claim is dismissed.

The tenant may deduct this sum from rent owed until such time as the tenant is compensated in the sum ordered.

Ongoing compensation for loss of the balcony, commencing January 2018, in the sum of $260.37 is permitted, as ordered.

I decline to order compensation for any future loss of quiet enjoyment. The tenant is at liberty to submit a future application.

As the application has merit I find, pursuant to section 72 of the Act, that the tenant is entitled to recover the $100.00 filing fee from the landlord. This sum may be deducted from rent owed.

I note that section 64(2) of the Act provides:

> *(2) The director must make each decision or order on the merits of the case as disclosed by the evidence admitted and is not bound to follow other decisions under this Part.*

Previous decisions issued had no bearing on this decision, which was made on the merits of the case.

Conclusion

The tenant is entitled to rent abatement as ordered for loss of the balcony, totalling $10,000.50 to December 2017.

Monthly rent abatement in the sum of $260.37 for loss of the balcony beyond December 2017 is ordered until such time as notice of access is given as ordered. This sum will increase to an amount representing 20% of rent owed should any notice of rent increase take effect.

The balance of the claim is dismissed.

The tenant is entitled to filing fee costs.

This decision is final and binding and 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: December 13, 2017

Residential Tenancy Branch