Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, FFT

Introduction

This proceeding dealt with a tenant's application for a Monetary Order for damages or loss under the Act, regulations or tenancy agreement, as amended. The hearing was held over three dates and the Interim Decisions issued following the first two hearing dates should be read in conjunction with this Decision.

The tenants and their Advocate appeared for all hearing dates. The landlord was represented by legal counsel only. Both parties were given the opportunity to be make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

The tenants' monetary claim was reduced to $15,009 after they removed the parking fee from their calculations. The tenants' Advocate provided a revised calculation to me and the landlord's legal counsel. Since the claim was reduced there was no objection to amending the application to reflect the revised amount, I have amended the claim to reflect the revised calculation.

As noted above, this proceeding was held over several dates. I have been provided hours of testimony and oral submissions and arguments as well as a large volume of written submissions and documentary, photographic and video evidence. While I have considered all that is before me, with a view to brevity in writing this decision I have summarized the parties' respective positions and evidence.

Issue(s) to be Decided

Are the tenants entitled to the compensation claimed against the landlord, as amended, for damages or loss under the Act, regulations or tenancy agreement?

Background and Evidence

The tenancy started on December 15, 2016 and ended on February 28, 2018. The monthly rent was originally set at $1,865.00 payable on the first day of every month plus $30.00 for parking. The monthly rent was increased to $1,969.00 starting on January 1, 2018.

The rental unit is a two bedroom apartment this is approximately 1,000 sq. ft., plus a balcony, that is located in a large apartment tower owned by the landlord. It was undisputed that when the tenancy started a significant renovation of the residential property had already commenced. The landlord also owns the apartment building adjacent to the subject property and two apartment buildings nearby. The landlord had undertaken renovations of all four of these buildings before and/or during the subject tenancy.

During their tenancy the tenants paid rent totalling $27,191 and the tenants seek compensation of $15,009 for loss of quiet enjoyment and loss of use of the balcony. The tenants' claim is the sum of monthly rental abatements of between 40% and 80% during their tenancy, depending on the various activities or loss of use experienced during their tenancy. I was provided a summary of the tenants' claims prepared by the tenants' Advocate which I have inserted below:

	Rent	A	B	C	D	E		Total
		Failure to maintain cleanliness; Windows not cleaned; security concerns; unsightly grounds; hallways and commons unfinished; plumbing failures and water shut-off; unusable swimming pool and hot tub	Loss of Access to Pool	Loss of Access to Balcony	Loss of Quiet Enjoyment - interior renovations; heavy activity in the building; significant dust and debris; reduced access to elevators; increasing clutter basement lobby, etc.	Loss of Quiet Enjoyment - Jack hammering; concrete drilling; heat; lack of air.		
	$27,191							$15,009
Feb 01 2018	$1,939	15%	5%		40%		= 60%	$1,163
Jan 01 2018	$1,939	15%	5%		40%		= 60%	$1,163
Dec 01 2017	$1,865	15%	5%		20%		= 40%	$746
Nov 01 2017	$1,865	15%	5%		20%		= 40%	$746
Oct 01 2017	$1,865	15%	5%		20%		= 40%	$746
Sep 01 2017	$1,865	15%	5%	20%	10%	30%	= 80%	$1,492
Aug 01 2017	$1,865	15%	5%	20%	10%	30%	= 80%	$1,492
Jul 01 2017	$1,865	15%	5%	20%	10%	30%	= 80%	$1,492
Jun 01 2017	$1,865	15%	5%	20%	10%	30%	= 80%	$1,492
May 01 2017	$1,865	15%	5%	20%	10%		= 50%	$933
Apr 01 2017	$1,865	15%	5%	20%	10%		= 50%	$933
Mar 01 2017	$1,865	15%	5%	20%			= 40%	$746
Feb 01 2017	$1,865	15%	5%	20%			= 40%	$746
Jan 01 2017	$1,865	15%	5%	20%			= 40%	$746
Dec 01 2016	$933	15%	5%	20%			= 40%	$373

The tenants testified that when they viewed the rental unit and met with the landlord's agent it was obvious there were renovations underway at the property. According to the tenants they were told by the landlord's agent that the expected completion of the renovations would be approximately three months and then the tenants would have the benefit of a recently renovated building. The tenants stated they decided it was worth it to endure a brief period of construction activity so as to benefit from the renovated property they expected to enjoy for the years that followed. The tenants testified that when the tenants viewed the property it was relatively quiet as no jackhammering or concrete drilling was taking place. In hindsight, the tenants now know that is because a "stop work" order was in place; however, that was not disclosed to them by the landlord's agent. Based on what they observed when they viewed the property and what was told to them by the landlord's agent they agreed to enter into the tenancy agreement and the rent was set based on the market rent for a renovated building.

The tenants testified that they are retirees and their child was attending the local university. As such, they expected to spend much of their leisure time at home in the rental unit during the years remaining in their child's university education.
When the tenancy started the property's pool was not available, the tenants could not access their balcony because the railings had been removed, and the common areas were dusty, without carpet, and construction debris littered the property. However, the tenants expected this to last only a few months. That turned out to not be the case as construction activity went on for much longer and the tenants lost use of their balcony and other services or facilities for much longer than a few months.

It was undisputed that the work on the renovation project stopped in December 2016 and no further progress was made for a number of months. The tenants testified that renovation work resumed in April 2017. The landlord's legal counsel submitted it resumed in May 2017. The tenants submitted that when work resumed the common areas, including the hallways and the elevator, were busy with construction activity, very dusty and unsightly. As well, access to common areas, including the parking garage, were often left ajar and security to the building was compromised.

Then in the summer months of June 2017 through September 2017 work on the exterior of building took place in addition to the interior work. The exterior work included concrete drilling, jackhammering, and construction crews on the exterior of the building, including on or in front of their balcony and windows. The pool and hot tub also remained inaccessible. The tenants testified that they found this period of time especially horrible. The tenants could not open the balcony door more than a couple of inches and the rental unit would become exceptionally hot because the property is not air conditioned and ventilation comes from opening the windows. Also, the sound of jackhammering and concrete drilling along with loss of privacy from workers being on the exterior of the building, coupled with the high heat made staying in the rental unit unbearable. The tenants are retirees and during the day they had expected to spend much of time at home but during this time staying in the rental unit was so unbearable they would often leave to escape the heat and noise. During this period of time the tenants considered the value of the tenancy to be negligible.

The tenants testified that during the period of October 2017 through December 2017 the work on the exterior of the building had finished and they were able to access their balcony; however, there were still bare floors in the hallways and there was construction activity taking place inside the building including other rental units in the building undergoing renovations. As a result, there was noise and dust being generated by the

construction activity. The tenants submitted the pool and hot tub remained inaccessible and since the pool was to be heated they considered this to be a loss.

The tenants testified that for the period of January and February 2018 the same activity as the previous months was so going on in the building except there was more construction activity taking place on their floor, which they estimated to be 5 or 6 other units on their floor were being renovated. This resulted in a lot more dust, construction equipment being in their hallway and the elevators being used to hall drywall and other construction materials through the building.

The tenants testified that the ongoing construction activity and all of the disturbances that come with it became too much for them to continue to endure and they decided to end the tenancy at the end of February 2018.

Under cross examination by landlord's legal counsel, the tenants acknowledged they did not notify or write to management of the property to complain of the construction activity. The tenants stated that they understood initially that there was going to be construction activity for a few months but that it continued for many more months due to the stop work order they subsequently learned about. The tenants also explained that the did not see any point in complaining to the management about the on-going renovation project as the landlord would have been aware of the major renovation activities it was undertaking at the property and the tenants did not see how a complaint letter from them would result in the project being completed faster.

Under cross exemption, the tenants submitted that the security issues they raised pertained to open or unlocked doors to the common areas and parking areas; however, the tenants acknowledged they did not experience any break in or theft. The tenants described feeling uneasy walking through the unsecured parking and common areas.

Under cross examination, the tenants were asked how many times they experienced a water shut off. The tenants stated it was several times, more than 10 times, but that they did know recall the exact number or dates.

The landlord's legal counsel submitted that the tenants have a burden to mitigate losses and they failed to do so. The tenants were of the position that they did mitigate their losses by leaving the rental unit when it was unbearably hot or noisy or during water shut offs.

The landlord's legal counsel took issue with the amount of compensation sought by the tenants and submitted that it was excessive compared to other amounts awarded to other tenants. In particular, the compensation the tenants' claim for the loss of the balcony was raised. I heard that the rental unit had approximately 1,000 sq. ft. of interior space and the balcony was approximately 15 ft. – 16 ft. wide and 3 ft. – 4 ft. deep. The landlord's legal counsel was of the position that the balcony should be valued less than interior space and that the tenants' request for a 20% rent abatement for loss of use of the balcony was excessive.

The tenant's advocate argued the amount of compensation sought by the tenants is reasonable when compared to other awards granted by other Arbitrators. With respect to the balcony, the tenant's advocate argued that the large balcony was a feature that afforded views and ventilation when it was accessible and should be valued accordingly.

The landlord's legal counsel was of the position the tenants' submissions included photographs and video taken of other properties undergoing renovation by the landlord but not the subject property. The tenants submitted that their written submissions, written in blue type, are their statements and the tenants' Advocate stated that the black print is more general information written by the Advocate. The tenants were of the position the photographs were of their property with the exception of a video of jackhammering noise that was taken at another property but only in an effort to demonstrate the sound of jackhammering.

The landlord's legal counsel argued the tenants' submissions were inconsistent and not reliable. The tenants and their Advocate explained that the male tenant, who was the primary speaker during the hearing, had hearing difficulties such that hearing over the telephone and higher frequency sounds are more difficult for him to hear. At times I noted the tenant's wife would repeat questions to him. The tenant's Advocate referred me to the written submissions and conceded that the dates appearing in the written submission more accurately reflect the construction activity dates as the tenant was providing timelines in his verbal testimony approximately two years after the event without referring to the written submission.

Analysis

Upon consideration of everything before me, I provide the following findings and reasons.

A party that makes an application for monetary compensation against another party has the burden to prove their claim. Awards for compensation are provided in section 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

As the applicants, the tenants bear the burden of proof. The burden of proof is based on the balance of probabilities.

The tenants' claims are based on the loss of use and quiet enjoyment of the rental unit and the residential property due to construction activity taking place at the residential property, including renovations of common areas and replacement of balcony railings of the rental unit.

Section 28 of the Act provides for a tenant's right to quiet enjoyment, including the right to:

- reasonable privacy;
- freedom from unreasonable disturbance;
- exclusive possession, subject to the landlord's right of entry under the Act; and
- use of common areas for reasonable and lawful purposes, free from significant interference.

Residential Tenancy Branch Policy Guideline 6: *Right to Quiet Enjoyment* provides the following policy statements, with a view to providing information, in part, concerning a tenant's right to quiet enjoyment:

B. BASIS FOR A FINDING OF BREACH OF QUIET ENJOYMENT

A landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.

Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.

In determining whether a breach of quiet enjoyment has occurred, it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises.

A landlord can be held responsible for the actions of other tenants *if* it can be established that the landlord was aware of a problem and failed to take reasonable steps to correct it.

Compensation for Damage or Loss

A breach of the entitlement to quiet enjoyment may form the basis for a claim for compensation for damage or loss under section 67 of the RTA and section 60 of the MHPTA (see Policy Guideline 16). In determining the amount by which the value of the tenancy has been reduced, the arbitrator will take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use or has been deprived of the right to quiet enjoyment of the premises, and the length of time over which the situation has existed.

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.

The landlord's legal counsel submitted that the tenants were inconsistent in their submissions, calling into question their credibility. A useful guide in regard to credibility is one of the most frequently used in cases such as this, is found in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), which states at pages 357-358:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

In hearing from the tenants over a number of hours, subject to questioning by their Advocate, me and the landlord's legal counsellor, I found the tenants to be highly credible. I found their description of the events taking place at the property and their experiences to be consistent despite questions posed to them at various different times and phrased differently. I found their experiences, as they described, to be in harmony with the construction activity taking place. For instance, the tenants described an unbearably hot rental unit when they could not open the patio door more than a couple of inches during the summer; the tenants described unbearable noise during times there was jackhammering and concrete drilling taking place; the tenants described the nuisance of tracking dust into their unit while construction activity, including dry walling was taking place. I did observe the male tenant provide an answer to the landlord's lawyer's question that was not on point but I noted that the question was posed to him when his wife was not present (she was tending to their barking dog) and given the tenant's response it was apparent to me he had misheard the question which I found likely given his hearing difficulties. I also accept the Advocate's explanation that in giving testimony nearly two years after the fact, the tenants provided approximate dates or timelines and that the written submission contains the more accurate time lines as being reasonably likely.

As for the landlord's credibility, there was no appearance by an agent for the landlord who had personal knowledge of the events taking place at the residential property. Ideally, the building manager or other agent who attended the property on a regular basis would have been called to testify but for some reason the landlord chose not to avail such a person during these proceedings. Rather, the landlord was represented by

legal counsel only and at no point was it suggested that the landlord's lawyers had first-hand knowledge or experience pertaining to the construction activity taking place at the residential property. As such, I could not examine the landlord and the tenants did not have the benefit of cross examining the landlord.

In these circumstances, I find it reasonable and appropriate to rely upon the tenants' submissions and I have given the great deal of weight to their verbal testimony with exception to dates or timelines for which I have given their written submission more weight.

In the case before me, it is undisputed that major renovations were undertaken by the landlord before and after the tenancy started, over several months. It is undisputed that the construction activity included loss of use of the balcony and access to the pool for periods of time and that the renovations included jackhammering, concrete drilling, dry walling, installing new flooring, and the like, by numerous tradespersons. While the end result of the renovations was likely desirable and necessary to maintain and/or improve the property, I accept that such activity resulted in loss of use of portions of the property by the tenants and created dust, noise, loss of privacy, and increased heat in the rental unit and that the activity was on-going over several months to the extent that it constitutes an unreasonable disturbance or significant interference. Therefore, I find I am satisfied the landlord breached section 28 of the Act.

Having been satisfied the tenants suffered a loss of use of the balcony and the pool and suffered unreasonable disturbances or significant interference, I accept the tenants' position that their tenancy was devalued; yet, they were required to pay the full amount of rent set out in their tenancy agreement without any rent abatement by the landlord. Therefore, I find I am satisfied the tenants suffered a loss as a result of the landlord's breach of section 28 of the Act and by way of this application they are entitled to compensation from the landlord.

The landlord's legal counsel argued the tenant's claims should be dismissed because the tenants did not complain or notify the landlord of their losses; however, I accept the tenants' position that the landlord knew, or ought to have known, of the major activity taking place at the property and that a complaint letter likely would not have resulted in the project being completed faster or less disruptively. As provided in Policy Guideline 6, a breach of quiet enjoyment may be found where the landlord caused the interference and in this case it is the landlord that caused the construction activity to occur. The tenants also submitted that they left the rental unit when the unit was unbearably noisy or hot or the water was shut off and I accept that is a reasonable

response to the situation. Therefore, I find I am satisfied the tenants did whatever was reasonable in the circumstances to mitigate their losses.

Probably the most difficult aspect of this claim is verification of the value of the tenants' losses. I recognize that valuing loss of use and enjoyment is difficult and I find I am tasked with determining whether the tenants have provided a reasonable approximation of their losses. Accordingly, I turn my mind to analyzing the reasonableness of the amount of compensation sought by the tenants below.

Both the landlord's legal counsel and the tenants' Advocate pointed to awards provided to other tenants by other Arbitrators in decisions involving this landlord and the subject residential property. However, I am not bound by decisions of other Arbitrators concerning other tenants and different rental units. Rather, each decision turns on its own merits and I have made this decision based on evidence provided to me for this proceeding. This is provided in section 64(2) of the Act, which I have reproduced below:

> (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.

For the period of June 2017 through September 2017 the tenants seek the greatest rent abatement, as seen in the chart provided in the background and evidence section of this decision. Based on the tenants' submission, I accept that during this time the tenants experienced the greatest losses given the loss of their balcony, the noise of concrete drilling and jackhammering, among other construction activity and the time of year when it would be hotter and more uncomfortable to be in the rental unit. For this period of time the tenants seek a total of 80% rent abatement and if I were to grant that request the tenants would essentially pay 20% of their monthly rent, or $373.00 per month. I find that request to be excessive and unreasonable as I find that paying only $373.00 per month is akin to paying for a storage facility sufficiently large to accommodate furniture for a 1,000 sq. ft., 2 bedroom apartment. While I appreciate the rental unit was very uncomfortable during that time period, the rental unit was still functional for the most part. The tenants were still able to use the rental unit for cooking and eating meals, bathing, sleeping and keeping their possessions. Also of consideration is that the jackhammering and concrete drilling and presence of construction workers was not in the evening and night time hours.

I have also considered the tenant's claim for loss of use of the balcony. The tenants seek 20% rent abatement, which is the equivalent of $373.00 per month. The size of the balcony, based on the tenants' submissions was approximately 45 to 64 sq. ft. and the interior area of the rental unit was approximately 1,000 sq. ft. Based on size alone, the balcony is approximately 5% of the total area of the rental unit, including balcony [calculated as an average of 55 sq. ft. of 1,055 total sq. ft.]. Generally, I am of the view that balcony space has a value that is less than finished interior space; however, it may be appropriate to value a balcony higher or lower in certain circumstances such as the time of year when a balcony is more or less desirable or the view provided by the balcony. In this case, the tenants argued the balcony afforded them views and ventilation which was especially important during the warmer months. However, their claim also included months during colder months when a balcony would not be such an important source of ventilation. As such, I find that an overall valuation for this particular balcony and circumstance to be closer to 5 - 10% of the monthly rent. Therefore, I find the tenant's claim for 20% of the monthly rent to be excessive and unreasonable.

With respect to the loss of access to the pool and hot tub, the tenants requested a rent abatement of 5%, or approximately $93 - $97 per month during their tenancy. Given a pool and hot tub located on the premises is more convenient than travelling to a community recreation centre and there were two tenants who were deprived of use of these facilities, I find their request for a 5% rent abatement to be within reason.

Based on the above analysis, overall, I am of the view that the tenants' claims are over-stated and I find a more reasonable approximation of their losses to be closer to one-half of what they are seeking, or $7,500.00.

The tenants' claims had merit and I further award the tenants' recovery of the $100.00 filing fee.

Based on all of the above, I provide the tenants with a Monetary Order in the total sum of $7,600.00 to serve and enforce upon the landlord.

Conclusion

The tenants were partially successful in their claims against the landlord. In recognition of my findings above, I provide the tenants with a Monetary Order in the amount of $7,600.00 to serve and enforce upon the landlord.

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: August 20, 2019

Residential Tenancy Branch