

DECISION

Dispute Codes:

MNDC, FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the tenant for monetary compensation in the form of a retro-active rent abatement and damages for loss of enjoyment of the suite or devalued tenancy. Both parties appeared and gave testimony.

Issue(s) to be Decided

The issues to be determined based on the testimony and the evidence is whether the tenant is entitled to monetary compensation under section 67 of the Act for damages or loss and a rent abatement. The burden of proof is on the applicant.

Background and Evidence

The tenancy began July 1, 2010 with rent set at \$650.00. A security deposit of \$325.00 was paid and was refunded when the tenant moved out on September 30, 2010. The tenant testified that at the start of the tenancy the landlord had advised the tenant that the upstairs residents were in a band and would occasionally practice. Based on the landlord's assurances that the sound would not substantially exceed the level that the tenant witnessed being that the upstairs occupants were rehearsing at the time, the tenant entered the tenancy. However, according to the tenant, the noise from the upstairs renters was above the level she witnessed and was intolerable. The tenant said that the volume affected the tenant's ability to enjoy her suite, sometimes even in the daytime. On occasion the tenant even had to leave because of the disturbance. The tenant testified that she made numerous complaints to the landlord and the police, but, after a particularly upsetting incident that occurred on August 28, 2010 in which the upstairs residents had a boisterous party lasting well into the early hours of the morning and impeded her driveway, the tenant finally felt it necessary to move. The tenant's position was that the landlord did not comply with the Act and her duty to ensure that the tenant's right to peaceful enjoyment was protected. The application indicated that the tenant was seeking a rebate of one month rent in the amount of \$650.00, the \$300.00 security deposit she paid for new accommodation and the \$50.00 cost of filing.

The tenant estimated the frequency of the loud noise-making was approximately 8 times hours per month and for a duration of up to 4 hours per incident.

The landlord testified that she was not aware that the problem was so extreme and did not learn how upset the tenant was until near the end of the four-month tenancy. The landlord pointed out that from the start, the tenant was aware of the fact that the band upstairs would be practicing on a regular basis and the tenant accepted the tenancy under these conditions. The landlord had also given the tenant advance written notice that the upper tenants would be having a gathering on August 28, 2010.

Analysis

Section 7 of the Act states that if a party fails to comply with the Act, or tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the Act grants a Dispute Resolution Officer authority to determine the amount and to order payment under such circumstances.

I find that in order to justify payment of damages under section 67, the Applicant has a burden of proof to establish that the other party did not comply with the agreement or Act and that this non-compliance resulted in costs or losses to the Applicant, pursuant to section 7. The evidence must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists,
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the Act or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage.

In this instance, the burden of proof is on the tenant to prove a violation of the Act or agreement and a corresponding loss.

Section 28 of the Act protects a tenant's right to quiet enjoyment and states that 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, lawful purposes, free from interference.

I find that the landlord and tenant had contracted for a tenancy that included a rental unit that was comfortable and liveable with some inevitable noise from the musicians upstairs. However, I find that the amount of noise likely exceeded what is permitted to ensure compliance with section 28 of the Act and was in excess to the level agreed-upon by the parties at the time the tenancy agreement was formed.

During the tenancy the tenant continued to pay \$650.00 rent in compliance with her obligation under the Act and agreement. But I find that, at the same time, the tenant clearly suffered a loss of value to the tenancy over its duration. Whether within the control of the landlord or not, I find that there were deficiencies of contractual obligations under the tenancy agreement for the period in question.

Specifically the tenant suffered a loss of enjoyment equalling 1.5 days per month and based on a daily rent of \$21.37 per day, I find that over the four-month tenancy, the loss to the tenant was \$32.05 per month for 4 months totalling \$128.22 plus an additional half day valued at \$10.69 for the incident that occurred on August 28, 2010.

Conclusion

Based on the testimony and evidence discussed above, I hereby grant a monetary order to the tenant for \$188.91 comprised of a rent abatement of \$138.91 for loss of value and the \$50.00 paid by for the application. The tenant must serve this on the landlord and the order may be enforced through an application to Small Claims Court if it remains unpaid.

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 2010.

Dispute Resolution Officer