

DECISION

Dispute Codes MNDC, O

Introduction

This hearing dealt with the tenant's application pursuant to section 67 of the *Residential Tenancy Act* (the *Act*) for a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. They agreed that the tenant handed the landlord her dispute resolution hearing package on January 26, 2011. I am satisfied that the tenant served this package to the landlord in accordance with the *Act*.

At the commencement of the hearing, the tenant revised the amount of her application for a monetary award from \$7,882.00 to 30% of that amount (i.e., \$2,364.60).

Issues(s) to be Decided

Is the tenant entitled to a monetary award for loss of quiet enjoyment during her tenancy?

Background and Evidence

The tenant commenced this periodic tenancy on October 1, 2006. The tenant pays \$140.00 each month, her subsidized portion of the landlord's \$768.00 monthly rent.

The tenant provided oral and written evidence regarding her claim that the landlord has failed to take adequate measures to reduce the excessive noise coming from the rental unit above her. She submitted that there has been ongoing noise from the suite above her which she finds intolerable, disrupting her sleep and her quality of life. The tenant requested a reduction in rent from January 2008 until the present to compensate her for her loss of quiet enjoyment of her rental premises. The parties agreed that the tenant sent her first written notice to the landlord of these concerns in November 2009.

The tenant submitted into written evidence two letters attesting to the unacceptable noise levels that she experiences in her rental unit. One of these individuals, Witness OT, participated as a witness in the proceedings. Efforts to contact the other individual, FM, at any one of three telephone numbers she left were unsuccessful. The tenant also entered written evidence that the tenant above her tosses waste water on her balcony.

The landlord submitted oral and written evidence regarding the history of the landlord's attempts to resolve the tenant's noise complaints. The landlord provided undisputed

evidence that the landlord has offered the tenant a number of different rental units for her consideration for a potential transfer. The tenant is only interested in a rental unit on the uppermost floor of this building as she is concerned that she will experience similar noise problems if she agrees to live below anyone. The tenant rejected an offer of a one-bedroom unit in another building because her portion of the rent would increase. The landlord testified that she believes that the tenant is sensitive to noise. The landlord has agreed to place the tenant on a waiting list for the next available one-bedroom rental unit on the uppermost floor of her building. No such unit is presently available, nor can the landlord predict when one will become available.

The landlord provided written statements from two individuals regarding this matter. One of the authors of these statements, Witness VB, participated in this hearing. At the hearing, the tenant who lives in the third-floor suite above the tenant also provided sworn testimony. She said that she has “bent over backwards” to try to accommodate the tenant’s concerns and cannot understand what she could be doing that causes the tenant to experience such high levels of noise from her rental unit.

Analysis

At the hearing, the tenant and her representative confirmed that the issue regarding water being tossed from the third-floor tenant’s suite onto her balcony did not factor into the tenant’s application for a monetary award.

While I have turned my mind to all the documentary evidence, including photographs, miscellaneous letters and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the tenants’ claim and my findings around each are set out in this decision.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, a Dispute Resolution Officer may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof.

I am presented with two very different accounts of the noise level in the tenant’s rental unit. The tenant, the witness who appeared on her behalf at the hearing, and a written statement from another individual, FM, all maintain that the noise coming from the third-floor suite above the tenant is unbearable and affects the tenant’s quiet enjoyment of her rental premises. The landlord and those who testified or sent letters on the landlord’s behalf maintain that the noise from the third-floor rental suite is well within a tolerable level.

Given the conflicting testimony, much of this case hinges on a determination of credibility. A useful guide in that regard, and 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 demeanour 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 conditions...

In addition to the manner and tone (demeanour) of the witness' evidence, I have considered their content, and whether it is consistent with the other events that took place during this tenancy.

For the reasons set out below, I find the tenant has not met the burden of proof required to demonstrate that she is entitled to a monetary award from the landlord for loss of quiet enjoyment of her rental premises. As such, I dismiss her claim for a monetary award on the basis of the following considerations.

The landlord provided undisputed oral and written evidence that she has attended the tenant's suite a number of times when the tenant has called her regarding the noise originating in the suite above her. On one occasion, the landlord stayed in the tenant's suite for an hour. On the other occasion, she stayed 30 minutes. She testified that she did not hear any unusual or excessive noise in the tenant's suite when she attended. The tenant has not supplied sufficient evidence to support her claim that people in the building forewarn the upstairs tenant when the landlord or others are coming to listen to the noise the upstairs tenant is causing. The landlord also asked the upstairs tenant to walk around and perform her usual tasks to determine if there was any specific activity that prompted the tenant's noise concerns. I find the landlord's oral and written evidence convincing and detailed. I am satisfied by the landlord's oral and written testimony that she has taken the tenant's noise complaints seriously and has done what she can to investigate these complaints and offer a reasonable solution by offering the tenant a transfer to a suitable rental unit when one becomes available.

I find the oral testimony of Tenant SD, the upstairs neighbor, credible. Her demeanour during her testimony convinced me of her credibility. She answered all questions in a calm and candid manner, and did not waver in her version of what happened.

Tenant EA, the author of a February 5, 2011 letter entered into evidence by the landlord, was also available to provide oral testimony at the hearing had this been necessary. Tenant EA's letter stated that she lives below a tenant in this same building with laminated flooring, the same product in the floor above the tenant. Tenant EA wrote that she has not encountered an unusual or inappropriate noise level from the rental unit above her and that her upstairs neighbour's daily activities have not affected her quality of life in any way. Neither the tenant nor her representative challenged Tenant EA's written statement and said that it was not necessary for her to participate in this hearing as they did not have any questions about her written evidence.

I also accept the written and oral testimony given by VB who testified that she attended the tenant's suite on three separate occasions, staying for at least a half hour each time. In her written statement of February 5, 2011, VB stated that the noise in the tenant's suite was "barely noticeable." The tenant's representative questioned this evidence and asked VB if she had also written another letter on January 26, 2011 in which she stated that the noise heard in the tenant's suite was very loud. VB responded that the letter the tenant's representative was referring to was a letter the tenant dictated for her because the tenant had difficulty writing in English. Witness VB said that the accurate account of the noise level she heard in the tenant's suite was that which she described in her February 5, 2011 letter presented into evidence by the landlord.

I also find that VB's testimony that the tenant dictated a letter to her for VB's signature is consistent with other evidence regarding this matter. For example, this might help to explain the noticeable similarity between the wording used in Witness OT's letter, a January 26, 2011 letter entered into written evidence by the tenant from Tenant FM and the tenant's own written submissions.

Tenant FM's January letter stated that she "visited her apartment once in a while" but recently visited the tenant's suite more frequently "because she asked me to come and witness the noise from the tenant upstairs." She continued as follows.

...I would support her claim that the noise audible within her apartment constitutes unbearable nuisance, based on my experience. The neighbor above her apartment is noisy; she is always moving her furniture around, dragging and throwing heavy things and wearing heels throughout the day and night. I find the noise excessive and disturbing...

The landlord entered the following written evidence regarding a conversation she had with the tenant's witness, FM, roughly one week before this dispute resolution hearing.

...She advised that she has not visited her (the tenant) often and hasn't for some time, but did hear noise from the unit above. I asked her to explain what she

heard and for how long. (FM) confirmed that it sounded like she may have dropped something and only happed (sic) for a second and did not continue... At the time of this discussion, FM did not indicate that she heard furniture moving around, dragging, throwing heavy things and wearing high heels or that she witnessed the soil water incident. I also asked (her) if the noise was any different than the noise she hears from her neighbor above and she admitted that it wasn't, but that (the tenant) is suffering...

At the hearing, the landlord expressed an interest in asking questions of Tenant FM about her January 26, 2011. Since Tenant FM was not available to participate in this hearing, I attach little weight to her disputed letter of January 26, 2011.

I do not find the oral or written testimony of OT very credible. She was uncertain as to when she had visited the tenant and was vague as to details. In her oral testimony, she essentially read into evidence what she had signed in her January 26, 2011 letter.

I have considered the testimony of the parties and the burden of proof, which falls to the tenant, as the applicant. The real test of the truth of the information provided of a witness must align with the balance of probabilities. While I do not doubt that the tenant finds the noise in her rental unit upsetting, I do not find the oral or written evidence she presented or the evidence of her witnesses as credible as that presented by the landlord and her witnesses. I dismiss the tenant's application for a monetary award.

Conclusion

I dismiss the tenant's application without liberty to reapply. 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*.