



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

**Dispute Codes** MNDC, OLC, FF, O

### **Introduction**

This matter dealt with an application by the Tenant for compensation for damage or loss under the Act or tenancy agreement, for an Order that the Landlord comply with the Act or tenancy agreement and to recover the filing fee for this proceeding.

On September 21, 2011, following the 1<sup>st</sup> day of hearing, counsel for the Landlord faxed to the Residential Tenancy Branch and mailed to the Tenant a request to have a Summons issued to 2 medical doctors who had provided letters in support of the Tenant's claim. In an interim decision dated September 27, 2011, I advised the parties that I would hear submissions from both parties at the reconvened hearing regarding the summons application. At the reconvened hearing, counsel for the Landlord argued that the doctors' letters were unreliable in that there was no evidence that the doctors were qualified to make the opinions set out in their letters and no evidence as to what information was relied on by the doctors when they made their written opinions. The Tenant stated that the doctors in question were unwilling to attend the hearing and he was unwilling to consent to the release of any medical records. In the circumstances, I find that the doctors' notes are of limited usefulness given that their reliability cannot be tested and accordingly they are excluded from evidence.

At the beginning of the reconvened hearing, the Dispute Resolution Officer advised the Parties that the proceedings would continue by hearing additional oral evidence from the Tenant, which would be followed by evidence from the Landlord and following that, the Tenant could ask questions of the Landlord and/or respond to her evidence. The Tenant presented some evidence then said he had nothing more to add and left the conference call. The Tenant did not dial back into the conference call for the remainder of the hearing.

### **Issue(s) to be Decided**

1. Is the Tenant entitled to compensation and if so, how much?

### **Background and Evidence**

This tenancy started in April 2007 and ended on September 1, 2011 when the Tenant moved out. Rent was \$650.00 per month plus \$20.00 for parking. There is no written tenancy agreement. The Tenant's spouse also resided in the rental unit throughout the

tenancy. The rental unit is located in a 3 storey building (owned by the Landlord) which has commercial tenants on the ground floor and residential tenants above them. The rental unit is located on the 3<sup>rd</sup> floor of the building.

The Tenant claimed that when he first moved into the rental property there was a small motor on the roof of the building directly above the bedroom of the rental unit that would draw air out from the kitchen of a restaurant on the ground floor. The Tenant said sometime later, a new owner of the restaurant installed another exhaust fan on the roof of the building that created a lot of noise. The Tenant said he frequently complained to the Landlord about the noise from the fan (which he said was operated off and on from 9:30 am to 10:00 pm or later) but she just told him to call the police or if they weren't happy there to move out. Consequently, the Tenant said for the balance of the tenancy he had to call the police who attended most of the time and told the restaurant to shut off the fan if it was after 10:00 p.m. The Tenant said the police did not always attend the rental property and on some occasions the restaurant operator left the fan on all night. The Tenant admitted that he had no police reports of these incidents.

The Tenant said in February 2011, a new restaurant owner installed a new exhaust fan on the roof which created even more noise. The Tenant claimed that the vibrations from the noise caused wall ornaments and dresser handles in the bedroom to rattle and a medicine cabinet mirror to shake. The Tenant said the noise from the fan was so unbearable that he and his spouse could no longer sleep in their bedroom and had to sleep in the living room. The Tenant's spouse claimed that due to a lack of sleep she became increasingly stressed out and couldn't focus at work with the result that she started making many mistakes and was eventually terminated from her employment.

The Tenant said he made a written complaint to the municipal by-law authority on July 25, 2011, but they said there was nothing they could do about it. The Tenant also said he was advised by the municipal by-law authority that a permit was required to install an exhaust fan on the roof of the rental property but that none was issued. The Tenant further said a municipal by-law officer took a noise measurement one day and advised him that it was within the acceptable range for the day time. The Tenant claimed that he later spoke with a police officer who advised him that the noise measurement was not within an acceptable range for evening hours.

The Tenant said he then spoke to the Landlord on or about August 11, 2011 at the rental unit about the noise from the fan. The Tenant said the Landlord told him at that time that he could move to another suite in the rental property. The Tenant said he did not want to do so because he believed the suite the Landlord was offering leaked. Consequently, the Tenant said the Landlord told him he should move out and he said he would.

The Landlord said that the same exhaust fan was located on the roof of the building from the beginning of the tenancy until mid-July of 2011 when a new one was installed. The Landlord said the first time the Tenant complained about noise from the fan was

early in 2010 and at that time she offered him another one bedroom suite in the rental property that was the same size as the rental unit. The Landlord said the Tenant did not want to move and told her that the suite she offered was too small. The Landlord she did not hear from the Tenant again about noise from the exhaust fan until August 11, 2011 and again she offered him the other suite which she claimed was the same size. The Landlord said the Tenant again refused her offer so she told him he could move out if he wanted to and he agreed.

The Landlord claimed that the new exhaust fan installed in July 2011 was quieter than the previous exhaust fan however she also claimed that the previous fan did not make much noise. The Landlord admitted that she rarely was in the rental unit. The Landlord denied that she ever told the Tenant to contact the police about noise from the exhaust fan. The Landlord claimed that there are new tenants in the rental unit and that they have not complained about noise from the exhaust fan (which the Tenant disputed).

### **Analysis**

Section 28 of the Act says (in part) that a tenant is entitled to quiet enjoyment which includes the right to freedom from unreasonable disturbance.

The Tenant and his spouse both gave evidence that the noise from the exhaust fan started approximately 6 to 18 months after the tenancy started and continued throughout the tenancy. The Tenant claimed that on many occasions he reported these noise disturbances to the Landlord but she refused to do anything about it and told him to call the police (which the Landlord denied). The Tenant also claimed that he contacted the police on a number of occasions but he provided no corroborating evidence of that (such as incident reports). The Tenant said the exhaust fan was replaced in February 2011 which created even more noise with the result that he reported it to the municipal by-law authorities in July 2011. The Tenant claimed that the noise from the exhaust fan violated permissible levels for evening hours however he provided no corroborating evidence of that.

The Landlord claimed that the noise from the exhaust fan did not make much noise and that she only had 2 reports of noise during the entire tenancy from the Tenant. On both of these occasions, the Landlord said she offered the Tenant alternate accommodations but he refused to move. In any event, the Landlord claimed that the new fan made less noise than the previous fan.

I did not find the evidence of either Party reliable. In particular, I found that the Tenant's evidence changed frequently throughout the hearing. For example, when the Tenant was asked about the service of his documentary evidence on the Residential Tenancy Branch he claimed to have delivered documents at a date prior to when some of his documents were dated. When confronted with this discrepancy, the Tenant then suggested a number of other dates. The Tenant also claimed that a new fan was installed 6 months after he moved in, then he claimed it was a year later and then

claimed it could have been 18 months later. As a further example, the Tenant initially denied that the Landlord offered him alternate accommodations but then admitted that she had done so in August 2011 only and then he changed his evidence again and claimed that she had also offered him another suite in June 2011. The Tenant also initially claimed that the suite proposed by the Landlord was unsuitable because he was advised by the previous tenants that it leaked but later claimed it was unsuitable because he was told by the previous tenants that it had mice and mould.

I also find that the Landlord's evidence is unreliable. In particular, the Landlord claimed that the Tenant only made 2 noise complaints to her about the exhaust fan during the tenancy. However in her oral evidence, the Landlord said that any complaints by the Tenant would have been dealt with by her maintenance man at the building and that it was the maintenance man who contacted her on 2 occasions. In her affidavit the Landlord claimed that in response to the Tenant's first noise complaint, she told him it would be too difficult to move the fan so she offered him another suite. In her oral evidence, however the Landlord claimed that the exhaust fan did not make any noise and that the new fan made even less noise. The Landlord admitted that she was rarely in the rental unit and therefore I find that she would not have had a reasonable opportunity to form an opinion about the noise created by the fan in the rental unit in any event. The Landlord further claimed in her oral evidence that the alternate suite she offered the Tenant was exactly the same size, however in her affidavit, the Landlord claimed that it was "substantially" the same size. I also note that in her oral evidence the Landlord identified the alternate suite as 301 but in her affidavit evidence, she identified it as suite 201.

Consequently, I find that this matter cannot be resolved simply by preferring the evidence of one party over the other as I found both Parties' evidence to be unreliable. However, the Tenant has the burden of proof in this matter and must show (on a balance of probabilities) that his right to quiet enjoyment was breached and that the Landlord failed or refused to do anything about it. I find that the Tenant has not provided sufficient evidence to conclude on a balance of probabilities that there were continual noise disturbances from an exhaust fan during his 4 year tenancy that he reported to the Landlord and that the Landlord failed to do anything about. For this reason, the Tenant's application must be dismissed without leave to reapply.

Counsel for the Landlord also argued that the Tenant would not have been entitled to compensation for any noise disturbances because the Landlord gave him two separate opportunities to move to another suite further away from the exhaust fan and the Tenant refused to move on both occasions. With all due respect, I disagree. Section 7(2) of the Act requires a party who suffers damages to take *reasonable steps* to minimize their losses (or to mitigate), however this does not necessarily mean that one Party will be expected to move their residence in order to relieve another Party from the expense of removing the source of the noise or other disturbance.

**Conclusion**

The Tenant's application is dismissed without leave 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*.

Dated: October 18, 2011.

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Residential Tenancy Branch