



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes ERP, LRE, MNDC, OLC, RP, RR, FF

Introduction

This hearing dealt with an application by the tenant for a monetary order, an order compelling the landlord to comply with the Act and perform repairs, an order suspending or setting conditions on the landlord's right to enter the rental unit and an order authorizing the tenant to reduce her rent. Both parties participated in the conference call hearing.

The corporate landlord was represented by C.S., the Chief Financial Officer, as well as a number of building managers and tradesmen. The tenant objected to anyone other than C.S. representing the landlord throughout the hearing and asked that the managers and tradesmen be viewed as witnesses and only participate in the hearing to offer their testimony and submit to cross-examination. There is no reason why the landlord could not have more than one agent representing its interests and the landlord had the right to be represented by those who were fully informed about the issues which gave rise to the tenant's complaint. As the building managers had dealt with the tenant throughout the period of time in which her complaints had arisen and as C.S. had the authority to settle the claim if the parties had reached a settlement, I determined that it was appropriate to consider H.N. and M.S., the building manager and assistant manager respectively, and C.S. as agents for the landlord and treat the remaining parties as witnesses. As a result, these three agents were present throughout the hearing.

Issues to be Decided

Is the tenant entitled to an order compelling the landlord to perform repairs?
Is the tenant entitled to an order setting conditions on the landlord's right to enter?
Is the tenant entitled to a monetary order as claimed?
Should the tenant be permitted to reduce her rent until repairs are completed?
Should the landlord be ordered to comply with the Act?

Background and Evidence

The rental unit is an apartment on the 9th floor of a building which has at least 26 floors and houses 163 rental units. The tenant has resided in the unit since March 2005.

The tenant testified that in November 2010, she first noticed a noise in the unit which she described as a low frequency droning or buzzing. She stated that in May 2011 she addressed the issue with H.N. and by November 2011 found the noise to be so disruptive, she again contacted the building management. The tenant produced two witnesses who gave testimony of their experience with the noise.

T.W. is the tenant's father and testified that he stayed with the tenant during the Olympics and noticed no noise at that time, but when he visited again in March 2011 he heard what he described as a humming noise, which he attributed to work being done outside. T.W. testified that he discovered that the noise persisted even after he closed the window and when he put his ear to the wall, he could hear a low frequency hum and feel a vibration in the wall. He testified that the noise continued throughout his 1 week stay.

O.E. regularly visits the rental unit and testified that he first noticed the noise just over a year ago and found it to be most noticeable when there was no competing background noise. He described the noise as a humming sound, comparable to the sound that an elevator or refrigerator might produce. He further described the noise as an oscillating, repeating pattern. He stated that the last time he had heard the noise was the morning before the hearing when he was visiting the suite.

The tenant testified that the noise has significantly impacted her daily use of the rental unit. She stated that she has been unable to sleep through the night as she is frequently awakened by the noise in the early hours of the morning and further stated that she is also bothered by the noise during the day. The tenant expressed frustration that the landlord had not been in the unit for more than 10 minutes and had never attended between 2 – 3 a.m. although invited to do so, suggesting that the landlord had never heard the noise when it was at its worst. The tenant and her witnesses all stated that the noise was not necessarily louder at night, but that it was more noticeable because there was less competing noise.

The landlord's agent C.S. acknowledged that there was some noise in the unit, but maintained that it was at a reasonable level and represented normal operating sounds. He stated that because the tenant had complained, he made every effort to find the source of the noise and determine whether there was something that could be done to minimize the problem.

The landlord produced as a witness J.H., who is a partner in H. Industries, a company specializing in HVAC. J.H. explained that the heating and cooling system in the building is a water source heat pump system with each suite having its own heat pump. He further explained that the heat pumps have two components which generate noise. The fan that circulates either warm or cool air is one source and the other is a compressor which circulates heated or cooled fluid through the lines.

The landlord also produced B.C. as a witness. B.C. is an employee with H. Industries and testified that at the request of the landlord, he entered the unit on January 16 and heard the noise and investigated the source. He stated that he was in the unit 2-3 times and that he could not hear the noise unless it was completely silent and he had his ear to the floor. He explained that by "completely silent" he meant that there was no music or talking or squealing tea kettles. B.C. described the noise as a reverberating noise and stated that he heard the same noise from other floors as well. He theorized that the sound originated with the heating system and intensified in extreme weather because more of the units had turned on their heat and there was more reverberation.

M.S., who is the assistant building manager, testified that he first heard a complaint from the tenant in September. Upon hearing the tenant describing the noise, he thought it might be a heat pump from an adjacent apartment, so he checked the pumps in the apartments surrounding the rental unit but found that all were operating well and without producing unusual noise. M.S. stated that the tenant thought the problem may have originated with an air exchange which had been installed on the roof in the spring of 2011, but this was ruled out as no unusual noise could be heard on the 26th floor, which was closest to the heat exchange. In November 2011, M.S. arranged for a heat pump to be repaired in unit just one floor above the rental unit, but as the tenant continued to complain after that repair was completed, M.S. determined that the malfunctioning pump could not have been the source of the noise. M.S. testified that while in December he heard a humming that seemed abnormal, he does not now think it was unreasonable and stated that he has been in the unit several times since and has not heard anything more than the hum from compressors. He further testified that in mid-January, he walked the hallways and stairwell of the building from top to bottom from 3:00 – 3:30 and made noises. He stated that he heard humming on floors 7, 8, 12-18 and 24 and in the lobby of the building, with the noise being the loudest in the lobby.

The building manager H.N. testified that she first heard of the tenant's complaint in January 2012. She stated that she herself had recently moved to the 9th floor and had found that she had to become accustomed to the sound of the heat exchangers, but stated that it was not extreme. In January, H.N. issued a notice to the 7 units on the 9th floor and entered every unit to determine whether anything could be heard from the

other units. Although one other tenant suggested that she had heard something, she later stated that the noise she heard was from outside the building.

The landlord produced as a witness D.M., who is the property manager. D.M. testified that he attended at the building for the first time on February 16, 2012. He entered the unit and heard the refrigerator, the fan and the compressor and described the sounds as a faint hum. He entered other units and heard similar noises. He then went to the mechanical room, water sprinkler room and main electrical room and could not hear that any of the equipment there was making unusual noises. He testified that he walked through floors 2, 3, 8, 9, 10 and 24 and was able to hear faint sounds, but none significantly louder on one floor than on the others.

The tenant argued that the fact of the noise is proven by the landlord and agents having heard the noise and investigated its source. She is seeking to recover 80% of the rent paid from May 2011 – the date of the hearing as compensation for loss of quiet enjoyment and an order that the landlord perform repairs to eliminate the noise. She further seeks to reduce her rent by 80% each month until the problem is resolved.

The tenant further seeks an order requiring the landlord to comply with the Act and to provide 24 hours written notice prior to entering the unit and ordering the landlord to provide her with the names and titles of any service personnel who would be attending. The tenant complained that the landlord had frequently knocked on her door to speak with her without having first given her notice and that on one occasion, H.N. had entered the unit without having given prior written notice. H.N. denied having entered the unit without the tenant's consent.

Analysis

The tenant bears the burden of proving on the balance of probabilities not just that there is a noise in the rental unit, but that this noise has caused her to lose quiet enjoyment of the unit. I accept that there is a noise in the unit.

In their testimony, the parties and their witnesses have all described the noise as a humming sound. The landlord and his agents and repairmen were able to hear the noise and identified it as the operation of heat pumps in the building. I find it more likely than not that the sound complained of by the tenant is the operation of the heat pumps in her own or other units, produced by either the fan or compressor components. Although other parties were able to hear the noise and investigated its source, I do not find that the landlord's actions prove that the noise is excessive. The landlord had a duty to investigate complaints by the tenant and I find that the aggressive investigation

of these complaints proves nothing more than the landlord's diligence in meeting their obligations under the Act.

Section 28(b) of the Act gives the tenant a right to quiet enjoyment which includes freedom from unreasonable disturbance. I interpret this section to suggest by implication that while a disturbance may not be unreasonable, a reasonable disturbance is allowed.

There are 163 units in the residential property but the tenant is the only resident to have complained that the noise made by the heating system is excessive. While I accept the possibility that noise could be louder in one area than another, the landlord's agents testified that they heard the noise at the same level in various areas throughout the building. The tenant provided no evidence that she had gone to other areas of the building to determine whether she could still hear the noise and absent a dispute that the noise is present to some degree throughout the building, I accept that it can be heard at the same level at the very least on floors 2, 3, 8, 9, 10 and 24 as per the testimony of D.M.

I find that in the course of its normal operation, the heating system used in the residential property necessarily makes some degree of noise that cannot be eliminated. While the tenant may have developed a hypersensitivity to this particular noise, I find that the standard I must apply is whether a reasonable person in the same situation would find the noise to be unreasonable. I am not persuaded that this is the case.

I am not satisfied that the noise produced in this unit is unreasonable and accordingly I dismiss the tenant's claims for a monetary order and orders compelling the landlord to perform repairs and authorizing her to reduce her rent until repairs are completed.

As for the tenant's assertion that the landlord has failed to comply with the Act with respect to giving notice of entry, I refer to section 29 of the Act.

29. Landlord's right to enter rental unit restricted

29(1) A landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:

29(1)(a) the tenant gives permission at the time of the entry or not more than 30 days before the entry;

29(1)(b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:

- 29(1)(b)(i) the purpose for entering, which must be reasonable;
 - 29(1)(b)(ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;
 - 29(1)(c) the landlord provides housekeeping or related services under the terms of a written tenancy agreement and the entry is for that purpose and in accordance with those terms;
 - 29(1)(d) the landlord has an order of the director authorizing the entry;
 - 29(1)(e) the tenant has abandoned the rental unit;
 - 29(1)(f) an emergency exists and the entry is necessary to protect life or property.
- 29(2) A landlord may inspect a rental unit monthly in accordance with subsection (1) (b).

Section 29(1)(a) allows the landlord to approach the tenant and request entry into the unit without having given prior notice.

The tenant testified that she found it disturbing when the landlord knocked on the door as she would have expected that no one would be on the secure floor except her guests and other residents. The hallway of the secure floor is a common area, freely accessible by other tenants, their guests, the landlord and the landlord's agents. The landlord is permitted under the Act to request entry without prior notice, the tenant had repeatedly requested that the landlord investigate and repair the source of the offending noise and the landlord's requests for entry occurred in order to permit agents to conduct an investigation. These facts lead me to find that the landlord has complied with the Act with respect to entering the unit.

I note that there is no requirement under the Act for the landlord to provide to the tenant the names and titles of parties entering the unit, although it would be courteous to do so at the time of entry.

The tenant referred to one instance in which she alleged that H.N. entered the unit without having first obtained consent, but as H.N. denied having done so and as the tenant bears the burden of proving her claim, I am unable to find on the balance of probabilities that an illegal entry occurred.

I therefore dismiss the claims for orders requiring the landlord to comply with the Act and limiting the landlord's access to the rental unit.

As the tenant has been wholly unsuccessful in her claim, I find that she must bear the filing fee paid to bring the application.

Conclusion

The tenant's claim is dismissed in its entirety.

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: March 27, 2012

Residential Tenancy Branch