



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MDSD & FF

Introduction

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

I find that the Notice to End Tenancy was sufficiently served on the Tenant by posting on February 24, 2014. Further I find that the Application for Dispute Resolution/Notice of Hearing filed by each party was sufficiently served on the other.

The landlord attempted to give evidence about conduct that took place after the date of the Notice. I advised the parties that evidence was inadmissible. The arbitrator duty is to determine whether the Notice to End Tenancy should be cancelled and an arbitrator can only consider conduct to the date of the Notice.

Issue(s) to be Decided

The issues to be decided are as follows:

- a. Whether the tenant is entitled to an order cancelling the one month Notice to End Tenancy dated February 24, 2014?
- b. Whether the tenant is entitled to recover the cost of the filing fee?
- c. Whether the landlord is entitled to an Order for Possession?

- d. Whether the landlord is entitled to recover the cost of the filing fee?

Background and Evidence

The parties entered tenancy agreement that provided that the tenancy would start on December 1, 2012. The rent is \$835 per month plus \$100 for the garage for a total of \$935 payable in advance on the first day of each month. The tenant paid a security deposit of \$400 at the start of the tenancy.

Briefly, the landlord gave the following evidence:

- He has recently purchased the rental property and took possession on February 5, 2014.
- The rental property contains 12 rental units. The tenant's rental units on the third floor.
- He has received many complaints from other tenants in the rental property about constant and excessive noise coming from the tenant's rental unit. He has talked to the tenant but the situation has not improved.
- He has received a number of written complaints of excessive noise from the tenant who is living immediately under the tenant's rental unit.
- The police have been called because of the excessive noise on two occasions to the date of the Notice to End Tenancy.
- He was present on one occasion when the police were called and the tenant would not open the door in order to converse with the tenant. The landlord filed police reports.
- The front door to the rental unit has been broken. The tenant changed the lock but failed to provide the landlord with a key.
- The tenant failed to promptly remove his garbage and on the occasion he did the garbage leaked on the carpet and the tenant failed to properly clean it up.
- The tenant has paid the rent for April.
- In September when he was considering whether to purchase the rental property the rental unit underneath the tenant was vacant.

Witness #1 testified on behalf of the landlord. Briefly her evidence is as follows:

- She moved into the rental unit underneath the tenant's on November 1, 2013.
- Shortly after she experienced excessive noise coming from the upstairs apartment and she complained to the tenant and to the then manager.
- The noise is excessive on a daily basis. It involves stomping around, constant moving of furniture and music and television on excessively loudly at all hours of the day and night.
- She complained to the tenant a number of times and has given him notes on 5 different occasions asking him to reduce the noise.
- Prior to the date of the Notice she has called the police on two occasions.
- She has had to resort to sleeping with earplugs on but even that does not fully eliminate the noise. On occasion she has had to move from her bedroom to the living room.
- The tenant testified she was woken up at 2:00 a.m. on February 20, 2014 and 4:00 a.m. on February 22, 2014.
- On one occasion in late February the noise was excessive and she had to call her boyfriend (who lives across the street) to ask the tenant whether he would reduce the noise. The tenant failed to sufficiently reduce the noise and she spent the night at her boyfriend's rental unit to get away from the noise.
- She testified she is experiencing health problems from the stress of being unable to get sufficient sleep and is now taking anti-depressants.
- She has advised the landlord that she intends to move out because of the excessive noise.

Witness #2 testified on behalf of the landlord as follows:

- He acts as Manager and security for the building.
- There is a large number of people who go to and from the tenant's rental unit at all hours of the day and night.

- He has received complaints on numerous occasions from the tenant and confirms the excessive noise.
- That on one occasion he kicked out some transients who were attempting to sleep in the electrical room and they told him that the tenant had propped the door open for them.

Briefly the tenant's testimony is as follows:

- He testified he has lived in the rental unit since December 2012 without any complaints.
- He denied that he was excessively noisy and testified the only noise is what would amount to normal usage.
- He testified he works in the afternoon and is not home to cause noise.
- He testified he told the landlord he was going to replace the lock on the door and there are no security issues.
- He testified he seldom has people over. His girlfriend visits occasionally and his friends are there from time to time.
- He left the garbage in the hall as that was what was done with the previous manager.

The tenant's agent also testified as follows:

- He is a friend of the tenant and on occasion has visited the tenant in his rental unit.
- The front door is undamaged and the rental unit is well taken care of.
- The only noise coming from the tenant's unit is regular noise coming from normal living.
- This is a wood framed building and sounds carry. This is not the tenant's responsibility.
- The tenant is a large longshoreman and walks with a heavy foot.
- The tenant lives a quiet life and any sound is from normal activity.

Grounds of Termination:

The Notice to End Tenancy alleges the landlord has grounds to end the tenancy on the bases of section 47(1)(c), (d) and (f) which provides as follows:

Landlord's notice: cause

47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:

...

(c) there are an unreasonable number of occupants in a rental unit;

(d) the tenant or a person permitted on the residential property by the tenant has

- (i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,
- (ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or
- (iii) put the landlord's property at significant risk;

(f) the tenant or a person permitted on the residential property by the tenant has caused extraordinary damage to a rental unit or residential property;

Tenant's Application:

In *Faryna v. Chorny*, [1952] 2 D.L.R. 354, the B.C. Court of Appeal set out the following test for assessing credibility:

"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 carries 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. (page 357)"

After carefully considering all of the evidence I determined the tenant has significantly interfered with and unreasonably disturbed another occupant in the rental property. As a result I determined that the landlord has sufficient cause to end the tenancy. I am

satisfied based on the evidence presented that the noise is excessive and disturbing. It often occurs in the late evening and early hours of the morning. It has had a significant effect on the health of the downstairs tenant.

The tenant has received plenty of warning that his activities are disturbing the downstairs tenant. The landlord has talked to him. The downstairs tenant has talked to him. In addition the downstairs tenant has given him five notes and the police have visited him on two occasions to the date of the Notice. The noise continues unabated despite repeated requests to do so. The tenant has made little or no effort to reduce the noise coming from his rental unit. I do not accept the submission of the tenant that the noise amounts to normal user. I prefer the evidence of the landlord's witness who has documented the disturbances to that of the tenant and his witness.

As a result I ordered that the tenant's application be dismissed. The rent was paid for April. At all material times the landlord has made it clear that he does not intend to reinstate the tenancy. As a result I ordered that the tenancy shall end on April 30, 2014.

Landlord's Application - Order of Possession:

I determined the landlord was entitled to an Order for Possession. The Tenant's application to cancel the Notice to End Tenancy has been dismissed. In such situations the Residential Tenancy Act provides the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and must vacate the rental unit by that date. Accordingly, I granted the landlord an Order for Possession effective April 30, 2014. As the landlord has been successful I ordered that the tenant pay the landlord the cost of the filing fee in the sum of \$50 such sum may be deducted from the security deposit.

The tenant must be served with this Order as soon as possible. Should the tenant fail to comply with this Order, the landlord may register the Order with the Supreme Court of British Columbia for enforcement.

Dated: April 08, 2014

Residential Tenancy Branch

