



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Shillhouette Apartments
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC, OLC, FF, O

Introduction

The tenant applies for a monetary award and a compliance order, alleging that the landlord is not and has not taken appropriate steps to eliminate or reduce noise disturbance from the apartment above her.

The hearing of this dispute commenced on May 11, 2015 and was adjourned to permit the parties and opportunity to find an amicable resolution. Resolution was not achieved and the hearing continued on May 26th.

The landlord is the respondent S.A.. The respondent individual Mr. J.N. is an employee only.

Issue(s) to be Decided

Does the relevant evidence presented at hearing show on a balance of probabilities that the landlord has failed in its obligations to the tenant? If so, what is the appropriate measure of damages and should a compliance order be made?

Background and Evidence

The rental unit is a one bedroom apartment in a 96 unit, twenty storey apartment building.

The tenancy started in November 2009. The current monthly rent is \$1395.00. The landlord holds a \$650.00 security deposit.

The tenant is in her seventies and appears to live a quiet life alone.

She testifies that she lived peacefully in her apartment from 2009 until approximately April 2014, when "J**" moved into the apartment directly above her.

Since then she has reached the conclusion that J** had been deliberately disturbing her with noise. She knows it is J** and not his partner, a woman name "D**" because J** is home during the day time and she hears noises then.

She testifies that she hears hitting noises at different intervals and levels and on and on continuous noises. She has concluded that some of the noises, such as building maintenance sounds, have been recorded by J** and then played back down into her rental unit at odd hours, even into the nighttime.

She says the noises are not the normal noises of living that one might expect in an apartment building.

She describes the layout of her apartment and the one above. She says that somehow J** knows how to locate her in her apartment and then moves to a location directly above her in his apartment and sends out noise. She thinks he knows her routines and locates her that way. If she watches TV he moves to be above her and makes the noises. If she is sitting and knitting in a chair, he moves to be above her and makes the noises there. Even when she is in her bedroom he somehow locates her, moves above her and makes noises.

She notes that the apartment above has laminate flooring, which does not dampen sound and that the sounds move through the metal in the heat registers. She is of the view that her carpeted apartment contains or traps the sounds from above.

She says that a neighbour who's bedroom was also below a portion of J**'s apartment had heard the sounds too and had broken his fixed term lease and left early because "this place is crazy." She could not convince the former neighbour to give evidence for this hearing.

The tenant has been complaining to the landlord's representative Ms. M.S. since June 2014. She has written complaints at least three times in 2014, with detailed explanations of the noises, the type of noise and the date and time.

The problem has continued despite her complaints and has not dissipated up to the date of hearing.

She has also attempted to record the noises. Using a microphone and recorder placed on a chest in her apartment. For this hearing she provided eight audio CDs containing over thirty two hours of recordings.

All the recordings were not played at hearing. Rather, the tenant pointed out particular places on several of the CDs to represent the type of sounds she was hearing.

She says the disturbances have continued and even escalated since last fall.

The landlord's representative Mr. N. testified that he determined and continues to be of the view that the tenant is sincere in her belief about the noise but that the noise is normal apartment building noise and is not unreasonably disturbing.

He says that after her original written complaint he met with her. He refers to an altercation between J** and the tenant when J** came down to the tenant's apartment but that, in my view, has little relevance to the facts alleged here.

He says that he thinks J** and his partner both work during the day and so could not be responsible for the daytime noise the tenant complains of.

Mr. N. says that he has listened to the tenant's recordings and they merely show regular apartment noise. He says the complaints are not about the normal kind of noise like loud music or shouting or partying. He says that he considered the noises might be building noises, from water pipes or heating systems and that he has called in tradesman at various time to check. He says they've all confirmed there was no apparent cause for any building noises in the tenant's apartment.

Ms. M.S. testified as a representative of the landlord. She says that when the tenant made her first written complaint she asked the tenant to call her when the noise was happening. As a result, she attended the tenant's apartment twice in the fall of 2014 after being summoned by the tenant. She says she heard no noises coming from above on either occasion. She has discussed the situation with the tenants living above and they deny making any disturbing noises.

She says that J** has told her to come and speak to him if there is any disturbing noise from his apartment. She says that she remains available to come to the tenant's apartment to confirm any disturbing noises.

Last fall Ms. M.S. received a recording from the tenant who described the recorded noise as a "bang, bang, bang." Ms. M.S. thought it was water pipe noise or perhaps an elevator sound.

Ms. M.S. has moved in next door to the upper apartment. She shares a wall between her suite and J** and D**'s apartment. She testifies that she has not heard any disturbing noise coming from their apartment. She says they are quiet.

In response, the tenant strongly denies that J** works during the day because she can hear him upstairs everyday. She says that he now has an "explosive" recording that he plays to disturb her.

Analysis

Section 28 of the *Residential Tenancy Act* (the “Act”) sets out the duty a landlord owes to its tenant. It provides:

28 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 and lawful purposes, free from significant interference.

In regard to “quiet enjoyment” Residential Tenancy Policy Guideline #6 “Right to Quiet Enjoyment” says:

Historically, on the case law, in order to prove an action for a breach of the covenant of quiet enjoyment, the tenant had to show that there had been a substantial interference with the ordinary and lawful enjoyment of the premises by the landlord's actions that rendered the premises unfit for occupancy for the purposes for which they were leased. A variation of that is inaction by the landlord which permits or allows physical interference by an outside or external force which is within the landlord's power to control.

The modern trend is towards relaxing the rigid limits of purely physical interference towards recognizing other acts of direct interference. Frequent and ongoing interference by the landlord, or, if preventable by the landlord and he stands idly by while others engage in such conduct, may form a basis for a claim of a breach of the covenant of quiet enjoyment. Such interference might include serious examples of:

- entering the rental premises frequently, or without notice or permission;
 - unreasonable and ongoing noise;
 - persecution and intimidation;
 - refusing the tenant access to parts of the rental premises;
 - preventing the tenant from having guests without cause;
 - intentionally removing or restricting services, or failing to pay bills so that services are cut off;
 - forcing or coercing the tenant to sign an agreement which reduces the tenant's rights;
- or,
- allowing the property to fall into disrepair so the tenant cannot safely continue to live there.

Accordingly, noise of such a level as to be a substantial interference with a tenant's ordinary and lawful enjoyment of the premises may amount to a breach of the covenant for quiet enjoyment entitling a tenant to recover damages and possibly a compliance order.

In this case it is not alleged that the landlord is making the noise. But as the Guideline notes, "... inaction by the landlord which permits or allows physical interference by an outside or external force which is within the landlord's power to control..." may put a landlord in breach of the covenant for quiet enjoyment.

The alleged noisemaker J** is either a tenant of the landlord or an occupant, the responsibility for whom lies with D** a tenant of the landlord. The power to control any unreasonable noise from the apartment above the applicant tenant is within the power and control of the landlord by use of its power to evict an offending, noisemaking tenant.

Before a landlord does so, it is incumbent on it to receive a complaint or otherwise be made aware of the problem, conduct a reasonable investigation and reach a reasonable conclusion about whether the complaining tenant is being unreasonably disturbed.

In this case I find that the landlord has taken reasonable steps to determine whether or not the applicant tenant is being unreasonably disturbed by the tenant's above her and that the landlord has reached the reasonable conclusion that she is not.

It is significant that the tenant says the unreasonable noise did not start until J** moved in upstairs. She had enjoyed years of peace and quiet before then.

However, I find that the landlord was attentive to the tenant's complaints. It did not ignore her. On two occasions the landlord's agent Ms. M.S. attended to confirm the fact that the tenant was suffering from unreasonable noise from above while it was occurring. She heard nothing.

The tenant's argument that on the second occasion of Ms. M.S.'s attendance J** above her must have heard Ms. M.S. knock on the door and stopped his noise making, is not plausible in my view.

The landlord spoke to J** who denied making any intentional noise and who invited the landlord to contact him anytime there was a complaint of noise.

The audio recordings diligently made by the tenant and presented to the landlord as proof, are unfortunately mixed with sounds from her own apartment. It is not possible to determine any particular noise that could be definitely said to be coming from above.

The recorded noises that are the subject of the complaints are unusual. They are not readily identifiable as a type of noise normally made by a person.

Ms. M.S. lives next door to J** and D** and has not heard any disturbing noise. It is reasonable to assume that she would be equally prone to hearing noise through the wall as would the applicant tenant through six inches of concrete dividing one floor from another.

In result the facts do not establish that the landlord is breaching its duty to the tenant to ensure her quiet enjoyment of her apartment.

Conclusion

The tenant's application must be dismissed.

The tenant's earnestness was apparent during this hearing. It is not beyond the realm of the possible that she is being intentionally disturbed by another. This hearing dealt only with her allegations and complaints up to the date of her application; March 31, 2015. I would suggest to her that if she feels the unreasonable noises are continuing, she obtain the assistance of a credible witness or witnesses to confirm the noise, particularly to confirm her belief that they are following her as she moves around her apartment, and present that corroboration to the landlord. If the corroborating witnesses are credible, the landlord may determine it necessary to re-investigate the matter.

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: May 27, 2015

Residential Tenancy Branch

