Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, RP

Introduction

This hearing was convened to deal the tenant's application filed May 12, 2017 under the *Residential Tenancy Act* (the "Act") for an order cancelling a 1 Month Notice to End Tenancy for Cause dated May 2, 2017 (the "1 Month Notice") and for an order requiring the landlord to make repairs.

The tenant attended the hearing with counsel and a witness. The landlord was represented by two building managers. Two witnesses gave evidence for the landlord. Both the tenant and the landlord had full opportunity to be heard, to present affirmed testimony, to make submissions and present documentary evidence, and to respond to the submissions of the other party.

Service of the tenant's application and notice of hearing and of the respective parties' evidence was not at issue.

Issue(s) to be Decided

Is the tenant entitled to an order cancelling the 1 Month Notice?

Is the tenant entitled to an order requiring the landlord to make repairs?

Background and Evidence

There was no written tenancy agreement in evidence. The tenant testified that he has been residing in the rental unit for approximately seven years. Rent is currently $1,000.00 and is due on the first of the month. A security deposit of $500.00 was paid at the beginning of the tenancy and remains with the landlord.

The 1 Month Notice indicates that the tenant has "significantly interfered with or unreasonably disturbed another occupant or the landlord." It also indicates that the tenant or a person permitted on the property by the tenant has engaged in illegal activity that has or is likely to adversely affect the quiet enjoyment, safety, security, or well-being of another occupant.

At the outset of the hearing one of the building managers advised that the "illegal activity" alleged was the tenant's giving keys to the rental unit to non-tenants. This does not constitute "illegal activity," which Residential Policy Guideline #32 describes as a "serious violation of federal, provincial, or municipal law." As set out in that guideline, the burden is on the landlord to establish illegal activity and the landlord in this case has not done so. Noise alleged to be caused by visitors to the rental unit who may or may not have keys to that unit can be addressed under the other category of cause alleged.

The building manager on behalf of the landlord testified that the applicant tenant has disrupted the tenants below him with noisy voices, music, computers, dropping things, and guests in the middle of the night. The managers' written submissions complain of "loud voices, stomping, dropping of things."

The manager further said that after April 2, 2017, the downstairs tenants directed their concerns to management rather than to the tenant directly. Letters and caution notices to the tenant from management dated April 3, April 16, April 24, and May 2 were included in evidence. All of these letters raise concerns about noise characterized as "stomping and banging on the floor during quiet hours" and "banging and rummaging noises along with loud voices" and "noisy, stomping/heavy loud walking in all areas of the apartment." Also in evidence are complaints from the downstairs tenants about this noise, which appear to have generated the caution notices.

In written submissions the managers said that on May 1 and in response to a complaint by the downstairs tenants they knocked on the applicant's door at about midnight. He told them he was working and just getting into the shower. The next day he told them he has given keys to his friends so he didn't know if his friends stopped by later in the night.

The building manager stated that he has attended at the applicant tenant's unit and does not believe that the state of the flooring accounts for the noise complaints. He stated that the building has 74 units in four stories and that he has received no other noise complaints from renters in a lower unit about the renters above them.

In response to questions from the applicant tenant's counsel, the manager stated that he has managed this building since December of 2016, that there have been no other complaints about the applicant tenant over the seven years of his tenancy and that the unit below the applicant tenant has been recently renovated. The manager was unwilling to share the cost of rent in the newly renovated unit, and rejected counsel's suggestion that this was a "renoviction." Later the manager advised that there was another unit in the building renting at a rate similar to the rate paid by the applicant tenant. He did not say whether that unit has been renovated.

Also in response to counsel's questions, the manager stated that he has heard the noise coming from the applicant's unit himself, which has consisted of music and patio doors slamming, and a computer. He conceded that he has not heard any party-like noise, has not

had any other problems with this tenant, and has not personally inspected the carpet in this tenant's unit. He further stated that he is not aware of how old the carpeting in the rental unit is, and that there are plans to replace the flooring in the common areas of the building. Lastly, still in response to questions from counsel, the building manager stated that he has not had any discussions with the owner of the building about the possibility of replacing the flooring in the applicant's rental unit, and has not spoken with the applicant tenant about giving keys to friends while he is away.

The landlord had the tenants who live below the applicant testify. The said that they have been tenants since December of 2016 and that the noise they are complaining about is not simply footsteps. It starts at 10:00 pm and lasts until 5:00 am, and can be heard through earplugs and noise cancelling headphones. In written submissions dated June 10 they say the disruption has occurred 3-4 times per week. It has required them to attempt sleeping in different rooms. They said that they tried to speak with the tenant above them but that he was not interested in having a discussion until the landlord issued the 1 Month Notice. The tenants below have since communicated their concerns to the manager, and one night they phoned the police, who attended at the unit above and advised that the upstairs tenant had told them he had friends over who were helping with the recycling.

Counsel for the applicant tenant asked the downstairs tenant about a comment in texts from the downstairs tenants that the floors were "paper thin." She said that this was language the applicant had used and that they used the same language when speaking with him in order to be conciliatory. She also noted that the tenants below them do not complain about their noise.

Also in response to a question from the applicant's counsel, the witness conceded that at one point they had complained to the applicant about noise and later apologized after they discovered the noise was coming from another neighbour. There were texts in evidence containing this exchange. In one, the downstairs tenants say "sorry to bug you again. It's 11 on a Sunday night and people are shouting over there. Totally cool with you having friends over, but please try to respect that the floors are paper thin." The applicant tenant responds: "Hmmmm . . .All quiet here . . . Just relaxing watching a show . . . Is it too loud perhaps? Can you hear anything now?"
The downstairs tenants then say: "No, it very well could be below me. I can still hear loud and clear . . . It's many voices. Sorry to bother you and sorry for the curt message as well." And the applicant tenant responds: "No worries at all . . . Glad you texted! #OLDBuilding4Sure." The conversation ends with the downstairs tenant saying: "Yeah. It was downstairs. I'm not sure how it sounded like it was coming from the ceiling."

The witness further testified that the noise is usually not music, but footsteps and dragging. The light fixtures and a hutch in the lower unit rattle in response to the movement upstairs. Another text from the downstairs tenants dated March 18, at 11:51 pm, includes the following: ". . . The last few nights have been pretty noisy . . . we've been awoken up a few times really late (3-4 am). Just hoping you could try to walk lightly tonight :)." The applicant tenant in response says:

“You bet buddy. These floors suck. Been up late working on a new project and will try to be as quiet as possible.”

In another text dated March 29, 11:57 pm, the downstairs tenants ask: “Friends over tonight?” to which the applicant tenant responds “They are just leaving!” A text dated April 12 shows the applicant tenant checking in with the downstairs tenants to confirm the sound levels have been better.

Counsel for the applicant tenant called witness MF. MF stated that he is a flooring installer and has installed over 1000 floors. He is self-employed and also contracts for large flooring companies. He is not a friend or acquaintance of the applicant tenant. The applicant tenant asked him to inspect the flooring in his rental unit. He observed that the carpets in the building as a whole were “tired” and “outdated.” He identified a photograph in evidence showing carpeting repaired with duct tape as having been taken in the common area of the building.

MF testified that upon inspection the carpet in the applicant’s rental unit is also worn and old, and that the underlay, which insulates against sound, has “turned to dust.” He identified two photographs in evidence as photographs of the underlay in tenant’s unit. These photographs show crumbling underlay beneath the carpeting, which has been peeled back. MF said that the duct tape along the underlay in the photos would have been used to hold the underlay down while carpet was installed over top of it, and that it was holding the underlay together to some degree in those spots.

He further testified that the underlay would be serving no purpose in its current state, and “might as well not be there” in terms of any soundproofing between the units. He also noted that one of the photographs showed the underlay along a wall, which would be in better condition than underlay in high traffic areas.

MF also stated that the tile in the tenant’s kitchen is soft and thin (1-3 mm) VCT tile and is not sound proof. It is also “tired and outdated.”

MF estimated it would cost between $2000.00 and $2,500.00 to replace the flooring in the tenant’s rental unit. He estimated the carpet as at least 10 years old.

The applicant tenant testified that he currently lives alone and has not before received any noise complaints over the approximately seven years of his tenancy. The rental unit is carpeted throughout with the exception of the tiled kitchen. He removes his shoes while at home, and has his visitors do the same. He works in social media marketing, which involves sitting in front of a computer, and often works evening and early morning hours. His work does not involve moving around the apartment with the exception of trips to the kitchen and bathroom. The tenants below first approached him about noise in February. He had dropped a bag of ice and their response was “intense.”

The applicant tenant further testified that he has been cautious about noise since becoming aware of the noise concerns, and that he himself is “constantly on edge” because of them. Regarding the police visit, he said that he had one friend over and they were cleaning the kitchen together and carrying recycling, but that it was not a big load of recycling.

The tenant estimated that he has friends over after 10:00 pm approximately once a week, and that they are then largely together in front of the computer.

The manager argued that the tenant’s evidence that he did not have a lot of friends was inconsistent with his testimony about having friends over. The manager also raised a concern with the tenant’s friends having keys to his unit.

A chronology of noise made by the downstairs tenants’ was included in evidence. It records noise after the date of the 10 Day Notice, between May 14 and June 9, including “banging and dragging,” “loud footsteps (sounded like multiple people)” between 9:30 and 11:30 p.m., “multiple voices, frequent use of the patio door, and what sounded like heavy-footed pacing” between 9:45pm and 1:30 pm.

The downstairs tenants estimated that the applicant has friends over late approximately four nights a week. They also rejected the applicant tenant’s statement that he confines his movement at night to the kitchen and bathroom.

Counsel for the tenant submitted that the noise complaints arose not from his client’s parties or stomping but from the activities of daily living, and that the tenant is not doing anything out of the ordinary. He is not routinely dragging or dropping things. His work habits late at night are consistent with the amount of movement required to use the washroom or kitchen during the night.

The applicant tenant committed to not having people over between the hours of 10:00 pm and 8:00 am for work purposes.

The manager in response noted that the lease agreement, which was not in evidence, specifies that the rental unit is not to be used for business purposes.

Analysis

Section 47(1)(d)(i) of the Act allows a landlord to end a tenancy for cause where the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord. Unless the tenant agrees that the tenancy will end, the tenant must dispute a notice under this section by filing an application within 10 days of receipt. The tenant is within the timeline.

Once a tenant disputes a notice, the burden of proof is on the landlord on a balance of probabilities to establish the cause alleged. Here, there is insufficient evidence to establish that

the tenant is responsible for the noise affecting the downstairs tenants. Instead, I accept the evidence of MF that the underlay and flooring in the rental unit has deteriorated and is therefore not providing adequate sound proofing.

Additionally, there have also been two occasions when the downstairs tenants have complained about disruptive noise that was not attributable to the applicant tenant. Both of these occasions suggest that the building itself if not adequately soundproofed and that it is difficult to ascertain the source of noise at times. The first occasion is documented in the text correspondence quoted above. After the downstairs tenants investigated further they acknowledged their mistake. They also expressed surprise that noise that appeared to be coming from above them was actually coming from below.

On May 1, 2017 the managers attended at the applicant's unit in response to another noise complaint and he was alone and getting into the shower. Although the managers observed that the tenant advised that friends may have entered his unit later without his knowledge, this is not relevant, as the noise that was being investigated by the managers had already occurred. It is relevant that noise that appeared to have originated with the tenant had not actually been caused by him.

Most of the noise complaints describe heavy footsteps and stomping. Some describe frequent use of the patio door late at night. None of these sounds should carry to the degree that they appear to be carrying, and the applicant is entitled to walk around his apartment and use the screen door at night.

To the extent that the noise disruption may have involved the applicant having friends over after 10:00, the applicant has committed to not having guests after 10:00.

Section 32 of the Act requires a landlord to provide and maintain residential property in a state of repair that is compliant with health, safety, and housing standards required by law, and that (having regard to the age, character, and location of the unit), makes it suitable for occupation. Although the age and type of building will affect how sound proof it is, keeping the flooring and underlay in good repair is part of the landlord's obligation. MF and the tenant have testified that the underlay has disintegrated. This is borne out by the photographs in evidence. The managers have testified that the carpeting and tile in the common areas in the building will be replaced. The managers have also stated that some of the rental units have been renovated.

Residential Tenancy Policy Guideline # 40 states that the "useful life" of both carpet and tile is 10 years. MF has estimated the carpeting as being approximately 10 years old.

Based on the testimony and the photographs in evidence I find that the underlay is not providing adequate soundproofing and that it needs to be replaced. I further find that the kitchen tile should be replaced with materials that will provide sound proofing consistent with today's standards.

In summary, the landlord has not established on a balance of probabilities that there is cause to end the tenancy under s. 47 of the Act. Accordingly, I cancel the landlord's 1 Month Notice.

Additionally, the tenant has established that the underlay and tile are both past their useful life span and are not providing sufficient insulation against sound. I therefore order the landlord to replace the underlay and tile as soon as reasonably possible and no later than August 4, 2017. As the carpet is also past its useful life, I order the landlord to replace the carpet in the rental unit at the same time.

Conclusion

The tenant's application to cancel the 1 Month Notice is allowed. The landlord's 1 Month Notice is cancelled. The tenancy will continue until ended in accordance with the Act.

The landlord is ordered to replace the underlay, carpet, and tile in the rental unit in question as soon as reasonably possible and no later than August 4, 2017, with materials that MF and the landlord's contractor agree will provide an appropriate degree of soundproofing between the units.

The landlord may issue another 1 Month Notice if the new flooring does not address the noise concerns of the tenants residing below the applicant tenant.

As the tenant's application is successful, the tenant will recover the application filing fee, and is authorized to withhold $100.00 from a monthly rent payment on a one time basis in full satisfaction of this award.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under s. 9.1(1) of the Act. Pursuant to s. 77 of the Act, a decision or an order is final and binding, except as otherwise provided in the Act.

Dated: June 27, 2017

Residential Tenancy Branch