



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC OLC RP FF

Introduction

This hearing was convened as a result of the tenant's application for dispute resolution under the *Residential Tenancy Act* (the "Act") for a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement, for an order directing the landlord to comply with the *Act*, regulation or tenancy agreement, for repairs to the rental unit and to recover the cost of the filing fee.

The tenant, a witness for the tenant (the "witness"), the landlord and a support person for the landlord, attended the teleconference hearing and gave affirmed testimony. The hearing began on April 7, 2017 and after 67 minutes was adjourned to allow for additional time to consider all of the evidence from the parties. An Interim Decision dated April 7, 2017 was issued to the parties and should be read in conjunction with this decision. On May 31, 2017, the hearing reconvened and after an additional 87 minutes the hearing concluded.

During the hearing the parties were given the opportunity to provide their evidence orally. A summary of the evidence is provided below and includes only that which is relevant to the hearing.

Issue to be Decided

- Is the tenant entitled to a monetary order under the *Act*, and if so, in what amount?
- Should the landlord be ordered to comply with the *Act*, regulation or tenancy agreement?
- Should the landlord be ordered to make repairs to the unit, site or property?

Background and Evidence

The parties agreed that a month to month tenancy began on May 1, 2011. Monthly rent has increased during the tenancy from the original monthly amount of \$976.00 and was increased in 2016 to \$1,090.00 per month and then increased in 2017 to \$1,130.00 per month and remains due on the first day of each month.

The tenant's monetary claim of \$5,536.45 is comprised of the return of 100% of her rent for the months of October 6, 2016 to the date the tenant filed the claim in March of 2017.

The tenant confirmed that the tenant first wrote to the landlord about her complaints about noise coming from the upstairs neighbours (the "neighbours") on November 7, 2016. The tenant presented several audio recordings (the "recordings") of what she described was noise coming from the neighbours. The landlord stated that she responded to the tenant's November 7, 2016 email about noise concerns from the neighbours on November 11, 2016.

The first recording was from November 11, 2016 at 9:34 p.m. The second audio recording from November 11, 2016 at 9:26 p.m. the landlord claims is reasonable noise. The landlord confirmed that she has not issued an eviction notice to the neighbours as she has listened to the audio recordings from the tenant and do not feel that any of the sounds are excessive and would be enough to evict the neighbours. The parties were advised that I considered the audio recording from November 11 at 9:26 p.m. to not be reasonable noise. The sound did not last for a long period.

The parties agreed that in October 2014 the landlord removed the carpet in the unit above the tenant and replaced the carpet with laminate flooring. The landlord testified that the laminate flooring has an underlay underneath for sound dampening but that she didn't think about noise transfer between the upper unit and the lower unit when she decided to replace the carpet with laminate flooring. The tenant is seeking an order to have the landlord remove the laminate flooring and replace it with carpet to avoid sound transferring between the neighbour unit upstairs and the tenant's unit. The landlord stated that the tenant did not complain about noise in the rental unit between October 2014 and November 2016 even though the same female neighbour moved into the upstairs unit in November 2014. It appears from the records submitted in evidence that the complaints about noise began when the female neighbour living upstairs began having a male living with her.

The following audio recordings were reviewed with the parties during the lengthy hearing which I provided my opinion on during the hearing and will refer to as the audio file names as described below:

Audio clip #	Date and Time	Details
4468	Nov 11, 2016 at 9:26 p.m.	Tenant provides example of loud noise made by upstairs neighbours. Landlord denies unreasonable noise. Parties advised that while the noise is not for a long period it is loud and not reasonable.
4474	Nov 12, 2016 at 9:54 a.m.	Dog walking sounds. The parties were advised that I consider the sounds to be loud and not reasonable. The sounds were not for a long period.
4515	Nov 14, 2016 at 8:31 p.m.	Parties advised that noise is normal noise.
4622	Dec 3, 2016 at 11:34 p.m.	Parties advised that noise is normal noise.
4719	Dec 10, 2016 at 12:29 p.m.	Tenant describes sounds as banging with the loudest at 38 seconds into the clip. There is some banging noted.
4778	Dec 22, 2016 at 1:16 a.m.	Some walking noises can be heard but is not major.
4905	Dec 30, 2016 at 6:33 p.m.	Tenant describes sounds as miscellaneous bangs. Parties advised that noise is normal noise.
4921	Dec 30, 2016 at 11:13 p.m.	Tenant describes sounds as walking in high heels or boots. Some walking sounds noted but not for a long period.
4954	Jan 1, 2017 at 1:57 a.m.	Tenant describes banging and the parties advised that there are loud banging sounds can be heard.
4958	Jan 1, 2017 at 2:10 a.m.	Tenant describes miscellaneous banging and people talking. The parties advised that there are loud banging sounds can be heard.
5035	Jan 4, 2017 at 1:00 p.m.	Tenant describes sounds as hammering sounds. The parties advised that a pounding sound can be heard.
5049	Jan 5, 2017 at 9:18 p.m.	Tenant describes sounds as dog walking around which can be heard on the audio clip.
5719	Feb 12 or 14, 2017	Tenant describes talking sounds. Parties advised

	at 11:06 a.m.	that the faint talking are normal sounds.
6009/6069	Mar 2, 2017 at 2:26 p.m.	Tenant lists the file as 6069 in her evidence and then 6009 elsewhere in her evidence so I have included both files numbers for clarity. The tenant describes the sounds as hammering sounds at the audio clip supports unreasonable loud banging sounds.

The tenant referred to her second written complaint in an email dated November 11, 2016. The parties confirmed that they spoke by phone regarding the noise complaints from the tenant. The tenant claims at one point the landlord stated to her that she could not be taking calls like this from the tenant. The landlord disputed that she said that and testified that she simply advised the tenant that she was calling too late at night at 10:00 p.m.

The tenant presented a third email complaint dated November 12, 2016. The landlord stated that she had spoken by telephone to the neighbour upstairs and the landlord stated that she didn't realize that she could not just have the tenants try to work this out between themselves.

The parties referred to an email from the neighbour upstairs claiming she was away for specific dates which the tenant responded to by stating that she did not agree with the neighbours claims and that there was still noise coming from the unit upstairs on the dates claimed by the neighbour that she was not in the unit. The tenant claims she responded to the landlord by email to this issue but could not locate that email to present during the hearing.

On November 20, 2016 the landlord stated that she ordered an area rug at her own cost for the upper unit to help dampen any noise transfer between the upper unit and the lower unit. The tenant claims that the area rug did not change the noises however.

The tenant testified that the neighbour was not "amicable" after her November noise complaints and that she felt that the neighbours were irritated with her after that point in time. The tenant indicated that in her opinion the neighbours were not altering their behaviour to reduce noise. The tenant claims that she gave it time in the hopes that the noise would not continue. The parties referred to an email from the tenant where the tenant claims there was plaster detached from her ceiling from what the tenant described as noise from above. There were photos submitted in evidence of the ceiling which were reviewed by both parties during the hearing. The landlord testified that the

photo supports that a broom was used to hit the ceiling from below. The tenant claims that the landlord's handyman attended the rental unit on December 12, 2016 and verbally stated that the tenants "must be hitting the floor very hard." The tenant confirmed that the handyman did not provide any evidence in writing in support of her claim of what the handyman told her. The landlord's version of what the handyman said was that "it sounds like it has been noisy" as if he was reiterating the tenant's complaint about noise between the floors.

The tenant alleged that the landlord's handyman recommended a cork pad in the unit above the tenant before the flooring was replaced. The landlord vehemently denied that such a conversation occurred.

The tenant stated that she complained again in January 2017 on the first day of January as she could not "relax, sleep, work, dine or entertain" due to the noise. The landlord responded to the tenant's complaint the next day on January 2, 2017. The parties confirmed there was no other communication between the parties until February 6, 2017 when the tenant complained again to the landlord. The landlord responded to the tenant the next day on February 7, 2017 and the tenant then filed for dispute resolution on March 5, 2017. The tenant was unable to provide the dates of conversations with the landlord regarding her complaints about noise.

The tenant's witness C.N. (the "witness") was affirmed and testified that he has been friends with the tenant since 2011. The witness stated that at the end of December he was over at the tenant's rental unit for about three hours having tea and that he could hear footsteps of two people above them and that it was "quite loud" to the point where he and the tenant would stop their conversation due to the noise. The witness also stated that he heard a dog walking around above them, the sounds of cabinets closing and some conversations. The landlord cross-examined the witness and asked the witness what type of building he currently lives in to which the witness confirmed he lives in a concrete building. The witness stated that while he hears some street noise he very rarely heard someone dropping something above him. The witness also confirmed that he has previously lived in a wood-framed building and that there is more noise transfer between floors in a wood-framed building compared to a concrete building. The witness stated that he has never had to stop a conversation before due to noise however.

The landlord responded to the tenant's concerns about not being able to work in the rental unit by reminding the tenant that it is a residential tenancy and not a commercial tenancy.

The landlord testified that she has advised the tenant that even if she had issued a 1 Month Notice to End Tenancy for Cause to her neighbours that the landlord could not guarantee that the next tenants would not be a family with children. The landlord requested to call two witnesses which was permitted. Both landlord witnesses; however, did not answer their phones when the undersigned arbitrator attempted to connect them into the hearing.

The landlord testified that her response to the tenant's complaints has been timely and reasonable but that she did not feel that the noises have been unreasonable. The landlord testified that the tenant's demand to change the laminate flooring back to carpet are not reasonable and that the neighbours upstairs have communicated to her that they feel harassed by the tenant. The landlord also pointed out that the tenant continues to reside in the rental unit which is a month to month tenancy and that the tenant is not bound by a fixed-term tenancy agreement. The landlord reiterated that she does not believe she has grounds to issue a notice to end the tenancy to the neighbours and that between October 2014 and November 2016 the tenant did not make any noise complaints. The landlord stated that the tenant is intolerant to noise. The tenant denies that she is sensitive to noise.

Analysis

Based on the evidence presented and the testimony of the parties provided during the hearing, and on the balance of probabilities, I find the following.

Test for damages or loss

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the *Act*. Accordingly, an applicant must prove the following:

1. That the other party violated the *Act*, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did what was reasonable to minimize the damage or loss.

In this instance, the burden of proof is on the tenant to prove the existence of the damage/loss and that it stemmed directly from a violation of the *Act*, regulation, or tenancy agreement on the part of the landlord. Once that has been established, the tenant must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the tenant did what was reasonable to minimize the damage or losses that were incurred.

Firstly, I have carefully considered all of the audio clips, documentary evidence and testimony including witness testimony provided and I find the tenant has failed to prove that she has lost 100% use of her rental unit for the period claimed. In fact, I find that claim by the tenant to be excessive and unreasonable given that many of the audio clips I find are normal noise that is consistent with the age and character of a wood-framed building in which the tenant resides. Therefore, I do not award the tenant the compensation she has requested as claimed. I also dismiss the tenant's request to have the landlord replace the laminate flooring as a result due to insufficient evidence and note that the landlord is permitted to install laminate flooring in the rental unit and that there were no noise complaints for a long period of time after the laminate flooring was installed. I afford little weight to the witness testimony as the witness confirmed that there is more noise transfer between floors in his experience in wood-frame units as compared to the concrete units. Furthermore, I find that hearing footsteps and conversations between an upper and lower rental unit does not constitute unreasonable disturbance. Regarding the ceiling photos, I find that those photos support ceiling nail pops only and that the photos do not support damage by a broom or by noise or pounding from above.

However; I do find the landlord has breached section 28(b) of the *Act* which requires the tenant to have quiet enjoyment of the rental unit which includes freedom from unreasonable disturbance. I find that the audio clips numbered 4468, 4474, 4719, 4954, 4958, 5035, and 6009/6069 are sufficient evidence of unreasonable disturbance and that by not issuing a notice to the neighbours the landlord must pay compensation to the tenant as a result. As I find the tenant failed to meet part three of the test for damages or loss though, I will grant the tenant a nominal amount of **\$50.00** for each of the 7 files which relate to 7 separate occurrences I have described above for a total of **\$350.00** in recognition of the landlord's breach of section 28(b) of the *Act*.

As the tenant's application had some merit, I grant the tenant the recovery of half of the cost of the filing fee in the amount of **\$50.00**. I do not grant the full amount of the filing fee as a majority of the tenant's claim was unreasonable and failed to meet the burden of proof.

I find the tenant has established a total monetary claim of **\$400.00** as described above. I grant the tenant a monetary order pursuant to section 67 of the *Act* for the amount owing by the landlord to the tenant in the amount of \$400.00.

Under the *Act*, if the tenant has the right to deduct the amount of \$400.00 from a future month's rent in full satisfaction of the monetary order.

Conclusion

The tenant's application was partially successful.

The tenant has been granted a monetary order pursuant to section 67 of the *Act*, for the amount owing by the landlord to the tenant in the amount of \$400.00. If the tenant decides not to deduct \$400.00 from a future month's rent in full satisfaction of the monetary order, the monetary order must be served on the landlord and may be filed in the Provincial Court (Small Claims) and enforced as an order of that court.

This decision is final and binding on the parties, unless otherwise provided under the *Act*, and 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: June 28, 2017

Residential Tenancy Branch