



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, OLC, FFT

Introduction

This hearing dealt with the tenants' application seeking the following:

- to cancel the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47 of the *Residential Tenancy Act* (the *Act*);
- an order to have the landlord comply with the *Act* and/or tenancy agreement; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72;

The tenants (collectively, the "tenant"), and the landlord's agent (the "landlord") appeared at the hearing. All parties present were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenant testified that he served the notice of dispute resolution package to the landlord's agent personally, by hand, on December 01, 2018. The landlord confirmed receipt of the notice of dispute resolution package. Therefore, I find that the landlord has been duly served with the notice of dispute resolution package, in accordance with section 89 of the *Act*. The landlord confirmed receipt of the tenant's evidence.

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Preliminary Issue – Scope of Application

I advised the parties that the tenant has applied for a number of items as part of his application. Residential Rules of Procedure, Rule 2.3 states that, if, in the course of the dispute resolution proceeding, the Arbitrator determines that it is appropriate to do so,

the Arbitrator may sever or dismiss the unrelated disputes contained in a single application with or without leave to apply.

I informed the parties at the beginning of the hearing that I was concerned that we would not have time to cover all aspects of the tenants' application in the time allotted. I informed the parties that the application in relation to the tenants' request to cancel the 1 Month Notice took precedence and as such would be heard first.

I informed the parties that if time allowed I would continue to hear evidence in relation to the remainder of the tenants' application. However, due to time constraints, the remainder of the tenants' application, with respect to seeking an order to have the landlord comply with the *Act* and/or tenancy agreement was not heard, and therefore, that portion of the tenants' application is dismissed with leave to reapply.

Preliminary Issue – Is the Landlord correctly identified?

The parties were referred to the copy of the tenancy agreement which provides that the landlord is listed not as an individual, but as a corporate entity. The tenant agreed that he mistakenly listed the resident manager as the landlord in his application. All parties agreed that the correct landlord is the corporate entity identified in the tenancy agreement. The parties agreed that the application before me should be amended to reflect the correct landlord. Therefore, pursuant to section 64(3)(c), I have amended the application to list the landlord as being the same corporate landlord as indicated in the tenancy agreement.

Issues(s) to be Decided

Should the landlord's 1 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession, pursuant to Section 55 of the *Act*? Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the tenant's claim and my findings around it are set out below.

The parties agreed that the tenancy began on January 01, 2018. The monthly rent was determined to be due on the last day of each month preceding the month for which rent is owed. The monthly rent was set at \$1,150.00 and has since been increased to \$1,173.00.

The parties agreed that the tenant provided a security deposit in the amount of \$575.00 which continues to be held by the landlord. The tenant provided as evidence a copy of a written tenancy agreement signed by both parties, which confirms the details provided by the parties. The subject rental property is a unit within a multi-unit apartment building.

The landlord issued a 1 Month Notice, dated November 27, 2018, to the tenants with an effective vacancy date of December 31, 2018. The landlord's 1 Month Notice identified the following reasons for ending this tenancy for cause:

Tenant or a person permitted on the property by the tenant has:

- *significantly interfered with or unreasonably disturbed another occupant or the landlord;*

The landlord testified that the tenants' activities are causing an unacceptable level of noise to emanate from the suite which is a disturbance to the occupants of other units within the same building. The landlord testified that an occupant who occupies the rental unit directly above the tenants has complained about noise caused by the tenants during late hours of the night.

The landlord testified that the occupant of the unit above the subject rental unit has submitted three noise complaints within the course of one calendar year. The noise complaints filed by the occupant of the suite above the subject rental unit are in relation to noise which the occupant alleges emanates during the late evening hours, after 11:00 PM, and sometimes during midnight or the hours following midnight into the next morning.

The landlord testified that another occupant, who occupies a unit directly beneath the subject rental unit filed a complaint regarding noise emanating late at night from the subject rental property over successive days during the weekend of November 16, 2018 and November 17, 2018. The same occupant also filed a noise complaint on another occasion, alleging that the noise emanated late at night.

The landlord testified that the occupant of the unit beneath the subject rental property also filed a complaint alleging that someone from the unit above him (the subject rental property) may have either urinated from the balcony above, or poured a beer from the balcony, such that the resulting liquid spilled onto his balcony below.

The landlord asserted that in total, there have been five noise complaints filed against the tenants over the course of one calendar year, and that these noise complaints, along with the one allegation of urination from a balcony, form the basis of the landlord's decision to issue the 1 Month Notice.

The landlord testified that the apartment building was built in approximately 1962, and that it is a wood-frame structure which results in sound being easily carried throughout the building, particularly at night.

The tenant provided testimony to refute the allegations submitted by the landlord and the other occupants. The tenant testified that, in response to the assertion from the occupant of the unit below his, that neither he, nor any guest permitted in the unit, has ever urinated from the balcony. The tenant testified that he has a carpet on his balcony, and that, from his recollection, the only time he poured anything off his balcony was when he had a bucket in the storage area on the patio that had collected water, and that he emptied the bucket by pouring the contents over the balcony.

The tenant provided that since he moved-in to the rental unit, he found that sound travelled easily throughout the building, and that even a normal, acceptable level of activity would result in noise being carried throughout the building.

The tenant testified that he could hear the conversations of the occupants of the units adjacent to him on either side, as well as noise from the unit across the hall from his unit. The tenant asserted that he could routinely hear noise emanating from the unit above his as well, and that the sound was not always anything extreme, but rather, was just as a result of other occupants going about their day, with the issue being that sound simply carried easily within the building.

The tenant denied the allegations made by the occupant of the unit beneath his with respect to noise occurring on two consecutive weekends in November 2018. The tenant testified that during one of the weekends in question, neither tenant was home for the entirety of the weekend, so the noise in question could not have been emanating from their unit. The tenant denied that the allegation of noise during the following

weekend as well, asserting that both tenants were out of the unit during that time as well, and contended that the noise could have been coming from another unit.

The tenant noted that the primary source of the noise complaints was the occupant of the unit directly above his rental unit. The tenant testified that during the entirety of his occupancy, he has never received a noise complaint from the occupants of the units adjacent to his on either side, nor from the person across the hall or from any other unit on the same floor as him.

The tenant testified that if the nature of the noise complaints, as alleged by the occupant of the upper unit, were genuine, then other occupants would hear the noise and bring forward similar incidents of undue noise. The tenant testified that he has a cordial relationship with other occupants and has attempted to be proactive with the occupant of the upper unit.

The tenant asserted that the occupant of the upper unit routinely makes noise as well, such as vacuuming after midnight and engaging in "woodwork" which causes noise to emanate down to his unit.

The tenant testified that his routine schedule, as well as that of the co-tenant, necessitates that they be out of the rental unit for most of the day. The tenant submitted that he wakes up early for work during the week, and arrives at work around 7:00 a.m., and that he does not return home until late in the evening. The tenant testified that his co-tenant similarly leaves early and does not return until late in the evening.

The tenant testified that both he and the co-tenant have been cognizant of the alleged noise complaints, and though they feel that they have not caused any additional noise other than that resulting from acceptable, daily use of the unit, they have attempted to further mitigate any noise by attempting to be vigilant in the later hours of the night to reduce noise.

The tenant further testified that on the weekends, he and the co-tenant routinely leave the rental unit to meet with friends, and rarely have friends come over to the rental unit, which would further bring into question whether the alleged noise observed by the occupant of the upper unit is emanating from the tenant's unit.

The tenant testified that during the course of being a tenant elsewhere, both he and the co-tenant have always had good references from other landlords, and that as tenants of the current building, they maintain good relationships with the other occupants.

The tenant testified that the primary source of the alleged noise complaint is the occupant of the upper unit, and that he had attempted to be proactive and approach the occupant of the upper unit to discuss how he could further mitigate his purported actions to alleviate the concerns of the other occupant.

Analysis

Section 47 of the *Act* allows a landlord to end a tenancy by giving notice to end the tenancy if, among other reasons, the tenant or a person permitted on the residential property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property

In accordance with subsection 47(4) of the *Act*, the tenant must an application for dispute resolution within ten days of receiving the 1 Month Notice. In this case, the tenants received the 1 Month on 1 November 27, 2018. The tenants filed their application for dispute resolution on the following day. Accordingly, the tenants filed within the ten day limit provided for under the *Act*.

Although this was the tenant's application, the burden of proof in such matters to end a tenancy for cause rests with the landlord. Where a tenant applies to dispute a 1 Month Notice, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the 1 Month Notice is based.

When one party provides testimony of the events in one way, and the other party provides an equally probable but different explanation of the events without any form of evidentiary corroboration, the party making the claim (and bearing the burden of proof) has not met the burden on a balance of probabilities and the claim fails.

In the matter before me, I find that, on a balance of probabilities, the landlord has failed to provide sufficient evidence that the tenants have undertaken action that would leave it open to the landlord to find that the tenants have significantly interfered with or unreasonably disturbed another occupant or the landlord.

The landlord indicated that, in total, five noise complaints have been filed against the tenants since the commencement of the tenancy, which comprises a one-year period. I find that the tenants have offered credible testimony to refute the allegations submitted by the occupant of the suite beneath the subject rental unit. I accept the tenants' testimony such that it is more likely than not that the tenants were not in the rental unit at the time that the occupant of the lower unit alleges that noise was emanating from the

subject rental unit. I also accept the tenant's explanation of water being emptied from a container which the occupant of the lower unit mischaracterized as someone urinating from the balcony above.

Therefore, I am left with three remaining noise complaints to consider over a period of one year. The basis of the noise complaints, as provided by the tenant, is the allegations submitted by the occupant of the upper unit.

The tenant maintained that he disagrees with the nature of the complaints made by the occupant of the upper unit. The further asserted that if the level and nature of the noise purportedly heard by the other occupant was true, that it would certainly be bothersome to the other occupants surrounding the subject rental unit.

I accept the tenant's testimony, which was corroborated by the landlord, that noise travels easily throughout the building, and therefore, that any resulting noise late at night would be audible by other occupants, and not just the occupant of the unit above the subject rental property.

I also find credible the tenant's testimony pertaining to his wish to be proactive in dealing with any purported noise complaints. The tenant testified that has never had a noise complaint from any occupants adjacent to him, nor from any occupants of the units located on the same floor as his. He maintained that he has good relationships with most occupants in the building. The landlord did not dispute this portion of the tenant's testimony.

I find that the tenant's behaviour in wishing to be proactive in an effort to mitigate any potential noise complaints from other occupants, and to foster good relationships with other occupants, is not indicative of a person who purportedly is categorized as engaging in activity that "significantly interferes with or unreasonably disturbs another occupant."

I also accept the tenant's testimony that he attempted to engage in discussion with the occupant of the upper unit to determine what the other occupant deemed to be unacceptable noise, such that the tenant could amend his behaviour to further mitigate noise during the evening. I find this behaviour also demonstrates that the tenant wished to maintain a respectful rapport with other occupants, and does not depict an individual who is devoid of the understanding that other occupants have a right to quiet enjoyment.

I also accept the tenant's testimony pertaining to his lifestyle, such that he and his co-tenant leave the rental unit early and return late, due to their respective work schedules, and that because they have to wake up early during the week, that they do not stay up too late. I further accept the tenant's explanation in repudiating the purported noise complaints, as the tenant's testimony in refuting the claims was logical and credible.

If the tenants had engaged in some of the conduct alleged, even then, I would have to consider the infrequency of the allegations, as the landlord has only highlighted five instances of purported noise complaints over a period of one year, and such infrequency might still not constitute significant interference and unreasonable disturbance of other occupants or the landlord.

However, the question of what occurred is not an easy determination to make with nothing more than the conflicting verbal testimony before me and reports received from third parties who were not present at the hearing, particularly as the burden of proof to justify ending the tenancy is on the landlord.

I find that, whenever a tenant's conduct becomes bothersome to other occupants, the landlord has an obligation to issue a written warning to make sure that the tenant understands what complaints and allegations have been lodged and the precise nature of the conduct that is expected. The tenant also should be told that unacceptable conduct may risk termination of the tenancy if it continues. Ending a tenancy is a drastic measure that is seen as a last resort. I find that it is a fundamental principle of natural justice that a party has the right to be warned of the consequences of the behaviour and be given a fair opportunity to correct the behaviour.

Based on the foregoing, I find that, on a balance of probabilities, the landlord has not met the burden of proving that the tenants engaged in behaviour that "significantly interfered with or unreasonably disturbed another occupant or the landlord", as set out on the 1 Month Notice. Therefore, I find it necessary to cancel the 1 Month Notice dated November 27, 2018, and determine that it is of no force and effect.

As the tenant was successful in this application, I find that the tenant is entitled to recover the \$100.00 filing fee paid for this application.

Conclusion

Based on the above, I order the 1 Month Notice, dated November 27, 2018, is cancelled and is of no force or effect. The tenancy will continue until it is ended in accordance with the *Act*.

I issue a Monetary Order in the tenant's favour in the amount of \$100.00 against the landlord. The tenant is provided with a Monetary Order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

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: January 21, 2019

Residential Tenancy Branch