Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OT, FFT

Introduction

This hearing dealt with the tenant's application pursuant to the Residential Tenancy Act (the "**Act**") for:

- an order requiring the landlord to comply with section 28 of the Act, which entitles the tenant to quiet enjoyment; and
- authorization to recover her filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenant testified that the landlord was personally served the notice of dispute resolution package on November 27, 2018. The landlord confirmed receipt of the notice of dispute resolution package via personals service on November 27, 2018. I find that the landlord was served with this package in accordance with section 89 of the Act.

The tenant uploaded an additional letter to the residential tenancy branch document system five days prior to the hearing. She did not serve a copy of this document on the landlord. Accordingly, I excluded this document from the hearing, although permitted the tenant to give oral testimony as to the contents of the letter.

The landlord testified that the tenant was personally served with his evidence package on January 19, 2019. The tenant confirmed receipt of this package via personal service on that date. I find that the tenant was served with this package in accordance with section 89 of the Act.

Preliminary issue – Polygraph

As part of her evidence package, the tenant uploaded a copy of a polygraph test that she obtained of her own initiative. Throughout the hearing, the tenant referenced to the polygraph as indisputable proof that her testimony was correct. The landlord objected to its use as evidence, or, in the alternative, asked that I assign it little evidentiary weight.

Polygraph tests and their results are not admissible as evidence. There is a bulletin on the Provincial Court of British Columbia website on this issue (http://www.provincialcourt.bc.ca/enews/enews-10-05-2016). While I am not bound by this bulletin, I do find it a useful guide in assisting to determine this issue.

In this bulletin, the court references a Supreme Court of Canada Decision *R v Béland*, [1987] 2 SCR 398, which canvasses this decision in depth. In brief**,** *Béland* excludes polygraph evidence for four reasons (as taken from the bulletin):

> First, admitting polygraph evidence offends the evidence rule against oath-helping. This rule forbids a party from presenting evidence that would bolster the credibility of that party's own witness. Polygraph evidence offends this rule because the only purpose it would serve would be to add support to the accused's testimony ("Look, I'm innocent!"), and the polygraph operator would be telling the court that the accused was telling the truth.
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> Second, polygraph evidence offends the rule against admitting consistent out-of-court statements by a witness. This rule says that having another witness testify that the accused person told them the same thing they are telling the court does not add to the accused's credibility. A polygraph operator's testimony would be this type of corroboration of the accused's testimony, so it offends the rule against past consistent statements.
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> Third, polygraph evidence offends the rule about character evidence. This rule holds that an accused may introduce evidence of his general reputation, but he cannot relate specific acts which might tend to establish his character. The results of a polygraph test would infringe this rule since it would amount to evidence that he did not lie in a specific event – the test.
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> Lastly, admitting polygraph evidence is contrary to the expert evidence rule. This rule says that an expert may only give their opinion about something if it will help

> the judge or jury understand a subject that is outside their understanding or experience. If the judge or jury can form their own opinion, then the testimony of experts is unnecessary. In applying this rule to polygraph evidence, the Supreme Court of Canada decided that such evidence would relate only to the issue of the accused's credibility and this issue is well within the court's ability and understanding.

I see no reason to deviate from the reasons of the Supreme Court of Canada. Accordingly, I exclude the polygraph test for the evidence that I will consider when making my decision. This does not mean that I discount the testimony of the tenant, or make any finding (at this point) as its veracity. Rather, I will weigh the tenant's testimony against that of the landlord, the documentary evidence, and the particular circumstances of this case. I will not, however, rely on the polygraph test to determine what is true.

Issue(s) to be Decided

Is the tenant entitled to an order that the landlord comply with section 28?

Is the tenant entitled to recover her filing fees?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of his submissions and arguments are reproduced here. The relevant and important aspects of the parties' evidence and my findings are set out below.

The parties entered into a month to month tenancy agreement on November 1, 2017. Monthly rent is $700. The landlord accepted a $350 security deposit, and continues to hold it in trust for the tenant.

The tenant testified that:

- The she resides in a second floor unit.
- Ever since she moved into the unit, she has been subjected to unreasonable noise emanating (described as the sound of "little bombs") from the unit directly below hers caused by its occupant (the "**First Floor Neighbour**").

- The noise occurs at all hours of the day and night, and has occurred every day since she moved in almost 15 months ago, with the exception of a short period of time (12 days).
- Aside from causing constant noise, the First Floor Neighbour has:
    - on multiple occasions, knocked on the tenant's door and then run away; and
    - called her a "bitch", in the lobby of the rental building, three months ago.
- She first notified the landlord (by way of the building manager) of the disturbance caused by the First Floor Neighbour in October 2017.
- The building manager advised her that the building manager had spoken with the First Floor Neighbour, and that, at some point in 2017, the First Floor Neighbour was told she would be given an eviction notice (although this never happened).
- She wrote a series of letters to the landlord outlining the noise caused by the First Floor Neighbour. These letters were dated April 12, 2018, September 6, 2018, and October 1, 2018.
- In the April 11, 2018 letter, she wrote that the building manager advised her that the First Floor Neighbour would be given a notice of eviction for breach of contract.
- She met with the landlord on October 1, 2018, and asked him for a $50,000 loan for what she said at the time were family issues, but, when testifying, she revealed she wanted to use this money to move to a motel for a month or two to escape the noise caused by the First Floor Neighbour.

The tenant did not provide any documentary evidence regarding the frequency or time of day of disturbances (such as a log book), or proving the disturbances actually occurred (such as an audio recording). I have only the tenant's oral testimony as to whether the noises occurred, and at what frequency and volume.

The landlord testified that:

- The building manager received a verbal complaint from the tenant regarding excessive noise caused by the First Floor Neighbour in November 2017. The building manager testified that she spoke to the First Floor Neighbour regarding this complaint, and she believed that the matter was resolved (no further complaints were made by the tenant for some time). She did not hear from the tenant again regarding the First Floor Neighbour until April 12, 2018.
- On April 12, 2018, the tenant delivered a letter in which she asked that the landlord stop charging her rent for a few months so that she could move to a

motel on account of the noise caused by the First Floor Neighbour. The landlord refused.

- The building manager's office is located directly next to the tenant's unit, and that the building manager did not hear any noise coming up through the floor of the tenant's unit.
- He has not received any noise complaints from other tenants about the First Floor Neighbour.

The landlord gave no evidence as to what steps, if any, he took to address the tenant's noise complaint on April 2018. Rather he testified that it was "quiet from April to mid-September".

The landlord further testified that:

- On October 1, 2018, he met with the tenant off-site at a Tim Hortons. He expected to discuss another noise complaint, but he testified the tenant asked for a loan of $50,000, and gave him a letter dated October 1, 2018, in which the tenant re-iterated her complaint about the First Floor Neighbour, and stated she "has a friend who was a prison guard in Vancouver. We are going to discreetly harass [the First Floor Neighbour]."
- Upon being asked for a loan, he concluded the meeting.
- On October 22, 2018, he received a letter from the tenant's lawyer demanding that he take steps to address the noise caused by the First Floor Neighbour.
- On October 29, 2018 he witnessed a heated argument in the lobby of the building between the tenant and the First Floor Neighbour.
- On November 1, 2018, he met with the First Floor Neighbour, who advised him that the tenant had been making a great deal of noise that could be heard in her unit, and that, on several occasions she had banged on the ceiling when the noise "became too much".
- He asked the First Floor Neighbour to cease banging on the ceiling, and to keep a log of the noises she experienced from the tenant's unit.
- The First Floor Neighbour kept a log from November 1, 2018 to November 14, 2018 which outlined at least 100 instances of noise coming from the tenant's unit (ranging from "banging on tub" to "back door slammed" to "loud music through the evening and early morning").
- Between November 6, 2018 and December 27, 2018, he attended the property on 16 separate occasions outside of regular office hours (starting as early as 5:15 am and as late as 12:50 am) to see if he could hear any of the noises

complained of while standing outside both the tenants' unit and the First Floor Neighbour's unit.

- He did not hear any noise during these times, or during his office hours, that he would characterize as excessive or requiring management attention (he testified he heard a television faintly through one of the doors).
- During the week of November 5, 2018 he saw the tenant in the lobby and advised her that he had spoken to the First Floor Neighbour regarding the noise. He testified that the tenant responded that "that would explain why it's been so quiet, I thought she was away." Upon hearing this, the landlord was under the impression the issue was resolved.
- On December 5, he received a copy of the (inadmissible) polygraph test from the tenant, which she said proved she wasn't lying about the noise.
- On December 29 and 31, he attended the First Floor Neighbour's unit for 30 minutes each time, and couldn't hear any noise caused by the tenant, and did not hear any unreasonable noise caused by the First Floor Neighbour.

Evidence Manipulation

At the hearing, the tenant made a serious allegation against the landlord with regard to his manipulating the letter she sent on October 1, 2018 to remove certain annotations she made on it prior to sending. These annotations appear on the copy of the letters in her evidentiary package, but not in the copy in the landlord's.

The annotations are as follows:

1) Beside a paragraph which, in part, reads "I have a friend who was prison guard in Vancouver. We are going to discreetly harass [First Floor Neighbour], are the words "couldn't do" and an arrow point at the aforementioned passage. (This annotation was written in what appears to be a felt-tipped pen, rather than a traditional pen which was used for the balance of the letter, and crosses two lines on the page of the hand-written letter).
2) Beside the paragraph which, in part, reads "I was getting headaches and now when [the First Floor Neighbour] bangs it is as though I get an instant warning headache. I spend very little time here", are the words "wanted to help" and an arrow point at the aforementioned passage (this annotation is printed in block letters, rather than the cursive of the remainders of the letter, and again is written so as to overlap several of the page's lines.)

When asked, the tenant strongly denied the possibility that the annotations were made on a copy of the letter she retained after she had sent the original to the landlord. She is adamant that the annotations were made by her prior to the letter's sending, and were on the copy of the letter sent to the landlord.

The landlord vigorously denies removing these annotations. He states that the copy of the October 1, 2018 letter in his materials is a true copy of the October 18, 2018 letter he received. He points out that if he manipulated the letter, there would be evidence of it, by way of breaks in the lines of the paper where the annotations once were. Additionally he points out that the type of writing implement used and style of handwriting differ between the annotations and the body of the letter.

Analysis

Manipulated Document

I will first address the allegations document manipulation.

I note that the substance of the annotations is suggestive of notes made to oneself after, and do not make much sense as additions to the letter. For example, I am uncertain why, if after stating that she was going to discreetly harass the First Floor Neighbour, the tenant would write "couldn't do", with an arrow pointing to the passage, prior to sending. It seems more likely that this was a note to herself made after the fact.

I also find persuasive the landlord's submission that, if he deleted text from the letter, that there would be some trace of this deletion be it whiteout marks, a broken line on the paper, or a smudge.

On a balance of probabilities, I find it more likely that the annotations were made by the tenant after sending the letter on the copy she retained, than that the landlord manipulated the letter to delete the annotations. Accordingly, I find that the tenant is mistaken in her recollection and that she made the annotations prior to sending the letter.

Breach of Quiet Enjoyment

Section 28 of the Act, in part, reads:

Protection of tenant's right to quiet enjoyment

28 A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

(b)freedom from unreasonable disturbance;

Policy Guideline 6 discusses this section in some detail:

> A landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.
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> Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.
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> […]
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> A landlord can be held responsible for the actions of other tenants if it can be established that the landlord was aware of a problem and failed to take reasonable steps to correct it.

In this case, the tenant alleges that the landlord did not take reasonable actions in preventing the disturbance, despite being aware of it.

Per Rule of Procedure 6.6, in any hearing, the party bringing the application bears the onus of proving the claims they are making. This is often referred to as the burden of proof. The standard the party bringing the application has to meet is that of a balance of probabilities. That is to say, the party bringing the application must show that it is more likely than not that the facts they claim occurred, actually occurred.

In this case, the tenant must persuade me that:

1) There was noise emanating from the First Floor Neighbours' unit;
2) This noise was not unreasonable (both in volume and amount); and
3) If there was, the landlord:
    a. was aware of the issue
    b. did not take reasonable steps to eliminate it.

I find that the tenant has failed to meet her burden of proof.

Given the conflicting testimony, much of this case hinges on a determination of credibility. A useful guide in that regard, and one of the most frequently used in cases such as this, is found in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), which states at pages 357-358:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried 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 circumstances.

The tenant provided no evidence as to the volume or frequency of the noise, beyond that it was constant (with one 12 day break). I have no basis, other than the tenant's testimony, to find that the noise occurred, or that, if it did, it was of an unreasonable level. The landlord testified he has not heard any of the noise described either during the day when he (or the building manager) is in the office next door to the tenant's unit, or during one of his 16 visits to the units in question after usual business hours.

I have already found the tenant to be mistaken with regards to her claims regarding the annotations on the letter described above. I do not find the tenant to be a reliable source of information. To the contrary, I found the landlord's testimony to be credible and in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances. For example:

1) When the tenant first brought the noise issue to the landlord shortly after moving in, the landlord testified he spoke to the First Floor Neighbour about it, and then heard no further complaint from the tenant. I do not find it likely that, if the First Floor Neighbour continued in causing a disturbance, that the tenant would have not made another complaint for almost six months (November to April).
2) When the tenant made a further complaint on October 22, 2018, the landlord again asked the First Floor Neighbour to cease the offensive conduct, and began upon an investigation to determine the scope of the noise. Shortly thereafter, the

tenant remarked to the landlord that there had been a quiet stretch for a number of days. The investigation did not show that any unreasonable noise occurred.

Where the testimony of the landlord and the tenant differ, I accept the testimony of the landlord over that of the tenant.

I find that the landlord acted reasonably in response to the tenant's complaints. I accept his testimony that he (or the building manager) spoke with the First Floor Neighbour following the November 2017, and October 2018 complaints, and that the noise stopped. This was a reasonable (and effective) response to the tenant's complaints. I accept his testimony that, after the April 2018 complaint, "it was quiet". Given that there was no further complaint lodged by the tenant until September 2018, this would seem to be corroborated. As the complaints continued from the tenant, I find that it was reasonable for the landlord to conduct an investigation to determine the extent of the noise. Without this investigation, it would be difficult for the landlord to take steps beyond a simple conversation with First Floor Neighbour to resolve the problem.

As the landlord could not confirm that any unreasonable noise (at the level of a small bomb, or otherwise) was being caused by the First Floor Neighbour, it was reasonable for him to take no action.

The tenant has been unable to, on a balance of probabilities, persuade me that the noise caused by the First Floor Neighbour was of an unreasonable nature, or that the landlord failed to take reasonable steps in response to her complaint.

I dismiss the tenant's application, without leave to reapply.

Conclusion

I dismiss the tenant's application, without leave to reapply.

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 31, 2019

Residential Tenancy Branch