Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, FFT

Introduction

This decision is in respect of the tenant's application for dispute resolution under the *Residential Tenancy Act* (the "Act"). The tenant seeks the following remedies:

1. an order cancelling a One Month Notice to End Tenancy for Cause (the "Notice"), pursuant to section 47(4) of the Act; and

2. compensation for the filing fee, pursuant to section 72(1) of the Act.

A dispute resolution hearing was convened on February 21, 2019 and the tenant and two representatives for the landlords attended, were given a full opportunity to be heard, to present testimony, to make submissions, and to call witnesses. The parties did not raise any issues in respect of the service of documents.

While I have reviewed all oral and documentary evidence submitted that met the requirements of the *Rules of Procedure,* under the Act, and to which I was referred, only evidence relevant to the issues of this application are considered in my decision.

I note that section 55 of the Act requires that when a tenant applies for dispute resolution seeking to cancel a notice to end tenancy issued by a landlord, I must consider if the landlord is entitled to an order of possession if the application is dismissed and the landlord's notice to end tenancy complies with the Act.

Issues to be Decided

1. Is the tenant entitled to an order cancelling the Notice?
2. If no, are the landlords entitled to an order of possession?
3. Is the tenant entitled to compensation for the filing fee?

Background and Evidence

The landlords' agents (hereafter the "landlord" unless otherwise noted) testified that and confirmed that the tenancy commenced on June 1, 2018 and is to continue as a month-to-month tenancy on June 1, 2019. Monthly rent is $1,000.00 and the tenant paid a security deposit of $500.00. There was also submitted into evidence and referred to by both parties, both a written tenancy agreement and a rental agreement amendment (the "amendment").

The amendment was signed by all parties on December 14, 2018. The second clause of the amendment speaks to noise restrictions, including what constitutes interference and also when the quiet hours are. Page 2 of the amendment, just above the signature blocks, is a term that reads "I/We hereby acknowledge that I/we have read and understand this Amendment, and I/we agree to comply with it fully. I/we understand that failure to comply with this Amendment constitutes a breach of a material term of my/our Residential Tenancy Agreement and may be cause for ending my/our tenancy."

The landlords testified that between November and December 2018 the landlords received many phone calls from tenants who live in the upstairs portion of the house. They had received a prior call from the upstairs tenant on June 21, 2018. The tenant resides in the lower level (or basement) of about half of the lower floor area. The upstairs tenants complained about noise issues from the downstairs tenant.

As a result, the landlords drafted the amendment to solve the noise issue on December 14, 2018. Apparently, this did not fix the issue, as the landlords received two written noise complaints from the upstairs tenant on December 15 and December 18, 2018 (copies of which were submitted into evidence). The landlords then issued a warning notice (submitted into evidence) to the tenant on December 19, 2018. Two days later, the upstairs tenant sent another complaint to the landlords, and referred to a threatening text message that the tenant had sent to her. In these messages the upstairs tenant also texted the tenant about his level of noise.

The upstairs tenant's complaints refer to the tenant at 11 P.M. on December 13, 2018, "banging and rattling dishes very loudly" and him saying "Gotta go do the dishes!" In her complaint letter of December 18, 2018, the upstairs tenant writes that on December 17,

2018, “the lower tenant was doing the usual that he does such as hollering, yelling, swearing, whistling, clapping, singing, making sounds like ‘wooooo’ yeaaa’ out loud.”

At this point, the landlords’ agent R.H. served the Notice on the tenant, on the door, on December 21, 2018 with an effective end of tenancy of January 31, 2019. Page two of the Notice indicates that the two reasons for the tenancy being ended are (1) that the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord, and (2) that there was a breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so. A copy of the Notice was submitted into evidence.

Under the DETAILS OF CAUSE(S) section of the Notice, the following information is provided (edited for spelling and punctuation):

> Three noise complaints received from the upper tenant between December 13 – Dec. 17/2018, in regards to excessive noise levels originating from unit between the hours of 8 PM – 7 AM weekdays 10 PM – 9 AM weekends. Warning letter issued to tenant on December 19, 2018 Another complaint received December 21/2018 for excessive noise during the night of December 20/2018. Lower tenant also sent a threatening text message to upper tenant for complaining to landlord.

The landlords testified that after the Notice was issued, they communicated with the tenant to resolve the issue once again, but the tenant denied making the noises and referred to the upstairs tenant’s letters and accusations as hearsay.

The landlords further testified and clarified that while the tenant made noises during the daytime, that the primary issue that the upstairs tenant had was with the tenant’s yelling and swearing at night, up to 1:00 A.M., 2:00 A.M., and so on. The upstairs tenant’s two letters refer to a range of late night times that there were noise disturbances.

The tenant testified that when he initially viewed the rental unit there were only 2 adults and 2 children “living above me.” He was unaware, and soon found out, that there was an additional adult living in the house with the upstairs tenants. Apparently, the upstairs tenant’s mother was in the room next to the tenant’s kitchen. He stated that if he knew there was an additional person living there in an adjacent room to the rental unit that he would not have moved in.

With respect to the times of the supposed noise complaints, the tenant testified that he starts work at the airport at 6:30 A.M. five to six days a week, and that he leaves at 6:10

A.M. He rhetorically asked how he could be up as late as alleged given his early morning work time. He further submitted that it is difficult to make his way through the rental unit without making any noise. Any noises complained about, such as closing the microwave door and dishes are the noises of everyday living.

He referred to one incident (involving a late-night argument referred to in the landlords' evidence) where his friend had come over in need of some support due to ongoing issues with the friend's common law partner.

The tenant testified as to poor insulation throughout the house that fails to mitigate the transmission of sound. He commented that the upstairs tenants with their two children and a dog are "quite noisy." The tenant asked two questions of the landlords' agents, that I asked. First, he wanted to know what type of insulation is in the house, and second, when is the floorplan submitted into evidence dated.

In rebuttal and response, the landlord testified that the house was built in the 1960s and that "it is not the best soundproofing." Though, he admitted to not having a close look at the insulation. As for the floorplan, the landlord testified that it was the original floorplan from when they purchased the house in 2016/2017.

The landlords' agents explained that there is no "third suite" occupied by another tenant but is the lower part of the house that is connected to the upstairs. He noted that the complaints regarding the noise came from upstairs, which is above the tenant's rental unit. Further, he noted that the noise issues arose at night and early morning hours, not during the time before the tenant leaves for work in the morning, as the tenant spoke about. He reiterated that the "main problem is the hollering and whistling and yelling," not when the tenant is getting ready for work in the morning.

In rebuttal and final submissions, the tenant argued, "I can't watch a hockey game without getting excited?" He further explained that his reference to "NEW YEAR Ain't going to be good." in a text to the upstairs tenant was simply that he was planning on having some friends over because it was going to be an ordinary New Year's Eve party. It was not, as submitted by the landlords, a threat to the upstairs tenant.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

Where a tenant applies to dispute a One Month Notice to End Tenancy for Cause, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the Notice is based.

In this case the Notice was issued under sections 47(1)(d)(i) and 47(1)(h) of the Act. Section 47(1)(d)(i) reads as follows:

> A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies: [. . .]
>
> (d) the tenant or a person permitted on the residential property by the tenant has
>
> (i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,

And, section 47(1)(h) reads, in conjunction with section 47(1), as follows:

> A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies: [. . .]
>
> (h) the tenant
>
> (i) has failed to comply with a material term, and
>
> (ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so;

In this case, the landlords argue that the tenant's ongoing noise-making has significantly interfered with and unreasonably disturbed another occupant, namely, the upstairs tenant and her family. The tenant disputes that he was making the alleged noise, and in the rare instance that he does, that it is justified because of the noises being everyday sounds and noises.

When two parties to a dispute provide equally reasonable accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim. In this case, there is documentary evidence consisting of text messages, statements from the landlords' agents, and two written complaint letters from the upstairs tenant, establishing that there was an ongoing issue of the tenant making significant and unreasonable noises and sounds. I further infer from the fact that the tenant signed an

amendment to the tenancy agreement, which was by all accounts created as an attempt to resolve the noise issues, that the tenant was aware of the noise issues.

A text, dated June 22, 2018, from the upstairs tenant to the landlords states that "…i [the upstairs tenant] had a good conversation with him today and told him exactly what he was doing that was keeping my kids up". In other words, the noise issues started not long after the tenancy commenced and almost six months before the Notice was issued.

In her complaint letter of December 15, 2018, the upstairs tenant refers to this being her second complaint. She further states that

> We have had noise issues with the Lower tenant since he began living here. Is [*sic*] has been on and off since then. I have tried to be a good neighbour and discussed the issue with him but he has not stopped. Throughout the month of November, I have had conversations about his volume during the late hours of the night.

The letter continues, and concludes as follows:

> I also have two young girls who should not need to be exposed to such filthy language being yelled out at odd hours of the night. Recently they have had trouble sleeping and are scared to sleep along in their rooms due to the hollering and yelling coming from downstairs. Although this is my first time writing you a letter about this, this has been an on and off issue since the lower tenant moved in in June but continuous since last month.

In her complaint letter of December 18, 2018, the upstairs tenant writes, *inter alia,* that "The lower tenant has completely taken away our peaceful enjoyment living here. Unfortunately, this is becoming very distrubing on a regular basis with every complaint, he gets worse."

While the tenant testified at length about his work start times, and testified about the layout and structure of the rental unit (in relation to the adjacent rooms belonging to upstairs), and that he was "lied to" when he viewed the rental unit about the number of other occupants in the property, none of this is material to the central issue of whether he has caused noise sufficient to significantly interfered with and unreasonably disturb the upstairs tenants. Whether there were four people living upstairs or five people is immaterial to whether a tenant can or might cause noise of this nature. That the tenant

starts work at the airport at 6:00 or 6:30 A.M. does not mean that he does not enjoy late nights.

I recognize that the insulation in this property is likely not the best to mitigate sound. Indeed, the landlords' agent testified that it is "not the best soundproofing," and the upstairs tenant admitted in one text that the tenant likely must tolerate the sounds of her family going about their business. The tenant testified that the upstairs tenants are "quite noisy." However, that the noise problem was an "on and off issue" indicates and reflects that the tenant can control the amount and type of noise he produced. While some of the noise complaints had to do with "slamming the microwave door"—and, I must agree with the tenant that it is nearly impossible to quietly close a microwave door—the central noise complaint had to do with "excessive noise levels" caused by the tenant's hollering, yelling, and swearing. Noise that is within the control of the tenant.

The tenant referred to the upstairs tenant's complaints being hearsay. The hearsay rule states that written or oral statement made by persons otherwise than in testimony at the proceeding in which it is offered are inadmissible if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein. And, while section 75 of the Act states that an arbitrator may admit evidence that would not necessarily be admissible under the rules of evidence, ending a tenancy solely based on a third party's statements (including those of text messages and complaint letters) requires that I determine whether such evidence may be relied upon in my decision.

Heresy evidence may be admitted, however, where its admission is (1) necessary to prove a fact in the issue, and (2) the evidence is reliable. The criterion of reliability is a function of the circumstances under which the statement in question was made. If a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be "reliable." That is, there is a circumstantial guarantee of trustworthiness is established. (*R. v. Smith,* [1992] 2 S.C.R. 915).
In this case, the hearsay evidence consists of written communication originating as early as June 22, 2018, and the written complaints originated prior to the Notice being issued. The circumstances under which the text messages and complaint letters originated were current with the noise complaints, and not, I find, created after the fact or in any way linked to the landlords' case. I find that the circumstances under which the statements were created negate the possibility that the upstairs tenant was untruthful or mistaken. Given the above, I find that the documentary evidence submitted by the

landlords in respect of the upstairs tenant's statement are reliable, and as such they are admissible.

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the landlords have met the onus of proving the first ground on which the Notice was issued, namely, that the tenant has significantly interfered with and unreasonably disturbed another occupant of the residential property. Having found that the first ground for ending the tenancy has been proven, I need not consider the second ground.

Section 55 (1) of the Act states that if a tenant applies to dispute a landlord's notice to end tenancy and their Application for Dispute Resolution is dismissed or the landlord's notice is upheld the landlord must be granted an order of possession if the notice complies with all the requirements of Section 52 of the Act.

Section 52 of the Act requires that any notice to end tenancy issued by a landlord must (1) be signed and dated by the landlord, (2) give the address of the rental unit, (3) state the effective date of the notice, (4) state the grounds for ending the tenancy, and (5) be in the approved form. Having reviewed the Notice, I find the Notice issued by the landlords on December 21, 2018, complies with the requirements set out in section 52.

Conclusion

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

I hereby grant the landlords an order of possession, which must be served on the tenant and is effective two days from the date of service.

This order may be filed in, and enforced as an order of, the Supreme Court of British Columbia.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the Act.

Dated: February 21, 2019

Residential Tenancy Branch