Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC

Introduction

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the Act) seeking:

- to cancel the landlord's One Month Notice to End Tenancy for Cause (the One Month Notice) pursuant to section 47 of the Act;

Both tenants and 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 "MM" presented testimony on behalf of both tenants, and will hereafter be referred to as the "tenant".

The tenant testified that he served the Tenant's Application for Dispute Resolution hearing package ("dispute resolution hearing package"), along with their evidence, to the landlord by way of registered mail. The landlord confirmed receipt of the dispute resolution hearing package and the tenant's evidence. Therefore, I find that the landlord has been served with the notice of dispute resolution package, and the tenants' evidence, in accordance with section 89 of the Act.

The tenant confirmed receipt of the landlord's evidence.

I note that Section 55 of the Act requires that when a tenant submits an Application 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 has issued a notice to end tenancy that is compliant with the Act.

Preliminary Issue – Amendment of Tenants' Application

The tenant MM testified that his wife, "LM", is also a tenant with respect to the tenancy agreement in place with the landlord. The parties agreed that the application should be amended to include MM as a tenant and as a party to the proceeding. Therefore, pursuant to section 64(3)(c), I amend the application to included MM as an applicant tenant and will note that the inclusion of LM as an applicant tenant is reflected in the style of cause.

Issues(s) to be Decided

Should the landlord's One Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession, pursuant to Section 55 of the Act?

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 tenants' claim and my findings around it are set out below.

The parties agreed that the tenancy began on June 01, 2010. The monthly rent was determined to be due on the second day of each month. The monthly rent was set at $1,500.00 and has since been increased to the current amount of $1,747.00. The parties agreed that the tenants provided a security deposit in the amount of $700.00 which continues to be held by the landlord. The tenant provided as evidence a copy of a written tenancy agreement which confirms the details provided orally by the tenant.

The subject rental unit is the upper suite located within a single-family detached home. The tenants rent and occupy the upper suite, along with their three children, aged four years, two years, and three months. The single-family home includes a separate lower unit which is occupied by two students, one whom is an individual who, for the purpose of this decision, will be identified as "LB".

The landlord issued a One Month Notice, dated January 10, 2019, to the tenants with an effective vacancy date of March 01, 2019. The landlord testified that the One Month Notice was served in person to the tenants. The tenant confirmed that he received the One Month Notice on January 10, 2019.

The landlord's One 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;*

In the section of the One Month Notice titled "Details of Cause", the landlord provided the following details to describe the nature of the purported activity which comprised the significance interference of unreasonable disturbance:

> *"Prolonged and excessive noise despite requests for quiet from Oct. 2018 to Jan. 2019, supporting emails and statement from disturbed tenant attached. Note: There is sound proofing insulation and double sheeting, one inch, of drywall Between the suites"*
>
> [reproduced as written]

The landlord testified that the rental unit is not suitable for the current tenants and their children, as the level of noise, along with its prolonged duration, results in the noise emanating to the unit below, thus causing continuous disturbance to the occupants of the lower suite.

The landlord testified that in September 2018, new occupants commenced residency in the lower unit, one of whom was LB. The occupants of the lower unit began to complain that the noise emanating from the upper rental unit was excessive, prolonged, and constituted a disturbance which diminished their quiet enjoyment.

The landlord testified that the occupants of the lower units are university students, and that the students found it difficult to be able to study in their unit. The occupant LB, in particular, outlined his concerns by way of a written statement which the landlord entered into evidence. The occupant LB asserted that the noise created by the tenants' children has impacted his academic performance, such that his grades have been lower as a result of the negative impact of the noise.

The landlord testified that LB had communicated directly with the tenants via email correspondence and text message communication, the contents of which were provided as evidence by the tenants. The communication between LB and the tenants included

LB's assertions that his sleep has suffered as a result of the noise caused by the tenants' children. At times, LB asserted, he would have to sleep during the day, including during the daytime hours on the weekends.

In the text message and email correspondence with the tenants, LB suggested that the tenants' children should not be allowed to run in certain areas of the upper unit, should not be able to push chairs, should not be permitted to run inside the rental unit during the weekend mornings, including on Sunday mornings.

The landlord testified that the occupant LB has alleged that the tenants' children create too much noise and disturbance as a result of their behaviour, which, in effect, has adversely affected his life and his ability to live in his unit in a peaceful fashion.

The landlord alleges that, according to the occupants of the lower unit, the actions of the tenants' children include excessive jumping and running which result in a significant amount of noise emanating to the unit below, as well as excessive noise in general which continues during the morning and afternoon hours. The landlord provided as evidence a written statement provided by the occupant LB.

The correspondence between LB and the tenants, via text messages and email exchange, shows that LB's concerns with respect to noise centres not on purported noise caused by the tenants, but rather, by the tenants' children.

The landlord testified that the house dates to approximately 1910, and that there are hardwood floors throughout the upper unit, with the exception of the kitchen floor, which consists of laminate.

The landlord testified that during the tenancy with respect to the tenants of the upper unit, there have been approximately four different occupants of the lower unit. When asked whether the other four occupants had brought forth similar noise complaints with respect to the tenants, the landlord stated that to his recollection, he could recount that there was one noise complaint in approximately July 2018 from a previous occupant, which related to noise caused by the tenants' eldest child.

The tenant testified that the house has forced air ducts which are conducive to carrying sound throughout the house, including to the unit below. The tenant referred to the age of the home and suggested that the noise mitigation is insufficient, such that routine, everyday tasks undertaken in the upper unit are easily carried to the unit below. The

tenant asserted that the condition and age of the home are contributing factors which allow sound to emanate easily within the structure.

The tenant denies that his family causes excessive noise. The tenant testified that he has been residing at the rental unit for nine years, and has never been the subject of noise complaints. The tenant provided that the lower occupants were aware that the tenants residing in the upper unit had young children, and that LB should have been cognizant that young children will invariably create some measure of noise which, to a member of the student demographic, might seem abnormal. However, the tenant asserted, the degree of noise caused by children aged two and four, would, to adults and parents, be reasonably classified as routine arising from children behaving in a manner consistent with their age.

The tenant denies the allegations submitted by the occupant LB, and provided that his children do not behave in a manner that would be classified as unusual, such that they deliberately cause excessive noise. The tenant testified that he would describe his children as being regular children who act and play in a manner that befits their respective ages, and that, to some extent, it is reasonable to accept that children will play and interact in such a manner that some level of noise will inevitably be generated during throughout the day.

However, the tenant denies that his children remain awake during late hours of the night as alleged by the occupant LB. The tenant provided that he and his wife have raised their children to be respectful, and that to the extent possible, they have attempted to direct their children to be respectful of others and to attempt to reduce the level of noise they generate.

The tenant asserted that both he and his wife are respectful tenants, and have occupied the rental unit since 2010. The tenant provided that both he and his wife are mindful of the other occupants, and their lifestyle is not such that they would create an undue level of noise.

The tenant testified that after learning of the noise complaints from LB, he and his wife have been proactive, understanding, and willing to accommodate LB’s request to reduce and mitigate the purported noise emanating from their unit.

The tenant testified that he has been able to adjust his children’s sleep schedule such that his children go to bed around 7 p.m. or 8 p.m. and awake the next morning at about

7 a.m. The tenant provided that he and his wife try to undertake quiet tasks with their children, and when possible, have them play outside or at a nearby park.

The tenant further testified that they avoided having other children over to play with his children in an effort to mitigate noise. The tenant provided that he installed padding under furniture and chairs, and has limited his children's access to balls and heavy toys which may produce noise. The tenant stated he has limited his children's ability to play on the flooring with cars to reduce noise.

The tenant testified that he and his wife have gone to great lengths in an attempt to influence and vary their children's behaviour and conduct in an effort to reduce noise such that it would be more acceptable to the occupants of the unit below.

The tenant further testified that apart from himself and his wife, the only other occupants permitted in the rental unit are his children, and that the basis of the noise complaints, and complaints in general, are centred around the purported conduct of his children, as alleged by the occupants of the lower unit.

The tenant testified to deny the allegations made with respect to the alleged conduct of his children, and asserted that both he and his wife have raised their children to be respectful of others, and that his children do not cause the level of noise or disturbance alleged by the landlord and the occupant LB.

The tenant provided that he has made great efforts to limit the purported noise caused by his children, but also asserted that the landlord and LB must recognize that children playing in a manner befitting their age will invariably cause noise, and that the children cannot be expected to remain extremely quiet throughout the day to accommodate the sleep schedule of LB and the other occupant of the lower unit.

The tenant testified that LB chooses to stay up late, sometimes past midnight, and that LB chooses to sleep during the day. However, the tenant asserted, his children are asleep between 8 p.m. to 7 a.m., and that it is not unreasonable for them to be active during regular waking hours past 8 a.m. and during the afternoon.

Analysis

Section 47 of the Act allows a landlord to end a tenancy by giving notice to end the tenancy if, among other things 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 file an application for dispute resolution within ten days of receiving the One Month Notice. In this case, the tenants received the One Month Notice on January 10, 2019. The tenants filed their application for dispute resolution on January 12, 2019. Accordingly, the tenants filed within the ten day limit provided for under the Act.

Where a tenant applies to dispute a One Month Notice, or in a matter in which the landlord seeks an Order of Possession, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the One Month Notice to end a tenancy for cause is based. Therefore, in the matter before me, the burden of proof rests with the landlord.

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, 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.

Both parties have provided documentary evidence, along with their respective testimony and submissions. However, the question of what occurred is not an easy determination to make when weighing 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 the evidence and testimony provided by both parties was reliable and depicted a version of events that was equally probable. However, the test that I must apply in this matter is a balance of probabilities, which is to say, that it is more likely than not that, based on the evidence and testimony, that events occurred in a certain way as opposed to another.

Although the landlord's evidence and submissions were considered on merit, in weighing the evidence and testimony from both parties, I find that the landlord had the burden of proving, on a balance of probabilities, that he had cause to issue the One Month Notice, and that the landlord failed to meet that burden.

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, or people permitted on the property by the tenants, have significantly interfered with or unreasonably disturbed another occupant or the landlord.

I accept the evidence provided by the tenant MM whereby he described that neither he nor his wife cause noise or disturbance that would interfere with the landlord or other occupant. The landlord did not dispute this portion of the tenant's testimony. The central issue is not whether the tenants are the cause of the significant interference or unreasonable disturbance , but rather, whether the occupants —in this case, the tenants' children—permitted on the property by the tenants, have caused significant interference or unreasonable disturbance to the occupants of the lower unit.

The allegations of significant interference or unreasonable disturbance alleged by the landlord and by the occupants of the lower unit focus primarily on the purported actions of the tenants' children, and, as a related matter, whether the tenants have adequately mitigated the purported noise and disturbance caused by the children.

I find that part of the central component of the complaints raised by the landlord and the other occupants from the residential property is the question of whether the tenants have sufficiently intervened to mitigate the purported actions of their children which form the basis of the noise and disturbance complaints.

The issue for me to determine is whether the purported actions of, and interference caused by, the tenants' children constitutes a *significant* interference and *unreasonable* disturbance, and whether the tenants have attempted to mitigate the actions of their children to the extent possible.

Section 47 of the *Act* provides, in part, the following:

> **47** (1)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,

The Act provides only that the landlord may end a tenancy for cause if the tenant has caused significant interference or an unreasonable disturbance; however, the Act does

not provide any guidelines as to what constitutes significant interference or an unreasonable disturbance. I must also consider that the people permitted on the residential property in this case are children, and that what might be considered "unreasonable" or "significant" must be viewed in light of the fact that the interpretation of unreasonableness or significant interference is being applied to children.

Based on the testimony from the parties, and keeping in mind that the onus is on the landlord to provide evidence to prove otherwise on a balance of probabilities, I find that the actions of the tenants and their children do not constitute significant interference or create unreasonable disturbance.

Both parties testified that the purported noise results from the children occupying the rental unit and playing inside the rental unit. While the other occupants might view the noise as a disturbance, I do not find that the act of children playing and conducting themselves in a manner that might create noise can be categorized as significant interference or unreasonable disturbance, given the fact that they are children of a very young age.

I accept the submission from the tenant MM that the conduct of his children is reasonable and fits the routine behaviour for children, especially given the respective ages of the children, and that the children simply play in a manner that is befitting of their respective ages.

I also accept the tenant's testimony that he and his wife have adequately intervened to adjust their children's behaviour when necessary, and that after being made aware of the noise complaints, they took reasonable steps to mitigate the noise created by their children.

I note that based on the testimony provided by the tenants, the tenants have been cooperative and willing to undertake measures to vary the behaviour of their children in an effort to mitigate the noise caused by their children. I also accept that the tenant's assertion that children of a very young age will invariably behave in a manner that might not be consistent with the expectations of a person belonging to a university student demographic.

Therefore, the interpretation of what constitutes "acceptable noise" becomes subjective, and I find that the tenants have acted reasonably to vary their children's activities—to the extent possible—and acknowledge that doing so, given that the children are aged two and four years respectively, is not an easy task.

As depicted in the documented correspondence between the tenants and LB, and as presented as testimony by the tenants, the tenants have undertaken efforts to mitigate the noise being generate by their children—by adjusting their sleep schedule, having the children play outdoors, and by not having other children over as guests.

Although I realize that such actions to mitigate, from the perspective of the landlord and LB, did not completely eliminate noise to the extent desired by LB, I find that the tenants' effort to do so illustrate their willingness to acknowledge and recognize LB's right to quiet enjoyment. I also note that it is unreasonable to expect parties to completely eliminate noise in between units, given the issue raised by the tenants that the residential building presents with noise mitigation issues (due, in part, to its age, and the materials used in its construction).

I find that the tenant's testimony, whereby he asserted that some of the noise being created due to their children playing in a normal manner should not be construed as unreasonable, is a reasonable determination to make, as there will inevitably be some level of noise resulting from such activity.

Of relevance to the issue is that the occupant LB had willingly adopted a schedule whereby he sometimes stayed up late into the night, sometimes past midnight, such that his sleep schedule varied and that he expressed to the tenants that he needed to sleep-in on weekends.

I find that it is not unreasonable for the tenants and their children to engage in routine activity during daytime and afternoon hours. Although this might be interpreted as a disturbance for someone who wishes to sleep later, the tenants also have a right to use of their rental unit, and for them and their children to do so during the day and afternoon is not abnormal, simply because another occupant has a different sleeping schedule and wishes that five other occupants of the upper unit cater their activities—and the timing of such activities, some of which include routine use of their rental unit—around his schedule and preference with respect to his sleeping patterns.

I find that the tenants have made an effort vary their use of the rental unit, and have tried to mitigate the noise made by their children. However, the tenants also have a right to use of their rental unit, and it is not reasonable for the occupant LB to expect the landlord to demand that the tenants amend the manner in which they undertake the daily use of their rental unit to cater to his sleeping schedule, which, on occasion,

necessitates that he sleep-in during the weekends during a time that might be customarily viewed as routine waking hours.

Therefore, based on the foregoing, I find that the neither the tenants, nor their children, have, through their actions, caused interference or disturbance that could, given the circumstances described, be categorized as significant or unreasonable, sufficient to end the tenancy.

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 One Month Notice.

Conclusion

Based on the above, I order the One Month Notice, dated January 10, 2018, is cancelled and is of no force or effect. The tenancy will continue until it is ended in accordance with the Act.

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: March 07, 2019

Residential Tenancy Branch