Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding M. ANNA WANG HOLDINGS and NEWPORT PROPERTY MANAGEMENT LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes FFT MNDCT OLC RP RR

Introduction

In this dispute, the tenants seek the following relief under the *Residential Tenancy Act* (the "Act") pertaining to a claim for loss of quiet enjoyment of the rental unit:

1. compensation in the amount of $17,970.00 under section 67 of the Act;
2. an order for regular repairs under sections 32 and 62(3) of the Act;
3. an order to reduce rent under section 65 of the Act;
4. an order that the landlords comply with the tenancy agreement, the Act, or the regulations, under section 62 of the Act; and,
5. recovery of the filing fee under section 72 of the Act.

The tenants applied for dispute resolution on July 26, 2019 and a dispute resolution hearing was held on August 19, 2019. The tenants, and an agent for the landlords, attended the hearing; the parties were given a full opportunity to be heard, to present affirmed testimony, and to make submissions. Both parties acknowledged the service of evidence and no issues were raised with respect to the evidence of either party.

I have reviewed evidence submitted that met the *Rules of Procedure* and to which I was referred but have only considered, and referred to, evidence relevant to the issues of this application.

It should also be noted that written statements from third parties not in attendance, and hearsay evidence from third parties, will be given less evidentiary weight than the direct oral testimony of the parties. I make mention of this because both parties frequently referred to third party hearsay and communication throughout their testimony.

Issues

1. Are the tenants entitled to compensation in the amount of $17,970.00?
2. Are the tenants entitled to an order for regular repairs?
3. Are the tenants entitled to an order to reduce rent?
4. Are the tenants entitled to an order that the landlords comply with the tenancy agreement, the Act, or the regulations?
5. Are the tenants entitled to recovery of the filing fee?

Background and Evidence

Noise is the central issue in this dispute. The tenants seek compensation and other remedies under the Act for a loss of quiet enjoyment due to noise. The landlords dispute the claim and argue that they have taken reasonable steps to address the noise, and that the amount claimed is unreasonable.

The basis facts of the tenancy are not in dispute: the tenancy started on July 1, 2018 and continues to the present day. Monthly rent was initially $2,995.00, which has increased to $3,056.00 as of August 1, 2019. The tenants paid a security deposit. A copy of the written tenancy agreement was submitted into evidence. The tenants rent the main floor, and part of the basement of a residential home. There is also a separate rental unit above the main floor, occupied by other tenants.

The house was, both parties acknowledge, built in 1911 or 1912. (A search on BC Assessment confirms that the house was built in 1912.) The tenants were aware of the approximate age of the house, or, the era in which it was constructed, when they went to look at it. They also testified that they were aware that older homes such as the one in which the rental unit is located are not particularly quiet places to live.

The tenants testified that upon the very first weekend of moving in, they observed that the “noise was quite high” from tenants who lived on the floor above them. The noise has, over the past year, been so bad that the tenants have had to sleep in the basement of the house for the last eight months. Sleeping in one of the three bedrooms on the main floor has been rather fruitless and unsuccessful. The noise, which is caused by the upstairs tenants carrying out their daily activities, is such that it has woken up the tenants in the early morning hours and late at night.

The tenants can hear everything the upstairs tenants do, including flushing toilets, cooking, and engaging in sexual activity. There were two sets of upstairs tenants. The

first set were there when the tenants moved in, and then they moved out around April 2019, with new upstairs tenants moving in thereafter. Regardless, the tenants have, they argue, suffered a loss of quiet enjoyment throughout both sets of upstairs tenants.

When the tenants first came to look at the rental unit, it was during the day, and it was quiet; there was nothing to indicate or forewarn them that there might be a noise issue. In an effort to resolve the noise issue, the tenants communicated frequently with the former property manager. This gentleman—who no longer works for the property managing landlord, and who did not testify—tried solving the noise problem by putting down some throw rugs in the upstairs tenants' rental unit. Cupboard felt pads were also installed, in an effort to muffle the noise from closing cupboards.

Copies of several emails between the former property manager the tenant A.L. were submitted into evidence. The emails convey increasing frustration by both parties over the lack of resolution of the issue.

The upstairs tenants then moved out, and a new set of upstairs tenants moved in. The second set of tenants removed the throw rugs, as they wanted to enjoy the hardwood floors offered by the house. Attempts by the parties to find a solution with the new upstairs tenants also failed.

The non-resolution then led the tenant C.M. to approach the upstairs tenants in an effort to find a solution. Nothing came of this, and a short while later the tenants received a warning letter from the property management landlord to not have any further contact with the upstairs tenants.

After some time, the tenants engaged the municipality, who, after an inspection, indicated that there is no fire suppression between the floors. As described by the tenants, they were "living in a hundred-year-old tinderbox." The tenant testified that, according to a conversation he had with the municipality, the instillation of a fire suppression barrier would reduce, though not completely eliminate, noise. He further submitted that they are not seeking a complete elimination of noise, and understand that older buildings are not soundproof, but that the noise should be reasonable.

I note that the tenants submitted a copy of an email from a municipal inspector who confirmed that nothing had been done to the property to permit extra living areas for more than one family. However, I note that there is no documentary evidence from the municipality establishing that the supposedly-required fire suppression barrier would reduce the noise.

Regarding the frequency of the noise, the tenants testified that it was, and is, a daily occurrence. In addition to the noise from the upstairs tenants moving around and performing their daily activities of ordinary life, additional noise is created when the upstairs go and up down a stairwell that is located outside the tenants' bedroom.

The landlords' agent testified that the tenants were mostly dealing with the former property manager ("A.L.") throughout the earlier part of the tenancy, and that A.L. was trying everything reasonable to resolve the noise problem. In preparing for the hearing, the agent spoke with A.L., who told him the they did not have any previous complaints about noise from previous tenants who lived on the main floor of the rental unit. The landlords also noted in their written submissions that a prior tenant who occupied the rental unit for just over a year never once complained about any noise problems. However, a copy of an email form this purported previous tenant is missing the tenant's full name and without being able to verify his identity, I cannot accept this email as evidence.

A.L. was apparently aware of the noise transmission of the house, and that he "makes potential renters aware of the noise" when showing the rental unit. Neither the landlords' agent or the former property manager provided evidence to confirm that they conveyed the noise transmission problem to the then-prospective tenants. Further, the landlords' agent testified that the landlords took steps to resolve the noise by (1) speaking to the owner of the property (that is, the first landlord listed in this dispute), (2) speaking to the upstairs tenants, (3) installing felt pads on the cupboards, and (4) installing area carpets.

The landlords' agent testified that as time went by, the complaints and the tone of the complaints changed from the occasional incident to more frequent incidents of noise.

In their written submission the landlords argued that "it has and continues to be the position of the Landlord that the Tenant's expectations of silence are entirely reasonable."

In their written submission the tenants stated that "When we signed the lease and moved in, we knew that there would be tenants above our suite, but we did *not* know that there was no sound-proofing between the above unit's and our unit's floors."

During the tenants' rebuttal phase of the hearing I asked the tenants whether they had looked into alternate options to suppress the noise, such as insulation. The tenant C.M.

explained that he had, and that they had purchased $500-worth of insulation tiles similar to that used in music recording studios. However, after bringing it home they then realized that it would involve putting a lot of holes in the ceiling throughout the rental unit, which they did not believe the owner would appreciate.

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.

Claim for Compensation for Loss of Quiet Enjoyment

Section 7 of the Act states that if a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

Section 67 of the Act states that if damage or loss results from a party not complying with the Act, the regulations or a tenancy agreement, an arbitrator may determine the amount of, and order that party to pay, compensation to the other party.

When an applicant seeks compensation under the Act, they must prove on a balance of probabilities all four of the following criteria to be awarded compensation:

1. has the respondent party to a tenancy agreement failed to comply with the Act, regulations, or the tenancy agreement?
2. if yes, did the loss or damage result from the non-compliance?
3. has the applicant proven the amount or value of their damage or loss?
4. has the applicant done whatever is reasonable to minimize the damage or loss?

Here, the tenants claim that the landlords failed to comply with section 28 of the Act, which states that “A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following: [. . .] freedom from unreasonable disturbance.”

Section 28 of the Act must, in this case, be read in conjunction with section 32(1) of the Act which states as follows:

> A landlord must provide and maintain residential property in a state of decoration and repair that
>
> (a) complies with the health, safety and housing standards required by law, and
>
> (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

In this case, the home was built in 1912. It is a 107-year-old home built of wood located in an older neighbourhood in Victoria, about a block from a popular waterfront park. Indeed, the tenants remarked that they "like the house, like the neighbourhood." But having regard to the age, character, and to a lesser extent the location of the rental unit, a reasonable person ought to have known that such a rental unit would bring with it a certain amount of noise.

A prospective tenant viewing a wood-framed 107-year-old home would have to expect that they would hear the noises of their neighbours, especially neighbours living above them in a hardwood-floored suite, as is the case here. While some fault may lay with the landlord in not emphasizing potential noise issues (they testified that they bring this to prospective tenants' attentions, though in this specific case there is no proof that they did so), it remains a potential tenants' responsibility to take steps to assess their potential rental unit. And I note that the tenants testified they were aware that older buildings carry with them the risk of noise being more noticeable than in newer homes.

Taking into consideration the age and character of the rental unit, I find that the landlord provided, and provides, a residential property in a state of decoration and repair that makes it suitable for occupation by a tenant. By extension and application of these principles, I further find that the tenants are, and were, provided with an acceptable modicum of quiet enjoyment as is to be expected in a home of this age and character.

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 tenants have not met the first part of the four-part test, namely, that the landlords failed to comply with the Act, the tenancy agreement, or the regulations.

Given the above, I need not consider the remaining three factors of this test. Therefore, I dismiss this aspect of the tenants' claim.

Claim for Orders of Compliance, Reduction in Rent, and for Repairs

Regarding these three claims, while the tenants submitted an email from the city, the email did not specifically refer to anything that needs to be done to the property. The tenants testified that there a fire suppression barrier that needs to be installed, but there was no documentary evidence to support this argument. As such, there is no basis on which I can issue an order that the landlords must "repair" the rental unit to comply with section 32(1), above. Likewise, having found no breach of the Act, there is no basis on which I may issue an order to reduce the rent.

I do not find that the landlords breached or are currently breaching the Act and as such I make no order that the landlords comply with the Act or that they make repairs to the rental unit. Accordingly, I dismiss this aspect of the tenants' claims in respect of an order for repairs, an order for compliance, and an order for the reduction of rent.

Certainly, I acknowledge that there is apparently an inspection underway, and that what may result from the municipal inspection is a requirement that the owner-landlord install fire suppression barriers. If it is found by the city that the property requires a fire suppression barrier then the owner-landlord will, of course, need to have this installed. Should the landlords fail to comply with any such inspection or orders by the municipality then the tenants would be at liberty to file an application for dispute resolution against the landlords under section 32 of the Act.

Claim for Recovery of the Filing Fee

Section 72(1) of the Act provides that an arbitrator may order payment of a fee under section 59(2)(c) by one party to a dispute resolution proceeding to another party. A successful party is generally entitled to recovery of the filing fee. As the tenants were unsuccessful I dismiss their claim for recovery of the filing fee.

Conclusion

I dismiss the tenants' 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 Act.

Dated: August 20, 2019