Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding wall financial corporation
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCT

Introduction

In this dispute, the tenant seeks compensation against their landlord for loss of quiet enjoyment, pursuant to sections 28 and 67 of the *Residential Tenancy Act* (the "Act").

The tenant applied for dispute resolution on February 21, 2020 and a dispute resolution hearing was held, by way of telephone conference, on May 7, 2020. The tenant, the landlord's agent, and two landlord witnesses attended the hearing. The parties were given a full opportunity to be heard, to testify, to make submissions and to call witnesses. No issues of service were raised by either party.

I have only considered evidence that was submitted in compliance with the *Rules of Procedure,* to which I was referred, and which was relevant to the issue of this application. As such, not all of the parties' testimony or written submissions may necessarily be reproduced herein.

Issue

Whether the tenant is entitled to compensation for loss of quiet enjoyment.

Background and Evidence

The facts of this case are relatively undisputed: the tenant, who lives in a rental unit below another rental unit, claims that her right to quiet enjoyment was breached on a continuous basis over the past year. Why? The rental unit above her has a family. In that family is a little boy of 5 or 6 years of age who has severe autism and who, according to the tenant, screams, bangs, thumps, and makes other noises for 12 hours a day. He has done so for virtually every day for the past twelve months since the

tenant moved in on May 1, 2019. In some cases, the number of thumps, bumps, and screams exceeds 10,000 in a 12-hour period. The landlord does not dispute that the little boy makes, or made, this much noise. “I had no idea [he] was that bad,” the landlord’s agent sighed.

The tenant confirmed that before moving into the rental unit, while she did not enter the rental unit to have a close look at it, at no time was she warned about the potential noise issue. (Though, as we shall see shortly, the landlord was aware of the problem.)

She moved in on or about May 1, 2019, and the noise from above began immediately. The upstairs family, according to the landlord, started their tenancy on September 1, 2012. (Which would mean that the boy had not yet been born.) The landlord testified that she had never received any complaints from any of the other neighbours about the noise after the boy was born; the tenant responded that the other neighbours have day jobs and are not at home during the day like the tenant is.

The landlord’s agent and the family attempted to reduce sound transmission by installing ¾” inch foam pads in the hallways and living room of the family’s apartment. This worked a little bit, but not enough. It is worth noting that the multi-rental unit apartment building is wood-framed construction and built in the 1960s. These are not known to be particularly effective at muffling sound between rental units. The landlord also convened meetings with all parties, including the president of the landlord (a corporate entity), in an effort to find some sort of solution. The tenant was increasingly frustrated, and the landlord was running out of options. The ongoing efforts of the landlord were to no avail. That said, the landlord’s agent added that they run a “family” oriented complex, so some noise is to be expected and that they “cannot control kids.”

The landlord’s agent was not unsympathetic to the tenant’s complaints but explained that the landlord was in a bit of a predicament: they could not simply evict the family because of noise from an autistic child (the potential human rights issues alone would thwart any landlord from considering it), but they were also understanding that nobody should have to listen to that amount of noise every day, all day, for months on end. The landlord’s agent said that “we’re trying to work with everyone,” but that there is not much more the landlord could do. Fortunately, the landlord’s agent shared some positive news: the family is relocating to a ground-level floor, which should remove the source of noise as far as the tenant is concerned.

In her summary, the tenant commented, “I feel like no one’s listening.” She has been “woken up every day by the boy’s screams” and his “screaming and banging.” For her

part, the tenant expressed an understanding with the difficulty of raising children, having raised seven herself, including a disabled one. “I understand,” she said, “but it’s not fair I’ve been put through this.” The tenant also remarked, “I believe she [the landlord’s agent] knew about the problem before I moved in.”

On this last point, the tenant referred to a letter (a copy was submitted into evidence) from the landlord’s agent to the family sent about a week before the tenant moved in. In it, the landlord’s agent wrote (reproduced as written, relevant excerpt only):

> This letter is being sent to you for 2 reasons. The first being the noise coming from your suite. The first being the noise coming from your suite. We have been working the suite below you for about a week now, And the thumping banging and running in your suite sounds real bad in the suite below. I really don’t know why the tenant that lived there before did not complain. I know this Is going to be a issue for the new tenant, so maybe we can work on controlling the noise and running. You must be considerate to those that live below. We are aware of your son’s issues But that does not mean others are not going to complain.

In terms of compensation, the tenant seeks $540.00 per month that she has endured a loss of quiet enjoyment, for a total of twelve months (May 1, 2019 to April 30, 2020, approximately). She explained that she calculated this amount based on the amount and duration and severity of the noise, and that the amount represents half of her monthly rent of $1,080.00. While the landlord’s agent asked, “how can you put a dollar amount on sound?” the tenant argued that there was no other recourse available to her other than to seek financial compensation.

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. Here, the tenant claims compensation for the landlord’s breach of the tenant’s right to quiet enjoyment.

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

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?

The above-noted criteria are based on sections 7 and 67 of the Act, which state:

> 7 (1) 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.
>
> (2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.
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> . . .
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> 67 Without limiting the general authority in section 62 (3) *[director's authority respecting dispute resolution proceedings]*, if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

In this dispute, the tenant claims that the landlord breached section 28(b) of the Act, specifically. In its entirety, section 28 of the Act states that

> A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:
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> (a) reasonable privacy;
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> (b) freedom from unreasonable disturbance;
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> (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 *[landlord's right to enter rental unit restricted]*;
>
> (d) use of common areas for reasonable and lawful purposes, free from significant interference.

Residential Tenancy Policy Guideline 6 Entitlement to Quiet Enjoyment outlines in greater detail what is meant by quiet enjoyment:

> 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.
>
> 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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> In determining whether a breach of quiet enjoyment has occurred, it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises.
>
> 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.

Since May 1, 2019, the tenant has endured what may only be described as a horrendous onslaught of noise on a near-hourly basis for up to twelve hours a day, day after day, week after week, month after month. While I place significance on the noise tally to which the tenant referred (that is, over 10,000 instances of noise in a twelve-hour period), because I am cautious to accept that she actually counted each and every instance of noise, I am more persuaded that the barrage of noise was constant and highly disruptive. That the tenant is disabled and spends most of her day at home only aggravates the environment in which she has endured this past year. The noise logs, the communications between the various parties, and the audio recording of the noise, all point to severe and ongoing breaches of the tenant's right to quiet enjoyment, specifically the right to enjoy her rental unit free from unreasonable disturbance. Finally, I note that the landlord did not dispute that the tenant endured the noise as described.

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 tenant meets the onus of proving her claim that the landlord – who has a legal

responsibility to ensure a tenant's rights under section 28 of the Act are upheld – breached section 28(b) of the Act.

Second, did the tenant's loss of quiet enjoyment result from the non-compliance? I must conclude that it did, because there are no other causes or events that lead to the tenant's suffering from the unreasonable disturbances. Causation is proven, I conclude.

Third, has the tenant proven the amount or value of their damage or loss?

To cite further from the policy guideline above, it briefly covers how compensation may be sought for a breach of this right:

> A breach of the entitlement to quiet enjoyment may form the basis for a claim for compensation for damage or loss under section 67 of the *RTA* and section 60 of the *MHPTA* (see Policy Guideline 16). In determining the amount by which the value of the tenancy has been reduced, the arbitrator will take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use or has been deprived of the right to quiet enjoyment of the premises, and the length of time over which the situation has existed.
>
> A tenant may be entitled to compensation for loss of use of a portion of the property that constitutes loss of quiet enjoyment even if the landlord has made reasonable efforts to minimize disruption to the tenant in making repairs or completing renovations.

The tenant claims compensation in an amount equal to 50% of her monthly rent times twelve months. Prima facie, the amount sought is not entirely reasonable. However, while the noise disturbances were frequent and lengthy, and while they persisted for a year, no other rights under section 28 of the Act were breached. The right to freedom from unreasonable disturbance is but one of four rights enumerated within this section, and the noise itself does not appear to have subsisted beyond the twelve-hour period. This is not to diminish the severity of the noise, but she was by all accounts still able to use the rental unit. Finally, it should be noted that some level of noise is to be expected during the day in a family-oriented multi-apartment complex; albeit not at this level, but some noise is expected to nevertheless exist. Therefore, for these reasons, I determine that a slightly-reduced amount equivalent to 40% of the monthly rent is a more appropriate amount of damages.

For the reasons explained above, I award the tenant compensation in the amount of $5,184.00. ($432.00 x 12 = $5,184.00.)

Fourth, has the tenant done whatever was reasonable to minimize her loss? I find that she did. She attempted on several occasions to have the matter resolved with the landlord. (She went so far as to hit the ceiling and call the police, which, while such conduct cannot be condoned, is understandable given the frustrating circumstances.) Quite simply, the tenant has a right to live in quiet enjoyment and there is not much more than she could have done to minimize her loss. It is worth noting, as is sometimes suggested in such cases, that the tenant could have simply moved if it was so bad. But this fails to recognize that a tenant ought not to be expected to abrogate their rights under the Act due to a failure of a landlord to uphold their obligations.

It should be noted that the landlord appears to have done all that it could have done to try and solve the problem. They appeared to work with the family fairly regularly in trying to minimize the noise. The landlord testified that they had wanted to move the family into a ground-floor suite earlier, but that there was none available. All of which is to say that, for the most part, the landlord's actions are commendable. That said, I cannot ignore the fact that the landlord, while fully aware of the family's noise levels, failed to inform the tenant about the problem when she was first considering the rental unit. Had the landlord fully informed the then-prospective tenant about the potential noise, the tenant may not have signed the tenancy agreement. Or, if the landlord had warned the tenant but they decided to move into the rental unit anyway, knowing of the noise, then she might not have ultimately had a claim for damages.

In the end, sadly, there are no true "winners" in this dispute. A family struggles with the immense challenges of raising a severely autistic boy, the landlord found itself in the unenviable position of trying to uphold its obligations (while trying to work with all parties), and the tenant endured a lengthy, terrible experience of noise disturbances.

Conclusion

I award the tenant compensation in the amount of $5,184.00.

A monetary order is issued in conjunction with this decision to the tenant, who must serve a copy of the order on the landlord. The order may be filed in, and enforced as an order of, the Provincial Court of British Columbia.

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

Dated: May 11, 2020

Residential Tenancy Branch