



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OLC, FFT

Introduction

This hearing dealt with an Application for Dispute Resolution (the “Application”) that was filed by the Tenant under the *Residential Tenancy Act* (the “Act”), seeking:

- An order for the Landlord to comply with the *Act*, regulation or tenancy agreement; and
- Recovery of the filing fee.

The hearing was convened by telephone conference call and was attended by the Tenant, and an agent for the Landlord (the “Agent”), both of whom provided affirmed testimony. The Agent acknowledged service of the Notice of Dispute Resolution Proceeding Package, including a copy of the Application and the of Notice of Hearing. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Rules of Procedure; however, I refer only to the relevant facts, evidence and issues in this decision.

At the request of the parties, copies of the decision and any orders issued in their favor will be emailed to them at the email addresses provided in the Application.

Preliminary Matters

Preliminary Matter #1

The Agent stated that the Landlord’s documentary evidence was emailed to the Tenant on June 25, 2020, and although the Tenant acknowledged service of the Landlord’s documentary evidence by email on June 28, 2020, they had questions regarding the deeming provisions and service by email.

On June 24, 2020, the practice directive authorizing email service during the state of emergency was repealed; however, sections 71 (2) (b) and 71 (2) (c) of the *Act* state that I may find that a document has been sufficiently served for the purposes of the *Act* on a date I specify and that a document not served in accordance with sections 88 or 89 is sufficiently given or served for purposes of the *Act*. As the Tenant acknowledged receipt of the Landlord's documentary evidence by email on June 28, 2020, I therefore find it sufficiently served for the purpose of the *Act* on that date, pursuant to sections 71 (2) (b) and 71 (2) (c) of the *Act*. Although the Tenant brought up the deeming provisions, I find that they do not apply in this circumstance as the Tenant acknowledged receipt.

Although the Tenant stated that the Landlord's documentary evidence was received by them less than 7 days before the scheduled date for the hearing, contrary to rule 3.15 of the Residential Tenancy Branch Rules of Procedure (the "Rules of Procedure"), ultimately, they acknowledged having sufficient time to consider and respond to it. Based on the above, I find that the acceptance of the Landlord's late evidence does not unreasonably prejudice one party or result in a breach of the principles of natural justice, and pursuant to rule 3.17 of the Rules of Procedure, I therefore accept it for consideration.

Preliminary Matter #2

Although the Tenant submitted a monetary order worksheet with their documentary evidence, they did not apply for monetary compensation, other than recovery of the filing fee, in the Application. They also did not submit an Amendment to the Application for Dispute Resolution seeking to add monetary claims to their Application.

Rule 6.2 of the Residential Tenancy Branch Rules of Procedure (the "Rules of Procedure") states that the hearing is limited to the matters claimed in the Application and rule 4 outlines how to amend an Application prior to the hearing. Although rule 4.2 states that an Application may be amended in the hearing in circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, I do not find that a monetary claim for loss of quiet enjoyment meets this criterion.

As result, the hearing therefore proceeded based only on the matters claimed in the Application. The Tenant remains at leave to file a monetary claim for loss of quiet enjoyment, should they wish to do so.

Preliminary Matter #3

Although the parties engaged in settlement discussions during the hearing, ultimately a settlement agreement could not be reached between them. The parties were also in agreement that as the upstairs tenants had already moved-out, the issue regarding ongoing noise disturbance had been resolved. Although the Tenant was advised of their option to withdraw, as the matter of ongoing noise disturbance had been resolved, the Tenant wished to continue with the hearing as scheduled as they wanted a decision from the Residential Tenancy Branch (the "Branch"), stating that the noise disturbances were unreasonable and finding that the Landlord breached section 28 of the *Act* by failing to act reasonably with regards to their noise complaints.

As a result, I proceeded with the hearing and rendered a decision in relation to this matter under the authority delegated to me by the Director of the Residential Tenancy Branch (the "Branch") under Section 9.1(1) of the *Act*.

Issue(s) to be Decided

Is the Tenant entitled to an order for the Landlord to comply with the *Act*, regulation, or tenancy agreement?

Is the Tenant entitled to recovery of the filing fee?

Background and Evidence

There was no dispute between the parties that a tenancy under the *Act* exists between the Tenant and the Landlord, and that the Tenant has resided in the rental unit for a over two years. During the hearing the parties agreed that the Landlord institutes quiet hours between 10:00 P.M. and 9:00 A.M. and that the tenancy agreements signed by occupants of the building therefore include a clause advising occupants not to allow loud conversations or noise to disturb the quiet enjoyment of other occupants of the residential property at any time, and in particular between the hours of 10:00 P.M. and 9:00 A.M.

The Tenant stated that their right to quiet enjoyment of the rental unit was regularly violated between September 1, 2019 – mid-June, 2020, and that the Landlord's actions have been insufficient, ineffective, and not fully implemented. The Tenant also stated that the efforts of the Landlord and the tenants above them ultimately did not result in a reduction to noise or the level of disturbance suffered.

The Tenant stated that they have been regularly awakened by the tenants above them between 6:30- 6:45 A.M., well before the end of the quiet hours stipulated in the tenancy agreement, by the "jarring" sounds of a child crying and banging/moving about in their crib. The Tenant stated that the noises above them are constant, inescapable, and cannot be drowned out by other measures such as fans, the television, or the noise cancelling headphones subsequently purchased by them to deal with this noise. The Tenant stated that the noises include the bouncing of balls and the dropping of toys, musical instruments, constant running and jumping of a child, crying, banging and intermittent loud thuds. The Tenant stated that some of the noise, such as loud thuds, occurred intermittently for several hours at a time throughout the day, while others were constant. The Tenant stated that the noise has been so bad at times that they and the other occupant of the rental unit have had to leave. The Tenant stated that a good-nights rest and the general quiet enjoyment of their rental unit was therefore impossible between September 1, 2020, and mid-June, 2020, when the tenants above them moved out, and that they were not even able to have a quiet meal or watch a movie without disturbance.

The Tenant submitted copies of five emails sent to the Landlord outlining their complaints between December 15, 2019, and May 14, 2020. Although the Tenant focused mainly on the noise from the rental unit directly above them, one email complaint also mentioned disturbance from the rental unit beside them.

The Tenant stated that when the state of emergency was declared, the impact of the noise became more significant on their life, as they were home most of the time. They stated it also impacted their ability to concentrate and work, as they were sleeping poorly and sometimes work from home. Additionally, the Tenant stated that they were unable to go to an alternate location, such as the library, to work during the state of emergency and therefore could not escape the noise. The Tenant described their daily living in the rental unit as a "nightmare" between September 1, 2019 – mid-June, 2020, as a result of noise disturbance.

The Agent stated that noise complaints can be difficult to deal with, as the tolerance level of individual people to noise differs greatly. The Agent acknowledged that the

upstairs tenants who resided above the Tenant during the period of the noise complaints have a small child and that it was difficult for them to control their child's noise and behaviour at all times, due to the child's age. However, the Agent denied that the level, duration, and nature of the noise from the upstairs tenants was objectively unreasonable, given the type of noise and the fact that it is a wood-frame multi-unit/family building or that either they or the upstairs tenants failed to act reasonably in response to the Tenants noise complaints.

The Agent stated that every time a noise complaint was received from the Tenant, they spoke with the upstairs tenants, or other occupants of the building as necessary, and that warning letters and emails were issued. The Agent stated that the upstairs tenants were always willing to work with them and the Tenant to address any noise complaints and put down wall-to-wall carpeting and foam mats, took away all musical and noisy toys, prohibited their child from wearing shoes in the house, stopped all jumping and running, limited their child's movements within the rental unit and made every effort to respond as quickly as possible when their child cried, including when they woke up. Additionally, the upstairs tenants disputed the overall durations, severity and times noted for the noise, stating that their child sleeps between 7:00/7:30 P.M. – 7:00 A.M., that they focus on quiet activities and play before 9:00 A.M. and make every effort to be out of the apartment for as long as possible every day, including in inclement weather.

The Agent stated that they and the upstairs tenants therefore believe that the noise types and levels were normal and reasonable, that significant efforts were made by the Landlord and the upstairs tenants to reduce noise despite their belief that the noise is not unreasonable, and that the noise does not constitute an unreasonable disturbance under the *Act*. In support of this testimony the Agent submitted copies of email complaints from the Tenant, follow-up emails sent to the Tenant, and copies of email correspondence with the upstairs tenants.

Analysis

Section 28 (b) of the *Act* states that a tenant is entitled to quiet enjoyment including, but not limited to, the right to freedom from unreasonable disturbance.

Policy Guideline 6 states that a landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected and defines a breach of the entitlement to quiet enjoyment as substantial interference with the ordinary and lawful enjoyment of the premises. The Policy Guideline states that this includes situations in which the landlord has directly caused the interference, as well as situations in which the landlord

was aware of an interference or unreasonable disturbance but failed to take reasonable steps to correct these.

Rule 6.6 of the Rules of procedure states that the standard of proof in a dispute resolution hearing is on a balance of probabilities and that the onus to prove their case is on the person making the claim. As this is the Tenant's claim, I therefore find that it is the Tenant's responsibility to satisfy me, on a balance of probabilities, that the occupants above them (who were also tenants of the Landlord), unreasonably disturbed them, that the Landlord was aware of this unreasonable disturbance, and that the Landlord failed to take reasonable steps to correct the issue resulting in a breach of section 28 (b) of the *Act*.

Although there was no dispute that some disturbance had been suffered by the Tenant, and that the Landlord was aware of this disturbance, the parties disputed whether the disturbances suffered were unreasonable and whether the Landlord had taken appropriate action to protect the Tenant's right to quiet enjoyment. Both parties submitted documentary evidence in support of their positions.

I acknowledge that any type of noise, including noise from children, may constitute an unreasonable disturbance, depending on the nature, severity, and duration of the noise. I also acknowledge that unreasonable disturbances by one tenant of a landlord to another may result in a breach of the landlord's obligations to the affected tenant under section 28 of the *Act*, in situations where the landlord was aware of an interference or unreasonable disturbance but failed to take reasonable steps to correct these. However, I find that for the following reasons, the Tenant has failed to satisfy me that in this particular case, the noise originating from the unit above them constituted an unreasonable disturbance under the *Act*.

Although the Tenant pointed to terms of the tenancy agreement requiring parties not to allow loud conversations or noise to disturb the quiet enjoyment of other occupants of the residential property at any time, and in particular between the hours of 10:00 P.M. and 9:00 A.M., I interpret this as a general requirement for parties to comply with the *Act* and to be courteous of their neighbours, particularly during these hours, not a change to the requirements of the *Act* in relation to unreasonable disturbance or a prohibition on all noise during these hours, as this is a multi-unit building and not all occupants lives will revolve around this schedule. Further to this, section 5 of the *Act* states that parties cannot contract outside of the *Act* and that any attempts to do so will be of no force or effect. As a result, I find that the requirements of section 28 of *Act* take precedence over any terms of the tenancy agreement regarding noise. Based on the above, I have

therefore assessed the Tenant's claims by first considering whether I am satisfied that any disturbances suffered were objectionably unreasonable under the *Act*, not simply whether they were contrary to terms of the tenancy agreement.

Given the nature of the building and tenancies in multi-unit/multi-family housing, I find that it would be impossible to eliminate all noise transfer between units and that it is therefore reasonable for occupants to expect that a reasonable amount of noise transfer will occur throughout the day, starting in the morning when most people will be preparing for work or school, and ending in the evening when most people will be winding down activity in preparation for bed. While I appreciate that every person's schedule, lifestyle, and expectations will differ, in my opinion the *Act* explicitly contemplates that noise will be present at various points throughout the day, and guarantees tenants only freedom from unreasonable disturbance, not all disturbance or reasonable amounts of disturbance.

Although the Tenant provided copies of five emails sent to the Landlord over the course of an approximately seven month period, in my mind these emails lack specificity in that they contain little information regarding the specific dates and times of actual disturbances suffered and read more as a general overview of the types of issues begin experienced over long periods of time (one or more months) and their general durations throughout a typical day. Although this is not a fatal issue in an of itself, the Agent maintained the position that the noise from the upstairs occupants was not unreasonable, given that this is a multi-unit wood-frame building, the noise was a result of regular daily living activities in the rental unit, such as the sounds of movement and reasonable play within the rental unit, as well as a normal and reasonable amount of sound from voices. Further to this, a letter from the upstairs occupants was submitted in which they state that the noise occurring in their rental unit is reasonable and disputing some of the Tenants assertions regarding when noise occurs, for how long, and at what levels. The letter also outlines the efforts made by them to further reduce noise transfer, such as placing area rugs and foam matting on the floors, preventing their child from wearing shoes indoors, taking away noisy or musical toys, and responding immediately to cries.

As stated above, the onus in this matter is on the Tenant to satisfy me of their claims as this is their Application. In cases such as this, where there is a dispute about whether the amounts, duration, or types of noise occurring constitute an unreasonable disturbance, I would expect to see more than self-authored documentation on the part of the Applicant in support of their claims, such as witness statements, witness testimony, audio or video recordings, etc. As the Tenant has submitted only self-

authored documentation, which in my opinion, lacks the level of specificity required to satisfy me of their claim, and both the Landlord and the occupant who is the subject of the majority of the noise complaints dispute that any unreasonable disturbance has occurred, I therefore find that the Tenant has failed to discharge the burden of proof incumbent on them and satisfy me, on a balance of probabilities, that any disturbances suffered were objectively, not just subjectively, unreasonable. Having made this finding, I find that I do not need to consider anything further and I dismiss the Tenant's claim for an order for the Landlord to comply with the *Act*, the regulation or the tenancy agreement without leave to reapply.

In any event, even if I had been satisfied that the Tenant was unreasonably disturbed, and that a breach of section 28 of the *Act* therefore occurred on the part of the Landlord, which I am not, the parties agreed in the hearing that the upstairs tenants have already moved out. As a result, I find that the Tenant's Application seeking an order for the Landlord to comply with the *Act*, the regulation or the tenancy agreement is moot, as the issue of any ongoing noise from the upstairs Tenant's has been resolved.

As I have already found above that I am not satisfied that the Tenant was unreasonably disturbed by the tenants above them and therefore no breach of section 28 of the *Act* occurred on the part of the Landlord, I therefore dismiss the Tenant's claim for an order for the Landlord to comply with the *Act*, regulation, or tenancy agreement without leave to reapply. As the Tenant's Application is dismissed, I decline to grant them recovery of the filing fee.

Conclusion

The Tenant's Application is dismissed in its entirety 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: July 13, 2020

Residential Tenancy Branch