



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, two witnesses for the Tenant and the Landlord, all of whom provided affirmed testimony. The witnesses were excluded from the proceeding except when providing testimony. The Landlord acknowledged receipt of the Notice of Dispute Resolution Proceeding Package, including a copy of the Application and the Notice of Hearing, as a result the hearing proceeded as scheduled. Both parties also acknowledged receipt of each other's documentary evidence, which I have accepted for consideration in this matter. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

Although I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Residential Tenancy Branch Rules of Procedure (the Rules of Procedure), I refer only to the relevant and determinative 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

Although the Tenant proposed settlement options during the hearing, ultimately a settlement agreement could not be reached between them. 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

The parties agreed that the rental unit is located in the lower portion of a house owned by the Landlord, and that occupants of the rental unit above the Tenant's rental unit are also tenants of the Landlord.

The Tenant stated in the hearing that although they have been as reasonable and understanding as possible about the noise coming from the upstairs occupants, the noise is so loud and so frequent that it makes it nearly impossible for them to enjoy their rental unit or to do their job, which currently involves working from home. The Tenant stated that although they try to spend as little time in the rental unit as possible throughout the day to avoid these noise disturbances, this is not always possible, and that they have had to take a vacation in both December of 2019 and March of 2020 simply to get away from the rental unit. The Tenant stated that they cannot take the noise any longer and although they want to stay in the rental unit, which is their home, the situation is currently untenable for them due to noise from upstairs and that they do not feel comfortable in the rental unit.

The Tenant stated that the noise is frequent between 7:30/8:00 A.M. to 9:00 P.M. during weekdays, except when the children are at daycare a few times a week, and that it is constant during these hours on the weekend, except on the rare occasion where the upstairs occupants go out. The Tenant characterized the noise as the sound of stampeding elephants, and as jarring as gunshots. Although the Tenant acknowledged that there is also some voice transfer, they stated that this, and other less frequent noise such as nighttime crying is reasonable and that it is the running, jumping and stomping which are the major issues. The Tenant also stated that they are often required to put a pillow over their head to muffle the noise.

As a result, the Tenant requested that the Landlord protect their right to quiet enjoyment by installing proper sound insulation between the floor of the upstairs rental unit and the ceiling of their rental unit, as they wish to impact both tenancies as minimally as possible and feel that even if the upstairs occupants vacate, there will continue to be noise transfer issues given the lack of proper sound insulation.

The Tenant called two witnesses during the hearing, both of whom testified that there was significant noise and disturbance in the Tenant's rental unit from the upstairs occupants when they visited the rental unit. The witness A.R. referred to the noise as deafening, unrelenting and overbearing and characterized the noises as stomping and banging beyond what would normally be expected through routine activity such as walking and children playing. The Witness A.H. stated that when they visited the rental unit with their son on one occasion, there was non-stop stomping and running occurring in the rental unit above for approximately three hours and that this noise was so significant that their 10 year old child even commented on it. A.H. stated that when they visited the rental unit on a subsequent occasion, the same type of noise disturbances occurred.

Both witnesses expressed that they understand that children make noise and clearly stated that the type, amount, and duration of the noise disturbances occurring from the upstairs occupants is simply unreasonable and beyond the type and level of noise expected from daily living activities and normal routine play.

In support of their Application the Tenant submitted copies of written, email and text correspondence between themselves and the Landlord including noise complaints, audio recordings, and decibel level graphs.

The Landlord stated that they purchased this property five years ago and that the previous occupants of the Tenant's rental unit had no issues with the upstairs occupants. The Landlord argued that the Tenant knew that a family with two children resided in the rental unit above them, and therefore should have done their due diligence before signing the tenancy agreement. The Landlord also focused several times throughout the hearing on the fact that they purchased the house in which both rental units are located as it is now, that they believe that it was built to code, and that it is not their fault or responsibility that there is improper or insufficient sound insulation between the units as they purchased it this way and it is simply the nature of the house.

The Landlord argued that the Tenant has not provided them with sufficient evidence that the upstairs occupants are breaching municipal sound bylaws, which the Landlord finds

to be an objective measure of what levels of noise are and are not reasonable, and stated that they have spoken with the upstairs occupants about the noise and issued them a written notice of the noise complaints. The Landlord stated that the upstairs occupants have also put down an area rug in the living room and that they have provided the occupants with a rubber mat for the hallway.

The Landlord questioned the reliability of the witness testimony, stating that friends of the Tenant are not reliable and unbiased sources of information, and argued that the decibel level graphs given to them by the Tenant for the alleged noises occurring are simply impossible, as the levels given are higher than what would be expected for a jet engine. They also questioned whether the audio recordings are reliable proof of the level of noise experienced in the rental unit as there is no proof these recordings were not modified to increase the noise levels.

The Landlord argued that the noise occurring in the upstairs rental unit is reasonable, that it occurs as a result of normal use of the rental unit for a family with young children, and that overall, it would not constitute an unreasonable disturbance to the average person. When asked, the Landlord acknowledged that they have not attended the rental unit in order to hear any noise occurring for themselves. Further to this, the Landlord stated that only 3 complaints were received from the Tenant, which does not support their assertion that the noise disturbances have been significant or constant, and argued that ultimately the Tenant has simply failed to meet the burden of proof incumbent upon them.

In support of their arguments the Landlord provided copies of correspondence between themselves, the Tenant and the occupants of the upper rental unit, including responses to complaints and warning letters, a timeline of events, and photographs of a mat in a hallway and an area rug in a living room.

During the hearing the Landlord also offered to end the Tenant's fixed term tenancy early by way of mutual agreement and stated that they are planning to sell the house in the near future.

Analysis

Although the Landlord argued that the noise transfer between the rental units is a result of the way the house was built and therefore not their responsibility, I do not agree. Section 28 (b) of the Act states that a tenant is entitled to quiet enjoyment of their rental unit including, but not limited to, freedom from unreasonable disturbance. Further to

this, Residential Tenancy Policy Guideline (the Policy Guideline) #6 states that a landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. Policy Guideline #6 defines a breach of the entitlement to quiet enjoyment as substantial interference with the ordinary and lawful enjoyment of the premises and states that a breach to quiet enjoyment may occur in 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.

Based on the above, I find that the Landlord is obligated to protect the Tenant's right to quiet enjoyment of their rental unit, regardless of whether this disturbance may be caused or contributed to by the manner in which the premises was built and a lack of proper sound proofing between units.

Although the Landlord argued that the Tenant has not met the evidentiary burden of proof incumbent upon them, I do not agree. While I acknowledge that the Tenant's witnesses are friends with the Tenant, I find no basis for the Landlord's argument that the testimony from the witnesses is therefore biased and unreliable. The witnesses provided affirmations prior to providing their testimony in which they promised to tell the truth in the hearing and although they are friends with the Tenant, they are not themselves tenants or occupants of the rental unit and I am therefore satisfied that they have no vested interest in the outcome of the hearing. Further to this, I find that the nature of tenancies are such that the people most likely to be present in a rental unit are the tenants themselves or their friends and family. As a result, I find that it would be unreasonable to exclude or reduce the weight of the witnesses affirmed and relevant testimony simply because they know the Tenant personally.

Having reviewed and carefully considered the evidence before me, including the testimony of the parties and the witnesses in the hearing, as well as the other documentary evidence before me for consideration, such as photographs, correspondence, and audio recordings, I am satisfied that the Tenant has experienced a breach of their right to quiet enjoyment of the rental unit under section 28 (b) of the Act due to noise transfer from the upper rental unit. Although it is not correct to say that the Landlord took no action in relation to the Tenant's complaints regarding noise, I find that the action taken was insufficient, as the Landlord has made no effort to observe the noise themselves, any effort to reduce noise transfer has not resulted in a lasting reduction in the level of disturbance suffered by the Tenant, and the Landlord has largely ignored culpability for resolving the issue on the basis that it is related to improper sound proofing between the units.

As both the Landlord and Tenant agreed that there is not proper sound proofing between the rental units, I accept that this is the case. Although the Tenant and their witnesses argued that the type, duration, and cause of the noise being transferred from the upper rental unit (primarily the sounds of running, jumping, and stomping), fall outside the scope of normal daily living activity and reasonable play, the Landlord disagreed stating that the upper unit occupants are not engaging in unreasonable behavior or producing unreasonable levels of noise.

Based on the above, I am unsure whether it is only the lack of proper sound proofing between the rental units which is causing the Tenant to be unreasonably disturbed by the occupants of the upper rental unit, or a combination of the lack of proper sound proofing and unreasonable behaviour on the part of the upper unit occupants. As the parties were in agreement that proper sound proofing between the units does not exist, I find that remedying this situation is the proper place to start in resolving this issue for all parties. I therefore order the Landlord to within 30 days of the date of this decision and at no cost to the Tenant, take reasonable measures to reduce sound transfer between the rental units, which may include but is not limited to, the installation of additional insulation or sound proofing insulation between the floor of the upper unit and the ceiling of the Tenant's rental unit, the installation of sound deadening panels, or the installation or placement of thick carpeting, area rugs, or mats and underpadding in the upper rental unit. The Landlord is required to give proper notice under section 29 of the Act for any entry to the rental unit(s) required for such purposes.

While I appreciate that children cause noise, and acknowledge that reasonable levels of noise from daily living activities and play do not generally constitute an unreasonable disturbance, I find that any type of noise, regardless of its cause, may constitute an unreasonable disturbance under the Act provided that the noise is frequent, ongoing, and substantially interferes with another tenant's ordinary and lawful enjoyment of the premises or their rental unit. If the Landlord takes reasonable and appropriate steps to reduce noise transfer between the rental units as required above, and the Tenant continues to be unreasonably disturbed by noise from the upper unit, the Landlord may need to seek an end to the tenancy for the upstairs occupants pursuant to section 47 (d) (i) of the Act in order to protect the Tenant's right to quiet enjoyment.

As the Tenant was successful in their Application, I grant them recovery of the \$100.00 filing fee pursuant to section 72 (1) of the Act. Pursuant to section 72 (2) (a) of the Act, the Tenant is authorized to deduct \$100.00 from the next months rent payable under the

tenancy agreement, or to otherwise recover this amount from the Landlord, for recovery of the filing fee.

The Landlord is also cautioned that failure to comply with the Act, regulations, or this decision and orders may result in administrative penalties of up to \$5,000.00 per day pursuant to section 87.4 of the Act and/or an Application for Dispute Resolution on the part of the Tenant seeking monetary compensation for a loss of quiet enjoyment and/or failure to comply with orders from the Branch.

Conclusion

The Tenant is successful in their Application seeking an order for the Landlord to comply with section 28 of the Act and protect their right to quiet enjoyment.

The Landlord is ordered to take reasonable measures to reduce sound transfer between the rental units, as outlined above, within 30 days of the date of this decision and at no cost to the Tenant. The Landlord is also ordered to protect the Tenant's right to quiet enjoyment by serving and enforcing a One Month Notice to End Tenancy for Cause on the occupants of the upper rental unit if the sound reduction measures put in place by the Landlord fail to adequately reduce noise transfer between the rental units and the Tenant continues to be unreasonably disturbed by the upper unit occupants.

Although this decision has been rendered outside of the timelines set forth in section 77(1)(d) of the Act and section 25 of the Interpretation Act, section 77(2) of the Act states that the director does not lose authority in a dispute resolution proceeding, nor is the validity of a decision affected, if a decision is given after the 30 day period in subsection (1)(d).

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: August 26, 2020