Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

OLC, RR, PSF, FFT

Introduction:

This hearing was convened in response to an Application for Dispute Resolution filed by the Tenants in which the Tenants applied for a rent reduction, an Order requiring the Landlord to comply with the *Residential Tenancy Act (Act*) and/or the tenancy agreement, for an Order requiring the Landlord to provide services or facilities, and to recover the fee for filing this Application for Dispute Resolution.

The female Tenant stated that on September 09, 2020 the Dispute Resolution Package and evidence the Tenants submitted to the Residential Tenancy Branch on September 01, 2020 were sent to the Landlords, via registered mail. The Landlord acknowledged receipt of these documents and the evidence was accepted as evidence for these proceedings.

On September 30, 2020 the Tenants submitted additional evidence to the Residential Tenancy Branch. The female Tenant stated that this evidence was placed in the Landlords' mail slot on October 01, 2020. The Landlord acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

On October 08, 2020 the Landlords submitted evidence to the Residential Tenancy Branch. The Landlord stated that this evidence was personally served to the female Tenant on October 08, 2020. The female Tenant acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

The parties present at the hearing were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. Each party affirmed that they would provide the truth, the whole truth, and nothing but the truth at these proceedings.

Preliminary Matter

Rule 7.4 of the Residential Tenancy Branch Rules of Procedure stipulate that evidence must be presented by the party who submitted it, or by the party's agent.

I note that both parties submitted a large amount of documentary evidence, which I previewed. Some of that evidence was not raised by either party during the hearing, even though at the conclusion of the hearing each participant clearly indicated they had no additional testimony and/or submissions.

This decision is based on the evidence presented during the hearing, as I find it reasonable to conclude that the issues raised during the hearing represent the primary issues in dispute. I did not consider issues that were not raised during the hearing, as the other party did not have the opportunity to respond to those issues.

Issue(s) to be Decided:

Is there a need to issue an Order requiring the Landlords to provide services or facilities to the Tenants?
Is there a need to issue an Order requiring the Landlords to comply with the *Residential Tenancy Act (Act)?*
Are the Tenants entitled to a rent refund due to being unable to use the back yard, due to noise disturbances, and/or a breach of their right to quiet enjoyment of the unit?

Background and Evidence:

The Landlords and the Tenants agree that:

- This tenancy began on August 15, 2018;
- The rental unit is a side by side duplex;
- The Landlords live on the opposite side of the duplex;
- The yard of the residential complex is not divided to be provide either duplex with a private yard;
- Rent of $1,900.00 is due by the first day of each month;
- The relationship between the Tenants and the Landlords has significantly deteriorated since this tenancy began;
- The relationship between the Tenants and the Landlords is now highly acrimonious; and
- The Tenants have given notice to end the tenancy, effective October 31, 2020.

The Tenants are seeking an Order requiring the Landlords to provide access to the back yard, including the right to erect a portable gazebo.

The female Tenant stated that:

- When this tenancy began the female Landlord specifically told the Tenants she did not share her “garden”;
- They had no other conversation regarding whether the Tenants would be permitted to use the yard;
- In May of 2019 the Tenants were given permission to erect a portable gazebo in a specific area of the yard;
- The Tenants agreed to move the gazebo to facilitate lawn mowing, but were never given notice to do so;
- It was not difficult to move the furniture the Tenants had beneath the gazebo when it was time to mow the lawn;
- The grass underneath the portable gazebo was “patchy at best”;
- The portable gazebo was removed for the season by the Tenants in late September or early October of 2019;
- On June 06, 2020 the Tenants were told they could not erect a portable gazebo in the yard because it was making the Landlords’ family “uncomfortable”;
- In May of 2019 the Tenants were given permission to leave a barbecue on a concrete area in the yard;
- The Tenants have never been asked to move the barbecue; and
- The Tenants have never been told they were not permitted to use the back yard.

The Landlord stated that:

- When this tenancy began the Tenants were told that they had never previously shared the yard or the garden with tenants;
- When this tenancy began the Tenants were told that the yard is used extensively by the Landlords’ family;
- When this tenancy began the Tenants did not express any interest in using the yard;
- In May of 2019 the Tenants were given permission to erect a portable gazebo in a specific area of the yard;
- The portable gazebo was removed for the season in late September or early October of 2019;
- On June 06, 2020 the Tenants were told they could not erect a portable gazebo in the yard;
- The Landlords did not want the gazebo erected in 2020, in part, because the gazebo had damaged the grass in 2019 and, in part, because it made it difficult to mow the grass in that area of the yard, due to the presence of the gazebo and heavy furniture;
- In May of 2019 the Tenants were given permission to leave a barbecue on a concrete area in the yard;
- The Tenants have never been asked to move the barbecue; and
- The Tenants have never been told they were not permitted to use the back yard.

The Tenants are seeking compensation, in the amount of $23,275.00, for loss of the quiet enjoyment of the rental unit. The Tenants claim for compensation relates, in part, to the Landlords refusal to allow them to erect the portable gazebo in the summer of 2020.

The Tenants submit that the Landlords used the majority of the yard on the residential property, which prevented the Tenants from fairly sharing this common area, which is a breach of their right to quiet enjoyment. In support of this claim the female Tenant stated that:

- There is one porch that provides access to the front doors of the Landlords' home and the rental unit;
- The Landlords placed furniture on this porch, as can be seen on photograph 3 of the Tenants' evidence;
- On occasion the Tenants would have to move this furniture to access their front door;
- The Landlords frequently sat on this porch, as can be seen on photograph 5 of the Tenants' evidence;
- In the summer of 2019, the Landlords erected an above-ground pool in the back yard, which was directly in front of the Tenants' window; and
- When the tenancy began the Tenants were not informed that the Landlords would have a pool in the yard.

The Tenant with the initials "JF" stated that:

- When the tenancy began the Landlords informed the Tenants that they would be erecting a pool in the yard during the summer;
- The pool was erected on the Landlords' driveway in the summer of 2018; and
- The pool was erected directly in front of the Tenants' window in 2019.

The Landlord stated that prior to the start of this tenancy, the Tenants were informed that the Landlords had a pool in the yard during the summer.

The Tenants' claim for compensation for loss of quiet enjoyment relates, in large part, to noise emanating from the yard. The female Tenant stated that:

- The Landlord's family frequently disturbs them by playing in the yard; running a boat and motorcycles; and riding a motorcycle in the yard;
- The noise disturbances occur primarily during the afternoon;
- The noise decibel levels of the motorcycles exceed local bylaws;
- She did not submit a copy of the local noise bylaw;
- She did not have a copy of the local noise bylaw with her at the time of the hearing, so she was unable to read it aloud during the hearing;
- She knows that the local noise bylaw limits noise levels to 55 decibels between 7 a.m. and 10 p.m.;

- The local noise bylaw estimates that noise from motorcycles is 110 decibels;
- The local noise bylaw stipulates that noise exceeding 55 decibels should not be "continuous" for more than 3-5 minutes;
- She reported her concerns to local bylaw enforcement authorities and was told that they would not investigate because she lived on the same property as the Landlords;
- During the afternoon of July 14, 2020 members of the Landlords' family was playing a set of drums in the yard;
- At approximately 9:00 p.m. on July 14, 2020 a 4-year old child played the drum set for 10-15 minutes.

In response to the allegations of noise in the yard, the Landlord stated that:

- Her family uses the backyard regularly;
- Her children rode a small mini-bike in the yard this summer, which the family no longer owns;
- She spoke with a bylaw officer about driving the mini-bike in the yard, and was told that the size of the bike did not "warrant investigation";
- Her family periodically works on a boat and dirt bikes in the yard;
- Her family does not ride the dirt bikes in the yard;
- Between 5 and 6 p.m. on July 14, 2020 a set of drums was being played in the yard;
- At approximately 9:35 p.m. on July 14, 2020 a 4-year old child tapped the drum set for approximately 5 minutes; and
- The drum set was in the yard because it was being sold.

The Tenants submitted video evidence of the noise generated in the yard.

The Tenants' claim for compensation for loss of quiet enjoyment relates, in part, to the Landlords' refusal to replace the stove. In support of this claim the female Tenant stated that:

- The stove in the rental unit is a 1958 gas stove;
- The oven in the stove is ½ the size of a typical oven;
- The oven is inefficient; and
- They asked for a different stove and offered to pay a portion of the cost of a new stove.

In regard to the stove, the Tenant with the initials "FR" stated that the oven loses heat because the oven door does not close properly.

In regard to the stove, the Landlord stated that the stove is old, it is currently functioning properly, and the Landlords do not wish to replace it.

The Tenants' claim for compensation for loss of quiet enjoyment relates, in part, to allegations that the Landlords have entered the rental unit without proper notice. In support of this submission the female Tenant stated that:

- At 4:00 p.m. on an unknown date in December of 2019, the Landlord informed the Tenants that a tradesperson would be entering the rental unit to repair the stove at 5:00 p.m. on that date;
- When the tradesperson arrived at the unit at the scheduled time, she allowed the tradesperson to enter the unit.

The Landlord stated that on November 28, 2019 the Tenants were informed that a tradesperson would be repairing the stove and that the stove was repaired on December 04, 2019.

The Tenants' claim for compensation for loss of quiet enjoyment relates, in part, to allegations of inappropriate behaviour. In support of this claim the female Tenant stated that:

- The Tenants changed the window coverings in the rental unit and shortly thereafter were asked why they had been changed;
- They were never told that they had to replace the window coverings;
- On July 16, 2020 the female Landlord and her daughter came to the rental unit and asked if the Tenants had received mail addressed to the Landlord;
- The Landlord's daughter recorded the conversation;
- When they left the Tenant overheard the female Landlord tell her daughter that she would now hear the Tenants talking about the daughter;
- In the Landlords' written submission, the Landlords allege that the Tenants were smoking inside the rental unit; and
- The Tenants have not smoked inside the rental unit.

In regard to the issue with the window coverings, the Landlord stated that she wished the Tenants had asked permission prior to removing window coverings in the rental unit, but they were never told they were not able to do so.

In regard to the recorded conversation on July 16, 2020, the Landlord stated that she and her daughter went to the rental unit on that date because she believed mail may have been misdelivered to the rental unit. She stated that the conversation was recorded for their own "protection", as the relationship between the Landlords and the Tenants was very poor at that point in time.

In regard to the issue of smoking, the Landlord stated in her written submission she expressed her suspicion that the Tenants were smoking inside the unit, but she has no proof of that.

Analysis:

On the basis of the undisputed evidence, I find that the tenancy agreement did not specifically assign a private area of the yard on the residential property to the Tenants.

On the basis of the undisputed evidence, I find that the Tenants have never been told they could not use the yard of the residential property. As the Tenants have not been denied use of the yard, I find there is no reason to issue an Order requiring the Landlords to allow the Tenants use of the yard.

On the basis of the undisputed evidence, I find that the tenancy agreement did not give the Tenants the right to erect a portable gazebo on the residential property. As the permission to erect a portable gazebo on the property was not a term of the tenancy agreement, I find that the Landlords had the right to withdraw this consent after living with the gazebo for one season.

Although the Landlords gave the Tenants permission to erect the gazebo on the property in the summer of 2019, I find that this permission was revoked in 2020 for reasonable reasons. Although the Tenants submit that they were never asked to move the gazebo to facilitate mowing of the lawn, I find that having to ask for the gazebo to be moved every time the lawn needed mowing would be inconvenient. Although the Tenants submit that it was not difficult to move their lawn furniture to facilitate mowing of the lawn, I find that having to do so every time the lawn needed mowing would be inconvenient. Although the Tenants submit the grass was not in good condition prior to the gazebo being erected, I find that the Landlords had the right to determine whether the gazebo was damaging their property.

As I have found that the tenancy agreement did not grant the Tenants the right to erect a portable gazebo and that it was reasonable to the Landlords to prevent the Tenants from erecting the gazebo for a second season, I will not be issuing an Order granting the Tenants' authority to erect a portable gazebo.

There is a general legal principle that places the burden of proving that damage occurred on the person who is claiming compensation for damages, not on the person who is denying the damage. In these circumstances, the burden of proving that the

Landlords breached the Tenants' right to the quiet enjoyment of the rental unit rests with the Tenants.

Section 28 of the *Residential Tenancy Act (Act*) grants tenants the right to quiet enjoyment including, but not limited to, rights to reasonable privacy; freedom from unreasonable disturbance; 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]; and use of common areas for reasonable and lawful purposes, free from significant interference.

Residential Tenancy Branch Policy Guideline #6 reads, in part:

> 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. 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.

As I have found that the tenancy agreement did not grant the Tenants the right to erect a portable gazebo and that it was reasonable to the Landlords to prevent the Tenants from erecting the gazebo for a second season, I find that the Tenants' right to the quiet enjoyment of the rental unit was not breached by the Landlords' decision to prevent the gazebo from being erected for a second season.

There is no evidence that the Tenants were told they could not use the yard on the residential property. I accept that the Landlords made full use of the yard on the residential property, including placing furniture on a shared front porch and erecting an above-ground pool during the summer.

Although it is clear that the Landlords' have greater use of the yard than the Tenants, given the placement of the Landlords' property, I cannot conclude that this prevented the Tenants from temporarily occupying unused portions of the yard . As the tenancy agreement did not specifically assign a private area of the yard to the Tenants, I find that the Landlords' extensive use of the yard did not breach the Tenants' right to quiet enjoyment.

While I find it fair to characterize the yard as “busy”, I cannot conclude that the noise emanating from the yard breached the Tenants’ right to quiet enjoyment.

In concluding that the noise emanating from the yard did not breach the Tenants’ right to quiet enjoyment, I was heavily influenced by the video evidence submitted in evidence. After viewing and listening to the video evidence, I cannot conclude that the noise created by riding a small motorcycle in the yard constitutes a significant disturbance. Conversely, I find that the video evidence shows that the noise created when a boat and motorcycles are being worked on was significant at times. I cannot conclude, however, that those noises exceeded what would be typically expected when a neighbour completes such home repairs, given that such noises are typically sporadic, they do not continue for unreasonable lengths of time, and they occur during the day.

In concluding that the Tenants have failed to establish that the noises emanating from the yard breaches their right to quiet enjoyment, I was heavily influenced by the absence of any evidence from the local bylaw authority that establishes the noise levels from the motorcycles breach local noise bylaws. Although the female Tenant testified that the local bylaw authority would not investigate her concerns because the Landlords live on the property, she submitted no proof of that. I find the Landlord’s testimony that the bylaw authority concluded that an investigation of the Tenant’s concerns was not warranted is equally likely.

Although the female Tenant clearly believes that the noise levels breach local bylaws, the Tenants did not submit copies of those bylaws nor did they submit any documentary evidence that the noise levels from the motorcycles exceeded allowable decibel levels.

I find that the video evidence submitted establishes that the noise from the drum set constitutes a significant disturbance. I find, however, that the Tenants have submitted insufficient evidence to establish that the noise lasted for any significant amount of time or that it occurred on more than one date. In the absence of evidence to the contrary, I accept the Landlord’s testimony that the drum set was outside for the purpose of selling it. Given the limited time of this disturbance, I find that the Tenants’ are not entitled to compensation arising from this disturbance.

I find that the Tenants submitted insufficient evidence to establish that the stove is not functioning properly. In reaching this conclusion I was heavily influenced by the absence of evidence from a qualified professional that corroborates the Tenants’ submission that it does not work properly or that refutes the Landlord’s testimony that it is functioning properly. As there is insufficient evidence to establish that the stove does

not work reasonably well, I decline to issue an Order requiring the Landlords to replace the stove and I dismiss any claim for compensation relating to the stove.

On the basis of the testimony of the female Tenant, I find that she granted a tradesperson entry to the rental unit for the purposes of repairing the stove in December of 2019. I find that the tradesperson was legally authorized to enter the rental unit at the time of the entry pursuant to section 29(1)(a) of the *Act*. As the Tenants have failed to establish that the Landlords entered the rental unit without proper authority, I dismiss any claim for compensation relating to an unlawful entry.

There is nothing in the *Act* that prevents tenants from removing window coverings provided with a rental unit, providing the coverings are re-installed at the end of the tenancy. Although it might be prudent for a tenant to discuss removing window coverings with a landlord before doing so, there is nothing in the *Act* that requires tenants to ask permission when they opt to remove window coverings. Similarly, there is nothing in the *Act* that prevents landlords from asking why window coverings have been removed. I find there is no evidence to suggest that the Landlord breached the Tenants right to quiet enjoyment when she asked why the window coverings had been removed, and I dismiss any claim for compensation relating to this interaction.

Although it might be respectful for one party to inform another party that a conversation is being recorded, there is nothing in the *Act* that prevents landlords from recording a conversation they have with a tenant. I find that by the time the Landlord recorded her conversation with the Tenant on July 16, 2020, the relationship between the Landlords and the Tenants had deteriorated to such a point that either party was justified in recording the conversation, in an effort to accurately record the interaction. I therefore dismiss any claim for compensation relating to this interaction.

Given the very apparent animosity between these two parties, I do not find it unreasonable for the Landlord to <u>suspect</u> that the Tenants were smoking inside the rental unit. I find that expressing that suspicion in a written submission for these proceedings constitutes a breach of the Tenants' right to quiet enjoyment.

While I accept that the relationship between the Landlords and the Tenants has become highly acrimonious, I find the acrimony arises from the incompatibility of two different lifestyles, rather than the Landlords substantially interfering with the Tenants lawful enjoyment of the premises. Overall, I cannot conclude that the Tenants are entitled to compensation for a breach of their right to quiet enjoyment.

The Tenants have failed to establish the merits of their Application for Dispute Resolution, and I dismiss their claim to recover the fee for filing the Application for Dispute Resolution.

Conclusion:

The Tenants have failed to establish the merits of the Application for Dispute Resolution, and the application for a monetary Order is dismissed.

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: October 19, 2020

Residential Tenancy Branch