



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

**Dispute Codes**      MNDCT FFT

### **Introduction**

This hearing dealt with the tenants' application pursuant to the *Residential Tenancy Act* (the "**Act**") for:

- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of \$4,218.25 pursuant to section 67;
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

All parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

### **Issues to be Decided**

Are the tenants entitled to:

- 1) a monetary order of \$4,218.25; and
- 2) recover the filing fee?

### **Background and Evidence**

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into a written tenancy agreement starting February 1, 2020. Monthly rent was \$2,250 and is payable on the first of each month. The tenant paid the landlord a security deposit of \$1,125. The landlord was ordered to return the security deposit to the tenants at a prior hearing. The tenancy ended on August 31, 2020.

The rental unit is located on the second floor of a multi-unit, mixed-purpose building (the "**building**"). The first floor of the building is occupied by commercial tenants. A gym is located directly below the rental unit. The tenants submitted a title search which shows the strata unit the gym is located in is owned by the landlord and her husband. The landlord rents this strata unit to the company who owns the gym business.

The rental unit and the unit the gym is located in gym belong to the same strata corporation. There are other businesses and apartments in the building which the rental unit and gym are located. I am unsure who owns the other strata units.

The tenants testified that, within a month of moving into the rental unit, they started to become unreasonably disturbed by the noises coming from the gym. They testified that there is no sound insulation between the two units, and they can hear weights clanking, dumbbells being dropped, loud music playing, and instructors or coaches yelling words of encouragement. The tenants described the noise as "constant". They testified that the noise starts as soon as the gym opens and continues throughout the day. They submitted a noise log they kept in July 2020. It records the noises occurring as early as 5:29 am (July 18) and before 7:00 am on multiple days (Jul 12, 15, 16, 17, 20, and 21).

The tenants submitted schedules of the gym's classes, taken from its website, for May to September 2020. In May and June, weekday classes started at 6:00 am, three days a week and 7:00 am on two the two other weekdays. Weekend classes started at 8:00 am (Saturday) and 12:00 pm (Sunday).

From July to September, weekday classes regularly started at 5:00 am. The tenants testified that they were routinely woken up by these classes. They tried wearing earplugs to bed and running a white noise machine at night, but neither of these enabled them to sleep through the noises of the early morning workouts below. When the dumbbells or weights were dropped, they testified that it felt like the reverberations were travelling up through the concrete walls.

The tenants called two witnesses in support of their application, AM and TB.

AM is an administrative assistant at a physiotherapy clinic located on the first floor of the same building as the gym and rental unit. The clinic is adjacent to the gym but does not share a wall. Instead, there is a hallway running between the two businesses. AM usually arrives at the office at 7:00 am. She testified that it is not uncommon for music to from the gym to be easily heard in the clinic. She testified that sometimes it is so bad that she has to move from her desk at the front of the clinic to an interior office to be able to get work done. She testified that this has been an ongoing issue for the eight years she has worked at the clinic, and that customers will often comment on how loud the gym can be. She stated that she has spoken to the owner of the gym ("MY") on a few different occasions, but that nothing ever comes of it.

TB is a former tenant of the residential property, having lived there from the spring of 2019 to June 2020. He lived on the third floor, on the opposite side of the building from the gym. He testified that he would regularly hear loud music coming from the gym as early as 8:00 am on Sundays. He did not describe any noise coming from the gym on weekday mornings before 7:00 am. He stated that he made complaints to his landlord and to the strata corporation, but that nothing was done to address the disturbances.

The tenants testified that they made noise violation complaints to the municipality, but, to their knowledge, nothing was done by the city. These complaints made no difference on the noise coming from the gym. They made a written complaint about the noise to the landlord's son, who lives in the residential property and acted as the landlord's agent. Early in the tenancy, tenant TA and the landlord's son had the following exchange between February 23, 2020 and March 2, 2020:

**TA:** Just wanted to give you a heads up. I've spoken to your mom about it, and she said she would get the strata involved. The gym downstairs is a massive noise issue. They start classes at 5:00 AM and start banging, clunking and booming with dumbbells. I've gone down about four times to ask them to try to keep it down. And they have done nothing. I've spoken to other residents in the building who also have said the noise is a huge problem.

[portion of conversation was cut off]

**TA:** Sometimes and is woken by the noise daily. Even now it sounds like someone is pounding on our floor. We wear earplugs. But it's coming through the structure of the unit so they don't help. Also the dude on Sunday mornings screams like a drill Sergeant and plays insanely loud hard house techno . He screams "WHOOOOOO" over and over like [expletive] Ric Flair.

**Landlord's Son:** My dad called strata, they are gonna talk to them.

**TA:** What are they gonna do about it? The metal on metal banging weights and booming is mostly the issue. At all hours. Honestly, I don't know who thought having a 24 hour gym under residential building was a good idea. But it's ridiculous. Even now CLUNK CLUNK CLUNK BOOM BOOM BOOM. It comes up through the floor and walls

**Landlord's son:** Honestly right now I am looking into noise violations and restrictions to see when they can and can't make noise... at a reasonable hour they can make that noise but not at 5:00 AM if the rules say you can't.

**TA:** Total. I filed complaints with the city. What about insulating the roof for noise? Concrete tends to reverberate sound. Maybe they can install something that absorbs the sound?

**Landlord's son:** Yeah we told them that they should do that. we just have to make sure with the city first what all the rules are.

**TA:** please keep me posted on this matter. As it does affect us everyday

**Landlord's son:** My dad said he wrote a complaint to the city and strata said if the issue comes again to go downstairs and tell them.

**TA:** Tell them a complaint is has been filed?

**Landlord's son:** Yeah and that they can't be making noise

**TA:** I mean a lot of noises equipment banging and clanging. It's your mom's building right? Doesn't she have some say about what business operating in it? Is spoken to [MY] and she never got back to me with any solutions.

The tenants submitted a screenshot of a text message TA sent MY on February 25, 2020, which stated:

This is [TA] (from above the gym).

I was wondering if maybe- while there is a trainer there at least-. They could show clients how to put the weights down gently.

Because currently it sounds like people are just power dropping bowling balls.

I'm heading into surgery today and have recovery at home. So anything you can do to make the noise less, is going to be extremely appreciated. Thanks in advance!

The tenants testified that the made other complaints to the landlord and her son, but that the noise issue was never resolved and that it continued until the end of their tenancy.

The tenants also submitted text messages they claim to have exchanged with other occupants of the building regarding the noise caused by the gym. These occupants were not called to testify at the hearing.

The tenants seek a monetary order of \$4,218.25, representing a 30% reduction in rent from when they first reported the noise to the landlord (late February 2020) to when they vacated the rental unit (August 31, 2020).

The landlord denied that any such noise issue existed. She testified that the no one on the strata council was ever notified of noise complaints regarding the gym. She testified that she was not aware of any complaints made to the city regarding noise violations of the gym.

The landlord testified that the current occupant of the rental unit ("**EC**") has not reported any noise to her from the gym. EC wrote a brief letter in support of the landlord, which was submitted into evidence. She wrote:

Hi, [EC] am a current resident of [the rental unit]. I am aware I reside above a gym, and I'm not disturbed by any noises from the gym. During shutdowns due to COVID-19, there were no noises from the gym at all as it was closed and not operating fully, and when the gym is open there are no overly loud or disturbing noises.

The landlord provided a letter from another tenant of the residential property who lives on the second floor ("**FB**"). FB wrote:

I've been asked by my landlord, [redacted], comment on sound emanating from the CrossFit gym on the ground floor of the building in which I live.

I have lived in [the residential property closed bracket since the summer of 2016. When I first viewed the unit I noted [the gym] to the left of the building's front door, and a physiotherapy clinic to the right dash both part of [street address of residential property]. I remember it clearly because I thought then dash and still do - that it is a very clever location for a physiotherapy clinic given all the aches and pains that might result from cross training.

After I settled in, I would occasionally hear muffled sounds in my apartment that I thought probably came from the gym - typically in the morning, but by no means daily. If these had risen to the level of being disturbing or a nuisance I might have contacted [my landlord], and I'm confident that the issue would have been addressed. But the sounds never did reach a volume or frequency that came close to warranting that. I was barely aware of them.

However, since the pandemic began in early March 2020, I have not heard these sounds at all. Gyms have been shut down repeatedly over the past year and a half to detail the spread of COVID-19, and walking past [gym] almost daily I can see how empty it is. I hope it will survive.

The landlord submitted a letter from the senior property manager of the strata management company responsible for managing the building. He wrote:

This letter serves to confirm that a noise complaint was received from [the rental unit] and subsequently a letter was handled inward on March 4, 2020 to the [gym] with respect to managing noise expectations in their compliance to the BC S3 3 2 by laws period new paragraph we are not aware of any other complaints with respect to noise emanating to other second floor units from [the gym].

Finally, the landlord also submitted a letter from MY:

I own and operate a fitness studio located at [address of the residential property]. Throughout the period of [TAs] occupancy at [the residential property], we had several noise complaints from her. In conjunction with the city, we dealt with the

noise issue and it was soon rectified. We continue to receive complaints from [TA] after said issue is dealt with. On one occasion, she illegally entered the studio premises using the back door and harassed two of our members. In addition, my staff and work partner were routinely interrupted while instructing classes and personal clients. Since her departure from [the residential property], we no longer confronted with any issue or complaint from any other tenant or from the city.

TA denied that she did not intentionally illegally enter the gym. She testified that, on one occasion there was a significant amount of noise coming from the gym and that she went downstairs and entered the gym through the rear door. She discovered two people in the gym exercising. The advised her that the gym was closed and that the rear door was supposed to have been locked.

The landlord testified that following the March text message exchange between TA and her son, her son went to the gym on March 4, 2020 to discuss the issue with the MY. She testified that the gym was not open.

The landlord argued that there were no recordings of the alleged noises coming from the gym, so I cannot say how determine whether or not the noise is reasonable. Additionally, she argued that the tenants have not submitted any proof of complaints made to the city or sanctions made by the city against the gym. She argued this suggests that the gym is acting in accordance with the city bylaws.

## **Analysis**

Section 28(b) of the Act states:

### **Protection of tenant's right to quiet enjoyment**

28 A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

(b) freedom from unreasonable disturbance;

RTB Policy Guideline 6 states:

### **B. BASIS FOR A FINDING OF BREACH OF 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.

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.

Rule of Procedure 6.6 states:

### **6.6 The standard of proof and onus of proof**

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. In most circumstances this is the person making the application.

So, the tenants bear the evidentiary burden to prove that it is more likely than not that they were disturbed by sounds coming from the gym, that these disturbances were unreasonable in nature, that that landlord was aware these disturbances were occurring, and that the landlord failed to act reasonably to provide the quiet enjoyment of the rental unit to which the tenants were entitled.

The parties provided conflicting evidence as to the nature of the disturbances caused by the gym, and to their frequency. Each side tendered evidence in support of their respective positions. The testimony of the tenants' witnesses and the written statements from the landlord's witness do not seem to be compatible.

I cannot reconcile how, for example, TB, living two floors above the gym, could say he heard loud music coming from the gym on Sunday mornings at 8:00 am, with FB's statement that she only "occasionally hear muffled sounds" coming from the gym.

I am skeptical that the property management company would not have received any noise complaints (other than a single complaint made March 4, 2020) if music coming from the gym was so loud as to cause TB to retreat to a different part of the psychotherapy clinic to do her work and that the noise issues were ongoing for eight years.

The only point that both sides' evidence seems to agree up on is that the tenants reported a noise disturbance to the landlord in late February 2020, that this was brought

to the attention of MY, and that the city became involved. MY, in her letter, says the problem was rectified (but does not say how this was done). The tenants say it was not addressed.

I have no documentation from the city (copy of a formal complaint lodged, record of investigation, letter from the city to the landlord, the gym, or MY, or proof any penalty was issued). I cannot say if the city found there was a bylaw infraction, or how it was resolved (if at all).

Additionally, the tenants have not provided any recordings of the alleged noises which would support their allegations that the noise persisted at unreasonable levels throughout the tenancy. With the ubiquity of smartphones, such evidence should have been relatively easy to produce.

Based on the evidence provided at the hearing, I cannot say if the disturbances emanating from the gym were as loud or as frequent as alleged by the tenants. As stated above, each side's evidence paints a completely different picture of what happened. The evidence of both sides appears credible. In the absence of any documentary evidence supporting the tenants' version of events, I find that they have failed to discharge their evidentiary burden to prove that it is more likely than not they were unreasonably disturbed by the gym.

As such, I dismiss their application without leave to reapply.

### **Conclusion**

I dismiss the tenants' application, 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: August 16, 2021

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Residential Tenancy Branch