



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ARBUTUS BLENHEIM G.P. INC. FOR AND ON BEHALF OF
ARBUTUS STREET PROJECT LIMITED PARTNERSHIP
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCT, OLC, FFT

Introduction

On April 29, 2021, the Tenants submitted an Application for Dispute Resolution under the *Residential Tenancy Act* (the “Act”) requesting a Monetary Order for compensation, an order for the Landlord to comply with the Act, and to recover the cost of the filing fee. The matter was set for a participatory hearing via conference call.

Preliminary Matters

The Landlord’s Agents (the “Landlord”) and the Tenants attended the first hearing and provided affirmed testimony. They were provided the opportunity to present their relevant oral, written and documentary evidence and to make submissions at the hearing. The parties testified that they exchanged the documentary evidence that I have before me. As such, I find that the evidence before me is admissible for this hearing.

This matter involved an extensive claim and there was a lack of time to hear the matter fully at the first hearing; therefore, the hearing was adjourned.

At this reconvened hearing, the testimony and evidence from the first hearing was reviewed with all parties and they were reminded that they had affirmed to tell the truth.

Issue to be Decided

Should the Tenants receive a Monetary Order for compensation, in accordance with section 67 of the Act?

Should the Landlord be ordered to comply with the Act, in accordance with section 62 of the Act?

Should the Tenants be compensated for the cost of the filing fee, in accordance with section 72 of the Act?

Background and Evidence

Unless otherwise stated in this decision, only documentary evidence presented or referred to by the parties during the hearing has been considered, pursuant to rule 7.4 of the Rules of Procedure.

Both parties agreed to the following terms of the tenancy:

The one-year, fixed-term tenancy began on November 15, 2020. The rent is \$2,280.00 and due on the first of each month. The Landlord collected and still holds a security deposit in the amount of \$1,140.00 and a pet damage deposit in the amount of \$1,140.00.

The Tenants submitted evidence and provided testimony for their claim for loss of quiet enjoyment and have requested compensation in the amount of \$3,494.90.

The Tenants testified that as of January 4, 2021, when a family of four plus a dog, moved into the apartment above, the Tenants have had to deal with constant noise from the occupants banging, running, jumping, and stomping throughout the apartment. The Tenants stated the noise level is unreasonable and have supplied noise logs, audio recordings, copies of correspondence with the Landlord, and submissions related to the loss of quiet enjoyment and the Landlord's non-compliance in addressing the issue.

The Tenants submit that their documentation, both written and audio recordings, show a pattern of repetitive and unreasonable disturbance.

The Tenants stated that they must wear earplugs to bed every night and despite white noise from sleep sounds and a fan, the Tenants are woken up every day by the upstairs renters.

The Tenants submitted affidavits from family and friends that demonstrate their shock, during their visits with the Tenants, regarding the amount of noise from the upstairs renters.

The Tenants submitted that between January 4, 2021 to March 24, 2021, the Tenants had 7 conversations and 3 site visits between them, the property managers, and the upstairs renters.

The Tenants submitted a recording of their conversation with the upstairs renters on January 8, 2021 where the father admitted that there is nothing they can do about their son running and jumping around.

The Tenants stated that they met with Landlord CL, in the rental unit, on March 11, 2021 and recorded the conversation. The Tenants submitted a transcript of the conversation and noted that CL stated the following:

"Now that I hear it for myself, I can support your claims."

“Well, now I can tell them that I’ve heard it myself, so they can’t tell me this isn’t happening. It’s like I can tell them that I’ve heard it for myself and I think it’s not acceptable.”

The Tenants stated that the Landlord failed in their due diligence by not taking action in a timely manner to mitigate the noise coming from the upstairs renters. The Landlord asked the Tenants to maintain the noise logs and regardless of presenting the Landlord with extensive entries, with admissions by the Landlord about the noise, they still refused to take meaningful action.

The Tenants submitted that they regularly suffered the loss of quiet enjoyment in their rental unit from January 4, 2021 until June 6, 2021. The Tenants stated the upstairs renters were quiet from June 7, 2021 until they moved out of the end of June 2021. The Tenants could not explain why or how the upstairs renters were able to be quiet for the last few weeks of June 2021.

The Tenants submitted a floor plan and their Rational for Damages and testified that the ongoing noise affected them while using their living room and bedroom. The Tenants submitted they have a combined loss of useable space of 55.79% and that most of the noise occurs between 6:30 a.m. and 9:30 p.m. The Tenants have claimed compensation of \$698.98 per month x 5 months for a monetary claim of \$3,494.90.

The Landlord submitted written statements from Witness LT, who was the building manager in January 2021. Witness LT testified that she provided access for the upstairs renters to move into their unit on January 4, 2021 and within an hour, received a text complaint from the Tenants. Witness LT submitted that the Tenants texted her again on January 5, 2021 about noise from upstairs and upon following up with the upstairs renters, Witness LT learned that they were building a few pieces of furniture and would try their best to keep it quiet. Witness LT stated she followed up with the Tenants and advised them to keep track of the noise issues and to contact her if there were further problems.

Witness LT stated she did not hear from the Tenants until January 26, 2021. She received a log with dates, times and types of noise complaints and subsequently reached out to higher management to assist with resolution.

Witness LT testified there were many occasions when she inspected the upstairs renter’s unit, provided strategic advice around carpeting and foam, and listened from the Tenants’ unit while never hearing significant noise from the upstairs renters. Witness LT stated that the Tenants’ noise log and audio recordings did not seem realistic and, on several occasions, would listen outside of both the Tenants’ door and outside the door of the upstairs renters and she could not hear any noise coming from the upstairs renter’s unit.

Landlord GL also submitted a written statement and testified that he responded to the Tenants' noise complaints on several occasions and would even attend the residential property after hours to listen to any potential noise disturbances. GL stated that the Tenants seemed overly sensitive to a "normal level of noise in a newly constructed wood framed building".

Landlord GL stated that the upstairs renters did their best to accommodate the Tenants' concerns and ended up being bullied out of their unit by the Tenants. Landlord GL did not provide any documentary evidence to support the times he attended the residential property in response to the Tenant's noise complaints.

The Landlord submitted a written email statement, dated July 21, 2021, from the upstairs renter ("JC"). JC stated that the only reason they moved out of their unit was because of the Tenants' actions. To mitigate the noise issues, JC enrolled her children in daycare and school; therefore, the children would be gone most of the day. Regardless, the Tenants would continue to regularly knock on their ceiling. JC submitted that her kids were in bed by 8:00 pm each evening.

Landlord CL testified that in an effort to respond to the Tenants noise complaints, regardless of any substantial evidence of noise, the Landlord provided a warning letter to the upstairs renters on March 2, 2021. Landlord CL stated that they could not determine any further noise issues stemming from the upstairs renters and therefore, could not pursue further mitigation efforts or consequences with them.

The Landlord stated that they have done all they could to respond to the Tenants' complaints which included attempting to note any noise issues, liaising with the upstairs renters, asking them to rearrange their furniture, sending a warning letter and responding to the Tenant's complaints throughout the tenancy. The Landlord submitted that there have been no other noise complaints from any of the other nearby units. The Landlord submitted that they had no reason to provide further warnings or pursue an eviction with the upstairs renters.

The Landlord submitted correspondence with the Tenants from July 19, 2021 where the Landlord offered to settle with the Tenants. The Tenants did not accept the Landlords offer and instead submitted an amendment to their Application for aggravated damages.

The Tenants submitted an amendment, received by the Residential Tenancy Branch on July 30, 2021, with a claim for aggravated damages in the amount of \$15,564.00 and included their Rationale for Damages. The Tenants testified that they spent a significant amount of time keeping the noise logs and that it was an incredible burden with no action from the Landlords until the Tenants applied for dispute resolution.

The Tenants submitted that the toll of this process left them in an exasperated and depressed state and have requested \$5,000.00 in aggravated damages.

The Tenants submitted that part of their aggravated damages claim related to the Landlord's misrepresentation related to noise transfer between rental units and the construction of the building. The Tenants have requested \$2,500.00 in damages.

The Tenants submitted that a large portion of the aggravated damages claim was related to the time they took to document the noise and to prepare for the hearing and was estimated at 44.8 hours. The Tenants submitted that they make \$180.00/hr at their consulting job and therefore are claiming \$8,064.00 in aggravated damages.

Analysis

Section 7(1) of the Act establishes that a party who does not comply with the Act, the Regulations or the Tenancy Agreement must compensate the other party for damage or loss that results from that failure to comply.

Section 67 of the Act establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order the responsible party to pay compensation to the other party. In order to claim for damage or loss under the Act, the party claiming the damage or loss bears the burden of proof. The Applicant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the Tenancy Agreement or a contravention of the Act on the part of the other party. Once that has been established, the Applicant must then provide evidence that can verify the actual monetary amount of the loss or damage.

In this case, the Tenants have the burden to prove that they suffered a loss as a result of the Landlord violating the Act or the Tenancy Agreement; demonstrate the amount or value of the loss; and prove that they acted reasonably to minimize that loss. The standard of proof is on a balance of probabilities meaning it is more likely than not that the facts occurred as claimed.

Section 28 of the Act provides that a tenant is entitled to quiet enjoyment including the right to reasonable privacy and freedom from unreasonable disturbance. *Residential Tenancy Policy Guideline #6* further provides that:

Temporary discomfort or inconvenience does not constitute a basis for a breach of the covenant of 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.

The Tenants alleged that the upstairs renters created frequent, ongoing and unreasonable disturbances and that the Landlord failed to address these concerns regardless of the Tenants' complaints, noise logs and recordings.

I find that the Tenants have completed extensive logs related to noise that disturbed them throughout January to early June 2021. The Tenants also submitted video recordings in an attempt to demonstrate the frequent and unreasonable disturbances from the upstairs renters.

When considering whether the Tenants suffered from frequent and ongoing interference or unreasonable disturbances, I considered both the Tenants' evidence and the evidence from the Landlord. When listening to the submitted recordings, I found that it was difficult to hear specific disturbances or differentiate the noise that was occurring in the Tenants' rental unit from that which was alleged to be from the upstairs renters. For example, when I heard a dog barking in one of the audio recordings, the Tenants admitted that was their own dog.

I find the evidence presented by the Landlord's Agents demonstrated that they did respond to the Tenants concerns during the first few months of the Tenant's complaints by liaising with both the Tenants and the upstairs renters, by asking the upstairs renters to reconfigure their furniture, by attending to the residential property in an attempt to note the alleged disturbances, and by issuing a warning letter to the upstairs renters in March of 2021.

I accept the Tenants evidence that the Landlord did attend to their rental unit in March 2021 and acknowledge that they heard some disturbances coming from the upstairs renters' unit. I find that this seems to be the only time there was any consensus between the Landlord and the Tenants about any disturbances and find that this does not constitute frequent and ongoing interference or unreasonable disturbance, pursuant to *Residential Tenancy Policy Guideline #6*.

I accept that the Tenants were upset and disturbed by the level of noise in their rental unit. I find that their perception of noise and the source of it conflicted with the upstairs renters' testimony about when the children were put to bed and that, at least, one of the children were in school/daycare during the day.

The Tenants' evidence also conflicted with the Landlord's (Agents') testimony regarding the cooperation, effort and changes made by the upstairs renters, the Landlord's testimony regarding the amount of time the Landlord responded to the Tenants' concerns, their attempts to document any disturbances, and the Landlord's statement that there were no other related noise complaints from any other occupants in the building. Although the Landlord did not provide the documentary evidence to demonstrate exactly how many times they attended to the residential property in response to the Tenants' complaints, I find, based on the Landlord's Agents' submissions and testimony that the Landlord demonstrated due diligence and appropriate response to the Tenants' concerns.

Based on the evidence before me, I find that the Tenants have failed to provide sufficient evidence that they suffered a loss as a result of the Landlord violating section

28 of the Act or the Tenancy Agreement, pursuant to section 67 of the Act. As such, I dismiss the Tenants' claim for compensation in the amount of \$3,494.90.

Residential Tenancy Policy Guideline #16 – Compensation for Damage or Loss discusses that nominal damages may be awarded where there has been no significant loss or no significant loss has been proven, but it has been proven that there has been an infraction of a legal right.

In this case, I have found that the Tenants have failed to prove they suffered a loss, pursuant to section 28 and 67 the Act. However, I do acknowledge that the Tenants spent a substantial amount of time documenting their concerns in an effort to demonstrate to the Landlords that they were required to respond to their (the Tenants') concerns that the quiet enjoyment of their tenancy was being disturbed. I also note that the upstairs renters did acknowledge that one of their children did cause some noise and that Landlord CL, did note that there had been some noise from the upstairs renter's unit. For these reasons, I award the Tenants nominal damages of \$300.00 per month from January to May 2021, for a total award of \$1,500.00.

Residential Tenancy Policy Guideline #16 speaks to Aggravated Damages:

"Aggravated damages" are for intangible damage or loss. Aggravated damages may be awarded in situations where the wronged party cannot be fully compensated by an award for damage or loss with respect to property, money or services. Aggravated damages may be awarded in situations where significant damage or loss has been caused either deliberately or through negligence. Aggravated damages are rarely awarded and must specifically be asked for in the application.

In this case, as noted above, I found that the Landlord responded to the Tenants' concerns with due diligence. When considering the Tenants' request for aggravated damages, I find that the Tenants have failed to provide sufficient evidence that their claim of damages or loss related to the quiet enjoyment of their rental unit was deliberately caused by the Landlord or that the Landlord was negligent in their actions. As such, I dismiss the Tenants' claim for aggravated damages in the amount of \$5000.00.

The Tenants claimed \$2,500.00 in aggravated damages related to the "misrepresented advertisements related to noise transfer" within the residential property. As I have found that the Tenants were unable to prove a loss pursuant to section 28 or 67 of the Act, I find that Tenants have failed to provide sufficient evidence to prove that the Landlord deliberately or through negligence misrepresented advertisements related to noise transfer. As such, I dismiss this part of the Tenants' claim for aggravated damages.

The Tenants claimed \$8,064.00 for the time it took to document their noise complaints and prepare for this hearing. As noted in Policy Guideline #16, aggravated damages may be awarded in situations where significant damage or loss has been caused either

deliberately or through negligence. I find that the Tenants made the choice to commit many hours to both the documentation of their noise concerns and the preparation for this hearing, and that the Landlord cannot be held responsible for the Tenants' choices in this regard. Furthermore, I have already found that the Landlord showed diligence with their response and that damages were not caused through the Landlord's deliberate actions or through negligence. As such, I dismiss this part of the Tenants' claim for aggravated damages.

The Tenants did not speak to the issue of ordering the Landlord to comply with the Act. As the upstairs renters had moved from their unit, I suspect that the issue may now be irrelevant. As such, I dismiss this issue.

I find that the Tenants' Application was partially successful. As such, I find that the Tenants are entitled to recover the cost of the filing fee for this Application for Dispute Resolution, in the amount of \$100.00, pursuant to section 72 of the Act.

Conclusion

I grant the Tenants a Monetary Order for the amount of \$1,600.00, in accordance with section 67 and 72 of the Act. In the event that the Landlord does not comply with this Order, it may be served on the Landlord, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

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: December 23, 2021

Residential Tenancy Branch