Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding One West Property Corp.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **MNDCT, OLC, FFT**

Introduction
This hearing dealt with an application filed by the tenant pursuant the *Residential Tenancy Act* (the "*Act*") for:

- A monetary order for damages or compensation pursuant section 67;
- An order for the landlord to comply with the *Act*, regulations or tenancy agreement pursuant to section 62; and
- Authorization to recover the filing fee from the other party pursuant to section 72.

The tenant attended the hearing, and the landlord was represented at the hearing by property manager, MB ("landlord"). As both parties were present, service of documents was confirmed. The landlord acknowledged service of the tenant's Notice of Dispute Resolution Proceedings package and the tenant acknowledged service of the landlord's evidence. Both parties testified they had no concerns with timely service of documents.

The parties were informed at the start of the hearing that recording of the dispute resolution is prohibited under the Rule 6.11 of the Residential Tenancy Branch Rules of Procedure ("Rules"). The parties were informed that if any recording was made without my authorization, the offending party would be referred to the RTB Compliance Enforcement Unit for the purpose of an investigation and potential fine under the *Act*. Both parties confirmed that they were not recording the hearing.

Preliminary Issues
At the commencement of the hearing, the tenant asked whether the tenancy would become month to month if she did not seek another fixed term lease. The landlord confirmed that understanding. I advised the parties that once the tenancy becomes periodic, either party may seek to end the tenancy on one month's notice to the other side. If the landlord were to serve the tenant with a 1 Month Notice to End Tenancy for Cause and the tenant filed an application to dispute it, the landlord would be required to prove the validity of their reasons for ending the tenancy.

Issue(s) to be Decided

Should the landlord be required to comply with the *Act*, regulations or tenancy agreement?

Is the tenant entitled to a monetary order from the landlord for not providing the tenant with quiet enjoyment?

Can the tenant recover the filing fee?

Background and Evidence

At the commencement of the hearing, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony pursuant to rule 7.4. In accordance with rules 3.6, I exercised my authority to determine the relevance, necessity, and appropriateness of each party's evidence.

While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

The tenant gave the following testimony. The tenancy began on May 1, 2017, as a fixed one-year tenancy. The parties have signed consecutive yearly lease renewals and the current lease is set to expire on April 30th.

In her application, the tenant seeks an order that the landlord provide her with quiet enjoyment of the rental unit by ensuring she is not disturbed by the noise emanating from the tenants living in the unit above hers. The tenant describes the interference as substantial and ongoing. She testified that the upper unit tenants create excessive noise that is beyond temporary discomfort or inconvenience. According to the tenant, the landlord was aware of the issue but failed to take the steps to correct the behaviour of the upper unit tenants. This entitles her to aggravated damages against the landlord.

The tenant seeks a direction from the Residential Tenancy Branch that the landlord:

1. Evict the tenants residing above her,
2. have them vacate the unit and
3. replace the laminate floors of the upper unit with carpets.

The tenant testified that her first complaint to the landlord was sent on May 13, 2018. The basis was loud noise and numerous gatherings disturbing her quiet enjoyment. By

the time she complained, there had been between 8 and 10 gatherings on weekends, loud and large. The tenant testified that the situation did not improve following the first email.

On February 3, 2019, the tenant sent a second complaint regarding a party hosted by the upper unit tenants which didn't stop until 9:00 p.m. The tenant testified that the excessive noise continued throughout 2020. Despite presuming the landlord was dealing with it, the noise continued. The tenant stated, *"it should have been apparent to the landlord that the tenants were intransigent.*" There was no improvement in 2019.

The tenant's third noise complaint came on January 1, 2020. In this complaint, the tenant was specific regarding the incident and raised issues of the upper unit tenants' lifestyle and suitability for living in a multi-unit residence. At the hearing, the tenant argues that the landlord should have been able to draw 3 inferences from the emails:

1. The upper unit tenants are not inclined to do anything to remedy the situation
2. The upper unit tenants have an inappropriate lifestyle
3. The landlord should have inferred that he needed to take more forceful measures.

The tenant argues that after the third complaint, the landlord was wilfully blind to the point of negligence.

The fourth complaint came on August 17, 2021. Again, excessive noise was the issue and the tenant testified that the landlord did nothing. Since the filing, the upper unit tenants have continued to make noise.

The tenant seeks compensation from the landlord on an escalating scale. She seeks damages for the emotional, psychological and physical harm caused to her by the landlord's failure to ensure she had quiet enjoyment of the rental unit. In her evidence package, the tenant describes it as a deliberate and/or negligent failure to *Act* in accordance with the Residential Tenancy *Act* to enforce her right to quiet enjoyment over a lengthy period of time.

The landlord gave the following testimony. The rental unit is one of two basement units below a main living unit in a single-family dwelling. The house had been converted to accommodate three separate sets of tenants living under 3 separate tenancies.

The sounds described by the tenant are consistent with living in a multi-family home built in 1988. Given the age of the structure and the original construction as a single-family dwelling, there is bound to be noise heard between the floors. The landlord has

followed up with complaints made by the tenant and tried to assist however there is only so much that can be done.

The landlord argues that there were no complaints from the tenant in the first year. In an email dated April 11, 2018, the tenant states she would “very much like to stay for another year, on the same terms as the current agreement”. This is indicative of the tenant’s enjoyment of the rental unit.

The first complaint in May of 2018 was the first time the landlord was made aware of the upper unit occupants’ family gathering that disturbed the tenant. The landlord testified he immediately addressed the issue with the upstairs tenants. They told the landlord that they didn’t think they made that much noise, however they apologized and stated they would be more mindful in the future. The landlord testified that he recommended that the parties have a personal conversation to avoid further negative issues. Following this, the landlord, not having heard any further complaints from the tenant, assumed that the upper unit tenants were no longer disturbing the lower unit tenant with noise issues.

The landlord testified that there were no family gatherings by the upper unit tenants for the rest of 2018 until a single one mentioned in the tenant’s February 03, 2019 email. The landlord argues that he responded to the tenant’s concerns immediately and spoke to the upper unit occupants who assured the landlord that they made a conscious effort to end the event at a reasonable time. The upper unit tenants have not held any family gatherings since the one in February of 2019, according to the landlord. There were no further noise complaints made by the tenant throughout 2019, the landlord testified.

The third noise complaint, on January 01, 2020 was not immediately addressed by the landlord due to the holiday season. When the tenant followed up, the landlord apologized to the tenant, then met with the upper unit tenants on February 18th. The landlord argues that this was the first time the specific noises being complained about were described. The landlord scheduled a meeting with the tenant for March of 2020 but it never happened due to the pandemic.

With the exception of extending the lease, the landlord and the tenant had no further interaction until a chance meeting while the landlord was showing a neighbouring property in August of 2021. He was surprised to find out the tenant still had concerns over noise from the upper unit tenants.

The landlord submits that in response to the tenant's complaints, felt pads were given to the upper unit tenants for installation on chair and table legs in the kitchen and living room. The landlord confirmed that nobody upstairs wore hard soled shoes in the house. The upper unit tenants have discontinued all family gatherings since the 2019 complaint. The landlord testified that he and the property owners are willing to do whatever they can to make the tenant's experience renting the unit enjoyable.

Analysis

Section 7 of the *Act* states: If a landlord or tenant does not comply with this *Act*, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results. 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 that party to pay compensation to the other party. Rule 6.6 of the Residential Tenancy Rules of Procedure indicate the onus to prove their case is on the person making the claim and that the standard of proof is on a balance of probabilities.

Residential Tenancy Policy Guideline PG-16 [Compensation for Damage or Loss] states at Part C:

In order to determine whether compensation is due, the arbitrator may determine whether:

1. a party to the tenancy agreement has failed to comply with the *Act*, regulation or tenancy agreement;
2. loss or damage has resulted from this non-compliance;
3. the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
4. the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

(the 4-point test)

In this case, the tenant seeks compensation from the landlord for failing to provide her with quiet enjoyment of the rental unit based on a claim of denial of freedom from unreasonable disturbance under section 28(c) of the *Act*.

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:

(a)reasonable privacy;

(b)freedom from unreasonable disturbance;

(c)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]*;
(d)use of common areas for reasonable and lawful purposes, free from significant interference

In determining whether the tenant's right to quiet enjoyment has been breached, I must determine whether the tenant's ordinary and lawful enjoyment of the rental unit has been substantially interfered with as a result of either the landlord's actions or inaction. In other words, if the upper unit tenants were responsible for the interference and the landlord failed to take reasonable remedial action, the landlord may be found to be in breach of the tenant's right to quiet enjoyment.

First, I turn to the layout of the rental property. When she moved in, the tenant understood she would be living in the lower unit of a single family detached home built in the 1980's that had been converted into individual units. The tenant's suite is located directly below the main living area of the upper-level suite and the tenant is aware that the upper unit is covered in laminate flooring. While the tenant states she expects to hear voices, TV's and other activities from the occupants living upstairs, it is apparent to me that the tenant found the noise level was unreasonable. I find I do not share this determination. The test of whether noise is unreasonable, or a nuisance is based on a standard of reasonableness, after considering all of the surrounding circumstances. There is no requirement that a noise reach a certain decibel range or other measurement in order to be considered unreasonable. In order to make a finding of significant interference or unreasonable disturbance, the interference or disturbance in question has to either be recurring in nature or otherwise very egregious.
If the upper unit tenants were deliberate in making noise to aggravate or otherwise disturb the tenant below, I would consider it unreasonable. On a balance of probabilities, I find the sounds of daily life, including walking around, speaking to one another and watching TV to be reasonable.

Next, in order for me to find the landlord has breached section 28 of the Act, I must be satisfied that the landlord knew the tenant was being denied quiet enjoyment and failed to take any steps to rectify it. In this respect, I find the landlord not at fault. The tenant's first complaint on May 13, 2018 was addressed by the landlord with a conversation with the upper unit tenants. There was no further communication with the landlord regarding noise until the second complaint on February 3, 2019. The tenant argues that the landlord ought to have known that the upper unit tenants continued to disturb her, stating *"it should have been apparent to the landlord that the tenants were intransigent.*" however I cannot fault the landlord for failing to address a concern he was not aware of.

When the landlord was made aware of the second complaint, I find he addressed her concerns by meeting with the upper unit tenants again. I must note here that a landlord must try to balance the upper unit tenants' right to quiet enjoyment of their rental unit, free from the landlord's significant interference, against the lower unit tenant's right to the quiet enjoyment of her own unit. I find the landlord's actions in speaking again to the upper unit tenants once again to be reasonable and prudent.

Throughout the remainder of 2019, the tenant made no further noise complaints made to the landlord, even though she documented each noise made by the upper unit tenants. I find the landlord had no way of knowing the tenant found her quiet enjoyment of the rental unit was being infringed upon. Likewise, it appears to me that throughout 2020, the tenant stayed silent until the chance meeting with the landlord at the end of August 2021. I find the landlord reasonably believed the noise issues were sufficiently addressed from their last communication until that chance meeting in August.

Based on the above findings, I conclude that the landlord did not breach section 28 of the Act. (Point 1 of the 4-point test). Following this, there is no damage I can attribute to a breach of the Act. (Point 2 of the 4-point test).

The tenant seeks compensation for periods of time that the landlord was completely unaware of the tenant's displeasure. The tenant cannot simply stay silent for a significant period of time about a disturbance and then seek retroactive compensation for that entire period when convenient. The tenant must *Act* reasonably in advising the landlord of the alleged disturbances in a timely manner. Consequently, I find the tenant has failed to mitigate the damages she seeks (point 4 of the 4-point test).

I find the landlord did not breach section 28 of the *Act* and fail to provide the tenant with quiet enjoyment. As such, I do not find the tenant has suffered a loss of damage resulting from a breach of the *Act*. For these reasons, the tenant's application seeking compensation pursuant to section 67 is dismissed without leave to reapply.

The tenant also seeks an order that the landlord comply with the *Act* by providing her with quiet enjoyment. I find that the landlord has provided the upper unit tenants with felt pads to alleviate some of the sounds heard in the lower unit. He has sought assurances from the upper unit tenants that they would not wear hard soled shoes or host parties. During the hearing, the landlord also offered to have rugs put down in high traffic areas of the upper unit. I find that the landlord has made reasonable efforts to

alleviate the tenant's concerns about the sounds of daily life coming from the upper unit and I dismiss her application seeking an order for the landlord to comply with the *Act*.

As the tenant's application was not successful, the tenant is not entitled to recovery of the $100.00 filing fee for the cost of this application.

Conclusion

This application is dismissed 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: March 15, 2022

Residential Tenancy Branch