Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding PENTICTON & DISTRICT SOCIETY FOR COMMUNITY LIVING and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes PSF; OLC

Introduction

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

- an order requiring the landlord to provide services or facilities required by law, pursuant to section 65; and
- an order requiring the landlord to comply with the *Act, Residential Tenancy Regulation ("Regulation")* or tenancy agreement, pursuant to section 62.

The landlord's two agents, "landlord LW" and "landlord SL," and the tenant attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. This hearing lasted approximately 58 minutes from 11:00 a.m. to 11:58 a.m.

This hearing began at 11:00 a.m. with me and the landlord's two agents present. The tenant called in late at 11:03 a.m. I asked the landlord's two agents to call back into the hearing because their telephone line was causing loud noises and interference. The landlord's two agents exited the hearing from 11:03 a.m. to 11:06 a.m. When they returned, I asked them to remove their telephone from speakerphone because it was causing echoing and feedback, making it difficult for me to hear properly. I did not discuss any evidence with the tenant in the absence of the landlord's two agents. This hearing ended at 11:58 a.m.

Landlord LW confirmed the names and spelling for her and landlord CS. The tenant confirmed his name and spelling. Landlord LW and the tenant provided their email addresses for me to send this decision to both parties after the hearing.

Landlord LW stated that the landlord company ("landlord") named in this application is an agent for the owner. She said that she is the housing coordinator for the landlord and that she had permission to speak on its behalf. She claimed that landlord CS is a housing and maintenance coordinator for the landlord and that he had permission to speak on its behalf. She stated that both landlord agents had permission to represent the owner at this hearing. She provided the rental unit address. She identified herself as the primary speaker for the landlord at this hearing. Landlord CS did not testify at this hearing.

Rule 6.11 of the Residential Tenancy Branch ("RTB") *Rules of Procedure ("Rules")* does not permit recording of this hearing by any party. At the outset of this hearing, landlord LW affirmed, under oath, that neither she, nor landlord CS, would record this hearing. At the outset of this hearing, the tenant affirmed, under oath, that he would not record this hearing.

I explained the hearing and settlement processes, and the potential outcomes and consequences, to both parties. Both parties had an opportunity to ask questions, which I answered. Both parties confirmed that they were ready to proceed with this hearing, they did not want to settle this application, and they wanted me to make a decision. Neither party made any adjournment or accommodation requests.

Landlord LW confirmed receipt of the tenant's application for dispute resolution hearing package. The tenant confirmed receipt of the landlord's evidence. In accordance with sections 88 and 89 of the *Act*, I find that the landlord was duly served with the tenant's application and the tenant was duly served with the landlord's evidence.

Pursuant to section 64(3)(c) of the *Act*, I amend the tenant's application to remove the abbreviated name of the landlord as a landlord-respondent party. Landlord LW confirmed that the legal full name of the landlord was already contained on this application, so the abbreviated version was not required. Both parties consented to this amendment during this hearing. I find no prejudice to either party in making this amendment.

Pursuant to section 64(3)(c) of the *Act*, I amend the tenant's application to add a claim requiring the landlord to comply with the *Act, Regulation* or tenancy agreement. The tenant included a description of this relief in the online RTB details of dispute for his application by stating the following: "I am filing to have my landlord comply with the act." The tenant claimed that he could not find the above claim when he filed his application, despite the fact that he applied for the same relief at a previous RTB hearing in

December 2019. I find no prejudice to the landlord in making this amendment, as the landlord was aware of the tenant's application, and responded to the tenant's claims by way of documentary evidence and verbal testimony from landlord LW at this hearing.

At this hearing, the tenant did not identify any services or facilities that he required the landlord to provide. The tenant stated that he did not intend to file for this claim in his application. I find that the tenant did not provide sufficient testimonial, documentary, or digital evidence regarding this claim. Accordingly, this portion of the tenant's application is dismissed without leave to reapply.

Issue to be Decided

Is the tenant entitled to an order requiring the landlord to comply with the *Act, Regulation* or tenancy agreement?

Background and Evidence

While I have turned my mind to the documentary and digital evidence and the testimony of both parties, not all details of the respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's claims and my findings are set out below.

Landlord LW and the tenant agreed to the following facts. Both parties signed a written tenancy agreement. Monthly rent in the current amount of $366.00 is payable on the first day of each month. A security deposit of $150.00 was paid by the tenant and the landlord continues to retain this deposit. The tenant continues to reside in the rental unit.

Landlord LW stated that this tenancy began on March 1, 2017. The tenant clamed that it began on November 14, 2017.

The tenant testified regarding the following facts. Since he moved into the rental unit, he has had to deal with drugs, smoking, and noise from the unit above him, which he can hear through his ceiling. He wants reasonable quiet enjoyment. He previously applied for this relief at the RTB and a previous hearing was held in December 2019. He has made frequent and repeated calls to 911 and the bylaw department. He has provided witness statements, screenshots and letters to the landlord. He wants the landlord to comply with the *Act*. There has been beating on his door. There has been a hammer to his ceiling for six months straight, every half an hour, keeping him awake

until 6:00 a.m. He provided a 105-page report to the bylaw department, regarding these issues. The issues regarding the noise and tapping on his ceiling have been ongoing from December 22, 2017, to date. He provided audio recordings, which are catalogued, and five files were given to the RTB. There are sharp hammer knocks on his ceiling. He signed his tenancy agreement on November 11, 2017. There is a 100-page document outline. He provided a log sheet from December 22, 2017. The calls to the police regarding cannabis started on May 28, 2018. He has told the landlord about all these issues, but the landlord will not do anything. He would love to stop filing applications but we he will have to do so for the "rest of his life" because of this "pestering behavior." He spoke to a police constable regarding the occupant living above him and provided the constable's phone number at this hearing.

Landlord LW testified regarding the following facts. The landlord asks that the tenant's entire application is dismissed because everything was addressed at the previous RTB hearing in December 2019. The tenant filed the previous RTB application in October 2019 and amended it in November 2019. Everything submitted by the tenant is the same issue from the previous RTB hearing. At the previous RTB hearing, that Arbitrator found that the landlord did what it could to investigate the tenant's issues. The landlord found that it was not the person living in the unit above the tenant, causing the noise and complaints. There have been no other complaints from any other tenants around the tenant's rental unit, whether beside or below him. The landlord's last meeting with the tenant was on December 13, 2021, where there were three landlord representatives in attendance. The tenant is not suitable for congregate living, as the building is 67 years old and neighbors make noise. The air intake is right by the tenant's rental unit and easily distributes air in the building.

Landlord LW stated the following facts. The landlord talked to the police, who asked the landlord to prevent the tenant from calling 911 repeatedly. The CEO of the landlord told the tenant that he is not suitable for congregate living. The landlord offered the tenant a subsidy to live in another unit in a different building, but the tenant refused. The landlord would support the tenant moving to another building. The landlord inspected the unit above the tenant's rental unit and did not find any evidence of a hammer or sharp stone. The occupant in the unit above the tenant has been harassed, due to the tenant's calls to the police, and the police have repeatedly knocked on her door and woken her up from sleeping, so she is not banging anything. This issue has been ongoing for years. At the December 2021 meeting with the tenant, the landlord asked the tenant to stop calling 911. There is no evidence of the tenant's reported disruptions. The previous RTB hearing Arbitrator found in the landlord's favour and dismissed the tenant's application without leave to reapply. The tenant approached the landlord's two

maintenance employees, but this is not appropriate, as they do not have anything to do with the tenant's complaints. The landlord supports the tenant's move to a different building and has offered this in the past, but the tenant declined.

Analysis

Burden of Proof

At the outset of this hearing, I informed the tenant that as the applicant, he had the burden of proof, to prove his application, on a balance of probabilities. The tenant confirmed his understanding of same and stated that he wanted to proceed with this hearing.

The *Act, Regulation*, RTB *Rules*, and Residential Tenancy Policy Guidelines require the tenant to provide evidence of his application. The tenant received an application package from the RTB and provided a copy of these documents to the landlord. The tenant was provided with a "Notice of Dispute Resolution Proceeding" ("NODRP") from the RTB, which contains the phone number and access code to call into this hearing.

The NODRP states the following at the top of page 2, in part (emphasis in original):

> *The applicant is required to give the Residential Tenancy Branch proof that this notice and copies of all supporting documents were served to the respondent.*
>
> - *It is important to have evidence to support your position with regards to the claim(s) listed on this application. For more information see the Residential Tenancy Branch website on submitting evidence at www.gov.bc.ca/landlordtenant/submit.*
> - *Residential Tenancy Branch Rules of Procedure apply to the dispute resolution proceeding. View the Rules of Procedure at www.gov.bc.ca/landlordtenant/rules.*
> - *Parties (or agents) must participate in the hearing at the date and time assigned.*
> - *The hearing will continue even if one participant or a representative does not attend.*
> - *A final and binding decision will be sent to each party no later than 30 days after the hearing has concluded.*

I informed the tenant that a legal, binding decision would be issued within 30 days after this hearing date. This information is contained in the NODRP above. The tenant confirmed his understanding of same.

The tenant was provided with a detailed application package from the RTB, including the NODRP, with information about the hearing process, notice to provide evidence to support their application, and links to the RTB website. It is up to the tenant to be aware of the *Act, Regulation*, RTB *Rules*, and Residential Tenancy Policy Guidelines. It is up to the tenant, as the applicant, to provide sufficient evidence of his application, since he chose to file this application on his own accord.

The following Residential Tenancy Branch ("RTB") *Rules of Procedure* are applicable and state the following, in part:

> *7.4 Evidence must be presented*
> *Evidence must be presented by the party who submitted it, or by the party's agent…*
> …
> *7.17 Presentation of evidence*
> *Each party will be given an opportunity to present evidence related to the claim. The arbitrator has the authority to determine the relevance, necessity and appropriateness of evidence…*
>
> *7.18 Order of presentation*
> *The applicant will present their case and evidence first unless the arbitrator decides otherwise, or when the respondent bears the onus of proof…*

I find that the tenant did not properly present his evidence, as required by Rule 7.4 of the RTB *Rules of Procedure*, despite having multiple opportunities to do so, during this hearing, as per Rules 7.17 and 7.18 of the RTB *Rules of Procedure.*

During this hearing, I found the tenant's testimony to be confusing, unclear, and difficult to understand. The tenant spoke very quickly throughout this hearing. I asked him to slow down so I could hear him properly and take notes of his testimony, but he continued speaking very quickly. The tenant testified for the majority of this hearing at approximately 40 minutes of this 58-minute hearing, and landlord LW only testified for approximately 10 minutes. I informed both parties that there was no need to rush through submissions and if we exceeded the 60-minute hearing time, the hearing could be adjourned to a later date to complete submissions.

During this hearing, the tenant read out the file names for many of his documents. He repeated the same complaints and issues. He read out police file numbers and phone numbers for police officers. The police file numbers and phone numbers are not of assistance, as I do not have access to the police database to look up the file numbers and the tenant did not provide copies of the police reports associated with the file numbers. I also cannot call the police officers and speak to them after this hearing, as my role as an Arbitrator is to make a decision regarding the tenant's application presented at the hearing, not to act as an investigator and call police officers to obtain additional information or evidence after the hearing, when the landlord will not have a chance to respond. The tenant chose not to bring any police officers or other witnesses to testify on his behalf at this hearing, despite the fact that I asked him at the outset of this hearing, if he was calling any witnesses.

This hearing lasted approximately 58 minutes, so the tenant had ample time to properly present his application, submissions, and evidence. The tenant filed this application on March 25, 2022, and this hearing occurred over 3.5 months later on July 14, 2022, so he had ample time to prepare for this hearing. The tenant filed the same application, which was previously heard by the RTB in December 2019, so he is aware of the RTB hearing process.

Res Judicata – Previous RTB Hearing in December 2019

Both parties agreed that there was a previous RTB hearing regarding the tenant's application for an order to comply, heard by a different Arbitrator on December 12, 2019, after which a decision, dated December 13, 2019, was issued, dismissing the tenant's entre application without leave to reapply. The landlord provided a copy of the previous RTB decision for this hearing. The file number for that hearing appears on the cover page of this decision. The Arbitrator noted the following, in part, at pages 1 to 3 of the previous RTB decision (bold emphasis in original):

> ***Issues***
>
> *Is the tenant entitled to an order requiring the landlord to comply with the act regulation or tenancy agreement?*
>
> ***Background and Evidence***
>
> *…*
> *The tenant is requesting an order that the landlord deal with issues that are affecting his enjoyment of his rental unit. The tenant testified that he is subjected*

to constant noise and smoke from the unit above him. The tenant has written to the landlord regarding his complaints, and the issues would continue again after a short period. The tenant testified that the smoke would enter his unit through the air intake as well as the kitchen and bathroom vents.

The landlord's agents testified in this hearing that the landlord had done everything possible to accommodate the tenant. The landlord provided undisputed testimony that they had even re-located the tenant once to another unit. The landlord made the same offer again when the tenant filed more complaints from this second unit, but the tenant declined this offer. The tenant confirmed this in the hearing, stating that he did not want to move.

The landlord's agents testified that this is a multi-unit building that housed many seniors including the one above the tenant. The landlord's agents testified that the noise was from the senior exercising, and that regardless of the accommodations made by the landlord, the tenant continued to express concern about the same issues.

The landlord testified that new rules have been passed where smoking is prohibited, but the smoking rule was grandfathered and certain units still housed smokers.

Analysis

I have considered the evidence and testimony provided by both parties. Although I am sympathetic to the fact that the tenant is subjected to noise and smoke from other units, I find that the evidence presented does not support any contravention of the Act or tenancy agreement by the landlord.

As this is a multi-unit building, with many occupants, and which has grandfather no smoking rules, I find that the landlord had taken steps to mitigate the outstanding issues brought up by the tenant by offering to re-locate the tenant on at least two occasions.

Although I find that the tenant's expectations of this tenancy have not been met, met, I find there is insufficient evidence for me to make a finding that the landlord had failed to meet their obligations regarding this matter. On this basis, I am dismissing the tenant's application without leave to reapply.

It is clear from the previous RTB decision, noted above, that the tenant previously applied for the same relief for an order to comply, regarding issues of noise, smoke, and problems with the neighbour living above him. At this current hearing, the tenant applied for the same relief for the same issues, noting they were from November 2017 to date.

I find that any events regarding noise and smoke from prior to December 12, 2019, to be *res judicata*, as they have already been decided and dismissed without leave to reapply, by a different Arbitrator at the previous RTB hearing on the above date.

Accordingly, this current decision only deals with events regarding smoke and noise from December 13, 2019 to the present date of this hearing, July 14, 2022.

Findings

Section 28 of the *Act* deals with a 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.*

Residential Tenancy Policy Guideline 6 "Entitlement to Quiet Enjoyment" states the following, in part (my emphasis added):

> *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.*

On a balance of probabilities and for the reasons stated below, I dismiss the tenant's application for an order requiring the landlord to comply with the *Act, Regulation* or tenancy agreement, without leave to reapply.

While the tenant is bothered by noise and smoke from the neighbour living above him, these complaints are not necessarily subject to intervention by the landlord. Residing in a multi-unit residential building can sometimes lead to disputes between occupants. A certain level of noise is to be expected, given the location of the tenant's rental unit neighbouring other units. The other occupants in the rental building are entitled to quiet enjoyment of their units, including completing activities of daily living and using their units for different purposes. The tenant cannot decide how or when the other occupants' units are to be used and for what purposes. The rights of all occupants must be balanced. Landlord LW said that the occupant living above the tenant's rental unit feels harassed by repeated police attendance at her unit, waking her up while sleeping.

When concerns are raised by one tenant, the landlord must balance its responsibility to preserve the tenant's right to quiet enjoyment against the rights of the other occupants in the rental building, who are entitled to the same protections, including the right to quiet enjoyment, under the *Act*. A landlord may try to mediate such disputes if it can, but sometimes more formal action is required.

I find that the tenant provided insufficient evidence to demonstrate that the landlord failed to take appropriate action to follow up on the tenant's complaints regarding noise and smoke at the rental property. I find that the tenant failed to provide sufficient evidence that the landlord failed to comply with the *Act*, *Regulation* or tenancy agreement. I find that the landlord has fulfilled its obligations pursuant to section 32 of the *Act*.

I accept the landlord's evidence and the affirmed testimony of landlord LW at this hearing. I accept that the landlord made best efforts to respond to the tenant's complaints regarding smoke and noise at the rental property. The landlord offered to support the tenant to move to another building and to provide a subsidy, but the tenant refused. During this hearing, the tenant claimed that he was still residing at the rental unit, and he had no plans to move out. The landlord inspected the unit above the tenant's rental unit, where the tenant complained of noise. The landlord spoke to the police repeatedly, who asked that the tenant stop making repeated 911 calls regarding these issues. The landlord had meetings with the tenant regarding his complaints. The landlord's maintenance personnel were contacted by the tenant, despite the fact that landlord LW said it was inappropriate for the tenant to do so. The air intake is near the tenant's rental unit in a 67-year-old building, where the smoke is easily distributed. As noted in the previous RTB decision above, there are still smokers at the rental property, since there are grandfather rules regarding smoking.

The landlord provided a copy of an inspection email, dated March 24, 2022, conducted the day before the tenant filed his application on March 25, 2022. The report is from landlord CS, stating that he inspected the unit of the neighbour living above the tenant, due to the tenant's complaints of hammering and electric saw usage. The report states that landlord CS spoke to the occupant, that she is a non-smoker, that she said she did not own a hammer or electric saw, that he saw no evidence of same in her unit, that she took sleeping pills at night, and that she has been woken up in the middle of the night by police, due to approximately 10-12 noise complaint calls made by the tenant to police.

I find that the noise and smoke referenced by the tenant are temporary inconveniences and not unreasonable disturbances, as noted in Policy Guideline 6, above. I find that the tenant failed to provide sufficient evidence of a loss of quiet enjoyment.

As the tenant was unsuccessful in this application, I find that he is not entitled to recover the $100.00 filing fee from the landlord. This claim is dismissed without leave to reapply.

Conclusion

The tenant's entire 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: July 14, 2022

Residential Tenancy Branch