Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNR, MNSD, FF

Introduction

This hearing dealt with an application by the tenant for a monetary order and a cross-application by the landlord for a monetary order and an order authorizing him to retain the security deposit. Both parties participated in the conference call hearing.

Issue to be Decided

Is the tenant entitled to a monetary order as claimed?
Is the landlord entitled to a monetary order as claimed?

Background and Evidence

The parties agreed that the tenancy began on August 15, 2010 and was set to continue for a fixed term which expired on August 31, 2011. The parties further agreed that the tenant was obligated to pay $1,100.00 per month in rent and that she paid a $550.00 security deposit.

The rental unit is an apartment in a multi-story wood frame building with hardwood flooring. The tenant testified that in June 2011, a new tenant with a young child began occupying the apartment immediately above the rental unit (the “Upper Unit”). The tenant claimed that the noise created by the child in the Upper Unit was extreme and significantly interfered with her quiet enjoyment of the rental unit. The tenant testified that she was a medical student who had intended to reside in the unit for three years during her course of studies. She stated that she studied at home and occasionally slept during the day due to on-call shifts and therefore needed a quiet environment.

The tenant described the noise emanating from the upper unit as non-stop every evening and all day on weekends. She said that she could hear the child in the Upper Unit run, drop toys and cry and that the sound echoed in the unit, occasionally causing vibrations which shook the curtain rods. The tenant stated that she was gone during the week through most of June but that she came home on weekends and was disturbed each weekend. On or about June 12 the tenant contacted the landlord to ask him to

rectify the problem. The following day, the landlord told the tenant that the occupant of the Upper Unit wanted to know the time frame in which noises were made so she could avoid future occurrences. The tenant responded that it was on and off all weekend.

The following weekend the tenant returned home and was again disturbed. She complained again to the landlord advising that there was “thunderous noise every time the child moves” and left a letter of complaint on the door of the Upper Unit. The following day, the tenant received cookies from the occupant of the Upper Unit and a handwritten note from the child who resided there. In the note, the child wrote “sorry I am loud. I will try better. I am growing up.” The tenant responded to this note by issuing a second letter in which she invited the occupant to come to the rental unit to hear the disturbance for herself and advising that she would “welcome suggestions and continued efforts beyond suggesting that I wait for her to grow up”.

On June 19, the landlord suggested that the tenant may be able to switch units with the occupant of the Upper Unit and offered to pay her moving expenses should such an arrangement be possible. The tenant expressed interest in the suggestion. On June 26 the landlord contacted the tenant to ask if the situation had improved, to which the tenant responded that the noise had continued non-stop.

On July 1 the landlord advised the tenant that the occupant of the Upper Unit was doing her best to keep the noise to a minimum, to which the tenant responded that the noise level was still unacceptable. The tenant invited the landlord to listen to the noise from the rental unit, an offer which the landlord did not accept.

On or about July 2 the landlord advised the tenant that nothing more could be done about the noise situation. On July 5 the tenant gave the landlord written notice advising that she would be vacating the rental unit on July 31 “as agreed in our discussion on July 2, 2011”. The landlord responded by letter the following day advising that the tenancy agreement would continue until August 31 and that the tenant could not end the tenancy prior to that date. He further advised that her moving expenses were her own responsibility.

Among the tenant’s evidence were letters from acquaintances who confirmed that while they were visiting in the rental unit, the noise from the Upper Unit was extremely disturbing.

The tenant seeks an award of $1,500.00 for loss of quiet enjoyment, $1,500.00 for aggravated damages, her costs associated with moving and transferring various accounts, fees and costs related to filing her dispute, the difference in rent between

what she had paid at the rental unit and what she pays at her new place of residence and the cost of stopping payment on her August rent cheque.

The landlord argued that he did what he could do to resolve the noise problem and he spoke with the occupant of the Upper Unit, but she was unable to keep her child absolutely quiet. The landlord stated that no other tenants have complained about noise from the Upper Unit and that the tenant who has resided in the rental unit since September 1 has not complained. The landlord submitted a copy of a letter authored by the new occupant of the rental unit in which she states that noise from the Upper Unit has not been an issue during her tenancy. The landlord stated that the tenant had greatly exaggerated the noise and that she was dehumanizing the child in the Upper Unit.

The landlord seeks an award for $1,100.00, which represents one month of lost income. The landlord took the position that the tenant broke the terms of the tenancy agreement by vacating the unit one month early. The landlord began placing advertisements for the rental unit in August and testified that he was unable to secure another tenant until September. The landlord stated that he allowed the tenant to advertise in July and he was in contact with a number of people who had been referred by the tenant, but those persons were either unsuitable or they did not want to rent the unit as a result of the tenant having told them that there were problems with noise.

The tenant testified that she advertised the rental unit in July and showed the unit to a number of prospective tenants, but that they were suspicious that something was wrong because it was she and not the landlord who was showing the unit. The tenant stated that she had to answer their questions honestly and tell them that she was vacating due to excessive noise from the Upper Unit. The tenant testified that she enlisted several acquaintances to contact the landlord as prospective tenants. Those parties wrote letters which were entered into evidence and which indicated that they had some difficulty in connecting with the landlord. One acquaintance suggested that the landlord inordinately delayed contacting him or permitting him to fill out an application.

Analysis

Section 28(b) of the Act states that tenants are entitled to freedom from unreasonable disturbance. In order to establish her claim, the tenant must prove that the disturbance from the Upper Unit was unreasonable. I accept that the tenant believed the noise to be unreasonable and I further accept that her acquaintances also believed it to be unreasonable. However, the standard which must be applied is objective rather than subjective.

The tenant made the choice to live in a wood frame building with hardwood floors. It must be expected that noise will travel more freely through a wood frame building than it would through a concrete structure and hardwood flooring in such a structure should be expected to compound the problem. There is no indication in the tenancy agreement that the building is restricted to adults only and although there may not have been a child residing in the Upper Unit at the beginning of the tenancy, the tenant should have contemplated that the occupants of the building may change over time.

I am not persuaded that the noise of which the tenant complained was unreasonable in the circumstances. Part of what has led me to this conclusion is the tenant's June 19 complaint to the landlord that "thunderous noise every time the child moves". This suggests to me that the tenant had an unreasonable expectation that there would be no movement from the occupants above her. Further, part of her complaints stem from the occupants in the upper unit walking heavily and wearing shoes. I find that walking heavily and wearing shoes may be considered part of everyday life and I am unwilling to characterize the noise generated from those activities as unreasonable.

I find that the tenant has provided insufficient evidence to prove that she was subjected to unreasonable disturbance and accordingly I dismiss her claim in its entirety.

I find that the tenant did not have the right to end the tenancy prior to the end of the fixed term. However, upon learning that the tenant intended to breach the terms of the tenancy agreement, the landlord had the obligation to mitigate his losses by making attempts to re-rent the unit. The tenant advertised the rental unit at the beginning of July at the suggestion of the landlord and I find that as the suite was being advertised, it was unnecessary for the landlord to advertise it himself. I find that the landlord's telephone records show that he was returning calls and I accept that he was acting to mitigate damages. The tenant was showing the unit to prospective tenants and I accept that she was not presenting the unit in its most favourable light. While she claimed that she was merely answering questions honestly, I find it more likely than not that she communicated to prospective tenants her own displeasure with her living situation and characterized the noise from the Upper Unit as unreasonably loud. I find that the tenant likely discouraged prospective tenants.

By the end of July, the tenant had stopped advertising the unit and at this point, the landlord had an obligation to place his own advertisements. The landlord did not dispute the tenant's allegation that he did not place advertisements until August 11. I find that in delaying advertising, the landlord failed to mitigate his losses.

As both parties contributed to the loss of income experienced in the month of August, I find it appropriate that they should share the financial burden. I award the landlord

$550.00 in lost income for the month of August which represents one half of the income he expected for that month. As the landlord currently holds a $550.00 security deposit, I order him to retain that deposit in full satisfaction of the claim.

I find it appropriate in the circumstances that the parties each bear their own filing fees.

Conclusion

The tenant's claim is dismissed. The landlord is awarded $550.00 and is ordered to retain the security deposit in full satisfaction of his claim.

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 18, 2011

Residential Tenancy Branch