



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

RR, OLC, FFT

Introduction:

This hearing was convened in response to an Application for Dispute Resolution filed by the Tenants in which the Tenants applied for an Order requiring the Landlord to comply with the tenancy agreement or the *Residential Tenancy Act (Act)*, a rent refund, and to recover the fee for filing this Application for Dispute Resolution.

The female Tenant stated that on October 19, 2019 the Dispute Resolution Package and evidence the Tenants submitted to the Residential Tenancy Branch in October of 2019 were sent to the Landlord, via registered mail. The Agent for the Landlord acknowledged receipt of the documents and evidence. He stated that he was not able to view video evidence that was served to the Landlord. The evidence the Agent for the Landlord was able to view was accepted as evidence for these proceedings.

On November 12, 2019 the Landlord submitted a copy of the tenancy agreement. The Agent for the Landlord stated that the tenancy agreement was not served to the Tenants as evidence for these proceedings. As the tenancy agreement was not served to the Tenants, it was not accepted as evidence for these proceedings.

On November 12, 2019 the Landlord submitted a written statement to the Residential Tenancy Branch. The Agent for the Landlord stated that this evidence was served to the Tenants, via email, in November of 2019. The female Tenant acknowledged receiving this document on November 12, 2019. As the Tenant acknowledged received the document, it was accepted as evidence for these proceedings.

The parties were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. Each party present at the hearing

affirmed that they would speak the truth, the whole truth, and nothing but the truth during these proceedings.

All of the evidence accepted as evidence for these proceedings has been reviewed; however, it is only referenced in this decision if it is directly relevant to my decision.

Preliminary Matter

The evidence submitted by the Tenants includes several videos. The female Tenant stated that these videos were provided to the Landlord, as evidence, on a USB device.

The Agent for the Landlord stated that he was unable to open the videos on the USB device served to the Landlord by the Tenants. He stated that he could not view or listen to the videos submitted by the Tenants. On the basis of this undisputed evidence, I find that the Agent for the Landlord has been unable to hear/view the Tenants' video evidence.

The female Tenant stated that the Tenants did not communicate with the Agent for the Landlord to determine if he was able to view the Tenants video evidence.

Rule 3.10.5 of the Residential Tenancy Branch Rules of Procedure reads:

The format of digital evidence must be accessible to all parties. For evidence submitted through the Online Application for Dispute Resolution, the system will only upload evidence in accepted formats or within the file size limit in accordance with Rule 3.0.2.

Before the hearing, a party providing digital evidence to the other party must confirm that the other party has playback equipment or is otherwise able to gain access to the evidence. Before the hearing, a party providing digital evidence to the Residential Tenancy Branch directly or through a Service BC Office must confirm that the Residential Tenancy Branch has playback equipment or is otherwise able to gain access to the evidence.

If a party or the Residential Tenancy Branch is unable to access the digital evidence, the arbitrator may determine that the digital evidence will not be considered.

If a party asks another party about their ability to gain access to a particular format, device or platform, the other party must reply as soon as possible, and in any event so that all parties have seven days (or two days for an expedited hearing under Rule 10), with full access to the evidence and the party submitting and serving digital evidence can meet the requirements for filing and service established in Rules 3.1, 3.2, 3.14 and 3.15.

Regardless of how evidence is accessed during a hearing, the party providing digital evidence must provide each respondent with a copy of the evidence on a memory stick, compact disk or DVD for its permanent file.

On the basis of this undisputed testimony of the female Tenant, I find that the Tenants did not confirm that the Landlord was able to view their video evidence, as is required by rule 3.10.5 of the Residential Tenancy Branch Rules of Procedure.

On the basis of the undisputed evidence of the Agent for the Landlord, I find that he has been unable to hear/view the Tenants' video evidence. I therefore find that it would be a breach of the principles of procedural fairness to consider the video evidence. The video evidence was not considered as evidence for these proceedings, in accordance with rule 3.10.5 of the Residential Tenancy Branch Rules of Procedure.

Issue(s) to be Decided:

Are the Tenants entitled to a rent refund?

Is there a need to issue an Order requiring the Landlord to comply with the tenancy agreement or the *Residential Tenancy Act (Act)*?

Background and Evidence:

The Agent for the Landlord and the female Tenant agreed that this tenancy began on April 01, 2018 and that the Tenants are still living in the rental unit.

The Tenants are requesting an Order requiring the Landlord to protect their right to the quiet enjoyment of the rental unit, by preventing the tenants living above them from making an unreasonable amount of noise.

The Tenants are seeking compensation, in the amount of \$9,350.00, in compensation for an on-going breach of the right to quiet enjoyment. The Tenants are seeking a 50% rent reduction from October 24, 2018; compensation for the cost of noise cancelling headphones; and the cost of temporarily vacating the rental unit.

The Tenants contend that their quiet enjoyment of the rental unit has been regularly breached by noise emanating from the site above them.

The female Tenant stated that when they first moved into the rental unit, they were disturbed by squeaking floors in the suite above them. She stated that the Landlords

repaired the squeaking floors after the Tenants expressed concern about the noise, and the Tenants are not seeking compensation for that disturbance.

In support of this claim the female Tenant stated that:

- they have also been disturbed by noises emanating from the upper unit, which include noises of a child running, adults stomping, a dog running, items being thrown for a dog, and a dog chewing on something;
- the Tenants hear these noises daily, on one occasion as early as 6:00 a.m. and sometimes as late as 8:00 p.m.;
- these noises were first reported to the Landlord on October 24, 2018;
- since that time that the Agent for the Landlord and the Tenants regularly discussed the noises, in person and by email;
- they understand the Agent for the Landlord has spoken with the occupants of the upper suite and asked them to reduce noise levels;
- they have spoken with the occupants of the upper suite and the occupants have told them they are unable to reduce the noise levels;
- the floors in the upper suite are hardwood;
- they understand the occupants of the upper suite have been provided with area rugs for the bedroom and living room;
- the noise disturbances continue in spite of the Landlord's efforts;
- the Agent for the Landlord told the Tenants they could end their fixed term tenancy early if they wished to move;
- the Agent for the Landlord told the Tenants the rental unit would not be rented to anyone else while the people in the upper suite are living in that suite;
- the Agent for the Landlord was in the rental unit in August of 2018 and he heard the type of noise the Tenants had been reporting;
- on September 19, 2019 they informed the Agent for the Landlord that they sometimes left the unit on weekends in order to rest; and
- the Tenants believe the occupants of the upper suite should be offered alternate accommodations and/or they should be evicted.

In response to this claim the Agent for the Landlord stated that:

- on October 24, 2018 the Tenants first reported being disturbed by a child running, adults stomping, a dog in the suite above them;
- since that time that the Agent for the Landlord and the Tenants regularly discussed the noises, in person and by email;
- he has spoken with the occupants of the upper suite and asked them to reduce noise levels;

- the occupants of the upper suite have a young child and they have told him they are making reasonable efforts to be quiet and to keep the child quiet;
- the floors in the upper suite are hardwood;
- the Landlord provided the occupants of the upper suite have been provided with area rugs for the bedroom and living room;
- he told the Tenants they could end their fixed term tenancy early if they wished to move;
- he told the Tenants the rental unit would not be rented to anyone else while the people in the upper suite are living in that suite;
- when he was in the rental unit on one occasion in August of 2018, he heard a noise in the upper suite, although he does not know if the noise was made by a child;
- he did not think the noise he heard in August of 2018 was particularly loud;
- on September 19, 2019 the Tenants informed him that they sometimes left the unit on weekends in order to rest;
- he thinks the Landlord has done everything possible to reduce the noise levels emanating from the upper unit;
- the building is an old building and not very sound proof; and
- he does not believe the Landlord has the right to end the tenancy as a result of noise from a young child.

The Tenants submitted emails exchanged between the Tenants and the occupant of the upper suite. It is clear from the se emails that the Tenants are being disturbed by noise from the upper suite and that the occupant of the upper suite believes they are not being unreasonably loud.

The female Tenant stated that the video recordings they submitted provided an audio recording of the noise levels in the rental unit at various times in September and October of 2019. She stated that the videos also showed readings on a sound meter which was recording the decibel level of the noise in the rental unit.

The female Tenant stated that the sound meter recorded average sound levels and peak sound levels of each recording. She stated that the typical average sound level record was between 58.2 and 60 decibels. She stated that the highest peak level recorded was approximately 89 decibels and the lowest peak level recorded was approximately 75 decibels.

The Tenants submitted a reference chart which indicates, in part that:

- a level of 50 represents a quiet home;
- a level of 60 represents a quiet street;
- a level of 70 represents a normal conversation;
- a level of 80 represents loud singing;
- a level of 90 represents a motorcycle.

The Tenants submitted a document from an employer, in which the employer declared that he/she heard loud noises emanating from the upper suite on August 27, 2019.

The Tenants submitted a document from a former occupant of the rental unit, in which the former occupant declares that they frequently heard loud footsteps, items being dropped and occasional party noise. The author described the noise and excessive and incredibly disturbing.

Analysis:

Section 28 of the *Residential Tenancy Act (Act)* stipulates that 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 of the *Act*;
- (d) use of common areas for reasonable and lawful purposes, free from significant interference.

Residential Tenancy Branch policy guideline #6 reads, in part:

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.

It is commonly accepted that unreasonable and ongoing noise is a breach of the covenant of quiet enjoyment.

To determine whether the Tenants right to quiet enjoyment has been breached, I must first determine whether the noise emanating from the upper suite is unreasonable. Black's Law Dictionary, sixth edition, defines reasonable as "fair, proper, just, moderate, suitable under the circumstances" while unreasonable is defined as "irrational; foolish; unwise; absurd; silly; preposterous; senseless; stupid".

On the basis of the evidence presented by the Tenants, I fully accept that they are being disturbed by sounds emanating from the upper unit, which includes the sound of a child running/playing, adults walking, a dog walking/playing, and things being dropped.

I have difficulty concluding, however, that the noises the Tenants report hearing in the rental unit are unreasonable. Rather, I find that they are noises that can be typically associated to daily living activities in a home that is occupied by a pet, a young child, and adults. In determining that the noises are not unreasonable I was influenced, to some degree, by the female Tenant's testimony that shows the noises typically occur during the day and end before 8:00 p.m. Given that these daily living noises are occurring during reasonable hours, I do not consider them unreasonable.

I find that the Landlord has taken appropriate and reasonable steps to protect the Tenants' right to the quiet enjoyment of the rental unit. In reaching this conclusion I was influenced by the undisputed evidence that:

- the Landlord fixed the floor in the suite above the rental unit after the Tenants advised the Landlord they were being disturbed by squeaky floors;
- the Agent for the Landlord spoke with the occupants of the upper suite regarding the noise complaints;
- the Landlord provided the occupants of the upper suite with area rugs to cover the hardwood floors, in an effort to reduce the noise level; and
- the Landlord offered the Tenants an opportunity to vacate the rental unit prior to the end of the fixed term of the tenancy, in an attempt to reduce the impact the noise was having on the Tenants.

There is no evidence that the Landlord offered the Tenants living in the upper suite with the opportunity to move into a different suite. Although this may have been a

reasonable action for the Landlord to take, I find that the Landlord was not required to do so. There is no expectation that a landlord will take every possible action to protect the Tenants' right to quiet enjoyment when they are being disturbed by the actions of another occupant of the residential complex. Rather, there is an expectation that a landlord will take reasonable steps to protect the Tenants' right to quiet enjoyment and I find that the Landlord did so by taking the aforementioned actions.

In adjudicating this matter, I was somewhat influenced by Agent for the Landlord's testimony that he does not believe the Landlord has the right to end the tenancy as a result of noise from a young child. As has been previously stated, I find that there is insufficient evidence to establish that the noises emanating from the rental unit are unreasonable. As there is insufficient evidence to establish that the noise was unreasonable, I find that the Landlord likely did not have sufficient evidence to end this tenancy, pursuant to section 49 of the *Act*, on the basis of noise.

In adjudicating this matter, I was somewhat influenced by the testimony of the Agent for the Landlord's testimony, who stated that he when he was in the rental unit on one occasion in August of 2018, he heard a noise from the upper suite, which he did not consider to be particularly loud. On the basis of the testimony of the female Tenant, I find that the noise the Agent for the Landlord heard was representative of the types of noises that are disturbing the Tenants.

Reasonable levels of noise are obviously subjective. What is reasonable to one person can be highly unreasonable to another person. In circumstances such as there, where a tenant believes noise levels are unreasonable and a seemingly unbiased party, such as an agent for a landlord, thinks the noise levels are reasonable, the person alleging unreasonableness bears the burden of proving the noise levels are unreasonable.

I find that the Tenants have submitted insufficient evidence to establish that the noise levels are unreasonable. In reaching this conclusion I was heavily influenced by the absence of audio evidence that allows me to make an independent assessment of the noise levels in the rental unit. Although the Tenants did submit audio evidence to the Residential Tenancy Branch, I am prevented from considering that evidence as it does not meet the rules established by the Residential Tenancy Branch Rules of Procedure.

In adjudicating this matter, I have placed little weight on the document from the Tenants' employer, in which the employer declared that he/she heard loud noises emanating from the upper suite on August 27, 2019. I find that this is simply a subjective

assessment of the noise levels in the rental unit, by a potentially biased party, it does not assist me in making an independent assessment of the noise levels in the rental unit.

In adjudicating this matter, I have placed little weight on the document from the former occupant of the rental unit, in which the former occupant declares that they frequently heard loud footsteps and items being dropped. I find that this information corroborates the Tenants' submission that loud noises could be heard, but it does not establish that the upper occupants are being unreasonably loud. Rather, it corroborates the Landlord's submission that the building is old, and that sound travels easily.

On the basis of the female Tenant's testimony and in the absence of evidence to the contrary, I accept that the average sound levels recorded in the video recordings was between 58.2 and 60 decibels. As these levels are between the noise levels found in a quiet home and on a quiet street on the reference chart submitted by the Tenants. I find that the Tenant's testimony supports my conclusion that the average noise levels were not unreasonable.

On the basis of the female Tenant's testimony and in the absence of evidence to the contrary, I accept that the noise peaked at times to between 75 and 89 decibels. As these levels are between the noise levels found in a normal conversation and a motorcycle on the reference chart submitted by the Tenants. I find that the Tenant's testimony establishes that brief loud noises could periodically be heard in the rental unit. I find that these noises would be consistent with a child jumping and/or running.

Although I accept that the Tenants are periodically disturbed by the sounds of a child periodically running/jumping (or similar loud noises) I find that these are noises that the Tenants must simply accept when they are living below a suite with children.

For all of these reasons, I find that the Tenants have submitted insufficient evidence that the Landlord failed to take reasonable steps to protect their right to the quiet enjoyment of the rental unit. I therefore dismiss the Tenants' application for compensation as a result of noise emanating from the upper unit.

I find that the Tenants have failed to establish the merit of their Application for Dispute Resolution and I dismiss their application to recover the fee for filing this Application for Dispute Resolution.

Conclusion:

The Tenants' Application for Dispute Resolutions is dismissed in its entirety.

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: November 21, 2019

Residential Tenancy Branch