Civil Resolution Tribunal

Date Issued: August 17, 2020

File: ST-2020-001312

Type: Strata

Civil Resolution Tribunal

Indexed as: *Lyon v. The Owners, Strata Plan BCS 2583*, 2020 BCCRT 917

B E T W E E N :

KEVIN LYON and TREVOR LEGGAT

APPLICANT

A N D :

The Owners, Strata Plan BCS 2583 and LORI MCDONALD

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This is a strata property dispute about alleged noise and bylaw enforcement.

2. The applicants, Kevin Lyon and Trevor Leggat, were tenants renting unit 610 (610) in the respondent strata corporation, The Owners, Strata Plan NW 2406 (strata) until October 1, 2019. The other respondent, Lori McDonald, owns a strata lot (609)

in the strata immediately next to 610.

3. The applicants are represented by Kevin Lyon. The strata is represented by a strata council member. Ms. McDonald represents herself.

4. The applicants say Ms. McDonald's use of her television sound system caused noise contrary to the strata bylaws for most of their 6.5-month tenancy. They say Ms. McDonald refused to address their concerns despite their requests that she do so on at least 4 occasions. The applicants also say the strata did not properly investigate their complaints about Ms. McDonald contrary to the *Strata Property Act* (SPA). Finally, the applicants say they were forced to terminate their tenancy agreement and move out of the strata as a result of the failed actions of the respondents because of the ongoing noise and vibration disturbances.

5. The applicants seek orders that the strata enforce its bylaws and that Ms. McDonald keep noise and vibration levels in 609 to a reasonable level, especially though the night. They also seek damages totalling $4,325.79 for reimbursement of the value of a vacation day taken by Mr. Lyon to move out of 610, a move-in fee for the applicants' new apartment, an increase in monthly rent for their new apartment, plus the costs of moving, a sound meter, and a "mattress topper". The applicants also claim for general damages of $6,000.00 for loss of enjoyment of their rented property.

6. The strata says it investigated the applicants' complaints and was unable to determine the source of their concerns. It denies the noise source was 610 and asks that the applicants' claims be dismissed.

7. Ms. McDonald says the strata did not find her responsible for the noise disturbances and denies she was the cause of the applicants' complaints. She asks that their claims be dismissed.

8. For the reasons that follow, I dismiss the applicants' claims and this dispute.

JURISDICTION AND PROCEDURE

9. These are the formal written reasons of the CRT. The CRT has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The CRT must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the CRT's process has ended.

10. The CRT has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, email, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.

11. The CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The CRT may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.

12. Under section 123 of the CRTA and the CRT rules, in resolving this dispute the CRT may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the CRT considers appropriate.

PRELIMINARY ISSUES

13. In its submissions, the strata says that some evidence should not be admissible. In particular, it claims the correspondence from previous tenants of 610 and the current tenants of 610 should not be admitted. It also says the recording of the council hearing held September 9, 2019 should not be admitted because it did not know of or agree to the recording.

14. I find there is no legal reason why this evidence should not be admissible. As for correspondence with the previous and current 610 tenants, the applicants are entitled to provide evidence they believe is relevant to their claims. It does not matter that the correspondence issued by the current tenants was supplied by the

applicants' landlord. As for the recording of the council hearing, there is no legal requirement that strata agree to the recording. On this basis, I allow the applicants' evidence, however, I discuss the weight I give to it below, as necessary.

ISSUES

15. The issues in this dispute are:

    a. Did the noise complained of by the applicants originate in 610? If so, have the applicants established the noise levels were in breach of bylaw 5(a)?

    b. Has the strata failed to properly investigate the applicants' complaint and enforce its bylaws?

    c. What is an appropriate remedy, if any?

POSITIONS OF THE PARTIES

16. The applicants submit that Ms. McDonald watches her television in the late evening and early morning hours using a sound system. They say her television surround sound system creates unreasonable noise that disrupted their sleep resulting in the loss of enjoyment of their rental unit. They also say that the strata failed to properly investigate their noise complaint and enforce its bylaws, although they did not specifically identify which bylaw Ms. McDonald had breached.

17. Ms. McDonald admits she watches her television late at night and into the early morning hours, but submits that the volume of her sound system is kept at a very low level. She denies her actions are unreasonable. She also says she did not receive any correspondence from the strata about the applicants' complaint and that the strata determined 609 was not the source of the noise after it investigated the applicants' complaint.

18. The strata submits the noise complained of by the applicants could not be clearly identified or linked to Ms. McDonald. It submits a different strata lot was found to be the source a noise complaint from subsequent 610 tenants and that strata lot was

fined. In its defence, the strata relies heavily on a previous CRT dispute under file ST-2019-007716 (previous dispute) which, as I discuss below, I find is not relevant to this dispute.

BACKGROUND, EVIDENCE AND ANALYSIS

19. In a civil proceeding such as this, the applicants, Kevin Lyon and Trevor Leggat, must prove their claims on a balance of probabilities.

20. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision except I did not listen to all the audio records as I discuss below.

21. As mentioned, I note that the strata made several references to the previous dispute throughout its submissions, but did not provide any details of the previous dispute. I asked CRT staff to advise me of its details. Staff provided me with the Dispute Notice and Dispute Response for the previous dispute and advised it was withdrawn during the facilitation process, which explains why there is no published decision. In short, the previous dispute involved bylaw fines assessed against a previous 609 tenant which were paid by the 609 owner. I find that the previous dispute is unrelated to this dispute and therefore not relevant in this proceeding.

22. The strata is an airspace parcel strata corporation created in October 2007 under the SPA. It consists of 206 strata lots in a single 12-storey, high-rise building located in Vancouver, BC. It is undisputed that the dividing wall common to each unit separates the bedroom of 609 from the living room of 610. Both strata lots are located on the 6th floor of the building.

23. The strata's owner developer filed bylaws different to the Schedule of Standard Bylaws under the SPA with the Land Title Office (LTO) on October 18, 2007, at the time the strata was created. The Standard Bylaws do not apply.

24. Several bylaw amendments have been filed with the LTO since 2007, but I find none are relevant. The applicable bylaw in this dispute is bylaw 5(a) dealing with the use of property. I summarize the relevant parts of bylaw 5(a) as follows:

A resident must not use a strata lot in a way that:

i. Causes a nuisance to another person,

ii. Causes unreasonable noise,

iii. Unreasonably interferes with the rights of another person to use and enjoy another strata lot.

25. The applicants were tenants of 610 from about March 15 to October 1, 2019, a period of about 6.5 months. They say there were disturbed by noises early in their tenancy. They submit by walking the common hallways of the 6th and 7th floors of the building, they determined the noise disturbances were coming from 609, Ms. McDonald's strata lot.

26. The applicants first attempted to address their concerns directly with Ms. McDonald. As I understand from the submissions, this included direct contact on at least 2 occasions and written correspondence on 2 other occasions between March 15 and July 2, 2019. The applicants say they first wrote to Ms. McDonald in April 2019 by leaving a note on her suite door. An undated letter was provided in evidence that Ms. McDonald acknowledged receiving. I accept it was posted to the door of 609 as the timing coincides with Ms. McDonalds submissions and she does not object to the date of the letter.

27. The April 2019 letter describes the noise disturbances as coming from a television surround sound system in 609. Ms. McDonald provided photographs of the living room of 609 that confirm a television surround sound system, consisting of a sound bar and speaker (possibly a subwoofer) near the television, and 2 speakers on the other side of the room about 24" away from the common wall adjoining 610. Ms. McDonald says she turned the volume down on her television as a result of letter. The applicants agree the volume level was reduced for a period of time after the April 2019 letter but subsequently increased.

28. The applicants wrote to Ms. McDonald again on July 3, 2019 after speaking with Ms. McDonald, and viewing her living room, in the early evening of July 2nd. The

letter was provided in evidence and confirms the disturbances relate to "bass noises coming through the wall". The letter alleges that the sound system used by Ms. McDonald could likely be adjusted to reduce or eliminate those noises especially during the evening. The applicants offered to assist Ms. McDonald with adjusting the sound system and included instructions on how the adjustments could be made.

29. Ms. McDonald replied to the July 3 letter (in handwriting on the letter) saying she did not want the applicants' assistance in adjusting her sound system, their requests were unreasonable, and she did not intend to make any further adjustments to her television volume. She denied that the disturbances were nightly as the applicants had stated and asked them to call the police the next time they had a noise complaint because she felt she was being harassed.

30. Ms. McDonald emailed several strata council members that same day at 5:19 pm advising the strata council of her dealings with the applicants over the past 2 months and included a copy of the July 3, 2019 letter and her response. She expressed concern about what she could do if further complaints were received from the applicants or if the strata began to fine her as a result of applicants' complaints. She also stated that one of the strata council members had previously attended her suite to discuss the issue with her.

31. The applicants did not involve the strata until July 3 when they contacted the strata's building caretaker. While it appears from text messages provided in evidence that the caretaker attended 609 on July 4, 2019 to witness the noise disturbance, there is no written statement from the caretaker in evidence.

32. On July 10, 2019, the applicants emailed the strata's property manager summarizing the actions they had taken to date, advising of their concerns, and requesting assistance in addressing the issue with Ms. McDonald. The property manager acknowledged receipt of the email on July 12th and advised it would be brought to the strata council's attention on July 24th, which I infer was the date of the next strata council meeting.

33. The applicants continued to correspond with the property manager and became frustrated when it appeared to them the strata was not adequately addressing their concerns. During the course of their communications with the property manager the applicants provided logs of the noise disturbances and several audio recordings as evidence.

34. The applicants requested a council hearing on August 13, 2019, which was held on September 9, 2019.

35. The applicants advised their landlord they would be breaking their lease on August 23 and provided a formal letter to their landlord on August 26, 2019, advising their tenancy would end on October 1, 2019.

Did the noise complained of by the applicants originate in 610?

36. Based on the correspondence exchanged between the applicants and Ms. McDonald, I find that 609 was the source of the complained-of noise. The applicants' approached Ms. McDonald who at first did not dispute her sound system was disturbing them. It appears she tried to reduce the noise concern by reducing the volume of her sound system. She later changed her position stating she was not the source. However, I am not persuaded by her arguments, given her only argument is that the strata did not find her responsible. This is especially true given my finding below that the strata did not begin to investigate the applicants' concerns until after the September 9, 2019 hearing.

37. My conclusion is also confirmed by the recorded video files showing the sound levels from the common wall between 609 and 610, which is not disputed by Ms. McDonald or the strata. While the video files do not establish any bylaw breach as I discuss below, I find they do show noise coming from Ms. McDonald's suite.

38. There is also the witness statement provided to the applicants by the previous 610 tenants that stated the previous tenants were also the subjected to noise coming from 609 when they were 610 tenants. I place limited weight on this evidence because of the previous dispute and a potential for bias. Nevertheless, I find the

statement supports the applicants' claim that the noise disturbance more than likely came from 609, Ms. McDonald's suite.

Have the applicants established the noise levels were in breach of bylaw 5(a)?

39. In order for the applicants to be successful in their claims they need to prove that the noise levels coming from 609 breached bylaw 5(a), summarized above. In other words, the applicants must prove the noise coming from Ms. McDonald's sound system was a nuisance, unreasonable, or unreasonably interfered with their use and enjoyment of 610. I note the bylaw does not establish any periods of "quiet time" such as after 10 or 11 pm. For the reasons that follow, I find the applicants have not established the noise levels coming from 609 breached bylaw 5(a).

40. The applicants say the noise from 609 is unreasonable and a nuisance because it disrupted their sleep patterns during the early morning hours. They say their use of ear plugs did not resolve the issue.

41. The tort of nuisance in a strata setting is a substantial, non-trivial interference with a person's use and enjoyment of their property that is unreasonable. (see *The Owners, Strata Plan LMS 1162 v Triple P Enterprises Ltd*., 2018 BCSC 1502 at paragraph 33).

42. I find I cannot agree that a nuisance has been established on the evidence before me.

43. The applicants provided about 39 audio recordings taken from the interior bedroom wall of 609 (next to the living room of 610) of noise transmissions between August 1 and Sept 29, 2019 (audio recordings). The audio recordings vary in length from about 1 minute to several hours. Six of the audio recordings were for overnight periods of up to 7 hours. I did not listen to all of the audio recordings because, in submissions, the applicants stated that one need only listen to examples to get an idea of what the noise was like. Therefore, I listened to some of the recordings provided, including those portions of the recordings that were highlighted by the applicants. While I did hear some noises that matched the applicants' description of

the “bass” noises, I could not determine the exact noise level. I also note that for many of the audio recordings I could not hear any “bass” noises.

44. Based on my review of the audio recordings, I do not find the recorded noise was unreasonable.

45. The applicants also suggested that proper equipment must be used to hear the noise, such as a sound system similar to that of Ms. McDonald’s, or the use of “amplifying software”, to properly evaluate the noise. I find use of such equipment unnecessary because it would be purely speculative to attempt to replicate the volume level used by Ms. McDonald in an adjacent room.

46. As a result, I find the audio recording evidence unpersuasive in supporting the applicants’ claim.

47. The applicants also provided 6 video recordings that captured live sound meter readings (video recordings). The video recordings were taken by the applicants between September 25 and 29, 2019 using 2 different sound meters.

48. In support of their position, the applicants cite *Tollasepp v. The Owners, Strata Plan NW 2225,* 2020 BCCRT 481 where the CRT found at paragraph 58:

> There is no requirement that noise reach a certain decibel range in order to be considered unreasonable or a nuisance. Rather, it is an objective determination, based on a standard of reasonableness, and in consideration of all the relevant facts, which would include the age and material of the building.

49. However, while I agree with the finding in *Tollesepp*, I find I need not describe details of the sound levels recorded because I find the video recording evidence to be unpersuasive on its face.

50. Of the 6 video recordings provided in evidence, only 3 included the date and time of the recording, as established by a voice activated “Google Assistant” recorded in the videos. The date and time stated in the 3 videos was 6:41, 9:22, and 9:18, but it is unclear if it was morning or evening. Further the video recordings ranged from

only 13 seconds to about 6 minutes. I find this evidence to be insufficient given it includes recordings covering less than 15 minutes over a period of 5 days. I find the video recordings provided do not prove that the same readings would have been obtained over the preceding 6 months.

51. In addition, as noted by Ms. McDonald, there is no evidence the applicants are familiar with the use of sound level equipment. For example, the video recordings show the sound meters were used within inches of the common wall. It may be that the noise levels would be different several feet from the wall or wherever the applicants slept in the bedroom.

52. The applicants obtained 2 quotations from sound engineering firms but found the cost of obtaining a report was too high and did not proceed with obtaining expert evidence.

53. For these reasons, I find the applicants have failed to prove the noise levels coming from 609 late in the evening or early in the morning were unreasonable or a nuisance. Therefore I dismiss the applicants' claim that Ms. McDonald was in breach of bylaw 5(a).

Has the strata failed to properly investigate the applicants' complaint and enforce its bylaws?

54. As earlier noted, the applicants first brought their complaint to the strata's attention about July 12, 2019 when the property manager responded to their email complaint. The property manager advised the issue would be raised with the strata council and later advised a warning letter had been issued to Ms. McDonald, which she denies receiving. At the September 9, 2019 hearing, the strata council seemed unaware of many of the applicants' reported issues. Rather, the hearing recording provided in evidence indicates the strata council members present at the hearing were not aware of the applicants' concerns until the August 2019 strata council meeting.

55. I appreciate that the applicants became frustrated and believed little or no action was being taken by the strata council to address their noise complaint, as they expressed at the hearing. I also accept it appears there was miscommunication

between the property manager and the strata council on the actions taken by the strata. Further, I also accept strata council did not attempt to investigate the complaint until September 10, 2019, the day after the hearing, as set out in by the strata's submissions. It is likely the hearing highlighted the seriousness of the issue and the strata council acted immediately to investigate the complaint by walking the hallways of the building to verify the source of the noise, just as the applicants had done shortly after they moved into the building.

56. I also appreciate that Ms. McDonald may have changed her behaviour in order to avoid the scrutiny of the strata council. However, I find the applicants' actions of starting a CRT dispute within about 2 months of making a complaint to the strata was premature. Rather, I find the period of 2 months between the complaint being filed and investigative action taken by the strata council was reasonable. Especially considering the miscommunication that appears to have occurred between the property manager and the strata council.

57. Moreover, the applicants decided to move out in late August 2019 prior to the strata council hearing and only about 1 month after the strata council's July meeting, which would have been the first opportunity for the strata council to discuss the complaint.

58. For all of these reasons, I dismiss the applicants' claims against the strata and Ms. McDonald.

What is an appropriate remedy, if any?

59. Given my conclusion above, I find the applicants are not entitled to their requested remedies or their requests for damages.

CRT FEES AND EXPENSES

60. Under section 49 of the CRTA, and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. Given the applicants' have been unsuccessful in this dispute they are not entitled to be reimbursed for CRT fees or dispute-related

expenses. The strata did not pay CRT fees or claim dispute related expenses, so I make no such orders.

ORDERS

61. I dismiss the applicants' claims and this dispute.

J. Garth Cambrey, Vice Chair