Civil Resolution Tribunal

Date Issued: August 20, 2020

File: SC-2020-003225

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Pfeifer v. The Owners, Strata Plan EPS 62*, 2020 BCCRT 931

B E T W E E N :

DARRELL PFEIFER

APPLICANT

A N D :

The Owners, Strata Plan EPS 62

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Kristin Gardner

INTRODUCTION

1. This small claims dispute is about a noisy bird repellent device (device).

2. The applicant, Darrell Pfeifer, says that the respondent strata corporation, The Owners, Strata Plan EPS 62 (strata), has the device on its apartment building roof, which is next door to Mr. Pfeifer's apartment building. Mr. Pfeifer says the device is

disturbing him and constitutes a nuisance. He seeks $1,050 in compensation for pain and suffering, which is $50 per day for each day the device has continued to disturb him.

3. The strata denies that the device constitutes a nuisance. The strata also says Mr. Pfeifer has not suffered any damage and his claim should be dismissed.

4. Mr. Pfeifer is self-represented. The strata is represented by the strata's council president Gerald Chipeur, who is a lawyer.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

6. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.

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

8. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the CRT considers appropriate.

9. I note that Mr. Pfeifer provided evidence and submissions about noise bylaws in other jurisdictions that should inform how the strata should operate the device as well as about other less intrusive bird deterrent methods available. However, Mr. Pfeifer does not seek an order that the strata amend its current operation of the device or replace it with another less intrusive option. In any event, I find such orders would be outside the CRT's small claims jurisdiction to make orders for injunctive relief under section 118 of the CRTA. Therefore, I decline to further address the evidence and submissions about other noise bylaws and alternatives to the device in these reasons.

ISSUE

10. The issue in this dispute is whether the device constitutes a nuisance and, if so, what is the appropriate compensation.

EVIDENCE AND ANALYSIS

11. In a civil claim such as this, the applicant bears the burden of proof on a balance of probabilities. While I have read all of the parties' evidence and submissions, I have only addressed the evidence and arguments to the extent necessary to explain my decision.

12. It is undisputed that the device in question emits a bird squawking sound that mimics a bird in distress, meant to deter seagulls from gathering and roosting on the strata building's roof. The strata's building is 10 stories high and Mr. Pfeifer's building is 21 stories high. Mr. Pfeifer lives on the 19th floor.

13. Mr. Pfeifer says that the device's noise frequency and volume has varied over the years, and he has complained about the device on several occasions since 2015. The evidence shows these complaints have sometimes been made directly to the strata, but at other times to the concierge of his own building, the neighbourhood developer, or to RN, who is the property manager for both Mr. Pfeifer's building and the strata's building.

14. Mr. Pfeifer says that the device was turned off for “several years” after one of his complaints in 2017 and was then turned on again in around March 2020. He says when the device resumed, it emitted noise every minute, 24 hours per day. Mr. Pfeifer first discussed the issue informally with DS, a member of the strata’s council, and then followed up with DS by email on March 29, 2020, asking if DS could arrange to have the device turned off.

15. DS replied to Mr. Pfeifer on April 9, 2020 and said he had confirmed there were no changes to the device and that it was continuing at the same “reduced settings” put in place “last year”. I find nothing turns on whether the device was turned off for some time prior to March 2020, as Mr. Pfeifer’s claim relates only to the device’s operation since March 2020.

16. On April 14, 2020, Mr. Pfeifer sent a “cease and desist” letter to the strata asking it to stop operating the device within 5 days, failing which he would start legal action. Mr. Pfeifer says the device continued at the same volume and frequency.

17. I turn to the relevant law. As noted above, Mr. Pfeifer says the device constitutes a nuisance. The general principle underlying the law of nuisance is that people are entitled to use and enjoy their land without unreasonable interference. The law of nuisance involves a “give and take, live and let live” approach: see *Grant v. Warman*, 2009 BCSC 886 (CanLII). This means that some interference is expected and not every invasion of a person’s interest in the use and enjoyment of their property will attract compensation.

18. The leading authority on nuisance is *Royal Ann Hotel Co. v. Ashcroft*, 1979 CanLii 2776 (BCCA), which says to determine whether an interference is unreasonable, the following factors must be considered:

    a. the nature of the act complained of,

    b. the nature of the injuries suffered,

    c. the character of the neighbourhood,

d. the frequency of the occurrence which causes the interference,

e. the duration of the alleged nuisance,

f. the utility of the defendant's conduct, and

g. other factors which could be of significance in special circumstances.

19. In this case, the act complained of is a noise. It is undisputed that there is no physical injury or damage to Mr. Pfeifer's property, which would tend to indicate that the interference is unreasonable. However, noise can cause an unreasonable interference with a person's use and enjoyment of their property: see for example the non-binding decisions in *Chen v. The Owners, Strata Plan NW 2265*, 2017 BCCRT 113 and *Bartos et al v. The Owners, Strata Plan BCS 2797,* 2019 BCCRT 1040, which both dealt with excessive elevator noise.

20. In order to be an unreasonable interference, the nature of the acts complained of must be substantial and beyond simply annoying or bothersome: *Osler Dev. Ltd. et al v. H.M.T.Q et al*, 2001 BCSC 129 (CanLII). Mr. Pfeifer's complaint is focused on the frequency and duration of the sound emitted from the device. He says that the sound is "extremely irritating" and "cringe-worthy". While Mr. Pfeifer admits that the sound is not loud, he says it is audible when he is on his deck or has his windows open. Mr. Pfeifer says the highly repetitive nature of the device and that it is operational at all hours of the day and night is what makes it a nuisance.

21. However, judging the unreasonableness of the interference is not measured by the subjective standards of an overly sensitive person, but by the standards of the ordinary reasonable person: *Chiang v. Yang*, 1999 BCPC 29. Because the test is objective, Mr. Pfeifer cannot satisfy his burden to prove the noise is a nuisance based only on statements of his own subjective experience: see *Gichuru v. York*, 2011 BCSC 342.

22. Mr. Pfeifer provided several recordings of the device from his apartment to demonstrate the sound the device emits. The recordings show that Mr. Pfeifer lives

in an urban neighbourhood with several other apartments nearby, relatively busy streets below him, and a harbor with a marina very nearby. In one of the recordings, what sounded like a descending float plane was audible. Each of the recordings was made during daylight hours. I find from listening to the recordings that the device noise lasts for approximately 10 seconds and it is emitted approximately once every minute. However, I also find that the sound from the device is almost indistinguishable from the live bird noises and other ambient noise in the area.

23. While the strata says that it has not received any other complaints about the device, Mr. Pfeifer produced an April 14, 2020 email about the device from another resident in Mr. Pfeifer's building, LS, to RN. In the email, LS says that the device is "becoming quite disruptive" as it "goes off until the wee hours of the morning and all day long". She also described the noise as "very loud".

24. The evidence shows that RN responded to LS on April 17, 2020 and advised her that the device has been operating for 10 years and was adjusted "slightly lower" a few days earlier. There is no evidence, such as a statement from LS, to show that she continued to be bothered by the device after the volume was adjusted lower. Mr. Pfeifer says that his recordings of the device were made after April 17. Therefore, I find the LS email insufficient to prove that the device continues to emit noise that is bothersome to anyone other than Mr. Pfeifer.

25. Given all of the evidence, I find that the device does not rise to the level of a substantial interference with Mr. Pfeifer's property, from the standpoint of an ordinary reasonable person. I place weight on the fact that the device operates in a densely populated urban area with, what I find is, other significant ambient noise, and there is evidence of only one other documented complaint. While I accept that the device is annoying and bothersome to Mr. Pfeifer, I find he has provided insufficient evidence to prove that the device constitutes a compensable nuisance and I dismiss his claims.

26. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. Mr. Pfeifer was unsuccessful and so I dismiss his claim for CRT fees. The strata did not pay any CRT fees or claim any dispute-related expenses.

ORDER

27. I dismiss Mr. Pfeifer's claims and this dispute.

Kristin Gardner, Tribunal Member