Civil Resolution Tribunal

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Type: Societies and Cooperatives

Civil Resolution Tribunal

Indexed as: *Kalyuk-Klyucharev v. City Edge Housing Co-operative*, 2022 BCCRT 496

B E T W E E N :

ALEKSEY KALYUK-KLYUCHAREV

APPLICANT

A N D :

CITY EDGE HOUSING CO-OPERATIVE

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Sherelle Goodwin

INTRODUCTION

1. The applicant, Aleksey Kalyuk-Klyucharev, is a former member of the respondent co-operative association, City Edge Housing Co-operative (co-op).

2. The applicant says the co-op did not respond to his complaints about improper sound insulation and noise complaints from the units above his. He also says the co-op

carried out a balcony, patio and parkade renovation without proper permits and failed to return his patio to its prior condition. He claims $8,000 in damages for unreasonable noise and loss of quiet and peaceful enjoyment of his unit, plus $2,000 in damages for the patio renovation problems.

3. The co-op says it responded to and investigated the applicant's noise complaints and denies the noise was unreasonable or a nuisance. The co-op also denies any alleged mismanagement of the renovation project. It also says the applicant has not proven his claimed damages.

4. The applicant represents himself. The co-op is represented by a director, MP.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over certain cooperative association claims under section 125 of the *Civil Resolution Tribunal Act* (CRTA). CRTA section 2 says 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 the dispute's parties that will likely continue after the CRT process has ended.

6. CRTA section 39 says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice and fairness.

7. CRTA section 42 says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, even where the information would not be admissible in court. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

8. Under CRTA section 127, 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

9. Although the applicant did not use these words, I find he claims the co-op acted in an unfairly prejudicial manner by failing to address his noise complaints. In a November 9, 2021 preliminary decision, another tribunal member found the CRT had jurisdiction to consider the applicants' claims about unfairly prejudicial actions of the co-op. While that decision is not binding on me, I agree with and adopt the tribunal member's reasoning. I find CRTA section 127(2) gives the CRT jurisdiction over allegedly unfairly prejudicial actions in co-op disputes because it allows the CRT to make an order against a co-op or its directors to prevent or remedy an unfairly prejudicial action or decision. I adopt the reasoning at paragraphs 16 to 18 of the non-binding but persuasive decision *Harding v. Meadow Walk Housing Co-operative,* 2021 BCCRT 1103 and find the CRT is not excluded from considering unfairly prejudicial allegations under section 156 of the *Co-operative Association Act* (CAA).

10. The applicant submitted 5 affidavits sworn in a related BC Supreme Court proceeding as late evidence. I find 4 of the affidavits are not relevant to this dispute as they do not discuss the applicant's noise complaints or patio renovation concerns but rather discuss how MP runs the co-op's board of directors (Board). However, I find the March 8, 2020 affidavit of the applicant's ex-spouse (DK) relevant as DK talks about noise in the applicant's unit. I find the co-op was not prejudiced by the late evidence as it had the opportunity to review and respond to it. So, I accept DK's affidavit and consider it below. I do not accept the other 4 affidavits submitted late as I find them not relevant to this dispute.

ISSUE

11. Prior to the adjudication of this dispute the applicant amended his Dispute Notice to remove some of his claims and requested remedies, as he is no longer living in the co-op.

12. The remaining issues in this dispute are:

    a. Did the co-op fail to investigate and remedy the applicant's noise complaints in a prejudicially unfair way to the applicant?

    b. If so, what remedy is appropriate, if any?

    c. Did the co-op mismanage the patio renovation project or damage the applicant's patio area?

    d. If so, what remedy is appropriate, if any?

EVIDENCE AND ANALYSIS

13. In a civil claim like this one the applicant has the burden of proving his claims on a balance of probabilities (meaning "more likely than not"). I have reviewed all submissions and weighed all evidence provided except the 4 late affidavits noted above. In my decision I refer only to that evidence necessary to explain and give context to my reasons.

14. The co-op is a non-profit housing co-operative which was incorporated in 1990. The co-op filed an amended set of rules with the Registrar of Companies on April 10, 2018 (Rules), which I find apply to this dispute. Appendix A of the rules is an Occupancy Agreement (OA) between the co-op and all members. I will refer to relevant Rules and OA sections below.

15. The applicant is a former member of the co-op and previously lived in unit 3610, which is a ground floor unit in 1 of the co-op's buildings. Unit 3610 is located directly below 2 other units in the same building, 3608 and 3612. MP lives in unit 3612. The applicant moved out of the co-op on November 30, 2021. None of this is disputed.

Unfairly Prejudicial Conduct

16. Section 7.02 of the OA prohibits a member from using their unit in a way, or engaging in any conduct that, interferes with or disturbs other members' quiet or peaceful enjoyment, or unreasonably interferes with other co-op members by sound, conduct, or other activity.

17. The applicant says he complained to the co-op about noise coming from units 3608 and 3612, but the co-op did not answer his complaints, or do anything to investigate the noise or fix the problem. The applicant says the co-op addressed noise and good behaviour complaints made against him, eventually terminating his membership. For clarity, the applicant does not seek any remedy for his membership termination in this dispute. If he had, I would not have resolved that issue as the co-op's termination of the applicant's membership was addressed by the court in *Kalyuk-Klyucharev v. City Edge Housing Cooperative,* 2020 BCSC 2033.

18. Although he does not use these words, I find the applicant claims the co-op acted in an unfairly prejudicial manner toward him in dealing with his noise complaints.

19. To be successful in his claim, the applicant must prove the co-op failed to meet his objectively reasonable expectations and that, on an objective basis, the conduct harmfully affected the applicant's particular interests. Terms such as "unfair", "inequitable" and "unjust" are appropriate ones to consider in characterizing conduct as unfairly prejudicial (see *Scipio v. False Creek Housing Co-operative Housing Association*, 2012 BCSC 1339, paragraph 29).

20. The parties agree that the applicant went to unit 3608 in late March 2019 to speak to the resident about noise, although they disagree about how the conversation occurred. In any event, the applicant then emailed the co-op's manager on March 28, 2019 to complain of clatter and loud noise from unit 3608 above him on weekends, which he said lasted a long time on March 27, 2019. The applicant noted unit 3608 had hardwood floors with no soundproofing, which was the likely reason the noises were so loud in the applicant's unit.

21. The applicant says he raised the noise complaints and lack of soundproofing to MP in person while the co-op was renovating unit 3608 for a new family in late April and early May 2019. MP does not dispute this, although specifically says he did not agree that the co-op would install further soundproofing or carpet to address the applicant's complaints.

22. The applicant complained to the co-op of noise from both units above his on August 6, 2019, as part of his written response to noise complaints lodged against the applicant. The applicant again complained of noise in his unit on December 13, 2020. He asked the co-op to remind his neighbours about the importance of keeping a curfew.

23. Overall, I am satisfied the applicant raised noise concerns with the co-op. He says the co-op failed to install adequate soundproofing between his unit and the upstairs neighbours' unit, which caused the noise problem.

24. I find the applicant's expectation that the co-op would replace the floor in unit 3608 with something more soundproof is not objectively reasonable. Contrary to the applicant's argument, I find the co-op did not assure him it would "fix" the soundproofing when it renovated unit 3608 in 2019. Even if the applicant's recollection of his conversation with MP is accurate, which MP specifically denies, the applicant says only that MP said the co-op was considering the applicant's request, and not that the co-op would change the flooring. So, I find the co-op did not agree to install more soundproof flooring above the applicant's unit when it renovated unit 3608.

25. The applicant says the co-op admitted there was a problem with noise isolation and decided to improve sound insulation in units but unfairly failed to fix the sound insulation in the applicant's unit. The November 19, 2019 meeting minutes show the co-op acknowledged that "new vinyl flooring" produced "additional noise/ no sound barrier". I infer the co-op refers to new flooring it was installing during unit renovations. As the minutes do not refer to any specific unit in the 3-building co-op, and are 6

months after renovations to unit 3608, I find the co-op's acknowledgment likely does not refer specifically to unit 3608.

26. The minutes also show the co-op decided to consider better subflooring in upper units for future flooring installations, on a case-by-case basis. I find the co-op decided to consider better soundproofing, and not to install it as argued by the applicant. Further, the co-op decided to consider it for flooring installations in the future, which I find does not relate to unit 3608 as it was renovated just months before. Neither is there any indication unit 3612 was renovated anytime after November 2019. So, I find the co-op did not decide to improve sound insulation generally, as the applicant argues.

27. On balance, I do not find the applicant's expectation that the co-op would install more soundproofing in the units above him is objectively reasonable. However, I find the applicant's expectation that the co-op would investigate his noise complaints is objectively reasonable. First, I find the OA is an agreement between the co-op and members. So, I find it objectively reasonable to expect the co-op ensures members comply with the agreement, including section 7.02.

28. Second, I find it is co-op policy that the co-op will attempt to resolve issues between members if members cannot resolve them amongst themselves. This is supported by DK's affidavit, who was also a co-op member and a former co-op director. DK said it was co-op policy to encourage residents to attempt to resolve "good neighbour" complaints themselves before seeking the co-op's help in resolving complaints about neighbours. Further, the co-op's November 19, 2019 directors' meeting minutes encourage members to try and resolve issues face to face before coming to the Board. In this case, the parties agree that the applicant attempted to speak to the former resident of 3608, and MP, about his noise concerns. So, I find the applicant's expectation that the co-op would take steps to address his noise complaints after he attempted to resolve them himself is reasonable.

29. Third, I find the co-op enforced section 7.02 of the OA against the applicant in regard to noise complaints it received about him. This is because the co-op wrote to the applicant about noise complaints against him on July 31 and October 29, 2019 and

reminded the applicant of section 7.02 of the OA. Further, the co-op terminated the applicant's membership on November 8, 2019, partly for failing to comply with OA section 7.02. So, I find the co-op has demonstrated that it does address noise complaints against members.

30. Although the co-op argues that it investigated and addressed the applicant's noise complaints, it provided no explanation of how it did so, or any supporting evidence. The August 21, 2019 Board meeting minutes refer to the applicant's August 6, 2019 letter as a response to the complaint against him. The other meeting minutes in evidence show no indication the co-op considered any of the applicant's own complaints, although the minutes are heavily redacted. The co-op has provided no explanation to justify addressing noise complaints made against the applicant, but not by him.

31. I find that the co-op acted unfairly and inequitably by enforcing OA section 7.02 against the applicant, but not investigating the applicant's complaints of noise and insufficient sound insulation around his unit. I now turn to consider the appropriate remedy.

32. As noted, CRTA section 127(3) allows the CRT to make an order to remedy a co-op's unfairly prejudicial action.

33. The applicant claims $8,000 in damages for loss of quiet, or peaceful enjoyment, for the co-op's allegedly improper repair and improper sound isolation. As noted above, I find the applicant's expectation that the co-op should have installed better soundproofing under the flooring in unit 3608 in April 2019 is not objectively reasonable. So, I must consider whether the applicant is entitled to any remedy for the co-op's failure to investigate and address the applicant's noise complaints. Generally, I find an appropriate order to remedy such action would be to order the co-op to investigate the applicant's noise complaints to determine whether better soundproofing was required. However, given the applicant no longer resides at the co-op I find such an order would be meaningless.

34. I have not found other cases in which a housing co-op was ordered to compensate a member or former member, for failing to investigate noise complaints. As noted in *Tollasepp v. The Owners, Strata Plan NW 2225,* 2020 BCCRT 481, several CRT decisions have found that, regardless of the source of the nuisance, a strata corporation may be liable for damages when it takes insufficient steps to investigate complaints and enforce its bylaws. However, while a strata corporation is statutorily required to enforce its bylaws under section 26 of the *Strata Property Act*, there is no corresponding statutory requirement for a co-op to enforce its rules or terms of its OA. So, I am not prepared to apply strata corporation case law to this co-op dispute. Further, I find the applicant has not proven the noise was a nuisance, as explained below.

35. Nuisance is a substantial, non-trivial and unreasonable interference with a resident's use and enjoyment of their property (see *The Owners, Strata Plan LMS 1162 v. Triple P Enterprises Ltd.,* 2018 BCSC 1502). The test of whether noise is unreasonable is objective and is measured with reference to a reasonable person occupying the premises (see *Sauve v. McKeage et al.*, 2006 BCSC 781). The test for nuisance depends on several factors, such as its nature, severity, duration, and frequency (see *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64).

36. The applicant filed 3 written noise complaints. On March 29, 2019, the applicant complained that he heard clatter and loud noise from above, but only on the weekends. In his August 6, 2019 complaint he said he heard running, walking, and things being dropped above him from 6 am to 10:30 pm. His next complaint was not until December 13, 2020, when he said he heard children running above him after midnight and asked the co-op to remind members of the noise curfew, which I infer starts before midnight. I find these complaints do not support the applicant's claim that the noise was overly loud, caused his chandelier to shake, caused him anxiety and prevented him from sleeping. This is because the applicant complained 3 times in writing, and once verbally, over the course of 21 months. Further, his complaints do not refer to ongoing, constant noise, severe noise, or otherwise suggest the noise was causing anxiety or sleeping difficulties.

37. In her affidavit, DK says she could clearly hear footsteps and dropped items from above, whenever she was in the applicant's unit. However, DK did not detail how frequent, long or loud the noises were, or when they occurred. Further, DK does not say the noises bothered her, but rather she understood they could bother the applicant, because of certain personality traits DK said the applicant has. On balance, I find DK's evidence does not support a finding of nuisance.

38. The applicant also submitted screenshots of a sound application on his cell phone, showing the maximum decibel (dB) level of sound measured over the course of 60 seconds in his apartment on various days between April 20 and November 30, 2021. However, there is no actual recording of the sound. The screenshots showed noise levels up to 86 dB, which the application's legend says is equivalent to loud music. However, that was on 1 occasion, without any associated time stamp. Further, many of the screenshots show dB levels equivalent to a whisper or a quiet library. The applicant's evidence does not show loud noise on a prolonged or daily basis, late at night or early in the morning. Further, without any explanation about what the noise was or where in the apartment the applicant had his phone to measure the noise, there is no way to provide any context to the dB level screenshots provided. In other words, I find the evidence does not establish the noise is severe, lengthy, or frequent.

39. I also find the applicant has not proven the noise prevented him from sleeping, caused him anxiety, or caused him to have difficulty at work, as the applicant argues. Although the applicant provided a copy of prescriptions for medication and a sleep clinic referral, there is no opinion or medical connecting those things to the noise in the applicant's apartment.

40. On balance, I find the applicant has not proven that a reasonable person would find the noise in his unit was unreasonable. So, although I find the co-op acted unfairly toward the applicant in failing to investigate and attempt to resolve his noise complaints, I find there is no order that would remedy the unfairly prejudicial conduct given the applicant no longer lives there. I further find the applicant is not entitled to damages, as he has failed to prove nuisance. So, I dismiss his $8,000 claim.

Patio Renovation Project

41. Based on a July 2, 2019 quote from the co-op's contractor, and the co-op's 2020 notices to its members, I find the co-op undertook a patio, balcony, and parkade membrane replacement project, starting in May 2020. The co-op's notices and the applicant's photos show that the renovation project included completely demolishing the applicant's and other members' patios to replace the patios and fencing

42. The applicant says the co-op knowingly allowed the project to start without the required permits which resulted in the renovation taking much longer than planned. The evidence shows the renovation started around May 1, 2020 but was stopped by the city in June 2020 because there was no work permit. It also shows the permit was obtained by September 2020 and work continued then. I find the renovation project was substantially completed by the time of the applicant's January 25, 2021 email to the co-op, with associated photos.

43. The co-op's notices to its members initially said the renovation project was planned to take approximately 4 months, plus time to remedy deficiencies. However, the notices also said the dates were approximate and the work could be slower.

44. While I accept that failing to obtain the needed permit delayed the project by at least 3 months, I find the applicant has not established that the 3-month delay caused him any damages. There is no indication the applicant would normally have used his patio, or what he might have used it for, during that 3-month delay. There is no indication that the applicant had to pay expenses to use other space, or resources, during the renovation project.

45. The applicant also says the contractor's workers broke the co-op rules and city bylaws by parking their machines under his window, parking their cars in the co-op lot, and starting work before 6:45 am. While I acknowledge that having a small machine parked directly outside your window may be inconvenient, the applicant has not shown this created a nuisance, or how any of the complained of behaviour personally caused him damage.

46. The applicant claims the co-op did not ensure his patio was returned to its original state. Specifically, the applicant says the contractor failed to replace his patio gate, or frame and paint a post on his patio, which I accept, based on the applicant's photos.

47. I find section 20.02 of the OA requires the co-op to maintain and manage the development and the grounds, which I find includes the applicant's patio. In carrying out its obligation, I find the co-op must act reasonably in the circumstances, but that the standard is not perfection. This is the same standard required of strata corporations in carrying out their duty to maintain and repair common property, which I find similar to the co-ops duty here (see, for example, *Basic v. Strata Plan LMS 0304*, 2011 BCCA 231).

48. I accept the applicant's assertion that he had a patio gate prior to the renovation. However, I find that does not mean the co-op must install a gate after the renovation. Neither do I find the co-op was required to frame and paint the metal support post on the applicant's patio. As noted, the burden is on the applicant to prove the co-op acted unreasonably, and I find he has failed to do so.

49. In any event, I find the applicant has not shown how failing to replace a gate or re-frame a metal post caused him any damages. There is no indication either situation is unsafe or caused the applicant to be unable to use his patio after January 25, 2021.

50. Overall, I find the applicant has not shown the co-op mismanaged the patio renovation project or how any such alleged mismanagement caused the applicant any damages. So, I dismiss his $2,000 claim for patio renovation "issues".

51. 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. As the applicant was not successful in his claims, I find he is not entitled to reimbursement of his paid CRT fees. As the successful respondent the co-op paid no fees and claimed no dispute-related expenses.

ORDER

52. I dismiss the applicant's claims and this dispute.

Sherelle Goodwin, Tribunal Member