



Civil Resolution Tribunal

Date Issued: June 16, 2022

File: ST-2021-008882

Type: Strata

Civil Resolution Tribunal

Indexed as: *Penz v. Sacilotto*, 2022 BCCRT 706

BETWEEN:

SARAH PENZ

APPLICANT

AND:

ENIO SACILOTTO, JEANNE SACILOTTO and The Owners, Strata
Plan BCS2583

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Trisha Apland

INTRODUCTION

1. This is a strata property dispute about bylaw enforcement and noise.
2. The applicant, Sarah Penz, owns strata lot 77 (unit 519) in the respondent strata corporation, The Owners, Strata Plan BCS2583 (strata). The respondents, Enio

Sacilotto and Jeanne Sacilotto, own neighbouring strata lot 78 (unit 520), which they rent out to tenants.

3. Ms. Penz alleges that the Sacilottos' former tenants made unreasonable noise from August 2020 until they moved out in December 2021, with the occasional short reprieve. She says the noise was a nuisance that disturbed her quiet enjoyment of her strata lot and caused her to experience "extreme distress".
4. Against the strata, Ms. Penz alleges it failed to take reasonable bylaw enforcement actions to stop the tenants from making unreasonable noise. She seeks an order that the strata enforce its noise bylaws "to restore the right of quiet enjoyment for owner" and pay her \$19,500 in damages. She separately claims the strata negligently enforced its bylaws and seeks \$39,000 in damages. So, Ms. Penz seeks a total of \$58,500 in damages from the strata for allegedly failing to reasonably enforce its bylaws.
5. Against the Sacilottos, Ms. Penz alleges they failed to keep the noise in unit 520 to a reasonable level to allow her to quietly enjoy her strata lot. She seeks \$5,000 in damages from the Sacilottos for the alleged loss of enjoyment of her strata lot. I note the Sacilottos did not live in unit 520 and there is no allegation that they made the noise themselves. The former tenants are not parties to this dispute.
6. The strata disputes Ms. Penz's claims. It says they should be dismissed because she had not proven the Sacilottos' former tenants caused unreasonable noise. The strata also says that it responded to Ms. Penz's noise complaints and took enforcement action that led to the Sacilottos evicting the tenants.
7. The Sacilottos say they took all reasonable steps to address Ms. Penz's noise complaints once they learned of them and the evidence does not confirm the noise came from unit 520 in any event. They also say Ms. Penz's claim fails to disclose a known cause of action against them.
8. Ms. Penz and the Sacilottos are each self-represented. The strata is represented by its insurer's lawyer, Molly Li.

9. For the reasons that follow, I dismiss Ms. Penz claims against the strata and refuse to resolve her claim against the Sacilottos.

JURISDICTION AND PROCEDURE

10. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over strata property claims under section 121 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.
11. Under CRTA section 10, the CRT must refuse to resolve a claim that it considers to be outside the CRT's jurisdiction. A dispute that involves some issues that are within and some that are outside the CRT's jurisdiction may be amended to remove those issues.
12. 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 and neither party requested an oral hearing. 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.
13. 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.
14. Under CRTA section 123, 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 Issue - Tort Claim

15. SPA section 121 gives the CRT jurisdiction over a claim “in respect of the *Strata Property Act* [SPA]” and sets out the scope of the CRT’s strata property jurisdiction. The strata filed a full set of amended bylaws in the Land Title Office (LTO) in October 2007, plus several amendments in later years. Those bylaws do not contain a provision that would entitle an owner to compensation from another owner for a breach of noise or nuisance bylaw. There is also no statutory provision in the SPA for one owner to claim damages from another owner for a bylaw breach. I find Ms. Penz’s damages claim against the Sacilottos involves the use or enjoyment of a strata lot but is not a claim “in respect of” the SPA as required to fall under CRTA section 121. Instead, I find it is a pure tort claim in either negligence or nuisance. See my discussion about the CRT’s jurisdiction in *Yoo v. The Owners, Strata Plan BCS 1293*, 2021 BCCRT 1332.
16. Ms. Penz’s claim against the strata also engages the law of nuisance and negligence. However, I find Ms. Penz’s claim that the strata breached its statutory duty to enforce its bylaws is a claim “in respect of” the SPA. I find it falls squarely within the CRT’s strata property jurisdiction.
17. At the intake stage, the CRT raised the potential jurisdictional issue with Ms. Penz. The CRT suggested she consider withdrawing her \$5,000 claim against the Sacilottos and refile it under the CRT’s small claims jurisdiction (CRTA section 118). Ms. Penz chose to continue with all claims as filed under the CRT’s strata property jurisdiction. As discussed below, I find Ms. Penz has not proven on a balance of probabilities that the Sacilottos’ tenants caused unreasonable noise and so, I find her tort claim would have likely failed in any event.
18. Under CRTA section 10, I must refuse to resolve the Ms. Penz’s claims against the Sacilottos having concluded that the CRT has no jurisdiction under SPA section 121. I refuse to resolve Ms. Penz’s claims against the Sacilottos for this reason.

ISSUES

19. The issues in this dispute are:

- a. Is Ms. Penz's claim for an order that the strata enforce its noise bylaw moot?
- b. Was the noise level in unit 519 a nuisance?
- c. Did the strata reasonably enforce its noise bylaws?
- d. To what extent, if any, is Ms. Penz entitled to the claimed damages?

EVIDENCE AND ANALYSIS

20. In a civil proceeding like this one, Ms. Penz as the applicant must prove her claims on a balance of probabilities (meaning more likely than not). I have read all the parties' argument and evidence but refer only to what I find relevant to provide context for my decision.

Background

21. As shown on the strata plan, Ms. Penz and the Sacilottos own neighbouring strata lots that share a party wall on the fifth floor of an apartment style building.
22. The strata's bylaw 5(a) says a resident or visitor must not use a strata lot, the common property (CP) or common assets in a way that causes a nuisance or hazard to another person, unreasonable noise, or unreasonably interferes with the rights of another person to use and enjoy the CP, common assets or another strata lot.
23. Bylaw 30 says the strata may fine an owner or tenant \$200 for each contravention of a bylaw. Bylaw 31 permits the strata to impose a fine every 7 days for a continuing bylaw contravention that lasts, without interruption, for longer than 7 days.
24. It is undisputed that the Sacilottos rented unit 520 to tenants over the years and did not live in their strata lot. Ms. Penz says when new tenants moved into unit 520 in August 2020 she started to hear "severe noises" from "PC gaming" and music.

25. The submitted correspondence shows that Ms. Penz complained to council on August 11, 2020 about the noise. She reported hearing noise “day and night” from August 6 to 11, 2020 behind the wall she shares with unit 520. The noise complaints consisted of hammering and banging, plus loud music, movies, and PC games with “constant powerful bass”. She also complained of cooking smells from unit 520, which are not part of her claim here.
26. As the respondents point out, Ms. Penz was the strata council president in August 2020 until the summer of 2021. The correspondence shows Ms. Penz directed her complaints through the strata manager and other council members.
27. On August 14, 2020, the strata manager wrote the Sacilottos’ tenants with details of Ms. Penz’s complaints and gave notice that council was considering imposing fines for an alleged bylaw 5 breach.
28. On August 27, 2020, one of the tenants responded and denied that they were the source of the noise. They wrote that the only banging they made was setting up their beds and pictures when they moved in, they were not home during the alleged incidents, and that they themselves heard noise and cooking smells from other strata lots. They alleged the complaints against them were racially motivated. The Sacilottos’ rental manager emailed the strata that they visited unit 520 and found no smell or “hifi system” in the unit, only a TV set.
29. The correspondence indicates that Ms. Penz did not complain about unit 520 in August or September 2020 and the strata took no further action.
30. From October 2020 through April 2021, Ms. Penz complained about hearing loud noises from unit 520, including late at night and very early in the morning. As before, she described noises from PC gaming, loud music, bass vibrations, banging on their shared party wall, and the occasional party. On receipt of Ms. Penz’s complaints, the correspondence shows the strata sent the tenants and the Sacilottos notice letters, held a hearing, and imposed bylaw contravention fines.

31. As set out in the submitted emails between the strata, the Sacilottos' rental manager and the unit 520 tenants, the tenants maintained that they were not the source of the noise issues and that they were being unfairly targeted.
32. As part of its investigation in January 2021, the strata made a council member, KC, available to attend Ms. Penz's strata lot if she called them about any further noise disturbance. It is undisputed that the building manager, BA, was also available to investigate Ms. Penz's complaints at the time the noise allegedly happened. KC and BA provided statements for this proceeding. They both state that they did not witness any noise from unit 520.
33. Ms. Penz argues the strata should have commenced a CRT dispute against "unit 520" for unreasonable noise in about April 2021. The strata says it declined to do so, in part, because council needed confirmation from a council member (other than Ms. Penz) of the alleged noises from unit 520 and it had none. I agree with the strata that it would have been premature to commence a CRT dispute given the lack of corroborating evidence of noise from unit 520.
34. The strata held a council hearing on April 26, 2021 at one of the tenants' request. The hearing minutes indicate that the tenant disputed that they were the noise source. However, I find the tenant must have agreed they were gaming because the minutes state that the tenant agreed to wear headphones while gaming and keep noise to a minimum. There is no objective or independent evidence about the volume of their gaming activities, which I come back to below.
35. In May 2021, the strata imposed several \$200 bylaw contravention fines against the Sacilottos and the tenants for "excessive noise" based on Ms. Penz's complaints. The strata explains that council had accepted Ms. Penz's complaints at face value. The strata later consolidated or reduced some of the fines.
36. Ms. Penz made no further noise complaints until September 20, 2021. She alleged that the unit 520 tenants had resumed their gaming and loud music. Ms. Penz then complained several times in October, November, and December 2021 about loud noises from unit 520, plus cooking fumes.

37. In response to Ms. Penz's complaints the strata took further enforcement action against the tenants and the Sacilottos. It imposed more fines and threatened to impose continuing fines for each new noise complaint.
38. In early November 2021, the Sacilottos' rental manager sent a notice of eviction to the tenants and the strata informed Ms. Penz the tenants would move out by December 31, 2021. The evidence shows the tenants moved out of unit 520 early on December 15, 2021.
39. However, Ms. Penz nevertheless complained to the strata on December 16, 2021 of "another horrible night of extreme noise from Unit 520 last night". She alleged that on December 15 the unit 520 tenants were blasting music and bass at a high level through the middle of the night. She said that the next morning, on December 16, the tenants "have been cooking without the fan and also PC gaming".
40. The strata followed up with the Sacilottos' rental manager who confirmed by email that the tenants had vacated unit 520 on December 15, 2021, it was empty, and the fob was left inside the unit. So, if Ms. Penz smelled cooking or heard gaming noises, I find they were likely from elsewhere.
41. On December 17, 2021, Ms. Penz complained again about loud noise or gaming. As stated in council member KC's signed statement, Ms. Penz located the noise on the seventh floor and KC attended with Ms. Penz.
42. Ms. Penz says the noise from the seventh floor strata lot, was an isolated incident and was not the noise she had heard from unit 520. She says the noise disturbances that she had been complaining about were different types of gaming noises than those she heard from the seventh floor. In other words, she maintains the noises she heard before December 17, 2021 were from unit 520.
43. There is no dispute that Ms. Penz has not made any further noise complaints since December 2021. Ms. Penz says the new tenants have been "wonderful and respectful" neighbours.

ANALYSIS

Is Ms. Penz's claim for an order requiring the strata to enforce its noise bylaw moot?

44. Mootness occurs when no live controversy exists which affects the rights of the parties: see *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), at para. 353. In *Borowski*, the court explained that determining mootness involves a 2-step analysis. First, whether the live issue has disappeared, and any issues are theoretical or academic. Second, if there is no live issue, should the court or CRT exercise its discretion to hear the case anyway.
45. Again, Ms. Penz's position is that the tenants in unit 520 made unreasonable noise contrary to bylaw 5(a) and the strata failed to adequately enforce its noise bylaws against unit 520. Under SPA section 26 the strata council has a duty to reasonably enforce the strata's bylaws. To that end, she seeks an order that "the strata enforce noise bylaws to restore the right of quiet enjoyment for owner". However, I find Ms. Penz already has the quiet enjoyment of her strata lot and based on her own submissions, there is no existing noise issue.
46. I find the noise enforcement issue is moot and there is no practical purpose in granting an order that the strata perform its statutory obligation in the future. I find the strata must respond to future complaints if and as they happen. I dismiss this aspect of Ms. Penz's claims.
47. However, Ms. Penz also seeks damages against the strata for allegedly failing to take adequate measures to enforce or uphold its bylaws. I find Ms. Penz's damages claims are not moot and I turn to discuss them next.

Was the noise level in unit 519 a nuisance?

48. As a starting point, Ms. Penz has the burden of proof in this CRT claim to prove the noise in 519 was at a level that caused a nuisance or unreasonable interference with her enjoyment of her strata lot. To be entitled to damages from the strata, Ms. Penz would then need to prove the strata negligently failed to meet its statutory duty to

enforce the noise bylaw, or treated her significantly unfairly in carrying out that duty, and that she suffered damages as a result. I find she has not done so here.

49. In the strata context, nuisance is a substantial, non-trivial and unreasonable interference with an owner's use and enjoyment of their property. The test of whether noise is unreasonable is objective and is measured with reference to a reasonable person occupying the premises. The interference must be intolerable to an ordinary person. The test also depends on several factors, such as its nature, severity, duration, and frequency of the noise. See *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, *The Owners, Strata Plan LMS 1162 v. Triple P Enterprises Ltd.*, 2018 BCSC 1502, and *Sauve v. McKeage et al.*, 2006 BCSC 781.
50. To support her claim, Ms. Penz relies primarily on her own testimony, plus her complaints with videos and photographs and physician notes. I reviewed Ms. Penz's photographs and video recordings that she submitted with her complaints to the strata. They consist of a video and photographs taken from outside the building showing a rectangle screen mounted on unit 520's wall that is shared with unit 519. I find it was likely a TV as there is no dispute that unit 520 had a TV. However, there is no objective evidence about whether the TV could be heard inside unit 519 or its volume.
51. Ms. Penz also submitted 3 short audio-video recordings of people talking loudly somewhere on the fifth floor, noise that sounds like a sports game on a television, and a child screaming. The recordings were taken in an empty CP hallway and show closed doors to several strata lots. I find it impossible to discern the exact source of the recorded noises. There are no audio recordings from within Ms. Penz's unit 519 and nor are there any recordings of the alleged PC gaming, bass sounds or loud music. I find the hallway audio-video recordings do not establish that there was audible noise inside unit 519 or the source of the alleged noise. They only prove that noises could be heard somewhere in the building when standing in the CP hallway.
52. Ms. Penz says the strata should have offered to conduct acoustic testing or sound monitoring inside unit 519 and it did not. She says she believes that test results would

have demonstrated how “severe” the noise disturbance was from unit 520. However, there is insufficient evidence to conclude that would be the case. I find it was open to Ms. Penz to attempt to record the alleged noises herself from inside unit 519 given she was able to take recordings in the CP hallway. For reasons that are unclear, Ms. Penz did not take her own recordings inside unit 519. I find Ms. Penz not making audio recordings from inside unit 519 suggests the noise was not loud enough for Ms. Penz to capture or she would have done so. Either way, I find there is insufficient evidence to make any findings about the level of noise in unit 519 or its source.

53. Ms. Penz says she had contacted a council member a number of times and they were unavailable, but she says she did not keep cell records of her attempts. She says she felt uncomfortable asking a council member to come and listen to noise in the middle of the night and felt hesitant to wake them up. While this might be the case, it does not assist Ms. Penz in proving her claims. Ms. Penz has no independent witnesses to the noise and most of her email complaints were made after the alleged noise incidents happened, sometimes several days after.

54. Council member SB stated that they volunteered that Ms. Penz could contact SB because they live on the same floor but Ms. Penz only contacted them once on December 17, 2021. That noise complaint was about a seventh floor strata lot. SB stated that their own strata lot is only 1 unit away from unit 520 and when SB leaves their unit they walk by unit 520. SB stated that they did not notice any unusually loud noises from unit 520. SB stated that they only recalled 2 occasions when they noticed noises from unit 520 that were “louder than usual but it was still typical of the usual living noises in apartments”. I find SB’s statement, combined with the lack of corroborating evidence of noise from unit 520, supports the conclusion that the unit 520 tenants were not causing unreasonable noise.

55. I find the fact that the strata took enforcement action does not prove that unit 520 caused unreasonable noise or that Ms. Penz experienced unreasonable noise inside unit 519. The emails indicate that the unit 520 tenant consistently denied that they made unreasonable noise. Even though there is evidence they were gaming, there is no independent or objective evidence that noise from the tenant’s gaming rose to the

level of a nuisance. As described above, Ms. Penz attributed gaming noise to unit 520 even after the tenants moved out and the unit was empty. I find this diminishes the reliability of Ms. Penz's assertion about the noise.

56. I acknowledge Ms. Penz submitted a note from a physician dated April 27, 2021 and another note dated September 17, 2021. However, I find the physicians' notes, like her complaints, are evidence that Ms. Penz reported noise disturbances to her physician. Without corroborating evidence, I am not persuaded by Ms. Penz's own reports that unit 520 was making unreasonable noise or that the noise volume in unit 519 was unreasonably loud.
57. Without a medical report or opinion statement from a medical professional, I find Ms. Penz has also not established that she suffered any physical or mental injury because of noise.
58. For all these reasons, I find Ms. Penz has failed to prove on a balance of probabilities that the unit 520 tenants caused a noise nuisance or that the noise levels in unit 519 were substantial, non-trivial and caused an unreasonable interference with her use and enjoyment of her property. Similarly, Ms. Penz has not proven she suffered any physical or mental damages because of noise in 519 or anything the strata did or did not do. Given these conclusions, I dismiss Ms. Penz claims against the strata.
59. 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. I see no reason in this case not to follow that general rule. As Ms. Penz was the unsuccessful party, I dismiss her claim for CRT fees and dispute-related expenses. The respondents paid no CRT fees and claimed no dispute-related expenses.
60. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against Ms. Penz.

ORDER

61. I dismiss all of Ms. Penz's claims against the strata and refuse to resolve Ms. Penz's claim against the Sacilottos.

Trisha Apland, Tribunal Member