



HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

Hsing Yang Chen

Applicant

-and-

Del Property Management Inc.

Respondent

DECISION

Adjudicator: Laurie Letheren
Date: November 10, 2015
File Number: 2014-18088-I
Citation: 2015 HRTO 1512
Indexed as: **Chen v. Del Property Management Inc.**

APPEARANCES

Hsing Yang Chen, Applicant)))	Self-represented
Del Property Management Inc., Respondent))))	Rachel A. Gibbons, Paralegal

INTRODUCTION

[1] This is an Application, filed on July 24, 2014, under s. 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the “Code”), alleging discrimination with respect to housing because of disability.

[2] The applicant owns a condominium in Metropolitan Toronto Condominium Corporation No. 901 (“MTCC 901”) where the incidents of discrimination are alleged to have occurred. He has lived there for approximately five years.

[3] MTCC 901 contracted with the respondent, Del Property Management, to provide property management services for the MTCC 901 condominium properties. MTCC 901 also contracted with a security company to provide security services for the condominium properties.

APPLICANT’S EVIDENCE

[4] The applicant stated that he began to be disturbed by a loud thumping noise in his condominium in early October, 2013. The noise would be sporadic, would last for a very short time and would occur about 5-8 times during the night and day. He stated that the noise was very loud and sounded like “thump, thump, thump”. The noise came from the suite above his. It would awaken him at night and bother him during the day.

[5] He stated that he complained to management and that management investigated. He was told that the tenant of the suite above had sustained a leg injury and the only way she can move was by using crutches or hopping around.

[6] He stated that he suggested to the respondent that the tenant above should use a walker. He claims that the respondent’s assistant property manager told him that there is nothing they can do when he asked, “What about my rights?”

[7] On October 11, 2013, he wrote to the president of the MTCC 901 board of directors. He stated that he received no reply.

[8] On October 18, 2013, he sent a letter to the respondent to ask what they will do to take care of the noise problem. In the letter, he wrote, “I happen to suffer from an ailment for which a good night sleep is absolutely necessary for my well-being”. He asked for a written reply within 2 weeks. He stated that he wrote a follow-up letter on October 23, 2013 and that he went to the respondent’s office on Oct 28, 30 and 31, 2013 and there was no reply to his letter.

[9] On October 18, 2013, the applicant alleges he was disturbed from his sleep at 1:20 am and 6 am. He went to the condominium above and introduced himself to the occupant. He stated that she refused to speak to him and she called the police. The police attended at his condominium and instructed him to tell the respondent of the noise problems rather than call the police.

[10] Also, on October 18, 2013, some of the respondent’s employees and persons from the security company came to his condominium to conduct a noise test. Some people went upstairs to the suites above his condominium while others remained in his condominium. The people upstairs banged and made noises while the people in his condominium listened. He stated that the noises that were made in the suite above sounded much like the noises he had complained about.

[11] He states that, after the police told him to speak to the respondent if he heard the noise, he would call security each time he was bothered by the noise. The respondent’s occurrence reports filed at the hearing show the applicant called the security desk more than 30 times during the period between August 28, 2013 and March 14, 2015. The occurrence reports show that the applicant made more than one call some nights. When questioned about the respondent’s responses to his calls, the applicant stated, “Yes they always came up when I called” and “yes they did come to my unit to listen for noise when I called them”.

[12] The applicant recalled that at the 2013 Annual General Meeting (“AGM”) of the board of directors of MTCC 901 it was announced that, because of his noise complaints, an engineering firm was to be contracted to record the level of noise. The directors indicated that from the results, MTCC 901 would decide whether they would take any further action. The applicant stated at the hearing that he was never told which suite they would conduct the noise test in. He thought it should be conducted in the suite above his and not in his suite. He gave evidence that he told a board member at the AGM that he thought this engineer testing would be a waste of money. He stated that he again suggested that it would be better to get a walker for the tenant because he believed that would help the problem.

[13] The applicant confirmed that he received a Notice of Entry on Feb 11, 2015 from the respondent indicating that they wanted to conduct a noise investigation the next day. The applicant wrote a letter to the respondent refusing entry. He stated at the hearing that he needed time to think about the test and to get some advice. He stated that he did not like the proposed investigation because it was to be conducted between 12 pm and 7 pm and he had been telling the respondent that there is usually no noise in the afternoon and the noise is usually at night. He stated that he also did not like it when he was told that if it was found that the noise was below a certain level that the respondent would not do anything. He believed that if the test were conducted in the afternoon, the test would be negative and that would not be in his favour and then the respondent would not do anything.

[14] When questioned by the respondent, the applicant stated, “I did not let them do the noise test. I chose not to cooperate anymore.”

[15] The applicant stated that sometime in the spring of 2015, he suggested to the respondent that the test should be conducted through the day and night for a week. He suggested that he could have agreed to this on the condition that the costs for his accommodation, during the time of the testing, would be covered. He indicated that as of the date of the hearing, he had not had a response to this suggestion. The noise continues to bother him.

[16] The applicant testified that because of deprivation of sleep and because of stress, his health has suffered a lot. He indicated that his conditions have worsened and that he had to take medication more frequently to treat one of the conditions. He stated that he also had dizziness and headaches and was referred to a neurologist for magnetic resonance imaging testing and that he was told that the headaches and dizziness are likely a tension headache from stress.

[17] He indicated that he had been using earplugs at night since January 2014 in order to be able to sleep. Because they have been used for so long, they itched and have caused infection in his ear twice but he still cannot sleep without earplugs.

[18] The applicant submitted a number of medical consultation reports; however, these were dictated prior to the dates relevant to this Application. Most of the medical documents submitted for the hearing that were relevant to the period of time of the alleged incidents, did not make any reference to stress or lack of sleep due to noise in his suite as being causes of or related to his symptoms. The only document that did mention the noise in his suite as a cause for his stress and insomnia was the prescriptive note given to the respondent in October 2013. The applicant did not call any of his doctors to verify the authenticity of the notes or give evidence to explain his medical conditions or their causes.

RESPONDENT'S EVIDENCE

Evidence of Property Manager

[19] The respondent called the property manager of the condominium complex. He gave evidence that there are three buildings grouped together for which he is the property manager. The applicant lives in one of these three building.

[20] He stated that his duties are the day to day operation and management of the common areas on the inside and outside of three buildings, including the building where the applicant lives. His work does not involve anything that is specific to the inside of a unit.

[21] He stated that he is familiar with the applicant. He started working at this condominium complex in May 2013 and had his first contact with the applicant in October 2013, when the applicant reported that there was a problem with noise.

[22] The property manager stated that they were seeing that there were many complaints from the applicant about noise coming from the suite above his. He stated that the respondent's policy is that if there is a complaint, the property management contacts the owner of the suite to advise of the complaint and to tell them that they need to take action. If the respondent gets more than two complaints about the same unit, the owner of the suite will be sent a letter from MYCC 901's lawyer to demand that the owner comply. The property manager stated that before the respondent can take any of these formal steps for noise complaints, it needs proof from the security company that this noise did in fact happen.

[23] The property manager stated that in the situation of the applicant's complaints, they did not have the proof needed because the security company reported that no noise was found each time they responded to his complaints.

[24] The property manager described the noise testing that was done on October 18, 2013. He stated that the respondent decided to conduct this test because of the number of noise complaints made by the applicant. Conducting a test was a way the respondent could determine if there was a noise problem. He stated that some of the respondent's employees created noise by jumping and dropping things on the floor of the suite above the applicant's. They tried to make the same kind of noises as the applicant had described and they knew that the occupant of the suite was using crutches. The property manager stated that the applicant had agreed that the noises that they were making that day were much like the noises he had heard and had complained about. The property manager stated that he remained in the applicant's suite while the other employees were upstairs making the noises. It was the witness's conclusion that the noises being made were not loud. He stated that he considered the noise he heard to be normal for condominium living.

[25] The property manager went through the occurrence reports that had been filed and stated that they are similar. The reports reflected his understanding of what had been happening. The applicant would complain about noise. Security would always follow-up and then security would report that they had heard no noise. The witness stated that there have been other noise complaints about other suites in the buildings. When these were investigated, security would speak to the owner and the noise is usually reduced.

[26] The property manager testified that the applicant told him that the noise happened once a night and the applicant told him that he was not able to sleep because he was afraid the noise would happen. He stated that he spoke to all the security guards that had responded to the applicant's noise complaints and they said they had never heard the noise reported and that is exactly what they reported in the occurrence reports. It is important that security report everything in writing to the respondent.

[27] The property manager recalled that at the November 27, 2013 Annual General Meeting of MTCC 901, the respondent was directed to engage an acoustic engineer to conduct a further review of the noise. He recalled the applicant stating that this would be a waste of time and money and suggesting that it would be better just to get the occupant of the suite above to use a walker. The property manager stated that he explained to the applicant that it was his understanding that the occupant of the suite above was not able to support herself with a walker.

[28] The property manager testified that the respondent scheduled the engineer to conduct the noise test on February 12, 2015 and gave the applicant a Notice of Entry on February 11, 2015 but the applicant refused entry. He stated that he asked the applicant to put the refusal in writing so that it would not be thought that the property manager was the one who decided not to have the engineer to do the tests.

[29] The property manager testified that they received the applicant's refusal of entry in writing but that after that, the applicant still complained. The witness says that he told the applicant, from then on, to call police if he had a noise complaint because without proof of the actual noise, the respondent cannot take any action. He stated that he told the applicant that the respondent cannot act any further because they did not have the tools to act.

[30] The property manager denied that the respondent ignored the applicant. He was always allowed into the property management office to discuss his complaints.

[31] He testified that he brought the applicant's suggestion that the test be done for a full week and the request that the applicant's accommodation be covered during the testing to the board of MTCC 901. He recalls that the board's response was that MTCC 901 could not agree to cover this expense when, in their opinion, the noise had not been proven to be a real problem.

[32] The property manager was asked whether he knew that the applicant's health issues were affected by the noise and was directed to a prescription note written by a doctor. In response to this question, the witness stated that he had seen the note and he took this as a prescription for a problem that the applicant went to see a doctor about on the date of the note, and not necessarily related to the noise problem. The property manager testified that the applicant had only told him that he gets awakened and has a hard time getting back to sleep. He did not know anything else about the applicant's health until he reviewed the documents that were filed for this Application.

Evidence of Security Supervisor

[33] The shift supervisor of the security company retained to provide services in the condominium complex testified. He describes his responsibilities as dealing with emergencies, responding to complaints and dispatching the patrol guards who act as his eyes and his ears around the condominium complex. He stated that in the case of a

noise complaint, once the investigation is complete, an occurrence report must be completed regardless of whether security heard and found the source of the noise.

[34] The shift supervisor went through the occurrence reports that had been filed by the respondent. He read the details of each report. Each of the reports indicated that the guard investigated the complaint by going to the floor where the applicant's suite is located, the floor below and the floor above to listen for noise. In each of the reports, the security guard is said to have reported that no noise was heard. In a number of the reports it is written that the security listened for ten minutes outside the suite above the applicant's and that the security guard reported back that he did not hear any noise from that suite or any of the surrounding suites.

Argument

[35] The applicant maintains that he is a person with a disability and that this disability was negatively impacted when he could not sleep. He argues that because the noise continued and the respondent allowed another occupant's rights to supersede his rights, the respondent has discriminated against him.

[36] The respondent argues that the applicant has provided no evidence to show that he experienced discrimination. It submits that the applicant was not treated any differently because of his disability and that the respondent was not aware of the applicant's disability.

ANALYSIS AND DECISION

[37] The respondent did not challenge the applicant's claim that he is a person with a disability. I find that for the purposes of this analysis under the *Code*, the applicant is a person with a disability and therefore has the right to be protected from discrimination because of disability as provided by the *Code*.

[38] The applicant has the onus of proving that the respondent violated his *Code* rights on a balance of probabilities. He must demonstrate that it is more likely than not that the respondent's actions in responding to his noise complaints amounted to an infringement of his *Code* rights. Clear, convincing and cogent evidence is required to satisfy the balance of probabilities test. See *F.H. v. McDougall*, 2008 SCC 53 at paragraph 46.

[39] The applicant alleges that he experienced a breach of his right to equal treatment with respect to the occupancy of his condominium which is protected under section 2(1) of the *Code*. In my view, the allegations raised in this Application are actually allegations of discrimination with respect to the receipt of the property management services provided by the respondent to the applicant which is protected under section 1 of the *Code*.

[40] However, regardless of whether I consider the allegations of discrimination under section 1 or 2 of the *Code*, I find that the actions of the respondent do not amount to a breach of the *Code*. For the reasons outlined below, I find that the applicant has not proven, on a balance of probabilities, that the respondent failed in its duty to accommodate the applicant's disability-related needs or that he experienced discrimination in his housing.

[41] The relevant sections of the *Code* are as follows:

1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability. 2(1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of ... disability ...

10(1) In Part I and in this Part,

“disability” means:

- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
- 11(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where:
- (a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or
- (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.
- (2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.
- (3) The Tribunal or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

[42] The applicant argues that because he has a disability, the respondent had a duty to accommodate his disability. He claims that the respondent allowed the rights of the tenant of the unit above his unit to supersede his rights. He claims that because the noise continued, the respondent had no intention of addressing the problem and that this is discrimination.

[43] As the Tribunal has stated in a number of decisions, the duty to accommodate arises only where an applicant has been subject to discrimination. The applicant must demonstrate that the actions or inactions of the respondent discriminated against him because of disability or he must demonstrate that the respondent failed to take appropriate steps to assess or respond to the applicant's request for accommodation. See *L.C v. Toronto District School Board*, 2011 HRTO 1336 at para 18; and *Baber v. York Region District School Board*, 2011 HRTO 213 at paras. 90-91

[44] In order to prove that he experienced discrimination, the applicant must show he experienced an adverse impact with respect to the service provided by the respondent and that his disability was a factor in the adverse impact. *Moore v. British Columbia (Education)*, [2012] 3 SCR 360 at para 33.

[45] The occurrence reports and the evidence provided by the witnesses demonstrate that the respondent, and the security company it worked with, responded to each of the applicant's complaints about the noise. The applicant stated that the respondent did come to listen for noise each time he called it and there is no dispute about the noise testing that was conducted in the applicant's condominium.

[46] Even if I accept that the respondent was aware of the applicant's disability, there is no evidence to suggest that the respondent's actions in addressing the applicant's noise complaints were unfair or had an adverse impact on him because of his disability. As well, there is no evidence to suggest that the respondent should have followed a different response process in order to meet the applicant's disability related needs. The applicant agrees that the respondent answered his call and investigated each time he made a complaint. The respondent had engaged a sound engineer to conduct noise testing; however, the applicant refused to allow the sound engineer to enter his condominium to conduct this testing.

[47] The applicant states that the noise continues and that is discrimination.

[48] The continued noise and its impact on the applicant is not the result of the respondent's unfair treatment of the applicant. The respondent's property manager stated, and it was not disputed, that the power of the respondent is to maintain the common areas of the condominium complex. The respondent has no control or power over who occupies the units. It was not within the respondent's power to have the occupant of the unit above the applicant's condominium removed from the unit or to force her to use a walker or wheelchair as the applicant was suggesting as a solution to the noise.

[49] The respondent's actions cannot be found to be discriminatory.

[50] For these reasons, this Application is dismissed.

Dated at Toronto, this 10th day of November, 2015.

"Signed By"

Laurie Letheren
Vice-chair