Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, FF

Introduction

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

I find that the Application for Dispute Resolution/Notice of Hearing was sufficiently served on the landlord by registered mail as service was acknowledged.

Preliminary Matter:

The tenant filed a claim in Small Claims Court. She subsequently withdrew that case and has filed a claim in the Supreme Court of British Columbia. She advised that in those proceedings she is seeking a monetary order for health problems (heart attacks) caused by the manner in which the landlord sought to evict the tenant in September 2011. I noted that a significant portion of this claim relates to a $5000 claim for the failure of the landlord to provide a safe environment leading to a heart infection. I asked whether this amounts to splitting the tenant's claim and whether it should be heard with her Supreme Court matter. The tenant assured me she had talked to a lawyer and wished to proceed with this claim.

Issue(s) to be Decided

The issue to be decided is whether the tenant is entitled to a monetary order and if so how much?

Background and Evidence

The tenancy began on December 1, 2004 and ended on September 30, 2011. The rent at the end of the tenancy was $746 per month payable in advance on the 1st day of each month.

This tenancy involved a great deal of acrimony between the parties especially at the end. Both parties filed a claim with the Residential Tenancy Branch and a decision was rendered on February 24, 2012 after a lengthy hearing that extended over three days. The facts relating to this tenancy are set out in great deal in that decision and it is not necessary to go through them in detail in this decision.

In that decision tenant was awarded a judgment in the sum of $1233.56. One of the tenant's claims in that hearing was for $500 for the failure to maintain a healthy environment. That claim was withdrawn by the tenant on a without prejudice basis. The solicitor for the landlord submits the tenant is entitled to bring that claim in these proceedings. However, she submits that the remainder of the tenant's claim in these proceeding are barred by the principle of res judicata/issue estoppel or is without merit.

The tenant seeks a monetary order in these proceedings in the sum of $6475. The claim included $5000 for the failure to maintain safe environment leaking window caused black toxic mould caused serious heart infection and $485 for moving costs - toxic environment forced move to temporary accommodation. The other claims filed by the tenant include the following:

- Lack of working refrigerator – April 13/11 – September 30. 2011 damaged by the landlord's husband inept repair ($200)
- Illegal entry into unit 101 April 13/11 for purpose of taking picture for fraudulent evidence in scam ($100)

- Refusal of two (2) registered letters to dispute File # 24….. by landlord ($40).
- Hiring Bailiff to serve papers as Ms C and her husband FA attempted to assault me previously ($150).
- Lack of a properly working toilet despite many attempts to get it fixed 2006 – 2011 ($500).

The Landlord submits that portions of the Tenant's claim are barred by the principle of res judicata. This principle provides that a matter which has already been conclusively decided by a court is conclusive between the parties. Final judgments prevent any re-examination or re-trial of the same dispute between the same parties. The Supreme Court of British Columbia in Jonke v, Kessler, Vernon Registry, Docket No. 3416 dated January 16, 1991 held that the principle of res judicata applies to residential tenancy arbitration. The policy reasons in favor of the principle are set out in a decision of Hardinge L.J.S.C., in Bank of B.C. v. Singh 17 B.C.L.R. (2d) 256 as follows:

> "…While people must not be denied their day in court, litigation must come to an end. Thus litigants must bring their whole case to court and they are not entitled to relitigate the same issues over and over again. Nor are litigants entitled to argue issues that should have been before the court in a previous action…"

The principle of res judicata prevents a party from bringing to litigation not only a matter that was previously heard, but also a matter that should have been heard at that previous arbitration. Mr. Justice Hall of the Supreme Court of British Columbia, in the case Leonard Alfred Gamache and Vey Gamche v. Mark Megyesi and Century 21 Bob Sutton Realty Ltd., Prince George Registry, Docket No. 28394 dated November 15, 1996, quoted with approval the following passage from the judgment of Henderson v. Henderson, (1843), 67 E.R. 313

> "In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of

> the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

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The Supreme Court of British Columbia has stated that res judicata applies to residential tenancy cases. The policy reasons set out in the excerpts above apply in this case. The original hearing was held in January and February 2012. The tenant filed the within application just prior to the expiry of the two year limitation period. Litigants must bring their whole case and they are not entitled to re-litigate the same issues over and over again.

With respect to each of the tenant's claims I find as follows:

a. I dismissed the tenant's claim of $200 for lack of a working refrigerator for the period April 13, 2011 to September 30, 2011. The dispute resolution officer in the previous decision dismissed the tenant's claim of $80 for repairs to the fridge and $200 for loss of food as the tenant failed to present evidence to support those claims. In my view the principle of res judicata applies to this claim and accordingly this claim is dismissed. The problems relating to the

fridge were apparent to the tenant at the time of the previous hearing and it should have brought at that time.

b. The tenant claimed $100 for illegal entry on April 11, 2013 where the landlord obtained took photographs. The tenant testified she only became aware of the illegal entry on the day of the previous hearing and thus those claims could not be heard at that time. I do not accept the submission of the landlord that this claim should be denied on the basis of res judicata. The landlord did not dispute the illegal entry. While the photographs may have been available at the time of the original hearing it is not reasonable to expect that the tenant would be able to amended her application at that time to make this claim. I determined the sum of $40 is reasonable in the circumstance.

c. I dismissed the tenant's claim of $40 for the cost of two registered mail letters. This relates to the cost of litigation with respect to the previous hearing. The only jurisdiction an arbitrator has relating to cost is the cost of the filing fee. Such a claim would have been denied in the previous hearing. Similarly it is denied in these proceedings.

d. The landlord withdrew her claim for the cost of hiring a bailiff to serve documents. The bailiff was not hired as the solicitor for the landlord accepted service. This claim is dismissed as withdrawn.

e. I dismissed the claim in the sum of $500 for the lack of a properly working toilet. The tenant was successful in the previous arbitration and the dispute resolution officer awarded her $200 for the lack of a working toilet from May to June 2008. The principle of res judicata applies to this claim. The tenant failed to establish sufficient reason why her original claim did not include a claim for the lack of a properly working toilet for the entire tenancy (if she was unhappy about its condition).

f. The solicitor for the landlord acknowledges that the tenant withdrew her claim of $500 at the original hearing on a without prejudice basis and that the tenant was entitled to raise it at a later date. The tenant has increased this claim to $5000. The tenant also seeks $485 for the cost of an emergency move to a temporary accommodation. I do not accept the submission of the landlord

that this claim is barred by res judicata. In order for this claim to be dealt with at the previous arbitration it would have been necessary to hear evidence relating to the claim that was withdrawn on a without prejudice basis.

Claim of $5000 for failure to maintain safe environment leaking window caused black toxic mould caused serious heart infection and claim of $485 for moving expenses:

The tenant testified that landlord failed to properly maintain the rental unit causing leaks in the window that lead to the presence of significant black mould. The present of the mould caused significant health problem for the tenant including a heart infection.

The tenant testified she experienced problems with toxic mould coming from leaky windows in 2009. In December 2010 she noted that the frame had pulled away from the window causing significant leaks and water damage to the walls, the carpet and underlay. In January 2011 she asked the landlord to re-seal the windows but the landlord failed to complete the work. In February she attempted to clean the mould by suing a face mask but she experienced rashes and an eye infection. The tenant has long term ongoing health problems with multiple sclerosis, etc.

The tenant testified that she visited her general practitioner who was not able to determine the cause of her ongoing problems. However, by the summer time she was referred to a cardiologist who diagnosed her problem as a heart infection. She was treated with a heavy dose of antibiotics.

The tenant testified there are 5 causes of a heart infection one of which is toxic mould. She testified the other causes do not apply to her.

As a result of the information she received from the cardiologist she determined that it was necessary to move. Around the middle of August she gave landlord written notice that she was vacating at the end of September.

The tenant testified that she had been on a waitlist for government housing. However, because of the condition of the rental unit she had to make a temporary move to another unit at a cost of $485. She remained in that unit until moving to the government housing in April 2012.

The medical evidence provided by the tenant is limited. She produced 3 pages out of a 23 page report that her doctor completed for her BC Disability Application. That report was prepared on March 17, 2011 and identifies several medical conditions suffered by the including multiple sclerosis, cardiac arythmia (angina), depression, asthma, and multiple bouts of optic neuritis in both eyes and mobility problems. This document does not indicate a heart infection was diagnosed. The tenant also produced a document from her cardiologist which is of poor quality but at one stage it states “HAS INFECTION.” There are other medical documents produced but one is unable to draw the conclusion from these documents that the tenant had an heart infection, that such an heart infection was caused by the mould in the tenant’s rental unit and the affect of such a heart infection on the health of the tenant.

The tenant produced a summary of the health dangers associated with aspergillus fungi in the southern USA.

The landlord acknowledged that when the tenant moved out of the rental unit there was mould around the window frames. However, the landlord submitted the obligation to clean the mould as provided in the Policy Guideline is that of the Tenants. Policy Guideline #1 includes the following:

“WINDOWS

> 1. At the beginning of the tenancy the landlord is expected to provide the tenant with clean windows, in a reasonable state of repair.
>
> 2. The tenant is responsible for cleaning the inside windows and tracks during, and at the end of the tenancy, including removing mould. The tenant is responsible for cleaning the inside and outside of the balcony doors, windows and tracks during, and at the end of the tenancy The landlord is responsible for cleaning the outside of the windows, at reasonable intervals.

The landlord further submits that even if the tenant was not responsible for cleaning the mould, the medical records she has produced do not conclude (in so far as they are legible that a heart infection was caused by mould).

The dispute resolution officer in the previous hearing in the Analysis section stated the following:

> "The Residential Tenancy Act requires a tenant to leave a rental unit reasonably clean and undamaged except for normal wear and tear at the end of a tenancy. I have reviewed the evidence of the parties, including the photographs, and I find that the tenant was not responsible for the mould build-up. It is clear that the windows leaked and I accept the testimony of the tenant that the rain water ran down the walls inside the rental until during the tenancy, and the landlord was made aware of the problem well before the tenant moved out."

I do not accept the submission of the landlord that is open to me to make my own findings on who is responsible for the mould as it was not the basis of any decision made by the dispute resolution officer. I disagree. In my view the parties are bound by this finding and the principle of res judicata applies. Further, I determined that such a finding formed the basis of the dispute resolution officer dismissing many of the landlord's claims in those proceedings. In any event I determined there is ample evidence to conclude that there was a structural problem leading to water leakage and mould. The problem was more significant than cleaning mould from the window.

However, I determined the tenant has failed to prove that her heart infection was caused by the mould present in the rental unit. The medical evidence produced by the tenant is not satisfactory. I note the solicitor for the landlord wrote to the tenant on

October 30, 2013 setting out their position and demanding that the tenant produce all medical records in relation to the diagnosis, any physician's letter or report that has been prepared, any expert report that has been prepared and any other documents that pertain in any way to this claim…

The tenant failed to disclose all of the medical evidence demanded. While the evidentiary rules in a Residential Tenancy claim are more relaxed than a court, the failure to produce all relevant medical evidence amounts to a denial of the principles of natural justice. The landlord is not in a position to fully assess the validity of the tenant's claim. Secondly, the tenant's allegation is that she suffered a heart infection and this was caused by the mould from the rental unit. In my view this requires medical opinion or more detailed information than what was provided. One document produced by the tenant concludes the tenant has an infection but it does not state where the infection was and more importantly what caused the infection. As a result I determined the tenant failed to prove her heart infection was caused by the black mould in the rental unit.

This does not end the matter. The tenant has made a general claim against the landlord for the failure to maintain a safe environment leaking window caused black mould. I determined this statement in the Application for Dispute Resolution is sufficient to raise a claim for breach of the covenant of quiet enjoyment.

Policy Guideline #6 on the breach of the covenant of quiet enjoyment includes the following:

> "This guideline deals with a tenant's entitlement to quiet enjoyment of the property that is the subject of a tenancy agreement. At common law, the covenant of quiet enjoyment "promis(es) that the tenant . . . shall enjoy the possession and use of the premises in peace and without disturbance. In connection with the landlord-tenant relationship, the covenant of quiet enjoyment protects the tenant's right to freedom from serious interferences with his or her tenancy."[1] A landlord does not have a reciprocal right to quiet enjoyment.
>
> ….

Basis for a finding of breach of quiet enjoyment

Historically, on the case law, in order to prove an action for a breach of the covenant of quiet enjoyment, the tenant had to show that there had been a substantial interference with the ordinary and lawful enjoyment of the premises by the landlord's actions that rendered the premises unfit for occupancy for the purposes for which they were leased. A variation of that is inaction by the landlord which permits or allows physical interference by an outside or external force which is within the landlord's power to control.

The modern trend is towards relaxing the rigid limits of purely physical interference towards recognizing other acts of direct interference. Frequent and ongoing interference by the landlord, or, if preventable by the landlord and he stands idly by while others engage in such conduct, may form a basis for a claim of a breach of the covenant of quiet enjoyment. Such interference might include serious examples of: · entering the rental premises frequently, or without notice or permission;
….

- allowing the property to fall into disrepair so the tenant cannot safely continue to live there.

"Temporary discomfort or inconvenience does not constitute a basis for a breach of the covenant of quiet enjoyment.

It is necessary to **balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises, h**owever a tenant may be entitled to reimbursement for loss of use of a portion of the property even if the landlord has made every effort to minimize disruption to the tenant in making repairs or completing renovations.

Substantial interference that would give sufficient cause to warrant the tenant leaving the rented premises would constitute a breach of the covenant of quiet enjoyment, where such a result was either intended or reasonably foreseeable.

A tenant does not have to end the tenancy to show that there has been sufficient interference so as to breach the covenant of quiet enjoyment, however it would ordinarily be necessary to show a course of repeated or persistent threatening or intimidating behaviour. A tenant may file a claim for damages if a landlord either engages in such conduct, or fails to take reasonable steps to prevent such conduct by employees or other tenants.

A landlord would not normally be held responsible for the actions of other tenants unless notified that a problem exists, although it may be sufficient to show proof that the landlord was aware of a problem and failed to take reasonable steps to correct it. A landlord would not be held responsible for interference by an outside agency that is beyond his or her control, except that a tenant might be entitled to treat a tenancy as

> ended where a landlord was aware of circumstances that would make the premises uninhabitable for that tenant and withheld that information in establishing the tenancy."

I determined the landlord was made aware of the leak and mould problems in January 2011 and failed to take remedial action. I determined the problems were the responsibility of the landlord as they involved structural problems with the window and rental unit. This adversely affected the enjoyment of the rental unit. The tenant was not able to use the front room portion of the rental unit. In the circumstances I determined the tenant is entitled to $500 for the reduced value of the tenancy.

In addition I determined the tenant is entitled to $485 for the cost of moving. The amount claimed is reasonable and the tenant incurred this expense. The landlord failed take remedial action to deal with the problems. It determined that while she has failed to prove that the mould caused her heart infection, it was reasonable to conclude that moving was necessary given her compromised health problems and the failure of the landlord to take steps to remediate the problem

The tenant raised a claim for compensation for the failure to have a working smoke detector in the materials presented prior to the start of the hearing. This claim was not included in the Application for Dispute Resolution. The tenant did not take steps to amend her application as permitted under the Rules of Procedure. As a result I determined that it was not appropriate for me to hear that claim.

Monetary Order and Cost of Filing fee

In summary I ordered the landlord(s) to pay to the tenant the sum of $1025.

It is further Ordered that this sum be paid forthwith. The applicant is given a formal Order in the above terms and the respondent must be served with a copy of this Order as soon as possible.

Should the respondent fail to comply with this Order, the Order may be filed in the Small Claims division of the Provincial Court and enforced as an Order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the Residential Tenancy Act.

Dated: December 20, 2013

Residential Tenancy Branch