Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding First United Church Social Housing Society
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC, MNSD, OPT

Introduction

This was a hearing with respect to the tenant's application for a monetary award, for the return of a security deposit and for an order for possession of the rental unit. The hearing was conducted by conference call. The tenant attended and was represented by her legal counsel. An observer was present with the applicant, but she took no part in the hearing. The landlord was represented by legal counsel at the hearing and the landlord's representative was also present.

Issue(s) to be Decided

Is the tenant entitled to a monetary award and if so, in what amount?
Is the tenant entitled to the return of her security deposit?
Is the tenant entitled to an order of possession of the rental unit?

Preliminary Issues

Is the tenant barred from making a claim pursuant to section 60 of the *Residential Tenancy Act*?

Is the tenant's claim precluded by application of the doctrine of *res judicata*?

Should the application be dismissed pursuant to section 62(4) of the Act on the ground that it is frivolous or otherwise an abuse of process?

Background and Evidence

The history of the proceedings with respect to this tenancy has been set out in earlier decisions, but a summary is again required for context:

The landlord is a non-profit housing society and it provides subsidized housing to eligible occupants. The tenancy began in 2006 on a month to month basis

In July 2012 the landlord served the tenant with a one month Notice to End Tenancy for cause. The tenant's application to cancel the Notice to End Tenancy was heard in August and the Notice to End Tenancy was cancelled.

On January 31, 2013 the landlord issued a second Notice to End Tenancy for cause and the tenant applied to dispute the Notice. After a hearing in March, 2013 the Notice was upheld by decision dated March 7, 2013. The landlord was granted an order of possession. The tenant applied for review consideration of the March 7th decision. The application for review consideration was dismissed by decision dated March 21, 2013.

The tenant moved out of the rental unit on April 30, 2013. On May 23, 2013 a petition for judicial review of the Residential Tenancy Branch decision was filed in the Supreme Court., but the petition did not proceed to a hearing. An amended petition was filed on April 2, 2014 and it was heard on September 29, 2014.

By decision dated November 27, 2014 The Honourable Mr. Justice Davies set aside the March 7, 2013 decision and the March 21, 2013 review consideration decision. He remitted the matter back to the Residential Tenancy Branch for rehearing. Pursuant to the Supreme Court order entered on January 13, 2013 he ordered that the Residential Tenancy Branch decisions be set aside and he ordered that the tenant's application be remitted for re-hearing before a different dispute resolution officer and he directed that the arbitrator re-hearing the tenant's application: "shall determine how, if at all the Petitioner significantly interfered with or unreasonably disturbed another occupant or the Landlord between January 21, 2013 and January 31, 2013."

On January 30, 2015 the Residential Tenancy Branch sent the parties a new Notice of Hearing setting the rehearing for March 3, 2015. Counsel for the tenant sought the landlord's consent to adjourn the hearing, because of the tenant's health problems. On February 23, 2015 counsel for the landlord consented to an adjournment of the March 3rd hearing.

On March 2, 2015 counsel for the tenant sent an email message to counsel for the landlord. She said that she was informed by the RTB that the scheduled hearing was cancelled instead of adjourned because there was no longer a tenancy that was at stake. Counsel for the tenant stated her understanding that both parties were at leave to reapply on other issues

According to the landlord as of April 30, 2015 two years had elapsed since the tenancy ended.

At the request of counsel for the tenant the proceeding was reopened and scheduled for hearing. As set out in a July 15 e-mail to the landlord, an officer from the Residential Tenancy Branch provided potential dates for a new hearing and said:

> Just a reminder – as I explained previously to all parties – this 'rehearing' is addressing ONLY the issues brought before the original arbitrator. We are not permitted to vary from the order issued from Justice Davies. Only the evidence that was in the original file will be addressed along with any evidence presented to the court for the Judicial Review.
>
> Any claims outside of the original application should be filed under a separate cover and within the limitation period set down by the *Residential Tenancy Act*. To date I have not been able to determine if (name of tenant) has filed any subsequent application for any monetary issues.

On August 10, 2015 a new Notice of Hearing was issued, setting the matter for rehearing on September 22, 2015. On August 28, 2015 counsel for the tenant submitted an amended application, amending the application originally filed on February 8, 2013 to include a claim for a monetary award in an amount exceeding $15,000.00. The application was filed despite advice from the Residential Tenancy Branch that amendments were not permitted on re-hearings ordered by a judge after judicial review.

The rehearing was conducted by conference call on September 22, 2015. The tenant and the landlord's representative attended and each was represented by counsel. The arbitrator issued an interim decision dated October 20, 2015. In the interim decision the arbitrator declined to allow the requested amendment to the tenant's application. She ordered that the hearing be reconvened for a further hearing on November 25, 2015.

At the November 25, 2015 hearing the arbitrator stated that the issue to be decided on the re-hearing was whether the 1 month Notice to End Tenancy for cause issued on January 31, 2013 should be upheld or cancelled and whether the tenant significantly interfered with or unreasonably disturbed another occupant or the landlord between specified dates. The arbitrator found that the issues were limited to these two matters based on her earlier interim decision and based on the fact that the tenant vacated the rental unit on April 30, 2013.

The landlord declined to present evidence to establish cause for the Notice to End Tenancy.

The arbitrator noted in her decision that:

> At the re-hearing of November 25, 2015 the landlord indicated that it would not be presenting any evidence in support of the Notice. The landlord's counsel pointed to several factors in taking this position: the tenant has already vacated the rental unit and the landlord regained possession of the rental unit; the tenant confirmed she does not wish to regain possession of the rental unit; the tenant's attempt to make a monetary claim against the landlord by way of an amended application were denied; and, the expense of these proceedings.

Based on the landlord's election to present no evidence, she granted the tenant's application to cancel the Notice to End Tenancy. The arbitrator concluded her decision as follows:

> The tenant's application to cancel the Notice end Tenancy was granted since the landlord chose not to present evidence in support of the Notice at the re-hearing for reasons outlined in this decision. Although the Notice has been cancelled, I found that the tenancy ended on April 30, 2013 when the tenant vacated the rental unit pursuant to section 44(1) (d) of the Act.

In this application the tenant has claimed a monetary award in the amount of $18,058.50 and an order for possession of the rental unit. The application was filed on December 17, 2015. The tenant said in her application that on November 25, 2015 the arbitrator gave an oral decision setting aside the landlord's Notice to End Tenancy. She said that therefore the tenancy has not legally ended. She said that the tenant is entitled to an order of possession and compensation as well as the return of her security deposit.

Counsel for the tenant provided a written submission in support of the tenant's application. She submitted that the tenant's claim was not barred by section 60 of the *Residential Tenancy Act* because the tenancy was never lawfully ended. Counsel noted that her submission was at odds with the arbitrator's finding in the November 27, 2015 decision that the tenancy ended on April 30, 2013. Counsel submitted that I am not bound by the arbitrator's finding that the tenancy ended on April 30, 2013 because section 64 of the *Residential Tenancy Act* provides that the director must make each decision on the merits of the case and is not bound to follow other decisions made under the relevant part of the legislation.

Counsel also submitted that even were I to find that the tenant vacated the rental unit on April 30, 2013, it would still be open to me to grant an extension of the time limit pursuant to section 66 of the Act.

Counsel for the tenant submitted that the tenant should be granted an order of possession and have her tenancy reinstated. She submitted that the tenant should be allowed to move into the rental unit or a comparable subsidized unit if the rental unit is no longer available.

Counsel for the tenant submitted that if an order of possession is not granted the tenant is entitled to damages or compensation in lieu of an order of possession. She submitted that the tenant was entitled to compensation for damage or loss that resulted from the landlord's failure to comply with the *Act*, Regulation or tenancy agreement. She submitted that the compensation required to be provided by section 7 is mandatory and not dependent upon on the making of an application for dispute resolution to claim compensation.

Counsel for the landlord submitted that the tenant's claims in this proceeding are barred by section 60 of the *Residential Tenancy Act*. The Act provides that:

Latest time application for dispute resolution can be made

60 (1) If this Act does not state a time by which an application for dispute resolution must be made, it must be made within 2 years of the date that the tenancy to which the matter relates ends or is assigned.

(2) Despite the *Limitation Act*, if an application for dispute resolution is not made within the 2 year period, a claim arising under this Act or the tenancy agreement in relation to the tenancy ceases to exist for all purposes except as provided in subsection (3).

(3) If an application for dispute resolution is made by a landlord or tenant within the applicable limitation period under this Act, the other party to the dispute may make an application for dispute resolution in respect of a different dispute between the same parties after the applicable limitation period but before the dispute resolution proceeding in respect of the first application is concluded.

Counsel noted that the tenant failed to ask for a stay of the Residential Tenancy Branch order of possession when she applied to the Supreme Court for judicial review and elected to move out of the rental unit.

Counsel for the landlord submitted that in the November 27, 2015 decision the arbitrator found that the tenancy ended on April 30, 2013 and the applicant is effectively using this new proceeding as an attempt to appeal from or review the November 27th decision.

Counsel advanced further arguments with respect to issue estoppel and *res judicata*. He also submitted that the tenant's claim was frivolous and an abuse of process.

Analysis

Counsel for the tenant submitted that the tenant has been wronged by her unlawful eviction and is therefore entitled to a remedy consisting either of damages or reinstatement of her tenancy.

I find that the tenant's claim is barred by section 60 of the *Residential Tenancy Act* because the claim was not brought within two years of the date that the tenancy ended and the claim ceased to exist for all purposes two years after April 30, 2013, which is the date found by the arbitrator that the tenancy ended. Contrary to the submissions of tenant's counsel section 66 of the *Residential Tenancy Act* confers no authority upon me to extend the limitation period for bringing a claim, because after the two year period has passed, the claim *ceases to exist for all purposes* (emphasis added).

Counsel for the tenant argued that the tenancy has not ended and I am not bound by the arbitrator's finding in her November 27, 2015 decision, namely: that the tenancy ended on April 30, 2015. In making this submission counsel has conflated the notion of binding precedent with the principle of *res judicata*. Section 64 of the *Act* merely establishes that arbitrators are not bound to adopt the reasoning applied by fellow arbitrators in other cases. The section does not say that findings of fact made by an arbitrator with respect to a specific tenancy will not be binding upon an arbitrator in a subsequent application concerning the same tenancy. To find otherwise would mean that no dispute could ever be finally resolved and would be open to endless re-litigation.

If the tenant disagreed with the findings made in the November 27, 2015 decision then her remedy was to seek a review, or a judicial review of that decision, but not to file a fresh claim seeking a different outcome, particularly when the limitation period has passed.

I agree generally with the written submissions of counsel for the landlord on these points. The tenant did not seek a stay of the order of possession when she originally applied for judicial review in 2013. She allowed the proceeding to languish for close to a year before reviving it and thereafter did not seek any alternative remedy until after the limitation period had passed. The tenant's claims are barred by section 60 of the *Residential Tenancy Act*; and by the principle of *res judicata*. I find as well that the tenant's claims are without merit.

Conclusion

The tenant's applications for a monetary award and for an order of possession are dismissed without leave to reapply.

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: March 17, 2016

Residential Tenancy Branch