# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

Dispute Codes CNL, MNDC, OLC, FF

Introduction

The tenant applies to cancel a two month Notice to End Tenancy for landlord use of property dated December 15, 2016. The Notice claims that the landlord or a close family member will occupy the premises. Such a Notice, if substantiated, is a lawful notice to end a tenancy under s. 49 of the *Residential Tenancy Act* (the "*Act*"). The tenant argues that a recent decision between the parties has already decided that the Notice is unjustified.

The tenant also seeks compensation claiming that she has been harassed by the landlord and his agents and has lost the general use and enjoyment of her rental unit as a result.

She also seeks relief relating to the claimed loss of use of the washing machine in the rental unit.

Both parties attended the hearing and were given the opportunity to be heard, to present sworn testimony and other evidence, to make submissions, to call witnesses and to question the other. Only documentary evidence that had been traded between the parties was admitted as evidence during the hearing.

Issue(s) to be Decided

Has the landlord's ground for the Notice already been heard and decided? Is the tenant entitled to compensation for harassment or loss of use of the washing machine? Is a compliance order against the landlord warranted?

Background and Evidence

The rental unit is a two bedroom "plus den" condominium apartment. There is as written tenancy agreement. The tenancy started September 1, 2015 for a one year fixed term.

The agreement provides that at the end of the fixed term on August 31, 2016, the tenant must move out. However, the agreement also provides that "landlord agrees to provide at least 3 months notice if lease will not go month to month Sept 1, 2016." No such three month notice was given.

The current monthly rent is $3500.00, due on the first of each month, in advance. The landlord holds a $1750.00 security deposit and a $1750.00 pet damage deposit.

In October 2016 the landlord issued a two month Notice to End Tenancy, dated October 3, 2016, for the same reason as the Notice in dispute here. The tenant applied to cancel that Notice (RTB file number recorded on cover page of this decision). The matter came on for hearing December 2, 2016. Both parties attended and gave evidence.

The arbitrator's decision, also dated December 2 determined,

> I find that the Landlord has not demonstrated good faith. That is, he has not demonstrated to me that his son will be moving into the rental property. Rather, the preponderance of evidence provided by the Tenant confirms – and I find – that the Landlord's motivation for ending the tenancy is to sell the rental property.

The landlord's counsel does not argue that the landlord's intention has changed since giving that prior Notice in October or that any new circumstances have arisen. He argues that the landlord had been informed by someone at the Residential Tenancy Branch that all he needed to do to defeat the tenant's challenge and uphold the Notice was to attend and testify that his son would be occupying the rental unit. As a result, he did not properly prepare for the hearing and the issue about his son moving in was not properly dealt with.

In response, the tenant notes that the landlord had her materials in support of her challenge to that prior Notice six weeks before the hearing.

The landlord filed an affidavit in this matter indicating that he wants his son in the rental unit because it is closer to the university he attends. His son has been living at home

since November and it takes an hour and a half to commute to school. The tenant's rental unit is only about 45 minutes away from the school.

The landlord's son had been living with a roommate in a rental unit of his own, paying $1500.00 as his share of rent. The landlord says the roommate left and his son could not find another roommate and so that's why he needs to move into this rental unit. He confirms that his son will be living alone in this rental unit but for a girlfriend who will reside elsewhere.

The tenant points out that the son's roommate left at the end of October, yet the first two month Notice was issued October 3rd. She suggests that the landlord's son could not have spent much time looking for another roommate given that timeline. She notes that her investigations have revealed 34 two bedroom apartments available for rent within two kilometers of the school, at rents between $800.00 and $1750.00. Instead of the landlord losing $3500.00 per month in rental income from this rental unit, he could save perhaps $2000.00 per month by renting one of those accommodations and his son would be only minutes from school.

The tenant testifies that since October the washing machine provided with the suite has not been working. She has informed the landlord but nothing has been done.

She complains that she was bombarded by realtors when the landlord was trying to sell the rental unit is August and September. She reports that two realtors came to take pictures. The landlord booked "multiple" appointments to enter the suite for the purpose of selling it. Three realtor attendances ended in no-shows and two cancelled.

She is also worried that the landlord will serve her with another Notice or an application for dispute resolution.

The landlord's counsel responds that the rental unit has never actually been listed for sale and that he wants his son to live in a safe neighbourhood.

## Analysis

### The Notice and the Previous Decision

I find that the landlord is bound by the previous decision rendered December 2, 2016 by the application of the doctrine of *res judicata*. That doctrine was recently reviewed by

Dardi, J. of the British Columbia Supreme Court in *Lougheed v. Wilson,* 2012 BCSC 169,

> [61] *Res judicata* is a core doctrine of our Canadian justice system. The policy objectives underlying *res judicata* are well established and can be distilled as follows - there is an interest in putting an end to litigation and no person should be twice vexed by the same cause of action: *Foreman v. Niven,* 2009 BCSC 1476 at para. 9; *Giles v. Westminster Savings Credit Union,* 2006 BCSC 1600 at para. 26 (the relevant portions of which were ultimately affirmed on appeal: 2010 BCCA 282). Notwithstanding the importance of these objectives, they must be balanced with the competing principle that litigants should not be deprived of their right to have their cases decided on the merits: *Cliffs Over Maple Bay Investments (Re),* 2011 BCCA 180 at para. 26.
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> [62] The Court in *Tylon Steepe Homes Ltd. v. Pont*, 2011 BCSC 385, appeals quashed on other grounds, 2011 BCCA 162, provides the following formulation of the doctrine of *res judicata* at para. 52:
> ... Where a cause or a fundamental issue has been decided, it is said to be *res judicata* and, absent special circumstances, is precluded from being adjudged a second time. When *res judicata* applies, a litigant is estopped by the prior suit from proceeding in the subsequent action. The maxim has traditionally been regarded as an exclusionary rule of evidence. The paramount policy considerations include the avoidance of duplicative litigation, potential inconsistent results and inconclusive proceedings. Finality to litigation is the prime objective. (Internal citations omitted.)
>
> [63] The doctrine of *res judicata* has two branches: issue estoppel and cause of action estoppel. Relitigation may be precluded in relation to an entire cause of action or with respect to a discrete issue. The essential principles of *res judicata* apply, albeit with modifications, to defences previously litigated as well: *Tylon Steepe,* at para. 53.
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> [65] There are three criteria which must be satisfied in order to successfully invoke issue estoppel:
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> (a) that the same question has been decided and was fundamental, as opposed to collateral or incidental, to the decision;
> (b) that the decision in the first proceeding said to create the estoppel was final; and
> (c) the parties to both proceedings must be the same or their privies.
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> (See *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248; *Grdic v. The Queen*, [1985] 1 S.C.R. 810; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44)

The question of the good faith intention of the landlord in having his son occupy this rental unit is the same question and it was a central question in the previous dispute resolution hearing. That decision was final (see s. 77(3) of the *Act*) and the parties were the same.

If the landlord is of the view that the matter was not properly dealt with in that previous hearing because he was not as prepared as he might have been, that is not a matter

that can be remedied on a subsequent application. I have no power to review or sit on appeal from the previous decision.

As a result, the two month Notice to End Tenancy dated December 15, 2016 cannot stand and it is hereby cancelled.

The Tenant's Claim of Harassment

A landlord has a limited right of entry to a rental unit. Often a landlord's entry is with the consent of the tenant and usually according to a prior agreement. Other times a landlord might enter without the tenant's consent as the result of a lawful notice to do so issued under s. 29 of the *Act*.

In this case the evidence satisfies me that the tenant was compliant in accommodating the landlord's listing agents and raised no complaint at the time. I find that the intrusions were minor in nature and not to the level of intrusion justifying any award of damages.

The Washing Machine

The tenant's undisputed evidence is that a washing machine was include as a service with this tenancy and that is has been inoperable, to the landlord's knowledge, since October, 2016.

In such circumstances, a compliance or repair order is appropriate. I order that the landlord have a qualified tradesman inspect and either repair or replace the washing machine within thirty days of the date of this decision.

The tenant's evidence was scant regarding any loss resulting from the lack of a washing machine. She has not alleged that she has suffered any extra expense or significant interference as a result. Nevertheless, I consider it apparent that some inconvenience would follow from the loss of that appliance and I award her $200.00 as damages for the period from October 2016 up to 30 days from the date of this decision.

If the landlord fails to attend to comply with the foregoing repair order within the period allowed, the tenant may reply for additional damages and/or a redirection of rent to ensure that she has a functioning washing machine.

Conclusion

The tenant's application to cancel the two month Notice and her request for a compliance order are allowed. Her application for damages for harassment is dismissed.

The tenant is entitled to recover the $200.00 award and the $100.00 filing fee for this application. I authorize her to reduce her next rent (either February or March 2017) by $300.00 in full satisfaction of the award and the fee.

The landlord has made his own application seeking an order of possession pursuant to the Notice in question in this dispute. That matter is set for hearing February 17, 2017 (file number noted on cover page of this decision). I have informed the parties that whatever my decision in this matter, it will render that application of no consequence and that they need not attend that hearing.

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: January 31, 2017

Residential Tenancy Branch