Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Baltic Title Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC

Introduction

This hearing was scheduled to hear a tenant's application to cancel a *1 Month Notice to End Tenancy for Cause* dated February 23, 2018. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

At the outset of the hearing, I confirmed that the parties had exchanged their respective written submissions and evidence upon each other. Accordingly, I have admitted and considered the documentation provided to me by both parties.

Based on the submissions of the parties, I also determined that it is necessary for me to decide whether the landlord was estopped from issuing the subject Notice to End Tenancy under the doctrine of *res judicata*. The tenant's legal counsel had indicated this would be an issue raised at the hearing by way of the written submissions. The landlord had also prepared and submitted a written response to the issue. During the hearing I gave both parties the opportunity to present their respective positions to me orally. After hearing arguments on the issue of *res judicata* I informed the parties that I would reserve my decision on that issue and I would proceed to hear the reasons and evidence with respect to issuance of the subject Notice in the event I reject the tenant's argument that the issue is *res judicata*.

Below, I describe the facts and the arguments I was provided, in summary form, and my analysis on the issue of *res judicata*.

Preliminary Issue to Determine

Was the landlord estopped from issuing the subject Notice to End Tenancy under the doctrine of *res judicata*? If not, is there a basis to set aside the Notice to End Tenancy?

Background and Evidence

The parties were in agreement that the tenancy started in June 2013 and the tenant is required to pay rent on the first day of every month. The tenant's current rent obligation is $1,237.00 per month.

The parties were also in agreement that the landlord had served the tenant with a *1 Month Notice to End Tenancy for Cause* dated November 24, 2017 indicating the reason for ending the tenancy is because the "tenant is repeatedly late paying rent" (herein referred to as "the first Notice"). In the details of cause on the first Notice the landlord described the tenant as having been served ten 10 Day Notices to End Tenancy for Unpaid Rent in the past 12 months. The tenant filed to dispute the first Notice and a hearing was scheduled for 9:30 a.m. on February 16, 2018 (file number referenced on the cover page of this decision). The tenant had served the landlord with notification that he had disputed the first Notice and both parties had submitted documentary evidence for that proceeding; however, only the tenant appeared for the scheduled hearing. The Arbitrator cancelled the first Notice by way of a decision issued on February 16, 2018. The decision states, in part:

> "Because the landlord did not attend the hearing I find the landlord has failed to satisfy the burden of proof to show the grounds for the 1 Month Notice and I therefore allow the tenant's application to cancel the 1 Month Notice."

At 11:24 a.m. on February 16, 2018 an Information Officer with the Residential Tenancy Branch recorded in the Branch records that the landlord had called and the landlord was informed of the Review Consideration application process.

The landlord did not file an Application for Review Consideration with respect to the February 16, 2018 decision. Rather, on February 23, 2018 the landlord served the tenant with another *1 Month Notice to End Tenancy for Cause* ("the subject Notice"). The subject Notice indicates the reason for ending the tenancy is because the "tenant is repeatedly late paying rent". In the details of cause on the subject Notice the landlord wrote that the tenant has been served seven 10 Day Notices in the past 12 months.

During the hearing, the landlord's agent acknowledged that the landlord had been notified of the hearing scheduled for February 16, 2018 and had submitted evidence in support of ending the tenancy for repeated late payment of rent. The landlord's agent explained to me that the landlord failed to appear for the hearing at the scheduled time because the reminder the landlord had set was inadvertently deleted. The landlord explained that the landlord's agent attempted to connect to the hearing when the mistake was realized but that the hearing was already over by then. The landlord's agent contacted the Residential Tenancy Branch and after waiting some time to speak with an Information Officer the landlord learned of the Review Consideration process but determined it would not likely succeed in making such an application because the failure to attend was due to the landlord's error or mistake.

As for the "Details of Cause" completed on the first Notice and the subject Notice, the landlord explained the difference in the number of 10 Day Notices reflects that the tenant has paid rent on time for the three months that passed since the first Notice was issued. The landlord also agreed that all of the alleged late payments occurred before the issuance of the first Notice and that the tenant has not paid rent late after issuance of the first Notice.

The tenant's legal counsel argued that the subject Notice should be found to be of no force or affect because it is based on the same allegations that were the subject of the first Notice which was cancelled by an Arbitrator. The tenant's legal counsel pointed out that the courts have found that there is a public interest in having final decisions and pointed to two court cases that he submitted into evidence: *Jonke v. Kessler* [1991 BCBC 383] and *Khan v. Shore* [2015 BCSC 830].

The tenant's legal counsel pointed out that in the *Jonke* case the court heard of a landlord who had issued multiple Notices to End Tenancy for the same allegation. The court found that the matter was *res judicata* and the landlord was estopped from issuing further Notices to End Tenancy with respect to the same allegation. The court outlined six criteria for determining *res judicata*, which the tenant's legal counsel submits have been met. The six criteria are, as paraphrased:

1. That a judicial decision was made;
2. That the judicial decision was pronounced;
3. That the judicial tribunal pronouncing the decision had competent jurisdiction;
4. That the judicial decision was final;
5. That the judicial decision involved determination of the same question raised in the current litigation; and,

6. That the parties to the judicial decision are the same.

The tenant's legal counsel submitted that the first Notice was disputed and a final and binding decision was issued and sent to both parties by the Residential Tenancy Branch, which has jurisdiction to resolve such matters, and that the decision was to cancel the first Notice. Further, the decisions issued under the *Residential Tenancy Act* are final; the landlord did not apply for Review Consideration of the decision; the parties involved are the same and the landlord's reason for issuance of the first Notice and subject Notice pertain to the same allegations which is that the tenant was repeatedly late paying rent prior to issuance of the first Notice.

In the case of *Khan*, the court heard of a landlord who had issued multiple Notices to End Tenancy indicating the same stated reason for ending the tenancy. The court determined that there was a distinction from the *Jonke* decision in that the tenant's disturbing behaviour was persistent and on-going and the landlord was not estopped from issuing multiple Notices to End Tenancy.

In the case before me, it was agreed that the tenant has not paid rent late since receiving the first Notice and the issue of late payment of rent has not persisted or is on-going. The tenant's legal counsel argued that the time to put forth the landlord's reasons to end the tenancy based on repeated late payment of rent made prior to the issuance of first Notice was at the first hearing of February 16, 2018 and the landlord cannot keep issuing Notices to End Tenancy based on the same allegation in an attempt to get the result it wants.

The landlord's agent argued that the decision of February 16, 2018 does not indicate whether there was leave or not to reapply. The landlord did not intend or chose to miss the first hearing and that it was the result of a human error. The landlord also stated that the subject Notice was not issued in retaliation. Rather, the merits of the cause indicated on the first Notice were not heard or considered at the first hearing even though the landlord had submitted documentary evidence for that proceeding because the landlord made a mistake and did not appear at the hearing.

The landlord pointed out that in the *Jonke* case, both the landlord and the tenant had appeared for both of their hearings, which was not the case on February 16, 2018.

The landlord also pointed out that in the *Khan* decision the court questioned whether Arbitrators may consider the principle of *res judicata* where different Notices to End Tenancy have been issued and concluded that each case must be decided on its

merits. In *Khan*, the court noted that in a previous dispute resolution hearing, the Arbitrator declined to consider the landlord's reasons for issuing a Notice to End Tenancy because the landlord had not provided particulars before the hearing and the court decided that that Notice to End Tenancy was not decided on its merits. The landlord in this case is of the position that the dispute scheduled for February 16, 2018 was not decided on the merits since the Arbitrator did not hear from the landlord or consider the landlord's evidence.

The landlord also submitted that an Arbitrator is not bound by previous decisions or case law. In summary, the landlord is of the position the allegations of repeated late payment of rent have not been heard before and that it is before me to determine whether I may proceed to determine whether the tenancy should end for repeated late payment of rent.

Analysis

The landlord has issued two 1 Month Notices to End Tenancy for Cause to the tenant for the same reason, repeated late payment of rent, with recognition that there have been no further late payments since issuance of the first Notice. The first Notice was the subject of a dispute resolution proceeding and canceled; however, the subject Notice has not been the subject of a previous dispute resolution proceeding and I am bound to make a decision on its enforceability.

Both parties made submissions to me with respect to the doctrine of *res judicata*. The doctrine of *res judicata* as it relates to landlords and tenants has been before the courts before and I have been provided two cases to consider.

The landlord submitted that I am not bound by case law. Section 91 of the Act provides that common law applies to landlords and tenants except as modified by the Act. Since common law is made by case law, I reject the landlord's position that I am not bound by relevant case law that applies to landlords and tenants. As such, I have considered the case law that has been provided to me.

As described in the *Khan* decision, *res judicata* comprises both cause of action estoppel and issue estoppel. At paragraph 30 of the *Khan* decision, with reference to paragraph 12 of *Erchbamer v. Wallster*, 2013 BCCA 76:

> In brief terms, issue estoppel prevents a litigant from raising an issue that has already been decided in a previous proceeding. Cause of action estoppel

> prevents a litigant from pursuing a matter that was or should have been the subject of a previous proceeding. If the technical requirements of issue estoppel or cause of action estoppel are not met, it may be possible to invoke the doctrine of abuse of process to prevent relitigation of matters.

A hearing was set to hear the parties' arguments with respect to repeated late payment of rent for the month of November 2017 and several prior months on February 16, 2018. The landlord had been notified of the proceeding and the landlord had submitted documentary evidence for the February 16, 2018 hearing but did not appear at the hearing to present it to the Arbitrator or provide the Arbitrator with oral evidence and arguments.

Section 64(2) of the Act provides:

> (2) The director must make each decision or order on the merits of the case as disclosed by the evidence admitted and is not bound to follow other decisions under this Part.

The Arbitrator presiding over the February 16, 2018 hearing was not bound to consider the landlord's documentary evidence in keeping with Rule 7.4 of the Rules of Procedure. Rule 7.4 of the Rules of Procedure provides:

> Evidence must be presented by the party who submitted it, or by the party's agent.
>
> If a party or their agent does not attend the hearing to present evidence, any written submissions supplied may or may not be considered.

In the absence of any evidence being presented to the Arbitrator by the landlord, on February 16, 2018 the Arbitrator concluded the landlord did not meet its burden of proof to demonstrate the tenancy should end for reasons indicated on the first Notice. Accordingly, the Arbitrator cancelled the first Notice.

The decision of February 16, 2018 was final and binding as provided under section 77of the Act where it states:

> (3) Except as otherwise provided in this Part, a decision or an order of the director under this Part is final and binding on the parties.

The tenant's legal counsel pointed to the six criteria for finding *res judicata* as set out in *Jonke v. Kessler*, and submitted that all six criteria were met. The landlord pointed out in the *Jonke* case both the landlord and the tenant had appeared for their dispute resolution proceedings, whereas, the landlord in this case had not appeared for the February 16, 2018 hearing and the merits of cause were not determined previously.

Dispute Resolution proceedings are a formal dispute resolution process and parties are expected to avail themselves for the hearing which includes making appropriate precautions to ensure one is available and appears for the hearing at the scheduled date and time.

The Act does provide a mechanism to permit a party who is unable to attend the scheduled hearing "because of circumstances that could not be anticipated and were beyond the party's control" to obtain a review hearing pursuant to section 79(2)(a) of the Act. The landlord did not attempt to seek a review hearing under this ground for the February 16, 2018 decision; although, I recognize that the circumstances described by the landlord would not likely be found to be a circumstance beyond the landlord's control.

While the landlord had provided documentary evidence for the February 16, 2018 hearing, if the landlord was of the position the Arbitrator presiding over the February 16, 2018 case should have considered the landlord's documentary evidence in the absence of the landlord appearing at the hearing, the landlord may have sought *Judicial Review* of the February 16, 2018 decision. Also, section 64 of the Act required the Arbitrator to determine the previous dispute resolution proceeding based on the merits of the case and if the landlord was of the position the Arbitrator did not determine the case on its merits, the landlord may have sought *Judicial Review* of the February 16, 2018 decision. The landlord did not seek Judicial Review of the February 16, 2018 decision.

It appears to me that the landlord is attempting to rectify its failure to appear for the February 16, 2018 hearing by simply issuing another Notice to End Tenancy. In my view, to permit a party to issue a Notice to End Tenancy and then not appear at the scheduled hearing to present their evidence to the Arbitrator, without seeking a review of that decision only to issue another Notice to End Tenancy for the same reason and then expect the case to be heard at a later date, would be the equivalent to obtaining an adjournment without consent or basis which I would consider to be an abuse of process. While I appreciate this may not have been the landlord's intention, I also recognize that the tenant had provided a written response and evidence for the February 16, 2018 hearing as well. I am of the view that <u>both</u> parties expected a final decision with respect

to the issue of repeated late payment of rent by way of the February 16, 2018 hearing. Therefore, I am of the view the landlord is attempting to re-litigate the issue of repeated late payment of rent concerning the same alleged late payments in a manner that is an abuse of process.

Also of consideration and as seen in the *Khan* decision, where a tenant's offending behaviour persisted and continued after the issuance of prior Notices to end Tenancy, the landlord was not estopped by the doctrine of *res judicata*. Accordingly, I am of the position that unless the tenant paid rent late after issuance of the first Notice, the landlord is estopped from issuing another Notice to End Tenancy for repeated late payment of rent. **Since there have been no late payment of rent after the issuance of the first Notice I set aside the second Notice and I order that the tenancy continues at this time.**

In recognition that the tenant acknowledged that he paid rent late on at least three occasions in 2017, **I issue the following ORDER to the tenant pursuant to the authority afforded me under section 62(3) of the Act:**

> **The tenant is ordered to ensure the full amount of rent is paid to the landlord on or before the first day of every month from this date forward.**

I further authorize that the landlord may issue another *1 Month Notice to End Tenancy for Cause* to the tenant if the tenant is late paying rent again and the reasons for ending the tenancy may include: "tenant is repeatedly late paying rent" and/or "failure to comply with an order of the Director" both of which are reasons for ending a tenancy under section 47 of the Act.

Also for parties' consideration is that during the hearing the landlord's agent described how the landlord uses the date stamp on the bank deposit slip to determine when rent is paid. Rent is considered paid on the date payment is given to the landlord, not the date the landlord takes the payment taken to the bank. A tenant has until the end of day on the day rent is due to present payment to the landlord; however, the tenant would be well served to consider the landlord's availability to receive the payment and the manner in which payment is given so as to allow sufficient time for the landlord to receive the payment. Post-dated cheques and pre-authorized payments/debits (if the landlord has such a system in place) are well recognized methods of ensuring the landlord has the tenant's rent payment when due.

The tenant did not request recovery of the filing fee paid for this Application for Dispute Resolution and I make no such award.

Conclusion

I have set aside the Notice to End tenancy dated February 23, 2018 and the tenancy continues at this time.

I have ordered the tenant to ensure future rent payments are made in full and on time from hereon in and if the tenant fails to comply with this order the landlord is authorized to issue another *1 Month Notice to End Tenancy for Cause* to the tenant for repeated late payment of rent and/or failure to comply with an order of the Director.

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: May 23, 2018

Residential Tenancy Branch