Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding DEVON PROPERTIES
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes:

MNDCT, FF

Introduction:

This hearing was convened in response to an Application for Dispute Resolution filed by the Tenants in which the Tenants applied for a monetary Order for money owed or compensation for damage or loss and to recover the fee for filing this Application for Dispute Resolution.

The Tenant stated that on July 20, 2018 the Application for Dispute Resolution, the Notice of Hearing, and 35 pages of evidence the Tenants submitted to the Residential Tenancy Branch on July 14, 2018 were delivered to the Landlord's business address. Legal Counsel acknowledged receipt of these documents and the evidence was accepted as evidence for these proceedings.

On November 02, 2018 the Tenants submitted 50 electronic files to the Residential Tenancy Branch. The Tenant stated that this evidence was delivered to the Landlord's business office on November 02, 2018. Legal Counsel for the Landlord acknowledged receiving this evidence, but was unable to open some of the video evidence. All of the evidence the Landlord was able to access was accepted as evidence for these proceedings. Had I determined that these matters were proceeding, I would have considered providing the Tenants with the opportunity to serve the video evidence to the Landlord in another format.

On November 06, 2018 the Landlord submitted 191 pages of evidence to the Residential Tenancy Branch. Legal Counsel for the Landlord stated that this evidence was served to the Tenants, via registered mail, on November 07, 2018. The Tenant acknowledged receiving this evidence and it was accepted as evidence for these proceedings.

The parties were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. The parties were advised of their legal obligation to speak the truth during these proceedings.

Preliminary Matter

At the outset of the hearing Legal Counsel for the Landlord stated that the Respondent has been incorrectly named on the Application for Dispute Resolution. With the consent of both parties the Application for Dispute Resolution has been amended to reflect the correct name of the Landlord, as provided by Legal Counsel during these proceedings.

Issue(s) to be Decided:

Am I barred from considering this matter on the principle of res judicata?
If not, are the Tenants entitled to compensation relating to renovations in the residential complex?

Background and Evidence:

The Landlord and the Tenants agree that this tenancy began on August 01, 2016. The Tenants contend it ended on May 31, 2018 and the Landlord contends it ended on July 31, 2018.

The Landlord submits that the Tenants are attempting to re-litigate the same claim that they have already brought forward, or should have brought forward, in their last two arbitrations. The Landlord submits that the matters today should be dismissed on the basis of res judicata, without leave to reapply.

The Landlord submitted a copy of a decision made by a Residential Tenancy Branch Arbitrator, dated December 02, 2016, which involves the same parties. The file number for this decision appears on the first page of this decision.

In the decision of December 02, 2016 the Arbitrator considered a claim for compensation because:

- a dishwasher, window coverings, closet rods, a floor transition, and balcony railings had not been installed at the start of the tenancy;
- tile was not sealed and grouted at the start of the tenancy;
- kitchen drawers were poorly installed at the start of the tenancy;

- the balcony was unusable;
- the Tenants were subject to ongoing construction noise; and
- carpets in the hallways had been removed which contributed to noise in the residential complex.

In the decision of December 02, 2016 the Arbitrator:

- awarded the Tenants $150.00 in compensation some of the deficiencies with the rental unit
- awarded the Tenants monthly compensation for $282.00 for the period between August 01, 2016 and December 31, 2016 because the Tenants were unable to use the balcony;
- authorized the Tenants to reduce their monthly rent by $282.00 until the balcony renovation was complete; and
- dismissed the claim for compensation on the basis of construction noise because she concluded that the Tenants had been advised of the planned construction prior to the start of the tenancy.

The Landlord submitted a copy of a decision made by a different Residential Tenancy Branch Arbitrator, dated June 14, 2017, which involves the same parties. The file number for this decision appears on the first page of this decision.

In the decision of June 14, 2017 the Arbitrator considered a claim for compensation because:

- carpets in the hallways had been removed which contributed to noise in the residential complex;
- the pool has not been functional since November of 2017; and
- common areas have not been properly cleaned.

In the decision of June 14, 2017 the Arbitrator:

- awarded the Tenants monthly compensation of $30.00 for being unable to use the pool for the period between December 01, 2016 and June 30, 2017;
- awarded the Tenants monthly compensation of $120.00 for lack of carpets in the hallways and lack of regular cleaning in common areas for the period between December 01, 2016 and June 30, 2017;
- authorized the Tenants to reduce their monthly rent by $30.00 until the pool is functional; and
- authorized the Tenants to reduce their monthly rent by $120.00 until the carpets were installed in hallways and regular cleaning of common areas has commenced.

The Landlord submits that the Tenants are barred, on the basis of res judicata, from seeking compensation for any issues that were considered in the previous two hearings or that should have been raised at the time of the previous two hearings. The Landlord submits that the issues in dispute in the current Application for Dispute Resolution are directly related to a construction project that gave rise to the issues in dispute at the previous two proceedings; that a Residential Tenancy Branch Arbitrator made a final and binding decision on those matters; and that any seemingly "new" claims should have been raised at the first two proceedings.

In the Landlord's written submission the Landlord cited several cases to support the submission that this matter should be dismissed on the basis of res judicata. Legal Counsel for the Landlord stated that the written submission accurately reflects the Landlord's position in regards to res judicata. The Tenant stated that he has read the Landlord's written submission. The parties were advised that I would consider the Landlord's written submission and that it was not necessary for Legal Counsel to articulate that submission at these proceedings.

When the Tenant was asked to explain what issues are being raised at this hearing which were not, or could not have been, raised at the previous two hearings he stated:

- lack of cleanliness in common areas;
- dirty windows;
- windows do not open properly;
- lack of security because construction workers were leaving the building insecure;
- concerns about hazardous materials;
- dust and debris from construction;
- leaky windows;
- disruption arising from incompetent renovations;
- construction noise;
- inability to open windows for ventilation due to construction;
- loss of privacy due to construction workers who could look into their rental unit;
- loss of elevator access; and
- periodic plumbing/water restrictions due to construction.

In response to the issue of res judicata the Tenant stated that:

- his previous failure to claim compensation for loss of quiet enjoyment was a "good faith omission" and he would have claimed compensation for loss of quiet enjoyment at the previous hearings if he understood he was able to do so;
- at the time of the first hearing the construction had just started and he did not expect it to last for as long as it did;

- the two previous decisions could not have anticipated the full magnitude of the loss of quiet enjoyment the Tenants experienced;
- he did not claim compensation for loss of quiet enjoyment at the second hearing because he had been told by building management that he has waived his right to quiet enjoyment when he moved into the rental unit;
- he has since been told by an employee of the Residential Tenancy Branch that he cannot waive his right to quiet enjoyment;
- Section 5 of the *Residential Tenancy Act (Act)* stipulates that a party cannot "contract out" of the *Act*;
- the Tenant submitted a tenancy application and signed Schedule A, which listed some non-specific renovations that were planned and does not disclose that jackhammering would occur on balconies;
- the Resident Manager told him balcony railings would be replaced but he did not understand that would involve jackhammering;
- Schedule A does not specify the full extent of the construction that occurred;
- he did not expect that jackhammering would continue for 36 months;
- the current claim for compensation is for the unreasonable duration of the renovations, which could not have been expected when the first Application for Dispute Resolution was filed;
- the Arbitrator at the first hearing erred if she concluded that the Tenants expected that construction noise would continue for the entire 36 months;
- he has the right to reapply if conditions change; and
- even if I were to conclude that some issues had been addressed I should allow claims that have not been addressed to proceed.

At the hearing Legal Counsel for the Lawyer stated that:

- all of these issues the Tenant mentioned at this hearing could have been raised at the first two hearings, including loss of quiet enjoyment arising from construction noise and cleanliness;
- many of the issues raised at these proceedings relate to issues that occurred in 2016 and 2017;
- anything that was not raised at the first two hearings could have been raised at those proceedings, as they occurred during the same time period;
- the Tenants do not have the right to raise those issues at a new proceeding simply because they did not consider raising them at the first hearings;
- Schedule A specifically mentions the need to repair balconies;
- Schedule A declares that renovations will take between 24 and 36 months;

- the Arbitrator at the first hearing concluded that the Tenants had been warned of the renovations prior to the start of the tenancy;
- she suspects that the Arbitrators in both of the previous proceedings took note of Schedule A which declared that the renovations will take between 24 and 36 months;
- the Arbitrator at the second hearing granted the Tenants on-going compensation until cleaning of common areas commenced; and
- the Tenants have failed to produce new evidence and circumstances.

Analysis

Res judicata is legal principle that bars a claim from being considered if a final and binding decision regarding the merits of that claim has been previously made by a person of competent jurisdiction.

At paragraph 18 Justice Pitt found, in *CPU Options Inc. v. Milton* [2006] that there is a three part test to determine if an action should be stayed on the basis of res judicata. The three parts of that test are:

1. The prior judicial decision was a final decision pronounced by a court of competent jurisdiction over the parties and the subject matter;
2. The decision was, or involved, a determination of the same issues or cause of action as that sought to be advanced in the present litigation; and
3. The parties to the prior judicial proceeding or their privies are the same persons as the parties to the present action or their privies.

I find that the Arbitrators who rendered the December 02, 2016 and June 14, 2017 decisions were acting on authority delegated to them by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Act*. As the decisions the Arbitrators rendered were final and binding and the Director of the Residential Tenancy Branch has authority over tenancy agreements between landlords and tenants, I find that step one of the aforementioned test has been satisfied.

I find that the parties involved in these proceedings were also involved in the decisions that were rendered on December 02, 2016 and June 14, 2017. I therefore find that step three of the aforementioned test has been satisfied.

The remaining issue to be determined is whether the previous two decisions related to the same issues in this Application for Dispute Resolution.

This matter has been somewhat complicated by the fact the Tenants have submitted a written submission that is designed to address the collective concerns of many of the occupants of the residential complex. Regardless, I will address each of the items raised in the Tenants' written submission.

In the Tenants' written submission the Tenants are claiming compensation for the period from December 01, 2015 to present because the Landlord failed to keep common areas reasonably clean.

I find that a final and binding judgement regarding the Tenants' claim for compensation for inadequate cleaning in common areas was made on June 14, 2017 when a Residential Tenancy Branch Arbitrator granted the Tenants monthly compensation of $120.00 for lack of carpets in the hallways and lack of regular cleaning in common areas for the period between December 01, 2016 and June 30, 2017 and she further authorized the Tenants to reduce their monthly rent by $120.00 until the carpets were installed in hallways and regular cleaning of common areas has commenced. I therefore find that the Tenants are barred from making a second claim in regards to cleaning of common areas, as the principle of res judicata applies.

In the Tenants' written submission the Tenants are claiming compensation for the period from December 01, 2015 to present for failing to keep windows clean and paper products in common bathrooms. In the written submission the Tenants are also claiming compensation for the period between April 01, 2015 and December 15, 2017 for failing to clean exterior windows. As these matters are issues that are largely related to cleaning common areas from a similar time period, I find that they should have been raised in conjunction with the initial claim for cleaning common areas and cannot now be reconsidered.

In concluding that all concerns regarding cleaning should have been considered at the previous proceedings I was guided by Mr. Justice Hall of the Supreme Court of British Columbia, in the case Leonard Alfred Gamache and Vey Gamache v. Mark Megyesi and Century 21 Bob Sutton Realty Ltd., Prince George Registry, Docket No. 28394 dated November 1996, where he quoted from the judgement of Henderson v. Henderson (1843) at paragraph 15:

> *…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 for 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 circumstances, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgement, 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.

In the Tenants' written submission the Tenants are claiming compensation for the period from January 01, 2016 to present for interior and exterior construction noise, which includes noise from sledgehammers, grinding, sanding, swearing, and music.

I find that a final and binding judgement regarding the Tenants' claim for compensation for construction noise was made on December 02, 2016 when a Residential Tenancy Branch Arbitrator dismissed the claim because the Tenants had been advised of the planned construction prior to the start of the tenancy. I therefore find that the Tenants are barred from making a second claim in regards to construction noises, as the principle of res judicata applies.

In the Tenants' written submission the Tenants are claiming compensation for the period from December 01, 2015 to present because they were exposed to dust inside their rental unit as a result of improper cleaning and construction. I find this claim to be remarkably similar to the claim the Tenants made in their first Application for Dispute Resolution, in which they applied for compensation for "dust and grit". I find that a final and binding judgement regarding the Tenants' claim for compensation for construction related dirt was made on December 02, 2016 when a Residential Tenancy Branch Arbitrator dismissed the claim for compensation related to the construction. I therefore find that the Tenants are barred from making a second claim in regards to construction dirt, as the principle of res judicata applies.

In the Tenants' written submission the Tenants are claiming compensation for the period between June 01, 2016 to August 31, 2017 because they needed to keep their blinds closed to prevent construction workers from looking inside their home. I find this claim to be remarkably similar to the claim the Tenants made in their first Application for Dispute Resolution, in which they applied for compensation for "loss of privacy". I find that a final and binding judgement regarding the Tenants' claim for loss of privacy related to the construction was made on December 02, 2016 when a Residential

Tenancy Branch Arbitrator dismissed the claim for compensation related to the construction. I therefore find that the Tenants are barred from making a second claim in regards to loss of privacy related to the construction, as the principle of res judicata applies.

At the hearing the Tenant testified that they are seeking compensation, in part, because of concerns about hazardous materials. I find this claim to be remarkably similar to the claim they made in the second Application for Dispute Resolution in which the Tenants declare there was a work stoppage because of improper management of asbestos removal. As this claim has already been brought before the Residential Tenancy Branch, the Tenants are barred from bringing that matter forward a second time.

In the Tenants' written submission the Tenants are claiming compensation for the period between June 01, 2016 to August 31, 2017 because the construction prevents them from opening their windows, which limits their access to fresh air. In the Tenants' written submission the Tenants are claiming compensation for the period from December 01, 2015 to present because the Landlord failed to ensure the building security was maintained during construction. In the Tenants' written submission the Tenants are claiming compensation for the period from April 01, 2016 to present because their ability to use the elevator was restricted by construction workers who were using them to transport workers and supplies. At the hearing the Tenant stated that they are claiming compensation because of periodic plumbing/water restrictions as a result of the construction. I find that all four of these matters are issues that are directly related to construction. In accordance with the previously discussed guidance provided by Mr. Justice Hall of the Supreme Court of British Columbia, I find that these three issues should have been raised in conjunction with the initial claim for compensation for construction and cannot now be reconsidered.

Although the Tenants are claiming compensation for construction noise that continued after the decision of December 02, 2016, I find that they are barred from claiming further compensation. I find the Tenants are barred from claiming further compensation for construction noise because their initial claim included a claim for a rent reduction as a result of the noise, which clearly indicates they are claiming compensation for future disturbances.

It appears that the Arbitrator's decision to dismiss the claim for compensation related to construction was largely related to an addendum one of the Tenants signed prior to entering into the tenancy agreement in which the Landlord informed the Tenants there would be construction noise for the next 24 to 36 months as a result of a fairly

significant renovation. In considering a claim for on-going construction I find that the Arbitrator would have been aware, on the basis of that addendum, that the Tenants were informed that the construction noise was expected to continue for an extended period of time.

In the Tenants' written submission the Tenants are claiming compensation for the period from August 01, 2016 to present because the windows are badly corroded and damaged, and their kitchen window does not work properly. Even if the Tenants did not raise this deficiency in a previous proceeding, I find the deficiency was present when they filed their first Application for Dispute Resolution and that they should have included this claim in one of the two previous Applications.

In adjudicating this matter I was guided by the decision of Justice Hardinge L.J.S.C. in Bank of BC v. Singh B.C.L.R. who wrote:

> *…While people must not be denied their day in court, litigation must come to an end. Thus litigants must being 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.*

During this adjudication I have considered the Tenants' submission that his previous failure to claim compensation for loss of quiet enjoyment was a "good faith omission" and he would have claimed compensation for loss of quiet enjoyment at the previous hearings if he understood he was able to do so.

I find that the Tenants submission that they failed to claim compensation for loss of quiet enjoyment in either of their previous applications is incorrect. I find that when the Tenants submitted their Monetary Order Work Sheet for their first Application for Dispute Resolution, they applied for "loss of enjoyment due to noise, dust, lack of privacy". Although the Tenants did not use the precise term "loss of quiet enjoyment", I find that it was abundantly clear that they were seeking compensation for loss of quiet enjoyment. I also find it abundantly clear that the Arbitrator considered a claim for loss of quiet enjoyment in her decision, as she makes reference to the Residential Tenancy Branch policy guideline regarding quiet enjoyment.

While I accept that the Tenants did not specifically apply for "loss of quiet enjoyment" in their second Application for Dispute Resolution and the Arbitrator did not specifically use that term in her decision, I am satisfied that her decision would not have been significantly altered if she did consider that matter. The Arbitrator granted the Tenants compensation "extra loud hallways and the lack of recent regular cleaning of the

common areas". I find it reasonable to conclude that the amount of compensation awarded would have been the same, regardless of whether the Arbitrator granted that compensation on the basis of loss of quiet enjoyment or because the Landlord failed to provide a service or facility, as the outcome was the same.

During this adjudication I have considered the Tenants' submission that the Tenants cannot waive their right to quiet enjoyment and that section 5 of the *Act* prohibits landlords and tenants from "contracting out" of the *Act*. I find that this submission is correct; however this is an issue that should have been raised at the time of the first hearing. In the event the Tenants now believe the first Arbitrator incorrectly concluded that the Tenants had waived their right to the quiet enjoyment of the rental unit by signing Schedule A, the correct response would be to file an Application for Review or to seek a judicial review in regards to that first decision. I do not have authority to now reconsider that matter, as a final and binding decision has been made in regards to the matter.

During this adjudication I have considered the Tenants' submission that the current claim for compensation is for the unreasonable duration of the renovations, which could not have been expected when the first Application for Dispute Resolution was filed; that the Tenants did not expect the construction to last as long as it did; the Tenants did not expect the jackhammering to continue for 36 months; and that the Arbitrator at the first hearing erred if she concluded that the Tenants expected that construction noise would continue for the entire 36 months.

As Schedule A was before the Arbitrator at the original hearing and it clearly specifies that the "work is expected to take 24 to 36 months to complete", I find it likely that the original Arbitrator was aware of the expected duration of the renovations. In the event the Tenants feel that the Arbitrator made an error when she concluded that the Tenants expected the construction noise to continue for the entire 36 months**,** the correct response would be to file an Application for Review or to seek a judicial review in regards to that first decision. I do not have authority to now reconsider that matter, as a final and binding decision has been made in regards to the matter.

During this adjudication I have considered the Tenants' submission that Schedule A does not specify the full extent of the construction that occurred and that it did not specify that jackhammering would occur. Schedule A identifies the nature of the work to be completed at the complex and specifies that there will be noise, dust, vibration, and inconvenience to access and egress. These are precisely the disturbances for which the Tenants are now seeking compensation. Again, this is an issue that should have

been raised at the first hearing and in the event the Tenants believe the first Arbitrator reached an incorrect decision in regards to Schedule A, the correct response would have been to file an Application for Review or to seek a judicial review. I do not have authority to now reconsider whether Schedule A correctly disclosed the scope of the renovations, as a final and binding decision has been made in regards to compensation for construction disturbances.

During this adjudication I have considered the Tenants' submission that the two previous decisions could not have anticipated the full magnitude of the loss of quiet enjoyment the Tenants experienced. In both of the previous files the Tenants applied for a rent reduction and in both cases the Tenants were awarded on on-going rent reduction until such time as certain deficiencies were corrected. I find it reasonable to conclude that the first Arbitrator would have awarded compensation for on-going construction noise if she had believed compensation for construction was warranted. Providing compensation in the form of on-going rent reductions is precisely how compensation should be awarded when the duration of a loss cannot be determined.

I find that the Tenants have failed to identify any issues that were not, or could not have been, considered at the first two hearings, with reasonable diligence. I further find that the Tenants has not made any submissions that would cause me to conclude that conditions in this residential complex changed significantly or that special circumstances apply that would allow them to open the same subjects of litigation that have been previously considered. I therefore decline to hear the Tenants' claims made in this Application for Dispute Resolution, on the basis of res judicata.

Conclusion:

The Application for Dispute Resolution is dismissed without leave to reapply, as I have declined to hear the Tenants' claims on the basis of res judicata.

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

Dated: November 28, 2018

Residential Tenancy Branch