Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDCT

Introduction

This hearing convened as a result of a Tenant's Application for Dispute Resolution filed on May 31, 2018 wherein the Tenant sought monetary compensation from the Landlord in the amount of $35,000.00 and return of his security deposit.

The hearing was scheduled for 1:30 p.m. on November 6, 2018. The Tenant called into the hearing on his own behalf. The Landlords both called into the hearing and were also assisted by legal counsel, M.J. Both parties were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

Preliminary Matter—Timing of Tenant's Application

Initially counsel for the Landlord submitted that the Landlords rely on section 60 of the *Residential Tenancy* alleging that the Tenant applied for dispute resolution outside the strict two year limitation imposed by that section. Counsel for the Landlord confirmed that she believe the Tenant had applied on June 1, 2018.

The evidence before me confirms that this tenancy agreement ended on May 31, 2016. Branch records indicate that the Tenant applied for Dispute Resolution on May 31, 2018 such that he applied within the two year limitation imposed by section 60.

Preliminary Matter—Evidence filed by Tenant

Branch records indicate that the Tenant filed 30 pages of evidence on October 24, 2018, including an affidavit sworn by the Tenant on October 24, 2018 and related exhibits.

Hearings before the Residential Tenancy Branch are governed by the *Residential Tenancy Branch Rules of Procedure. Rules 2.5, 3.13, 3.14* and *3.17* address an applicant's requirement to submit their evidence and read as follows:

2.5 Documents that must be submitted with an Application for Dispute Resolution

To the extent possible, the applicant should submit the following documents at the same time as the application is submitted:

- a detailed calculation of any monetary claim being made;
- a copy of the Notice to End Tenancy, if the applicant seeks an order of possession or to cancel a Notice to End Tenancy; and
- copies of all other documentary and digital evidence to be relied on in the proceeding, subject to Rule 3.17 [*Consideration of new and relevant evidence*].

When submitting applications using the Online Application for Dispute Resolution, the applicant must upload the required documents with the application or submit them to the Residential Tenancy Branch directly or through a Service BC Office within three days of submitting the Online Application for Dispute Resolution.

3.13 Applicant evidence provided in single package

Where possible, copies of all of the applicant's available evidence should be submitted to the Residential Tenancy Branch directly or through a Service BC Office and served on the other party in a single complete package.

An applicant submitting any subsequent evidence must be prepared to explain to the arbitrator why the evidence was not submitted with the Application for Dispute Resolution in accordance with Rule 2.5 [*Documents that must be submitted with an Application for Dispute Resolution*].

3.14 Evidence not submitted at the time of Application for Dispute Resolution

Documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the Residential Tenancy Branch directly or through a Service BC Office not less than 14 days before the hearing.

In the event that a piece of evidence is not available when the applicant submits and serves their evidence, the arbitrator will apply Rule 3.17.

3.17 Consideration of new and relevant evidence

Evidence not provided to the other party and the Residential Tenancy Branch directly or through a Service BC Office in accordance with the Act or Rules 2.5 [*Documents that must be submitted with an Application for Dispute* Resolution], 3.1, 3.2, 3.10.5, 3.14 and 3.15 may or may not be considered depending on whether the party can show to the arbitrator that it is new and relevant evidence and that it was not available at the time that their application was made or when they served and submitted their evidence.

The arbitrator has the discretion to determine whether to accept documentary or digital evidence that does not meet the criteria established above provided that the acceptance

> of late evidence does not unreasonably prejudice one party or result in a breach of the principles of natural justice.
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> Both parties must have the opportunity to be heard on the question of accepting late evidence.
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> If the arbitrator decides to accept the evidence, the other party will be given an opportunity to review the evidence. The arbitrator must apply Rule 7.8 [*Adjournment after the dispute resolution hearing begins*] and Rule 7.9 [*Criteria for granting an adjournment*].

The Tenant applied for dispute resolution on May 31, 2018. The dispute relates to a tenancy which ended two years prior.

As I communicated to the parties during the hearing, I decline to consider the Tenant's Affidavit of October 24, 2018 and related exhibits as I am not satisfied this evidence is *new* as contemplated by the *Rules,* nor am I satisfied that it was not available at the time that the Tenant's application was made or when he served and submitted their evidence.

The parties agreed that all evidence that each party provided had been exchanged. No other issues with respect to service or delivery of documents or evidence were raised.

I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Matter—Tenant's Conduct during the Hearing

The Tenant was cautioned numerous times about his conduct during the hearing. Several times he was rude and hostile, combative and argumentative, breathing heavily into the phone, laughing while the Landlord was testifying and making loud noises while fixing his bike (which he admitted to doing).

The Tenant also stated that the entire Residential Tenancy Branch were all "not very bright". The Tenant also repeatedly asked for information relating to my qualifications to be making the Decision relating to his issue. When I informed him I had delegated authority under the *Act* he insisted that I tell him what university I went to and whether I was a lawyer.

Additionally, the Tenant was informed that, pursuant to *Rule 6.11,* the hearing was not recorded and that he was not permitted to make any such recording.

Rule 6.10 deals with disruptions during the hearing and reads as follows:

> **6.10 Interruptions and inappropriate behaviour at the dispute resolution hearing**
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> Disrupting the hearing will not be permitted. The arbitrator may give directions to any person in attendance at a hearing who is rude or hostile or acts inappropriately. A person who does not comply with the arbitrator's direction may be excluded from the dispute resolution hearing and the arbitrator may proceed in the absence of that excluded party.

Notwithstanding his disruptive behaviour, at no time did I mute the Tenant's line, and as such he was able to fully participate throughout the hearing. In fact, at the conclusion of his testimony I offered the Tenant numerous opportunities to provide further submissions or testimony with respect to his claims to which he responded he did not have any further submissions.

Preliminary Matter—Prior Hearing and Res Judicata

The Tenant has applied to the Residential Tenancy Branch for Dispute Resolution on four separate occasions with respect to this tenancy; I have included the file numbers for all five previous files on the unpublished cover page of this my Decision.

In the Tenant's original Application he sought to cancel a notice to end tenancy, as well as monetary compensation in the amount of $10,625.00 representing compensation for 12 month's rent ($10,625) for "violation of his rights by the landlord plus moving expenses". This Application was heard on May 4, 2016. This hearing also dealt with a cross application by the Landlord for an Order of Possession and monetary compensation for unpaid rent. In that Decision, and in reference to the Tenant's monetary claim, the Arbitrator found as follows:

> *I find the tenant complained numerous times about noise and actions of the tenant in the upper unit. However, I find insufficient evidence that the landlord neglected to address his concerns or in any way, violated the Act or the tenancy agreement in their actions or omissions. I find the landlord sent a warning letter, then made an effort to investigate the noise complaint by listening in the tenant's unit (which apparently was not possible). The tenant said the upper tenant deliberately quieted if he knew someone was listening. When the tenant invited me to hear the noise which he said was happening in the conference call, I was unable to hear any noise or stomping on the telephone. I find the landlord investigated the complaint about feces in the laundry and the urine smell but they were unable to substantiate that these items originated from another unit. Although the tenant complained about actions of the landlord laughing about him or calling him names, I find insufficient evidence to support his complaints. In fact, the weight of the evidence from letters from other tenants and the landlord is that this tenant is causing unreasonable disturbance and noise to other tenants. I find if the tenant suffered loss of peaceful enjoyment, it is not the result of the landlord's non compliance so no compensation is due pursuant to section 67. I dismiss the Application of the tenant in its entirety as there is insufficient evidence to support his allegations.*

In each of the other two applications filed by the Tenant, the Tenant sought the sum of $35,000.00 from the Landlord; the second application was cancelled by the Tenant on November 10, 2017; similarly the third application was cancelled by the Tenant on May 11, 2018.

In the hearing before me the Tenant confirmed that his claim related to his allegations that the Landlord did not protect his right to quiet enjoyment as a result of his neighbour's disruptive behaviour as well as what he characterized as an "unlawful eviction. Again he claimed the sum of $35,000.00 for these issues.

The Tenant's claim for monetary compensation as a result of his neighbour's alleged disruptive behaviour, and his claim that the Landlord failed to protect his right to quiet enjoyment was dismissed by the aforementioned May 4, 2016 Decision of Arbitrator Bruce. In that Decision, Arbitrator Bruce also found the notice to end tenancy to be valid, such that she found the eviction to be legal.

Arbitrator Bruce's Decision cannot be changed by submitting a subsequent application to the Residential Tenancy Branch. As noted during the hearing, I am precluded, by operation of the legal principle, *Res Judicata,* from reconsidering Arbitrator Bruce's final and binding Decision on this matter.

Res Judicata ("the matter is judged") is an equitable principle that, when its criteria are met, precludes re-litigation of a matter. There are a number of preconditions that must be met before this principle will operate:

1. the same question has been decided in earlier proceedings;

2. the earlier judicial decision was final; and

3. the parties to that decision (or their privies) are the same in both the proceedings.

All three of the above preconditions apply in the case before me. The question of the validity of the notice, as well as the Tenant's right to monetary compensation for breach of his right to quiet enjoyment was decided by Arbitrator Bruce and her decision was final. Further, the claim before me relates to the same parties as in the matter before Arbitrator Bruce.

Discretion exists to not apply *Res Judicata,* even when the preconditions are met. The Supreme Court of Canada in the 2001 Decision in *Danyluk v. Ainsworth Technologies Inc.* and later in the 2013 decision of *Penner v. Niagara (Regional Police Services Board)* explained that "the underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case." Further, this discretion exists to ensure that "a judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice."

The Court then identified seven factors which could be considered in determining whether it would be fair and just in applying *Res Judicata:*

1. the wording of the statute;
2. the purpose of the legislation;
3. the availability of an appeal;
4. safeguards within the administrative process;
5. the expertise of the administrative decision maker;
6. the circumstances giving rise to the prior decision;
7. any potential injustice that might result from the application or non-application of the principle (which the Court described as "a final and most important factor").

A qualitative assessment of these factors must be carried out as it is possible that the significance of one factor could outweigh a collection of other factors. The question to be decided is "would applying the principle of *Res Judicata* be unfair or unjust?"

I find the third factor, the availability of an appeal, to be the most significant in the case before me.

The Tenant applied for Review Consideration of Arbitrator Bruce's May 4, 2016 Decision. In the Review Consideration Decision the Tenant was informed as follows:

> *"The tenant submitted an abundance of pages of narrative and other documentation consisting largely of events and interactions with the landlord instigated by the tenant* ***after*** *the original hearing date in response to the hearing event. The tenant also provides copies of e-mails between the parties dated in February 2016. Inclusive in the tenant's submissions is 3 pages of narrative which asserts the Arbitrator did not call the witnesses they provided and that the Arbitrator ignored relevant evidence. In addition, the tenant submits a categorical analysis of the Arbitrator's Decision in which they categorically provide their version of the facts and questioning the Arbitrator version of facts and their findings. The tenant also asserts the landlord committed fraud by lying during the hearing: by providing false information and making statements the landlord knew were not true.*
>
> *All the information / evidence dated February 2016 to which the tenant refers to in their application for Review may be relevant to this matter; however, it was clearly available at the time of the original hearing and is not new. All information arising from the events instigated by the tenant after the hearing is new; however, they amount to a re-argument of the facts which were before the Arbitrator and the relevance of those facts has already been determined.*
>
> *It must be emphasised that a Review is not an opportunity to re-argue the case. Under the prescribed ground for Review "new" evidence includes evidence that is relevant to the hearing proceedings, and, that has come into existence since the arbitration hearing which would have been relevant to the hearing proceeding . However, "new" evidence does not include evidence that could have been obtained, or advanced, or submitted by the parties for the hearing before the hearing took place. The tenant has not alleged any*

new and material facts. The facts they related in their submissions on Review were all known to the tenant at the time of the original hearing and they had an opportunity to respond to all the evidence during the hearing. The tenants' Review application on this ground is an attempt to reargue matters that were before the Arbitrator at the original hearing.

It must also be known that in regard to the claim of fraud, it is not enough to allege that the opposing party made false statements in the hearing, which were met by a differing version of events by the tenant, and the whole evidence adjudicated upon by the Arbitrator. I find that the tenant provided countering evidence to the landlord, and the Arbitrator preferred the evidence of the landlord. Therefore, I do not accept the landlord's claim that the Arbitrator's Decision was obtained by fraud.

The tenant's Review application also asserts they may not have been afforded a fair hearing by the Arbitrator. The tenant argues that the Arbitrator failed to consider certain evidence and that they would have arrived at a different outcome in their Decision had they considered it. While the claim the applicant was denied a fair hearing may provide grounds for an application to the Supreme Court of B.C. for Judicial Review, it does not constitute a valid ground for Review pursuant to my statutory authority under section 79 of the Residential Tenancy Act.

I find the tenant has not satisfied the burden of proving that they have new and relevant evidence not available at the time of the original hearing or that the Arbitrator's Decision was obtained by fraud, and as a result the application on both grounds must fail.

Documents submitted by the Landlord confirm that on June 23, 2017 the Tenant filed in the B.C. Supreme Court for Judicial Review of the May 4, 2016 Decision. By Decision dated November 7, 2017, the Honourable Mr. Justice Kent dismissed the Tenant's Application for Judicial Review. Mr. Justice Kent found that there was sufficient evidence before Arbitrator Bruce to support the findings she made. He further found the same for the reconsideration process before Arbitrator Lanon.

Should the Tenant disagree with the Honourable Mr. Justice Kent, his remedy is to seek an appeal to the B.C. Court of Appeal; it is not to file another Application with the Residential Tenancy Branch seeking the same relief.

At the outset of his testimony and submisisons, theTenant alleged that he believed the issues in his tenancy arose due to his race.

As an Arbitrator with the Residential Tenancy Branch, I have delegated authority. The power and authority of the Residential Tenancy Branch is derived from the *Residential Tenancy Act*. The dispute resolution process does not create a court and as such, Arbitrators delegated under the *Act,* do not have inherent powers arising under the common law which are possessed by a judge.

As an Arbitrator under the *Residential Tenancy Act,* I do not have jurisdiction to consider matters under the *B.C. Human Rights Code,* as that jurisdiction is delegated to the Human Rights Tribunal.

Documents submitted by the Landlord confirm the Tenant also filed a complaint with the Human Rights Tribunal. By Decision dated May 19, 2017 the Tribunal member dismissed the Tenant's claim and found in part as follows:

> *[72] … the evidence does not support a conclusion that the [Landlords] were aware of the Neighbour's use of the term over the whole span of the noise issues. Absent this knowledge, the Tribunal could not reasonably find that the [Landlords] were in breach of the [Human Rights] Code for failing to interpret issues between [the Tenant] and the [Neighbour] as anything other than an interpersonal dispute between co-tenants living in close proximity…The evidence is only that at some point, likely in February 2016, the [Landlords] were aware that the Neighbour had used the derogatory term in reference to [the Tenant]."*

And continuing at paragraph 76:

> *[76] In any event, I am persuaded that there is no reasonable prospect that [the Tenant] would be able to prove that the [Landlords] failed to take adequate steps to address the noise issue; even assuming it was the Neighbour who made all of the noise and that there was a basis to concluded that the [Landlords] should have understood the conduct was discriminatory throughout the period of the dispute"*

The Tribunal then considered whether the Tenant's eviction was pursued in retaliation for his complaints about the Neighbour.

> *[87]…I have taken great care in reviewing the materials to consider whether it supports the claim that the Respondent's decision to evict [the Tenant] was in retaliation. I note that [the Tenant's] late payments had been ongoing for some time and [the Landlord's] decision to move forward with the eviction did follow closely on the heels on what appears to have been a re-escalation of the situation between [the Tenant] and the Neighbour. Proximity in time can in the right circumstances support an inference of correlation. However, I am persuaded that there is no reasonable prospect that the Tribunal could draw such an inference here."*

In dismissing the Tenant's claim the Tribunal concluded as follows:

> *[89]…It is difficult not to empathize with [the Tenant's] experience. However, the whole of the materials leads me to conclude that there is no reasonable prospect of proving that the [Landlords] breached the Code via discriminating or retaliating against [the Tenant] under ss. 10 or 43."*

Should the Tenant disagree with the Decision of the Tribunal, his remedy is to seek Judicial Review of that Decision in the B.C. Supreme Court; it is not to file another Application before the Residential Tenancy Branch.

Issues to be Decided

1. Is the Tenant entitled to return of his security deposit?

Background Evidence

In the application before me, the Tenant also applied for return of his security deposit.

In the May 4, 2016 Decision Arbitrator Bruce recorded as follows:

> *"The landlord requests that they retain the full security deposit in trust until the tenant vacates and it can be dealt with according to section 38 of the Act."*

While the Tenant was provided an opportunity to give testimony and submissions regarding his Application filed May 31, 2018, the Tenant failed to make any submissions regarding his security deposit save and except to note that he paid the sum of $425.00 on his Application for Dispute Resolution.

The Landlord provided a video of the rental unit confirming the condition of the rental unit as of the end of the tenancy.

Analysis

Security deposits are dealt with pursuant to section 38 of the *Act* which provides as follows:

> **Return of security deposit and pet damage deposit**
>
> **38** (1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of
>
> (a) the date the tenancy ends, and
>
> (b) the date the landlord receives the tenant's forwarding address in writing,
>
> the landlord must do one of the following:
>
> (c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;

(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

(2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24 (1) *[tenant fails to participate in start of tenancy inspection]* or 36 (1) *[tenant fails to participate in end of tenancy inspection]*.

(3) A landlord may retain from a security deposit or a pet damage deposit an amount that

(a) the director has previously ordered the tenant to pay to the landlord, and

(b) at the end of the tenancy remains unpaid.

(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,

(a) at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant, or

(b) after the end of the tenancy, the director orders that the landlord may retain the amount.

(5) The right of a landlord to retain all or part of a security deposit or pet damage deposit under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit or a pet damage deposit has been extinguished under section 24 (2) *[landlord failure to meet start of tenancy condition report requirements]* or 36 (2) *[landlord failure to meet end of tenancy condition report requirements]*.

(6) If a landlord does not comply with subsection (1), the landlord

(a) may not make a claim against the security deposit or any pet damage deposit, and

(b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.

Security deposits are funds held in trust by Landlords for the benefit of tenants. Landlords must deal with security deposits in accordance with the *Residential Tenancy Act,* failing which the funds may be doubled pursuant to section 38(6).

Pursuant to section 38(1) a tenant’s right to return of their deposit is not triggered until the tent provides the landlord with their forwarding address in writing. A tenant’s written request for return of the security deposit ensures that the trust funds are sent to an appropriate address.

Further, a forwarding address allows the landlord to serve the tenant with any application should the landlord wish to pursue authorization to retain the deposit funds.

Section 39 further provides that a landlord may retain the deposit if a tenant fails to provide their forwarding address in writing within a year of the end of the tenancy; for clarity I reproduce that section as follows:

> **39** Despite any other provision of this Act, if a tenant does not give a landlord a forwarding address in writing within one year after the end of the tenancy,
>
> (a) the landlord may keep the security deposit or the pet damage deposit, or both, and
>
> (b) the right of the tenant to the return of the security deposit or pet damage deposit is extinguished.

I am unable, based on the evidence before me, to find that the Tenant provided the Landlord with his forwarding address as required by section 38(1) and 39 of the *Act*.

As the Tenant bears the burden of proving his claim on a balance of probabilities, I am unable to find he has met the burden of proving his entitlement to return of his security deposit. His claim is therefore dismissed.

Conclusion

The Tenant's Application is dismissed in its entirety.

The Tenant's claim for $35,000.00 in compensation relating to alleged disturbances caused by his Neighbour and his allegation that the Landlord failed to take appropriate steps to protect his right to quiet enjoyment was decided by Arbitrator Bruce on May 4, 2016. Similarly, Arbitrator Bruce found that the notice to end tenancy was valid, such that she dismissed the Tenant's claim that his eviction was unlawful. Arbitrator Bruce' Decision was upheld on Review Consideration by Arbitrator Lanon as well as on Judicial Review to the B.C. Supreme Court by the Honourable Mr. Justice Kent. I am precluded by the legal principle of *Res Judicata* from reconsidering these issues. Should the Tenant disagree with the findings of the Honourable Mr. Justice Kent, his remedy is to pursue an appeal in the B.C. Court of Appeal.

The allegations made by the Tenant with respect to racial discrimination are outside my jurisdiction. Evidence confirms the Tenant has pursued this matter in the appropriate venue, the Human Rights Tribunal, where his application was dismissed. Should he disagree with the Tribunal's Decision, his remedy is to seek a Judicial Review of that Decision in the B.C. Supreme Court.

The Tenant's claim for return of his security deposit is dismissed as the Tenant has failed to meet the burden of proving that he provided the Landlord with his forwarding address in writing within one year of the end of the tenancy as required by sections 38(1) and 39 of the *Residential Tenancy Act.*

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 5, 2018

Residential Tenancy Branch