Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: CNL, FF

Introduction:
The Application for Dispute Resolution filed by the Tenant seeks the following:

a. An order to cancel the two month Notice to End Tenancy dated October 16, 2018
b. An order that the landlord comply with the Residential Tenancy Act, Regulations and/or tenancy agreement.
c. An order to recover the cost of the filing fee.

The hearing was commenced on November 26, 2018. There wasn't sufficient time to complete the presentation of all of the evidence and it was reconvened to December 11, 2108. Both of the parties were present on the two days. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Preliminary Issue:
On December 11, 2018 the tenant requested an adjournment on the basis that he was not able to participate in the hearing today because the landlord had engaged in course of conduct to force him to cause him to loss sleep. The tenant failed to present medical evidence to support this position. The landlord opposed this request. I dismissed the tenant's request for an adjournment for the following reasons:

- The tenant failed to provide medical evidence to support his allegation of ill health and inability to participate in the hearing today.
- The hearing was originally set for November 26, 2018 but it was adjourned because of insufficient time to complete the hearing. I determined both parties should have had all of the evidence ready to present as of the date of the earlier hearing.
- I determined that an adjournment would prejudice the timely resolution of this hearing.

I ordered that the hearing proceed. The landlord began presenting his evidence. A short time later the tenant interrupted the hearing because loud thumping music. The

tenant accused the landlord of doing this. The landlord was not at home and was in his solicitor's office. I asked that the landlord phone home to see if anyone was home and request to turn off the music. The landlord phoned home but no one answered. The tenant suggested it might by the landlord's daughter playing the drums. The tenant was asked to move to a different part of the rental unit.

I determined the tenant was ingenuous in his request that the hearing be stopped because of excessive noise. The tenant testified he was putting on head phones. It did not appear there was any problem with outside noise for the remainder of the hearing.

Both parties were given a full opportunity to present evidence and make submissions. It became apparent to me as the hearing progressed that the major issue was whether the principle of res judicata applied. The tenant raised this principle in his application and uploaded a large amount of materials to support his position. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence and submission that they wished to present with regard to the application of the principle of res judicata. This decision is based on that principle. .

I find that the 2 month Notice to End Tenancy was served on the Tenant by posting on October 16, 2018. Further I find that the Application for Dispute Resolution/Notice of Hearing was served on the landlord by mailing, by registered mail to where the landlord resides on October 17, 2018. With respect to each of the applicant's claims I find as follows:

Issues to be Decided:

The issues to be decided are as follows:

a. Whether the tenant is entitled to an order cancelling the two month Notice to End Tenancy dated October 16, 2018?
b. Whether the tenant is entitled to an order that the landlord comply with the Residential Tenancy Act, Regulations and order tenancy agreement?
c. Whether the tenant is entitled to recover the cost of the filing fee?

Background and Evidence:

The tenancy began in December 2012. The tenancy agreement provided that the tenant(s) would pay rent of $1362 per month payable in advance on the first day of each month. The tenant testified there are orders for other arbitrators reducing the rent to $800 per month. The tenant(s) did not pay a security deposit.

There have been a number of other hearings between these parties and a number of hearings are pending.

Grounds for Termination:

The Notice to End Tenancy relies on section 49 of the Residential Tenancy Act. That section provides as follows:

- The rental unit will be occupied by the landlord or the landlord's spouse or a close family member (father, mother, or child) of the landlord or the landlord's spouse

The landlord testified that he has a good faith intention for to take possession of the rental unit for family use including the following:

- He has lived in house for 20 years. His adult daughter has lived there since she was born 18 years ago.
- His daughter works in the neighborhood. She has many friends in the area.
- He and his daughter presently live in the upstairs portion of the rental property. He has a room on the bottom floor which is used for his business.
- He wishes to take back the rental unit on the bottom floor so that his daughter will have a place to live. She presently lives in the upstairs portion.
- The daughter is attending university and cannot afford to move out to another place and pay rent.
- The landlord's mother is 93 years old and lives on Vancouver Island. She can no longer climb stairs. She is unable to visit because of the stairs to gain access to the upper suite. The landlord wishes to regain possession of the rental unit so that he can facilitate visits from his mother.
- He has no intention to re-rent the rental unit.
- He needs the rental unit to be used to accommodate the needs of his business which is located on the bottom floor. He intends to use the additional space for the purpose of a meeting room.
- There have been no problems with the tenancy from the start of the tenancy until May 2018 when he served a 2 month Notice to End Tenancy for landlord use was issued.

A number of applications have been heard by the Residential Tenancy Branch prior to the date of the issuance of the 2 month Notice to End Tenancy on October 16, 2018 including the following:

- On July 5, 2018 an arbitrator cancelled a 2 month Notice to End Tenancy for landlord use on the basis that the landlord failed to prove service of his evidence on the Tenant.
- On August 21, 2018 an arbitrator dismissed the landlord's application for an order for the early end of the tenancy.
- On August 28, 2018 an arbitrator cancelled a one month Notice to End Tenancy dated July 5, 2018 on the basis of insufficient proof.
- On September 14, 2018 an arbitrator cancelled a 2 month Notice to End Tenancy for landlord use that was issued on July 16, 2018.

Whether the principle of Res Judicata applies

The tenant submits the 2 month Notice to End Tenancy dated October 16, 2018 should be cancelled on the basis of the principle of res judicata.

Neither party provided copies of court decisions on res judicata. The tenant submitted a large number of decisions from arbitrators considering this principle. I do not find those decisions helpful as they are not binding on my. However, the decision of the Supreme Court of British Columbia, B.C. Court of Appeal and the Supreme Court of British Columbia is binding on me and I have referred to a number of them in this decision. .

The Law on Res Judicata:

The principle of res judicata provides that a matter which has already been conclusively decided by a court is conclusive between the parties binds the parties. Final judgments prevent any re-examination or re-trial of the same dispute between the same parties. The Supreme Court of British Columbia in Jonke v, Kessler, Vernon Registry, Docket No. 3416 dated January 16, 1991 held that the principle of res judicata applies to residential tenancy arbitration. The policy reasons in favor of the principle are set out in a decision of Hardinge L.J.S.C., in Bank of B.C. v. Singh 17 B.C.L.R. (2d) 256 as follows:

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

The principle of res judicata prevents a party from bringing to litigation not only a matter that was previously heard, but also a matter that should have been heard at that previous arbitration. Mr. Justice Hall of the Supreme Court of British Columbia, in the case Leonard Alfred Gamache and Vey Gamche v. Mark Megyesi and Century 21 Bob Sutton Realty Ltd., Prince George Registry, Docket No. 28394 dated November 15, 1996, quoted with approval the following passage from the judgement of Henderson v. Henderson, (1843), 67 E.R. 313

> "In trying this question I believe I state the rule of the court correctly when I say that, 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 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 cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, 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 Khan v. Shore, 2015 BCSC 830 the court considered the application of the principle of res judicata to residential tenancy application and held as follows:

> [29] The doctrine of res judicata is based on the community's interest in the finality and conclusiveness of judicial decisions and the individual's interest in protection from repeated suits for the same cause. In Cliffs Over Maple Bay (Re), 2011 BCCA 180 (CanLII), the BC Court of Appeal reviewed these principles, stating this at para. 26:
>
> > Appellate courts in Canada have emphasized that the importance of finality and the principle that a party should not be 'twice vexed' … for the same cause, must be balanced against the other "fundamental principle" that courts are reluctant to deprive litigants of the right to have their cases decided on the merits: see Toronto (City) v. Canadian Union of Public

> Employees, Local 79, 2003 SCC 63 (CanLII), at para. 55; Revane v. Homersham, 2006 BCCA 8 (CanLII), at paras. 16-7; Lange at 7-8.

[emphasis added]

[30] Res judicata today comprises both cause of action estoppel and issue estoppel, described in Erschbamer v. Wallster, 2013 BCCA 76 (CanLII) at para. 12:

> 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.

[31] I understand Mr. Prowse's submission to rely on issue estoppel.

[32] Issue estoppel requires three things: (1) the same question has been decided; (2) the prior judicial decision was final; and (3) the parties to the prior judicial decision or their privies are the same persons as the parties to the current proceedings or their privies. (See Erschbamer at para. 13.)

[33] In Danyluk v. Ainsworth Technologies Inc., 2001 SCC 44 (CanLII), the Supreme Court of Canada cautioned about a mechanical application of the rules governing issue estoppel and noted that the court has a discretion as to whether or not it should be applied. Mr. Justice Binnie (writing the judgment for the court) stated this at para.33:

> The rules governing issue estoppel should not be mechanically applied. 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. (There are corresponding private interests.) The first step is to determine whether the moving party …has established the preconditions to the operation of issue estoppel … If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied: British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc. (1998), 1998 CanLII 6467 (BC CA), 50 BCLR (3d) 1 (CA), at para. 32; Schweneke v. Ontario (2000, 2000 CanLII 5655 (ON

CA), 47 OR (3d) 97 (CA), at paras. 38-39; Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund (1999,1999 CanLII 4553 (NS CA), 176 NSR (2d) 173 (CA), at para. 56.

Analysis:

In a hearing between the parties held on September 14, 2018 the arbitrator ordered that a 2 month Notice to End Tenancy issued on July 16 2018 be cancelled and held as follows:

"Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here. The tenant chose to focus much of their testimony and evidence on issues unrelated to the application such as the landlord's business and debts. The principal aspects of the tenant's claims and my findings around each are set out below.

There have been numerous previous hearings in regards to this tenancy. There are also other pending hearings. The rental unit is a floor in a detached home. The landlord occupies the other portion of the detached home with his daughter. The current monthly rent is $1,362.00 payable on the first of each month.

On July 16, 2018 the landlord issued a 2 Month Notice with the reason given for the tenancy to end as:

- The rental unit will be occupied by the landlord or the landlord's spouse or a close family member (father, mother, or child) of the landlord or the landlord's spouse.

The landlord testified that they intended for their adult daughter to occupy the rental suite. The landlord said that their daughter is attending post-secondary education and they wanted to afford her greater independence while continuing to provide for her. The landlord also said that he operates a home business and would use portions of the rental suite to conduct business during some hours of the day.

The landlord confirmed that they have issued a previous 2 Month Notice for the same reason on May 1, 2018. The landlord said that 2 Month Notice was cancelled at a previous dispute resolution hearing as they were unable to show it had been signed and completed in accordance with section 52 of the *Act*.

The landlord had issued a previous 1 Month Notice to End Tenancy for Cause on July 5, 2018, and applied for an early end to the tenancy on July 10, 2018. Both of these attempts to end the tenancy were dismissed at earlier hearings.

At the hearing the landlord also requested that the RTB issue an order that the tenant take down videos which they have uploaded on various internet sites which they characterize as hurtful and libelous. The landlord also orally requested that the tenant

The tenant seeks an order that the landlord comply with the Act by ceasing to issue further Notices to End Tenancy. The tenant applies for a reduction in rent of $15,500.00 for the loss of services. The tenant submits that the landlord has turned off appliances and denied services that are implicitly included in the tenancy agreement.

Analysis

Where a tenant applies to dispute a 2 Month Notice within the time limit, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the 2 Month Notice is based. The landlord claims that they and their daughter will occupy the rental unit.

The tenant disputes the intention of the landlord and points to the fact that the landlord has issued multiple Notices to End Tenancy in the past. I find that the tenant is making a good faith argument.

Residential Tenancy Branch Policy Guideline number 2 notes that good faith is an abstract and intangible quality that encompasses an honest intention, the absence of malice and no ulterior motive to defraud or seek an unconscionable advantage. A claim of good faith requires honesty of

intention with no ulterior motive. The landlord must honestly intend to use the rental unit for the purposes stated on the Notice to End the Tenancy.

This Guideline reads in part as follows:

> *If evidence shows that, in addition to using the rental unit for the purpose shown on the Notice to End Tenancy, the landlord had another purpose or motive, then that evidence raises a question as to whether the landlord had a dishonest purpose. When that question has been raised, the Residential Tenancy Branch may consider motive when determining whether to uphold a Notice to End Tenancy. If the good faith intent of the landlord is called into question, the burden is on the landlord to establish that they truly intend to do what they said on the Notice to End Tenancy. The landlord must also establish that they do not have another purpose that negates the honesty of intent or demonstrate they do not have an ulterior motive for ending the tenancy.*

The tenant has raised the good faith intention of the landlord which I find has significant basis. In the present situation where the landlord has issued multiple Notices to End Tenancy it is reasonable to question the intention of the landlord. The landlord has issued an earlier 2 Month Notice on the same basis. When that Notice was cancelled at a previous hearing for insufficient evidence the landlord began issuing other notices. The landlord issued a 1 Month Notice to End Tenancy for Cause on July 5, 2018 and applied for an Early End to the Tenancy on July 10, 2018 prior to issuing the present 2 Month Notice on July 16, 2018. The landlord also testified that there are ongoing disputes with the tenant involving disparaging comments made in online videos.

Based on the evidence, I find that there is sufficient doubt about the good faith intention of the landlord in issuing the 2 Month Notice. I find it more likely that the landlord is attempting to end this tenancy and has issued the 2 Month Notice as well as other Notices towards that end. It is apparent that this is an adversarial relationship with both parties complaining about the other. Under the circumstances I find it more likely that the 2 Month Notice was issued as part of the landlord's ongoing campaign to end this tenancy rather than an honest intention to use the rental unit as indicated.

Consequently, I allow the tenant's application and cancel the 2 Month Notice. This tenancy continues until ended in accordance with the *Act*."

….

Conclusion

The 2 Month Notice is cancelled and of no further force or effect. This tenancy continues until ended in accordance with the Act.

The balance of the tenant's application is 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*.

Analysis:

After carefully considering all of the evidence and the submission of the parties I determined that the principle of res judicata applies for the following reasons:

- The landlord has the burden of proof to establish sufficient cause to end the tenancy on a balance of probabilities.
- I accept the submission of the solicitor for the landlord that the cancellation of the 2 month Notice to End Tenancy dated May 1, 2018 on the basis of the failure to properly deliver evidence is not a basis for the principle of res judicata. That case was decided on technical grounds and not the merits.
- However I determined that the September 14, 2018 decision binds the parties and bars the landlord from issuing another 2 month Notice to End Tenancy within a short period of time after it has been cancelled for the following reason:
    - The September 14, 2018 decision is based on a 2 month Notice to End Tenancy which has identical grounds to the 2 month Notice to End Tenancy that is the subject of this application. The landlord is relying on the same evidence in support. The landlord testified that he desperately needs to regain possession of the rental unit and the reasons are the same for the three Notices to End Tenancy. The arbitrator in the September 14, 2018 hearing held:

> "Based on the evidence, I find that there is sufficient doubt about the good faith intention of the landlord in issuing the 2 Month Notice. I find it more likely that the landlord is attempting to end this tenancy and has issued the 2 Month Notice as well as other Notices towards that end. It is apparent that this is an adversarial relationship with both parties complaining about the other. Under the circumstances I find it more likely that the 2 Month Notice was issued as part of the landlord's ongoing campaign to end this tenancy rather than an honest intention to use the rental unit as indicated. Consequently, I allow the tenant's application and cancel the 2 Month Notice. This tenancy continues until ended in accordance with the *Act*."

- The September 14, 2018 decision held that the landlord has an ulterior motive for ending the tenancy caused by the adversarial relationship between the parties and thus not have an honest intention to use the rental unit as indicated.
- The landlord failed to provide sufficient evidence to establish that this adversarial relationship has changed.
- The hearing on September 14, 2018 and this hearing raised the same question to be decided and the landlord relies on the same evidence. The decision on September 4, 2018 is final and binding on the parties. The parties are the same. I do not accept the submission of the solicitor for the landlord that the arbitrator in the September 14, 2018 hearing has given the landlord the right to serve a new Notice to End Tenancy on the same grounds.
- Further, I do not accept the submission of the landlord that there is a sufficient difference in the evidence that would give the landlord the right to serve a new two month Notice to End Tenancy in such a short time period.
    - The solicitor for the landlord identified additional financial information including the university fees and a Revenue Canada slip. That information is not significant and could have been available at the time of the September 14 2018 hearing.
    - The landlord and his daughter both were present to give evidence at the September 14, 2018 and this hearing.

- The landlord obtained legal help after the September 14, 2018 decision. This does not give a party right to serve a new 2 month Notice to End Tenancy on the same grounds.

- This is a good example of the reason for the principle of res judicata. While a litigant has the right to have his case determined on the merits there comes a time when the litigation must come to an end. A litigant is not permitted to repeatedly raise the same issue. The matter was determined on the merits in the September 14, 2018 decision and it is binding on the parties.

Conclusion:

I determined the principle of res judicata applies. As a result I ordered that the Notice to End Tenancy dated October 16, 2018 be cancelled. The tenancy shall continue with the rights and obligations of the parties remaining unchanged until ended in accordance with the Residential Tenancy Act.

I dismissed the Tenant's application for a 12 month order prohibiting the landlord from filing further eviction notices except for non-payment of rent without leave to re-apply. I determined that it is possible that the conduct of the Tenant may give rise to a situation where the landlord has a lawful right to end the tenancy for cause or on some other basis.

I dismissed the tenant's application that the landlord not be allowed to file new application no serve further eviction notices until all proceeding have been fully adjudicated by the RTB and if necessary by appeal without leave to re-apply as there is no basis for such an order.

I dismissed the tenant's application for an order declaring the landlord's eviction notices/application in a short time frame is declared an abuse of process and/or harassment as there is insufficient evidence for such an order.

I determined the tenant is entitled to recover the cost of the filing fee as the tenant has been successful with the issue which most of the time was spent on. I ordered that the landlord pay to the tenant the sum of $100 for the cost of the filing fee such sum may be deducted form future rent.

This decision is final and binding on the parties.

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 11, 2018

Residential Tenancy Branch