



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDCT, FFT

Introduction

This hearing convened as a result of a Tenants' Application for Dispute Resolution filed on September 3, 2018.

The hearing was conducted by teleconference at 1:30 p.m. on January 7, 2019.

Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

Preliminary Matter—Res Judicata

The nature of the claim before me relates to the Tenants' request for compensation for four months' rent, return of their security deposit and recovery of amounts ordered to be paid for flooring repairs.

On July 27, 2018 the parties attended a hearing before the Residential Tenancy Branch. Pursuant to this Decision, the Landlord was awarded 3.75 months of rent (pursuant to the fixed term tenancy agreement), authorized to retain the Tenants' \$900.00 security deposit and \$300.00 furniture deposit and granted compensation in the amount of \$67.00 for flooring repairs.

The Tenant, K.O., testified that during the August 27, 2018 hearing they argued that the Landlord had breached a material term of the tenancy agreement, due to the ongoing and undisclosed balcony work, such that they should not be held responsible for rent payments for the balance of the fixed term.

Following the August 27, 2018 Decision, the Tenants applied for Review Consideration on the basis that they alleged they had new and relevant evidence and the Decision was obtained by fraud. In their application, the Tenants submitted evidence with respect to their argument that the Landlord breached a material term of their tenancy agreement by failing to disclose the balcony work. Their request for review consideration was denied.

In the Application before me the Tenants essentially seek to overturn a Decision of the Residential Tenancy Branch made on August 27, 2018. While they submit they have different arguments than that which was presented on July 27, 2018, the issues remain the same.

As noted during the hearing, I am precluded, by operation of the legal principle, *Res Judicata*, from considering the Tenants' application as it is, in essence, an attempt to reargue the findings of Arbitrator Lee on August 27, 2017.

Res Judicata ("the matter is judged") is an equitable principle that, when its criteria are met, precludes relitigation 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 parties to the August 27, 2018 Decision are the same as the parties in the Application before me.

As well, the question of the Tenants' responsibility for the payment of rent for the balance of their fixed term was decided by Arbitrator Lee and her decision was final. Had the Tenants believed they should be relieved of paying rent due to the Landlord's alleged breach of a material term, it was their responsibility to make that argument at the time the Landlord applied for rent for those months. In fact, the Tenants testified during the hearing before me that they made such arguments before Arbitrator Lee. The Application before me appears to be the Tenants' attempt to reargue that position, with the benefit of hindsight and perhaps further knowledge.

Similarly, the question of the disposition of their security and furniture deposit was decided by Arbitrator Lee such that the Landlord was authorized to retain those funds. Again, that Decision was final.

Finally, the Landlord's claim for compensation for floor damage was decided by Arbitrator Lee on a final basis.

Discretion exists to not apply *Res Judicata*, even when the preconditions are met. The Supreme Court of Canada (S.C.C.) 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."

The S.C.C. 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 be unfair or unjust?"

I find the third factor to be the most significant in the case before me. Decisions of the Residential Tenancy Branch may be appealed to the B.C. Supreme Court by way of Judicial Review Proceedings. The evidence before me confirms such proceedings have been commenced.

Again, and as communicated in the Review Consideration Decision, if the Tenants believe the August 28, 2018 decision contains an error in law, is biased or unfair, the proper course is to apply to the Supreme Court of British Columbia for a judicial review of the decision.

Conclusion

I decline jurisdiction to hear the Tenant's Application filed September 3, 2018 on the basis of the prior Decision of Arbitrator Lee issued August 28, 2018.

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

Dated: January 7, 2019

Residential Tenancy Branch