Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding IMH 350&360 DOUGLAS APARTMENTS LTD and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes RR, FFT

Introduction

This hearing dealt with a tenant's Application for Dispute Resolution ("application") seeking remedy under the *Residential Tenancy Act ("Act")* for a monetary order in the amount of $18,653.19 for a rent reduction for repairs, services or facilities agreed upon but not provided, and to recover the cost of the filing fee.

On May 7, 2019, the tenant, a support person for the tenant, an agent for the landlord ("agent") and counsel for the landlord appeared at the teleconference hearing and gave affirmed testimony. During the hearing the parties were given the opportunity to provide their evidence orally. A summary of the testimony is provided below and includes only that which is relevant to the hearing.

Although not all documentary evidence was confirmed as received by the parties, only the evidence confirmed received and reviewed has been referred to in this decision.

Preliminary and Procedural Matters

At the start of the hearing, counsel for the landlord requested to change the landlord name to the correct landlord company name, which was done pursuant to section 64(3) of the *Act.*

In addition, counsel raised the issue of *res judicata,* which I will discuss further below. As *res judicata* was raised, the parties were advised that I would make one of two findings, either that *res judicata* applies and the matter will be dismissed or *res judicata* does not apply and an Interim Decision will be issued adjourning the matter to be reconvened at a later date.

Res Judicata Submission and Response

During the hearing, counsel submitted that in a previous decision, the tenant is attempting to re-litigate the same claim that was already brought forward or should have been brought forward at the last arbitration hearing held on April 5, 2017. Counsel submits that the previous decision addressed compensation for loss of use of a hot tub, pool and balcony and that any claim for noise and other issues, could have been and should have been raised to be considered with that application, versus dividing a claim into parts.

Counsel writes:

> 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 Regisrty, Docket No. 28394 dated November 15, 1996, quoted the following passage from the judgment of *Henderson v Henderson (1843)* at paragraph 15, the Court ruled:
>
> > *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*** [emphasis mine].
> >
> > *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.*
> >
> > **Gamache v Megyesi**

Counsel also writes:

> In Chafchak v Hungry Howie Pizza & Subs, Justice Patterson of the Ontario Superior Court of Justice wrote at paragraph 33:
>
> > *... the principle of res judicata is namely that a judgment between parties to litigation is conclusive upon issues actually brought before the court and upon* ***any issues which the parties, exercising reasonable diligence, should have brought forward on that occasion*** [emphasis mine]*.*
> >
> > **Chafchak v Hungry Howie Pizza & Subs**

In addition, counsel adds:

> Further, Justice Patterson's decision references a three part test to determine whether an action should be stayed on the basis of *res judicata* at paragraph 30:
>
> a. The prior judicial decision was a final decision pronounced by a court of competent jurisdiction over the parties and the subject matter;
>
> b. 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
>
> c. The parties to the prior judicial proceeding or their privies are the same persons as the parties to the present action or their privies.
>
> **Chafchak v Hungry Howie Pizza & Subs**

and

> The policy reasons in favour of the principle are set out in a decision of Hardinge L.J.S.C., in Bank of BC 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.*

Due to the length of this portion of counsel's submission, I have included it as written:

> 31. Arbitrator S presided over the First Arbitration and found that the value of the tenancy was reduced by 25% for the unusable balcony, hot tub and swimming pool. The Landlord submits that the Tenants' account has reflected this ongoing rent reduction.

32. The Arbitrator did not award the tenants any compensation for the disruption, including the noise, caused by the renovations to the building outside of the rental unit because the Tenant did not make this claim although it was an ongoing at the time of the First Arbitration.

33. The Tenant attempts to bring “new” issues in the current claim. However, the time line is the same. The parties are the same. The tenancy period and the building in the herein arbitration are the same.

34. Although the First Arbitration was held in April 2017, and the herein claim lists dates from January 2016 to March 2019, the Landlord submits that the Tenant asked for a rent reduction on an ongoing basis, which is why she was awarded with one at the First Arbitration. The construction project undertaken by the Landlord would be a lengthy one, and this was made aware to the Tenant with the notice provided.

35. Arbitrator S noted that the specific issues to be decided dealt with the Tenant’s use of balcony, hot tub and pool. However, the onus to bring the claim is on the applicant.

36. As such, the Landlord submits that it is improper and contrary to the doctrine of *res judicata* if the Tenants are able to bring up the same issues albeit at different times. The issue remains the same and related to the construction project that the Landlord undertook, which was also the subject of the First Arbitration. These issues were decided upon by an arbitrator of the Residential Tenancy Branch and the Tenant should not be able to reargue their claim.

37. Further, if the Tenants introduce seemingly “new” issues that they did not bring up during the First Arbitration, the Landlord submits that under the doctrine of *res judicata*, the Tenant should have brought these claims forward at the time of the First Arbitration if they had exercised reasonable diligence.

38. It is settled law that the Tenant cannot re-litigate issues that should have been brought up to the RTB in the previous arbitrations. This applies to any seemingly “new” issues that the Tenant has included in the herein claim.

> 39. The Landlord submits that these are not new issues that occurred after the Tenant's First Arbitration. In fact, exterior construction on the Building commenced in late June 2016. Although there was a stop work order in December 2016, construction around the Building has started again. The issues brought by the Tenant are not new. It is the responsibility of the litigant bringing the claim to bring forward **all** issues when they have their day in court or a court of competent jurisdiction. The Landlord submits that these claims in the current arbitration should be dismissed because the Tenant had her chance to bring forward the claim. The Landlord should not be penalized for the Tenant's omission or mistake of not including all her evidence in the First Arbitration.
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> 40. The Landlord has been previously successful in dismissing a similar matter where tenants of the Building tried to re-litigate their tenancy issues several times.
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> [Arbitrator name redacted]

The tenant's response to counsel's submission is that the tenant is a layperson and cannot match counsel's legal arguments and that there is "probably legal arguments to be heard" but could not find them. The tenant's support person stated that these are issues that have persisting since the last ruling. The tenant claims that other people have applied later after a previous decision; however, did not have any examples to provide during the hearing. The tenant also argues that the previous arbitrator "neglected to grant leave to reapply and I feel that is an error"' however, the tenant provided no evidence that the tenant applied for a clarification of the previous decision or Judicial Review at the Supreme Court.

Decision Regarding *Res Judicata*

After considering the submission and evidence before, and on the balance of probabilities, I am satisfied that counsel has made a compelling argument that the legal principle of *res judicata* applies to the entire matter before me.

Res judicata is a rule in law that a final decision, determined by an Officer with proper jurisdiction and made on the merits of the claim, is conclusive as to the rights of the parties and constitutes an absolute bar to a subsequent Application involving the same claim.

With respect to *res judicata*, the courts have found that:

> "…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."
>
> 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 15 November, 1996, quoted with approval the above passage from the judgement of *Henderson v. Henderson,* (1843), 67 E.R. 313.

I have taken into account that the tenant continues to reside in the same unit in the same building as the previous decision dated in 2017. I have also taken into account that the tenant applied for the matters before me on August 24, 2018, which is just over 16 months following the previous decision, which covers an overlapping time period and includes noise, which I find would have reasonably existed during the same time frame as the previous application. Therefore, I find that the tenant has failed to exercise reasonable due diligence in bringing these matters forward to be considered in their previous application, which resulted in the previous decision.

In addition, I find that Residential Tenancy Branch ("RTB") Rules of Procedure ("Rules") Rule 2.9 applies, which states that an applicant may not divide a claim. Therefore, for both reasons stated above, I find that the tenant has attempted to divide a claim and that the legal principle of *res judicata* applies to the application before me and that I cannot hear the matter as a result. Therefore, it is dismissed without leave to reapply.

I also note that the tenant attempted to verbally reduce the amount claimed during the hearing before the matter of res judicata was heard; however, I find that this does not change my finding as I am basing my decision on the original application as served on the respondent landlord, and that the tenant failed to amend their application in accordance with the RTB Rules.

Finally, I disagree with the tenant who claims the previous arbitrator made an error by not granting leave to reapply. In fact, if the tenant was of that opinion in April 2017 after receiving the previous decision, the tenant could have and should have sought clarification or taken the matter to Judicial Review, neither of which were done by the tenant.

Conclusion

The tenant's claim cannot be reheard as I find that the tenant failed to exercise reasonable due diligence as noted above, and has attempted to divide a claim. The legal principle of *res judicata* applies.

I do not grant the filing fee as a result.

This matter is dismissed, without leave to reapply.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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 29, 2019

Residential Tenancy Branch