Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Q-14 HOLDINGS LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNL-4M, FFT

Introduction

On September 1, 2020, the Tenants submitted multiple Applications for Dispute Resolution under the *Residential Tenancy Act* (the "Act") requesting to cancel the Four Months' Notices to End Tenancy for Demolition, Renovation, Repair or Conversion of a Rental Unit, dated August 18, 2020 (August 2020 - Four Month Notices), pursuant to section 49 of the Act, and to recover the cost of their filing fees.

The Applications for Dispute Resolution name the same Landlord; relate to the same residential property; and, relate to the same issues. As such, the matters were joined by the Residential Tenancy Branch. The matters were set for a participatory hearing via conference call.

The Landlord, represented by their agents DM and CD, attended the hearing. Nine of the ten Tenants and their agent, KI, also attended the hearing. All parties who spoke during the hearing provided affirmed testimony. They were provided the opportunity to present their relevant oral, written and documentary evidence and to make submissions at the hearing. The parties testified that they exchanged the documentary evidence that I have before me.

Preliminary Matters – Settlement Agreement

Section 63 of the Act allows an Arbitrator to assist the parties to settle their dispute and if the parties settle their dispute during the dispute resolution proceedings, the settlement may be recorded in the form of a Decision and include an Order. Accordingly, I attempted to assist the parties to resolve this dispute by helping them negotiate terms for a Settlement Agreement with the input from both parties. The parties could not find consensus on the terms of a Settlement Agreement; therefore, the following testimony and evidence was heard, and a Decision made by myself (the Arbitrator).

Preliminary Matters – *Res Judicata*

Early in this hearing, the Tenants submitted that this matter has already been before the Residential Tenancy Branch (RTB) in a dispute where a decision (2019 Decision) was issued by an arbitrator (see details on the Show Cause page) in 2019. The Tenants stated that the arbitrator, in the 2019 Decision, struck down fifteen Four Month Notices to End Tenancy after 8 hours of detailed testimony during the April 29, 2019 hearing (2019 hearing). The Tenants submit that the scope of work that was described during the oral testimony of the Landlord in the 2019 hearing is the same scope of work as described in the August 2020 - Four Month Notices and on the current building permit.

As the subject matter of this dispute was already heard during the 2019 hearing, the Tenants submit that the principle of *res judicata* must be invoked.

Res judicata is the doctrine that an issue has been definitively settled by a judicial decision, such the same issue between the same parties cannot be re-examined. The Tenants included their submissions about *res judicata* in their evidence package that was acknowledged by the Landlord as having been received prior to this hearing. As the Tenants have raised this concern, I advised the parties that I would hear testimony, receive evidence and make a decision in relation to the application of *res judicata* in this matter.

The Landlord asked if he could excuse his witnesses who were standing by for the hearing. I reminded the Landlord that all parties have an opportunity to present their evidence in relation to whether the findings in the 2019 Decision apply to these Applications, and, specifically, whether *res judicata* applies to these (the Tenants') Applications. I advised the Landlord that it was his choice whether to keep or release his witnesses.

Issue to be Decided

Should the principle of *res judicata* be invoked in relation to the issues in the Tenants' Applications for Dispute Resolution?

Should the Tenants be compensated for the cost of the filing fee, in accordance with Section 72 of the Act?

Background and Evidence

I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Tenants' Submissions:

The Agent for the Tenants ("KI") submitted that this is the third Dispute Resolution Process they have disputed where the Landlord has served multiple Four Month Notices on the tenants of the residential property.

KI testified that the Landlord issued fifteen Four Month Notices to End Tenancy for Demolition, Renovation, Repair or Conversion of Rental Unit, dated February 22, 2019 (2019 - Four Month Notices), to the Tenants of the residential property. KI stated that the subsequent April 2019 hearing resulted in the cancellation of all fifteen of the 2019 – Four Month Notices.

KI stated that the Landlord served another set of eleven Four Month Notices to the Tenants in January of 2020. The Landlord claimed that the renovations were so extensive that they would require the rental units to be vacant for 12 months. At the hearing on April 27, 2020, the Landlord rescinded these Notices.

KI testified that the Landlord served the Tenants a third set, the August 2020 - Four Month Notices to End Tenancy, on August 18, 2020. The Landlord claimed that the renovations were so extensive that they would require the rental units to be vacant for 16 to 24 months.

The Tenants submit that the arbitrator has provided a final decision about the validity of the 2019 - Four Month Notices and the work described therein. The Tenants submit that the 2019 Decision is relevant and applicable to the August 2020 – Four Month Notices and that applying the *res judicata* rule, prevents the Landlord from ending the tenancies, as the issue regarding the scope of work and vacant possession have already been decided in favour of the Tenants.

KI submitted the work proposed in the 2019- Four Month Notices included:

> "complete re-piping of all domestic water lines, including connections to city storm and sanitary drains, complete renovation of all suites, including painting, flooring, kitchen and bathrooms, with installation of dishwashers, washers and dryers for all units, renovation of the interior/exterior common areas of the buildings including painting, flooring, and repair/replacement of rotten balconies, installation of fire stopping, repairs to the electrical as required, walls where required, and removal of any environmental hazards in the affected areas requiring demolition" (2019 work).

KI testified that the Landlord's agent and witnesses provided oral testimony during the April 2019 hearing that expanded the scope of the 2019 work by including the reconfiguring of rental units, electrical upgrades to comply with the city's energy plan, structural work and the replacement of windows. KI stated the Landlord spoke to the hazardous materials in the residential property and had also included a report about the hazardous materials. KI submitted that the arbitrator considered all of this evidence when making their findings in their 2019 Decision.

KI stated that the Landlord, a day after the 2019 hearing, applied for the current Building Permit which was referred to in the latest set of August 2020 – Four Month Notices. KI provided written submissions detailing the work description on the current Building Permit, issued on December 17, 2019, as follows:

> "Interior and exterior alterations to this existing 3-story residential rental building containing 26 rental suites on this site. No work is proposed to basement parking garage. Interior alteration includes: Removal of interior partitions and re-configuring some of the suites interior layouts. No change to the existing suite demising configurations; replacement of all kitchen cabinets, plumbing and other fixtures; replacement of all electrical wiring and fixtures including detection and fire alarm system; replacement of all bathroom fixtures and their plumbing including rebuilding the plumbing walls; replacing interior doors with larger size doors.
> Exterior renovation is for replacing all exterior windows only." (2020 work)

KI provided a copy of the August 2020 – Four Month Notices, which was served to Tenant JC and referred to the planned and detailed work as follows:

> "Full building renovation and restoration as listed and outlined on the building permit. Removal of Hazardous Materials including but not limited to asbestos, installation of fire stops, as well as, full shut downs of essential services including water, heat and electricity, will make the suites unsafe for occupancy during these major renovations."

The Tenants submit that the 2019 work and the 2020 work are almost identical in terms of the proposed renovations. KI stated that the arbitrator, during the 2019 hearing, heard 8 hours of testimony that included evidence in relation to; the same scope of work as is proposed in the August 2020 – Four Month Notices; the validity of the 2019 – Four Month Notices; why these tenancies should not end; why vacant possession of the rental units is not required for the proposed work; and how the Landlord did not have required permits for the work, pursuant to Section 49 of the Act.

KI referred to the 2019 Decision and noted that the arbitrator made the following findings and statements in relation to the evidence submitted during the 2019 hearing:

> *"I find that the several of the landlords' own witnesses confirmed that it may be possible to complete the repairs without requiring the permanent vacancy of the rental units, but that it was not preferable or practical due to the cost in doing so."*
>
> *"In light of the fact that the tenants have expressed a willingness to accommodate the repairs by moving out temporarily, I am not satisfied that the landlords have established that the repairs are so extensive that the only option would be to permanently end these tenancies."*
>
> *"I find that the landlords have not met the burden of proof to show that they had all the necessary permits and approvals required by law to perform the necessary repairs and renovations, nor have they demonstrated that it would be absolutely necessary for the tenants to permanently vacate their homes in order to undertake the repairs."*
>
> *"The landlord's 4 Month Notices, dated February 22, 2019, are hereby cancelled and of no force and effect. These tenancies are to continue until they are ended in accordance with the Act."*

KI stated that the Tenants have been living under the fear of eviction since early 2019. KI submitted that the Landlord has not provided any additional evidence to demonstrate that the work proposed under the August 2020 – Four Month Notices is any different than that under the 2019 – Four Month Notices where an arbitrator already ruled that the tenancies did not have to end and that the Notices were invalid.

Landlord's submissions:

The Landlord submitted that, in the 2019 Decision, the arbitrator stated the following:

> *"…I am satisfied with the landlords' explanation that the aging building requires maintenance and repairs, and the landlord is fulfilling its duty to do so as required by section 32 of the Act as stated below."*
>
> *"I accept the testimony of the landlords and their witnesses that the scope of the work has changed from when this project had begun, and may change as further work and investigation is done."*
>
> *"I accept the testimony of the landlords and their witnesses that the repairs may pose a safety risk to the occupants."*

The Landlord stated that the arbitrator, in their 2019 Decision, cancelled the 2019 - Four Month Notices based on the Landlord not having the proper permits. The Landlord said that they now have the permits in place and that there is more work to be done. The Landlord submitted that there are a different set of conditions, including hazardous materials, and that the Tenants need to vacate the building as it won't be safe to occupy.

The Landlord's architect WR was called as a witness. WR stated that there is a different scope of work since the last application. He testified that as a result of the permit process, there have been several more issues identified. WR stated that there was more structural work required, more hazardous materials discovered and because they would be relocating several walls, new structural beams would need to be installed. WR said that "seismic performance is different now", that there was some water damage and some envelope issues that had to be addressed.

In response to KI's cross-examination, WR and the Landlord responded that they have identified the different scope of work required as a result of conducting investigations into 3 of the rental units in the residential property. The Landlord acknowledged that there are no reports, assessments or documentation related to the expanded scope of work which they are stating is required. The Landlord stated that he would have to bring in expert witnesses to provide oral testimony in order to speak to the visual observations made.

The Landlord submitted that *res judicata* should not be applied in this matter as the previous arbitrator acknowledged that the scope of work could change, the scope of work has changed, and the work is so extensive that the Tenants will need to vacate their rental units.

Analysis

As part of their Application for Dispute Resolution, the Tenants have claimed that the principle of *res judicata* is applicable to the present facts and as such, should preclude the issue of whether their tenancies should end from being adjudged a second time.

I will consider three preconditions that must be met before I decide whether the principle of *res judicata* should be applied, whether:

1. the same question has been decided in earlier proceedings;
2. the earlier judicial decision was final; and,

3. the parties to that decision are the same in both proceedings.

Has the same question been decided in earlier proceedings?

The arbitrator, in their 2019 Decision found that the extent and nature of the 2019 work did not require the permanent vacancy of the rental units. As part of the analysis whether the same question has been decided in earlier proceedings, I must determine whether the 2019 work is the same as the 2020 work.

The Tenants submitted copies of the 2019 – Four Month Notices and the 2019 Decision and compared the scope of work to the scope of work described in both the August 2020 – Four Month Notices and the Building Permit. The Tenants maintain that the work is almost identical in terms of the proposed renovations and that the Landlord has only expanded the renovation timeline, despite the same scope of work.

The Tenants submitted copies of the Four Month Notices that were issued to the Tenants in January of 2020 that indicated the Landlord required 12 months of vacant possession. The Tenants also submitted copies of the August 2020 – Four Month Notices that now indicate the Landlord requires 16 to 24 months of vacant possession.

The Landlord submitted that, since the 2019 hearing, they have investigated by looking at three units in the residential property to determine that the scope of the work has increased from 1 year to 2 years. The Landlord's witness WR stated that there is a different scope of work since the last application and testified that as a result of the permit process, there have been several more issues identified.

The Landlord acknowledged that there were no reports, assessments or estimates available referencing the investigation into the three units and the subsequent change in scope to the work.

I find that the Tenants have established a strong case that the arbitrator, in their 2019 Decision, has already adjudged whether the tenancies need to end based on the similar scope of work that is being proposed by the Landlord in the August 2020 – Four Month Notices. I base this on my review of the parties' submissions and note that the scope of work that was considered in the 2019 Decision is very similar to the scope of work proposed by the Landlord in the August 2020 – Four Month Notices. Specifically, both the 2019 and 2020 work descriptions include reconfiguration of the rental units, full kitchen and bathroom renovations, electrical and plumbing work, removal of hazardous materials and the installation of fire stops.

In this matter, the Landlord has the burden to prove that the same question has not been decided in earlier proceedings and to demonstrate, on a balance of probabilities, that the scope of the 2020 work is sufficiently different than that decided in the 2019 Decision.

The Landlord testified the work that is now required is much more extensive than it was as proposed in 2019. The Landlord stated that there were now hazmat concerns and structural modifications that would require more time than originally thought. However, I did not hear from the Landlord or their witnesses of any specifics regarding the broader scope, the process they used to reach these conclusions or how this work was different than was discussed during the 2019 hearing.

Furthermore, the Landlord did not provide any assessments, professional recommendations or documentation to demonstrate why now, versus 2019, there is a significant amount of new work proposed or required. Based on the Landlord's submissions, I find the Landlord failed to provide sufficient evidence to demonstrate, on a balance of probabilities, that the 2020 work is sufficiently different than the 2019 work.

As I have found that the Landlord's proposed work has not sufficiently changed since the 2019 hearing, I find that the same question regarding whether the rental units need to be vacant in order for the Landlord to complete the 2020 work has already been decided in earlier proceedings, the 2019 hearing. As a result, I find that the first precondition to apply *res judicata* has been met.

Before considering the second precondition, I want to acknowledge the Landlord's interpretation that the original arbitrator had allowed the Landlord to serve new notices to end tenancy based on their (the arbitrator's) statement in the 2019 Decision:

> *"I accept the testimony of the landlords and their witnesses that the scope of the work has changed from when this project had begun, and may change as further work and investigation is done."*

In my view, the arbitrator did acknowledge that there had been changes to the work originally proposed in 2019, considered the expanded scope, and still found that the tenancies did not have to end. I agree that the project's scope of work may continue to change as further work and investigation is done; however, to reiterate, I have found that the Landlord failed to provide sufficient evidence that the scope of work had expanded as to be sufficiently different from the 2019 work.

Was the earlier judicial decision final?

Section 84.1 of the Residential Tenancy Act states that the director of the Residential Tenancy Branch has exclusive jurisdiction "to inquire into, hear, and determine all those matters and questions of fact, law and discretion arising or required to be determined in a dispute resolution proceeding" and provides that a decision or order of the director on such matters "is final and conclusive and is not open to question or review in any court".

Arbitrators exercise powers delegated by the director in making decisions in dispute resolution proceedings. Regardless of section 84.1 of the Act, affected parties may seek judicial review of a decision or order. In this case, the Landlord did not seek a judicial review of the 2019 Decision.

I find that the judicial decision made by the arbitrator in their 2019 Decision was final.

Were the parties to that decision the same in both proceedings?

I have noted that all the 11 applicants in this Application for Dispute Resolution were also Applicants referred to in the 2019 Decision.

The Landlord is the same in this Application and in the 2019 Decision.

I find that the parties in this Application for Dispute Resolution were all parties that were involved in the 2019 hearing and the subsequent 2019 Decision.

I find that the three preconditions have been successfully established and that the principle of *res judicata* is applicable to the present case.

While I have the discretion not to apply the doctrine of *res judicata*, I find that there is no basis to exercise my discretion to do so in this case. As such, I find that the principle of *res judicata* should be applied to these matters as they have already been before the Residential Tenancy Branch during the 2019 hearing. The arbitrator, in their 2019 Decision, cancelled the 2019 – Four Month Notices and I have found that the same questions from this Application for Dispute Resolution have been decided in that 2019 Decision.

Therefore, I find that the August 2020 – Four Month Notices should also be cancelled.

I find that the Tenants' Applications have merit and that the Tenants are entitled to recover the cost of the filing fee for these Applications for Dispute Resolution. As such, I authorize the Tenants to deduct $100.00 from a future monthly rent payment.

Conclusion

I authorize and order that the principle of *res judicata* should be applied to the matters in this joint Application for Dispute Resolution.

I authorize and order the cancellation of the Four Months' Notices to End Tenancy for Demolition, Renovation, Repair or Conversion of a Rental Unit, dated August 18, 2020, as a Residential Tenancy Branch arbitrator has previously decided that it would be unnecessary for the Tenants to permanently vacate their homes in order to undertake the repairs as proposed by the Landlord.

These tenancies will continue until ended in accordance with 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: November 2, 2020

Residential Tenancy Branch