



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Greater Victoria Housing Society
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **MNDCT**

Introduction

This hearing dealt with an application by the tenant under the *Residential Tenancy Act* (the *Act*) for the following:

- A monetary order for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement pursuant to section 67 of the *Act*.

This is a continuation of the hearing which began on October 25, 2021 and adjourned after 2 hours and 10 minutes to today; the hearing continued for 74 minutes for a total hearing time of 3 hours and 24 minutes.

The agents LR, RM and VH attended for the landlord ("the landlord"). The tenant attended with the advocate MB ("the tenant"). Each party acknowledged receipt of the evidence of the other. I find each party was served in accordance with the Rules and the *Act*.

The tenant called the witness KD, and the landlord called the witness YB; both witnesses provided affirmed testimony.

The parties were informed that recording of the hearing was not permitted. Each party confirmed they were not recording the proceedings.

Issue(s) to be Decided

Is the tenant entitled to a Monetary Order for compensation?

Background and Evidence

This is an application by the tenant pursuant to section 67 for reimbursement in the amount of \$7,070.00 for counselling expenses incurred with the counsellor KD from December 3, 2019 to February 24, 2021.

Substantial documentary evidence and considerable conflicting testimony was submitted by both parties in a lengthy hearing. This included written statements/correspondence/reports from doctors, mental health professionals, lawyers, advocates, police, and witnesses. Not all this evidence is referenced. Only key findings and admissible, relevant evidence are included in this Decision.

There are three previous Decisions regarding this tenancy which are referenced on the first page and which were submitted.

On August 21, 2020, an RTB Arbitrator awarded the tenant an award for loss of quiet enjoyment and reimbursement of a nominal amount for counselling fees. The file number is referenced on the first page (referenced throughout as “the August 2020 Decision”).

Because of the August 2020 decision, the landlord claimed the matter had already been decided. The landlord requested the application be dismissed without leave to reapply under the doctrines of *res judicata* and estoppel,

I adopt the findings of fact and law made in the previous 21-page Decision of August 21, 2020 which are not all repeated in this decision.

The tenant submitted written argument of 6-pages; the tenant and witness KD, the counsellor, provided testimony. A summary of the tenant’s outline of events follows with reference to quotes from the evidence:

1. The parties had a monthly tenancy agreement beginning March 15, 2005 which ended September 29, 2020. The unit was in a residential building of some 40 apartments.
2. A male tenant HF also began to live in the building in 2005.
3. The landlord issued warnings to HF beginning in 2011 regarding reported unacceptable behaviour by other female occupants.
4. The tenant complained to the landlord about the 'sexualized violence' of HF towards her stating she was "sexually assaulted and sexually harassed repeatedly" by HF from March 2015 until July 2019.
5. The landlord issued a One Month Notice to End Tenancy for Cause ("Notice") to HF on October 26, 2017. The landlord obtained an Order of Possession on January 30, 2018 under the file number referenced on the first page.
6. HF vacated the building in March 2018 but retained his keys which were not returned to the landlord. The tenant continued to claim repeated assaults by HF which were reported to the landlord.
7. In August 2018, an application by the tenant to restrict access by HF was heard. The hearing number is referenced on the first page. The Arbitrator ordered the landlord to take certain specific steps to get the keys back, failing which, the tenant and landlord were instructed to communicate when HF entered the building. The file number is referenced on the first page.
8. Nevertheless, HF continued to go into the building until July of 2019.
9. In November 2019, the tenant brought an application for damages which resulted in the August 2020 Decision. The tenant claimed that The Arbitrator awarded the tenant damages for loss of quiet enjoyment and reimbursement of counselling fees.
10. The tenant stated as follows in the written submissions:

[T]he distress experienced by [the tenant] can be understood in part as responses to negative social responses by [the landlord], not exclusively as responses to the sexualized violence. Additional emotional, spiritual, physical, and mental distress was induced because the Landlord did not take [the tenant's] reports of sexualized violence seriously even though they knew that [HF] had an established pattern of harmful behavior towards women

11. In the August 21, 2020 Decision, the Arbitrator found as follows with respect to the application for reimbursement of counselling fees:

Counselling Fees

Next, I turn to the Tenant's claim for the recovery of the counselling fees she paid since January 2016. I note the Tenant attended and paid for counselling and therapy in order to regain mental wellness in the face of her continual issues with HF over the years, described by the counsellor as follows: "Much of the time, we have been discussing her ability to cope and working with strategies to help her feel safe in her housing situation."

I accept that the Tenant was the victim of several unsolicited and inappropriate sexual encounters with another Tenant in the building. I accept that this would have caused significant emotional and psychological distress, especially given the repeated incidents, and the lack of closure. The Tenant took steps to mitigate the negative

impacts on her wellbeing by seeking this therapy. I accept that this would have come at a significant cost, over the years.

I note that the Tenant failed to provide a detailed account as to how she arrived at the amount of \$4,080.00. I acknowledge that the Tenant's counsellor attended the hearing to state she spent at least that amount in counselling fees.

It seems likely that the Landlord's inaction would likely have contributed to heightened anxiety and distress as she resided in the building with HF, with limited alternative options. As stated above, I find the Landlord failed to take sufficient action to protect the Tenants quiet enjoyment, which is a breach of the Act. However, I note that the Tenant failed to provide a detailed account as to how she arrived at the amount of \$4,080.00. I acknowledge that the Tenant's counsellor attended the hearing to state she spent at least that, but there is only an itemization of some of those fees, and appointments. Ultimately, I find the Tenants has failed to sufficiently demonstrate the value of her loss.

An arbitrator may award monetary compensation only as permitted by the Act or the common law. In situations where there has been damage or loss with respect to property, money or services, the value of the damage or loss is established by the evidence provided.

[...]

In this case, I find a nominal award is more appropriate, given the lack of corroborative accounting to demonstrate how her total was calculated. I award a nominal award of \$500.00.

12. In this application, the tenant claimed key dates were as follows:

- a) July 2018 – tenant filed her RTB Application (relating to August 2020 Decision) claiming reimbursement of counselling expenses from January 2016 to July 2018;
- b) July 2019 – assaults by HF stopped;
- c) Hearing (relating to August 2020 Decision) - March, May, July, and August 2020;
- d) August 21, 2020 – Decision of RTB;

e) April 22, 2021 -Tenant brought current application claiming reimbursement of counselling fees from December 3, 2019 to February 24, 2021 (not claimed in August 2020 Decision)

13. The tenant included detailed information about the counselling expenses claimed from December 3, 2019 to February 24, 2021 including dates and amounts. The witness KD affirmed the accuracy of the amount of fees for counselling in this time for which the tenant seeks reimbursement.
14. The tenant and the witness KD claimed treatment was necessary from December 3, 2019 to February 24, 2021 because of the actions of the landlord which predated the August 2020 Decision, but which were not claimed.
15. The tenant asserted that the August 2020 Decision awarding nominal damages for counselling was not final and the current claim was not “barred”:

[This] would give rise to a real injustice to the Tenant, who proved an entitlement to costs at an administrative tribunal, and who asks now to be compensated, not for those same costs, which would be unfair, but for the subsequent costs arising from the same proven misconduct of the Landlord.

16. The tenant requested that the Arbitrator use discretion and award the additional claim for counselling.

The landlord provided testimony and evidence the cumulative import of which asserted that they had complied with their obligations with respect to the tenant’s claims of abuse by HF. They also asserted that the August 2020 Decision was final, conclusively dealt with the tenant’s application including her claim for compensation for counselling fee, and the tenant was not entitled to an additional claim in the current Application.

Key aspects of the landlord’s submissions, with reference to their written submissions, are as follows:

1. The landlord stated they are a not-for-profit registered charitable housing society with 16 buildings, over 900 units and over 1100 tenants.

2. The landlord stated that their evidence submitted for the hearing which resulted in the August 2020 Decision included details of the landlord's responses to the tenant's claims; they submitted no new evidence for this hearing as the matter has been adjudicated.
3. The landlord stated that the tenant should have submitted all receipts for counselling expenses prior to the August 21, 2020 Decision and cannot now claim a second opportunity to do so.
4. The landlord submitted:

[The landlord] is relying on the final judgement of the RTB Hearing [August 2020 Decision] in order to move forward as a business and not-for-profit housing society, and not to be subject to any more claims from the Tenant on matters that have been settled under the Residential Tenancy Dispute Resolution process.

[The landlord] requests that [this application] be dismissed in its entirety under the legal Doctrine of Res judicata / Estoppel.

5. The August 2020 Decision met all criteria for application of *res judicata* and estoppel as follows:
 - I. Finality - the August 2020 Decision was final.
 - II. Mutuality - the parties appeared before the RTB, fully participated in a hearing, accepted the Decision (no Review Consideration of application for Judicial Review) and the landlord paid the tenant the award.
 - III. Re-hearing - the current hearing is an attempt to rehear the hearing that led to the August 2020 Decision; the information submitted by the tenant was available at the time of the hearing and the current hearing is "not separate or distinct" nor does it include "new evidence".
 - IV. Reasonable diligence - the tenant had fair and reasonable opportunity to present her case at the hearing which led to the August 2020 Decision. She was represented by an advocate, called the counsellor as a witness to attest to the reasons and costs for the counselling, submitted a

substantial evidence package following which the Arbitrator made a final and binding decision on the tenant's application for compensation of counselling fees.

In summary, the tenant claimed an award for reimbursement of counselling fees. The landlord requested the claim be dismissed without leave to reapply.

Analysis

RTB Decisions

The Act provides that a Decision of an Arbitrator is final and binding on the parties. Section 77(3) states as follows:

Director's decision

77 (3) Except as otherwise provided in this Part, a decision or an order of the director under this Part is final and binding on the parties.

Res judicata

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.

Res judicata is a rule of law that once a lawsuit is decided, the same issue or an issue arising from the first issue cannot be contested again. Cause of action estoppel means that a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding.

Black's Law Dictionary defines *res judicata* as follows:

A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, **constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.**

[emphasis added]

Janus v. The Central Park Citizen Society, 2019 BCCA 173 (CanLII) states as follows:

[9] First, the law is clear that the suffering of different or more serious damage at a later time does not create a different cause of action [...] A single cause of action cannot be split to be made the subject of multiple proceedings [...]

As well, *Dhillon v. Roberson*, 2020 BCSC 641 states:

[193] The doctrine of res judicata prevents the re-litigation of issues that have been determined with finality in previous litigation between the same parties: Doering v. Grandview (Town), 1975 CanLII 16 (SCC), [1976] 2 S.C.R. 621. This doctrine provides litigants with the certainty that once a matter has been before the court, the court's determination is final, subject only to appellate review.

[194] The three requirements for cause of action and issue estoppel are well known:

- i. The claim or issues was (or, in the case of cause of action estoppel, ought to have been) decided in a previous litigation;*
- ii. The previous litigation or decision was final; and*
- iii. The parties in the current litigation, or their privies were parties of the previous litigation or decision.*

I note that there is no evidence before me that the tenant appealed that decision to the RTB or to the BC Supreme Court via judicial review. As such, I find that the tenant accepted the August 21, 2020 decision of the RTB.

I find the RTB Decision of August 21, 2020 following a lengthy hearing met the requirements of finality, mutuality, and due diligence.

I find that the tenant has brought a second application for compensation for counselling fees despite a decision of the Director having been made, which awarded compensation under this heading. I find the tenant's Application is an application to re-hear an already determined issue.

In summary, I find as follows:

- (i) the issue of compensation for counselling expenses was raised and decided in a previous arbitration (the August 2020 Decision) which was conducted in a fair and reasonable manner;
- (ii) the previous arbitration decision was final, as the tenant did not dispute the finding through appeal or judicial review; and
- (iii) the parties to the current arbitration were parties to the previous arbitration decision.

For the above reasons, I find the previous RTB Decision of August 21, 2020 is a final and binding Decision, conclusive of the tenant's claims, including the claim for compensation for counselling expenses raised in this Application. I find the tenant's claim has been heard and resolved in the hearing resulting in the Decision of August 21, 2020. I find the principle of *res judicata* applies.

As this matter was the subject of a final RTB Decision of August 21, 2020, the tenant's claim is dismissed without leave to reapply.

Conclusion

The tenant's claim 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*.

Dated: October 25, 2021

Residential Tenancy Branch