Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPT, AAT, PSF, LRE, OLC

Introduction

The Applicant seeks the following relief under the *Residential Tenancy Act* (the "*Act*"):

- an order of possession pursuant to s. 54;
- an order pursuant to ss. 27 and 62 that the Respondent provide services or facilities;
- an order pursuant to s. 62 that the Respondent comply with the *Act*, Regulations, and/or the tenancy agreement;
- an order pursuant to s. 70 to suspend or set conditions on the Respondent's right to enter the rental unit; and
- an order pursuant to ss. 30 and 62 allowing the Applicant access to the rental unit.

T.T. appeared as agent for the Respondent. The Applicant did not attend, nor did someone appear on their behalf.

Pursuant to Rule 7.1 of the Rules of Procedure, the hearing began as scheduled in the Notice of Dispute Resolution. As the Applicant did not attend, the hearing was conducted in their absence as permitted by Rule 7.3 of the Rules of Procedure. The hearing concluded at 9:40 AM without the Applicant's participation.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The Respondent's agent acknowledged receipt of the Notice of Dispute Resolution.

Preliminary Issue – Res Judicata

At the hearing, the Respondent's agent confirmed that the parties in this dispute have appeared before the Residential Tenancy Branch on separate applications that were heard on September 9, 2022 and October 27, 2022. The Respondent confirmed the file numbers for those applications.

I was provided with a copy of the September 9, 2022 decision, which pertained to an application filed by the Respondent for an early termination of the tenancy. The arbitrator on that application determined that he could not adjudicate the matter as he did not have jurisdiction. I reproduce the relevant portion of the decision:

> I find there is insufficient evidence that there is a tenancy agreement between the parties. The respondent is not obligated to pay rent and while they are performing some work, there is little evidence that the nature, scope and timeline of the work has been agreed to by the parties. If an agreement between the parties exists it is so vague and indistinct as to be rendered meaningless. Based on the totality of the evidence, I find that the relationship between the parties does not have the elements of a tenancy. No landlord tenant relationship exists between the parties that would give rise to obligations on either part under the *Act*.
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> Consequently, as I find there is no tenancy in place I find I have no jurisdiction to consider the present application.

The previous finding in the September 9, 2022 decision raises the issue of res judicata, which is a legal doctrine preventing parties in a matter from relitigating matters that have previously been decided. In this case, the question of jurisdiction has already been decided. The doctrine of res judicata is explained in *Khan v Shore*, 2015 BCSC 830 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, 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, at para. 55; *Revane v. Homersham,* 2006 BCCA 8, 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 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, 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 NSCA 77 (CanLII), 176 NSR (2d) 173 (CA), at para. 56.

I find that issue estoppel ought to apply to the present application. The Respondent's agent confirmed that the parties in this dispute are the same, the issue, being jurisdiction, has already been determined, and the previous decision was final. It is not my place to sit in judgment or appeal of the previous decision, which made a clear finding that no landlord-tenant relationship existed such that the *Act* did not apply, nor does the *Act* empower me to do so in any event. Further, I find that the interest of ensuring the finality of litigation is not overridden by any other considerations such that I would determine to proceed with hearing in any event. This matter is res judicata.

The application is dismissed without leave to reapply in its entirety.

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 24, 2022

Residential Tenancy Branch