Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes **CNR-MT MNDCT RP LRE AS OLC**

Introduction

This hearing was convened as a result of the Tenant's application for dispute resolution ("Application") under the *Residential Tenancy Act* (the "Act"). The Tenant seeks:

- an order to allow an extension of time for the Tenant to dispute a 10 Day Notice to End Tenancy for Unpaid Rent and/or Utilities pursuant to section 66;
- if an order for an extension of time for the Tenants to dispute the 10 Day Notice to End Tenancy for Unpaid Rent and/or Utilities is granted, then an order to cancel the Notice pursuant to section 46;
- a monetary order for compensation or other money owed by the Landlord to the Tenant pursuant to section 67;
- an order required the Landlord to complete repairs to the rental unit pursuant to section 32;
- an order to suspend or set conditions on the Landlord's right to enter the rental unit pursuant to section 70;
- an order to allow the Tenant to assign or sublet the rental unit when the Landlord has unreasonably withheld or denied permission pursuant to section 65; and
- an order for the Landlord to comply with the Act, *Residential Tenancy Regulations* and/or tenancy agreement pursuant to section 62.

The Tenant did not attend this hearing scheduled for 11:00 am. I left the teleconference hearing connection open for the entire hearing, which ended at 11:20 am, in order to enable the Tenant to call into this teleconference hearing. The Landlord's agent ("ZM") and its legal counsel ("KL") attended the hearing and they were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Dispute Resolution Proceeding. I also confirmed from the teleconference system that ZM, KL I were the only ones who had called into this teleconference.

Preliminary Matter – Effect of Non-Attended by Tenants at Hearing

Rules 7.1, 7.3 and 7.4 of the *Residential Tenancy Branch Rules of Procedure* state:

> **7.1 Commencement of the dispute resolution hearing**
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> The dispute resolution hearing will commence at the scheduled time unless otherwise set by the arbitrator.
>
> **7.3 Consequences of not attending the hearing**
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> If a party or their agent fails to attend the hearing, the arbitrator may conduct the dispute resolution hearing in the absence of the party, or dismiss the application, with or without leave to re-apply.
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> **7.4 Evidence must be presented**
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> Evidence must be presented by the party who submitted it, or by the party's agent. If a party or their agent does not attend the hearing to present evidence, any written submissions supplied may or may not be considered.

Given the Tenant did not attend the hearing before the hearing ended at 11:20 am, being more than 10 minutes after its commencement, the Application is dismissed without leave to reapply. As the Tenant was not present at the hearing, I will not consider any of the evidence submitted by the Tenant in advance of the hearing when adjudicating the Application.

Preliminary Matter – Addition and Removal of Respondent in Application

At the hearing, KL stated the person ("ZM") named as landlord in the application is the employee of the landlord of the rental unit. KL provided the name of the landlord ("PWY") and required that I amend the Application to remove ZM as the respondent and to add PW as the respondent.

4.2 Amending an application at the hearing

In circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing.

If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

The Tenant could have reasonably anticipated that a request would be made at the hearing for an order that the Application be amended to remove ZM as the respondent and to add to PWY as the respondent. As such, I order the Application be amended to remove ZM as a respondent and to add PWY as the respondent. For the purposes of this decision, whenever the Landlord is used, it refers to PWY.

Preliminary Matter - Application of the Principle of *Res Judicata*

KL stated the Tenant was removed from the rental unit by bailiffs on or about March 13, 2023. KL stated the Landlord made an application for dispute resolution by direct request ("Previous Application") to the Residential Tenancy Branch. KL stated Tenant did not make an application for dispute resolution to dispute a Ten Day Notice to End Tenancy for Unpaid Rent and/or Utilities dated December 7, 2022 ("10 Day Notice") that was served on him. KL stated the adjudicator ("Adjudicator") who heard the Previous Application issued an Order of Possession and monetary order for rental arrears of $2,436.00 that were owing by the Tenant to the Landlord as of December 1, 2022.

Section 46(5) of the Act states:

46(5) If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant

(a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and

(b) must vacate the rental unit to which the notice relates by that date.

Based on section 46(5) of the Act, the Adjudicator found the Tenant was conclusively presumed to have accepted that the tenancy ended on the effective date of the 10 Day Notice, being December 20, 2022.

Sections 55(1) and 55(1.1) of the Act state:

> 55(1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if
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> (a) the landlord's notice to end tenancy complies with section 52 *[form and content of notice to end tenancy]*, and
>
> (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.
>
> (1.1) If an application referred to in subsection (1) is in relation to a landlord's notice to end a tenancy under section 46 *[landlord's notice: non-payment of rent]*, and the circumstances referred to in subsection (1) (a) and (b) of this section apply, the director must grant an order requiring the payment of the unpaid rent.

The Adjudicator already issued an Order of Possession and monetary order for the rental arrears of $2,436.00 owing in response to the Landlord's Previous Application. The principle of *res judicata* applies to residential tenancy dispute resolution hearings. This principle provides that a matter which has already been conclusively decided by a court is conclusive between the parties. Final judgments prevent any re-examination or re-trial of the same dispute between the same parties. The Supreme Court of British Columbiain Jonke v, Kessler, Vernon Registry, Docket No. 3416 dated January 16, 1991 held that the principle of res judicata applies to residential tenancy arbitration. The policy reasons in favor of the principle are set out in a decision of Hardinge L.J.S.C., in Bank of B.C. 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..."

The principle of res judicata prevents a party from bringing to litigation not only a matter that was previously heard, but also a matter that should have been heard at that previous arbitration. Mr. Justice Hall of the Supreme Court of British Columbia, in the case Leonard Alfred Gamache and Vey Gamche v. Mark Megyesi and Century 21 Bob Sutton Realty Ltd., Prince George Registry, Docket No. 28394 dated November 15, 1996, quoted with approval the following passage from the judgment of Henderson v. Henderson, (1843), 67 E.R. 313

> "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.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."

I find the right to the Landlord to an Order of Possession pursuant to section 55(1) of the Act and a monetary order for unpaid rent pursuant to section 55(1.1) of the Act is related to the same subject matter and between the same parties and that the Landlord based on the 10 Day Notice. As such, I find the principle of *res judicata* applies and prevents me from granting the Landlord an Order of Possession and a monetary order for unpaid rent as those orders have already been granted to the Landlord by the Adjudicator in the Previous Proceeding.

Section 57(3) of the Act states:

> 57(3) A landlord may claim compensation from an overholding tenant for any period that the overholding tenant occupies the rental unit after the tenancy is ended.

Residential Tenancy Policy Guideline 3 ("PG 3") provides guidance, among other things, on situations where a landlord may seek unpaid rent or, where the tenancy has ended pursuant to conclusive presumption under section 46(5)(a) of the Act. PG 3 states in part:

> B. Overholding tenant and compensation
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> Section 44 of the RTA (section 37 of the MHPTA) sets out when a tenancy agreement will end. *A tenant is not liable to pay rent after a tenancy agreement has ended. If a tenant continues to occupy the rental unit or manufactured home site after the tenancy has ended (overholds), then the tenant will be liable to pay compensation for the period that they overhold pursuant to section 57(3) of the RTA (section 50(3) of the MHPTA). This includes compensation for the use and occupancy of the unit or site on a per diem basis until the landlord recovers possession of the premises.* In certain circumstances, a tenant may be liable to compensate a landlord for other losses associated with their overholding of the unit or site, such as for loss of rent that the landlord would have collected from a new tenant if the overholding tenant had left by the end of the tenancy or for compensation a landlord is required to pay to new tenants who were prevented from taking occupancy as agreed due to the overholding tenant's occupancy of the unit or site.
>
> [emphasis in italics added]

Based on the foregoing, I find that the principle of *res judicata* does not bar the Landlord from seeking compensation from the Tenant for overholding the rental unit after the effective date of the 10 Day Notice. As such, the Landlord has the option of making an application for dispute resolution to seek compensation for the time the Tenant overheld the rental unit rental after the effective date of the 10 Day Notice until he vacated it as stated in PG 3.

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

Conclusion

The Application is dismissed in its entirety without leave.

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: April 12, 2023

Residential Tenancy Branch