Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, FF

Introduction
This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for unpaid rent pursuant to section 67;
- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover her filing fee for this application from the tenants pursuant to section 72.

The tenants did not attend this hearing, although I waited until 1:25 p.m. in order to enable them to connect with this teleconference hearing scheduled for 1:00 p.m. The landlord attended the hearing and was given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. During the course of the hearing, an individual who acted as the landlord's agent (the agent) during relevant portions of this tenancy and/or the dispute resolution process joined and participated in the teleconference hearing.

Issues(s) to be Decided
Is this matter properly before me and do I have jurisdiction to consider the landlord's application?

Background and Evidence
There is a lengthy history as to how the landlord's application for dispute resolution was scheduled for my consideration at this hearing.

The landlord's amended application for a monetary Order, authorization to retain the tenants' security deposit and recovery of the filing fee was submitted on December 19, 2014.

The landlord's application was originally scheduled for a hearing by Arbitrator TM (the original Arbitrator) on April 7, 2014. When the landlord did not attend that hearing and the tenants did, the original Arbitrator dismissed the landlord's application on April 7, 2014. The original Arbitrator also issued a monetary Order in the tenants' favour in the amount of $1,175.00, the stated amount of the tenants' security deposit.

On April 19, 2014, the Residential Tenancy Branch (the RTB) received an application for review of the April 7, 2014 decision (the original decision). In that application, the agent submitted signed hospital records confirming that the landlord was admitted to hospital on March 31, 2014, discharged on April 2, 2014, and issued medication that prevented her from participating in the April 7, 2014 hearing. Arbitrator GK issued a Review Consideration Decision (the first Review Consideration Decision) on April 29, 2014, in which he allowed the application for a review on the basis that the landlord was unable to attend the original hearing because of circumstances that could not have been anticipated and were beyond her control.

The landlord's application was scheduled for a Review Hearing on June 9, 2014, at which time once more the tenants attended but the landlord was neither present nor represented. Arbitrator RL issued a Review Decision on June 9, 2014, in which he confirmed the original decision and monetary Order of April 7, 2014, noting that his decision was final and binding on both parties.

On June 18, 2014, the RTB received an application for review of the June 9, 2014 Review Decision from the agent. Once more, the agent applied for a review on the basis that the landlord was unable to participate in the June 9, 2014 decision for medical reasons which rendered her unable to attend the hearing due to circumstances that could not be anticipated and were beyond her control. He noted that the landlord was admitted to hospital on June 2, 2014 for emergency surgery and was in post-operative care and on medication at the time of the June 9, 2014 teleconference hearing. He also attached a three-sentence statement of June 10, 2014 from the landlord's surgeon who confirmed that he operated on her on June 2, 2014, noting that she would be required to be on "bed rest" until he was happy with her healing.

In her June 25, 2014 Review Decision, Arbitrator DV considered the request by the agent for a review of the June 9, 2014 decision. In her decision, Arbitrator DV noted that the issue before her was whether the landlord had provided sufficient evidence to support the indicated ground for review, again that the landlord was unable to attend the hearing due to circumstances that could not be anticipated and were beyond her control. After considering the agent's application and the surgeon's note, Arbitrator DV made the following final and binding determination:

> *...It is my finding that the applicant/landlord has not submitted sufficient evidence to support her application.*
>
> *There was no indication that the landlord was still in the hospital at the time of the hearing or otherwise incapacitated to be unable to call into the teleconference hearing.*
>
> *Further I find it reasonable that, as this was the landlord's second hearing on her original application for dispute resolution, she would have an agent attend the hearing, to ask for an adjournment, or represent her...*

Arbitrator DV also found that the landlord had failed to demonstrate why she did not have an agent represent her at the June 9, 2014 teleconference hearing "especially as her agent filed her application for review consideration." Arbitrator DV dismissed the landlord's application for a review of the June 9, 2014 decision hearing as she concluded that the landlord (through her agent) had not presented sufficient evidence to support her application for a review of that decision. She confirmed that the decision and monetary Order of April 7, 2014 made by the original Arbitrator remained in force as the landlord's application for dispute resolution had been dismissed.

Following receipt of Arbitrator DV's June 25, 2014 Review Consideration Decision, the agent once again filed an application for review on July 25, 2014. In that decision, the agent stated that the decision in question was issued on June 18, 2014, and not received until July 22, 2014. The agent also stated that the Order in question was issued on April 7, 2014 and received on June 18, 2014. The agent included more detail in this additional application to reconsider one of the decisions issued by an Arbitrator appointed under the *Act* (presumably that of Arbitrator RL, although his decision was issued on June 9 and not June 18, as maintained in this application for dispute resolution). The agent applied for a review on the same ground as was cited in the previous two applications for review (i.e., the landlord was not able to attend the hearing due to circumstances that could not be anticipated and were beyond her control). In addition, the agent attached a copy of a July 24, 2014 letter from the same surgeon who issued the June 10, 2014 letter, in which that surgeon replaced one of the sentences in his earlier letter with three sentences. The agent made no mention whatsoever of Arbitrator DV's June 25, 2014 dismissal of the June 18, 2014 application for review of Arbitrator RL's June 9, 2014 final and binding Review Decision.

Arbitrator KL reviewed the agent's July 25, 2014 application for review of the June 9, 2014 Review Hearing decision on August 6, 2014. As there is no mention in his August

6, 2014 decision of Arbitrator DV's June 25, 2014 dismissal of the agent's most recent application for review, I find that Arbitrator KL proceeded to issue his decision on the landlord's application for review without any knowledge that a final decision had been made with respect to the landlord's application for a review of the June 9, 2014 decision for the same ground as Arbitrator KL was asked to consider. Without this knowledge and without any indication in the agent's submissions that the subject matter of the landlord's application had already been finally and conclusively determined, Arbitrator KL issued a purported decision on August 6, 2014. Based on the information provided to him by the agent, Arbitrator KL accepted the agent's application for review on the basis that the landlord was unable to attend the June 2014 Review Hearing conducted by Arbitrator RL "due to circumstances that could not be anticipated and were beyond her control." Arbitrator KL suspended the original decision and Orders issued on April 7, 2014, pending the outcome of a new Review Hearing of this matter. Arbitrator KL arranged for notices of a new Review Hearing to be created and mailed to the landlord for service to the tenants.

The landlord submitted written evidence and sworn oral testimony that notices of this new Review Hearing and the new dispute resolution hearing package and evidence were sent to the tenants by registered mail, although she was uncertain as to the date of this mailing. She also submitted copies of the envelope returned to the landlord confirming that these documents were returned to the landlord as unclaimed.

Analysis

Section 79(2) of the *Act* establishes very limited grounds for seeking a review of a final and binding decision issued by an Arbitrator appointed under the *Act*, including the June 9, 2014 Review Hearing decision issued by Arbitrator RL. Section 80(c) of the *Act* also establishes that a party has only 15 days after the issuance of a decision to apply for review after that decision is received by the party. Section 81(2) of the *Act* tasks the Arbitrator assigned responsibility for considering the application for review to base the decision solely on the written submissions of the applicant.

As I noted at the hearing, the problem I face in considering this application is whether the decision issued by Arbitrator KL on August 6, 2014 has any legal effect or whether it is a nullity.

In this case, I find a number of problems with respect to the accuracy and thoroughness of the information included in the July 25, 2014 application for review filed on the landlord's behalf. Section 80(c) of the *Act* would have required any application for review initiated by the landlord or her agent to have been submitted within 15 days of receiving Arbitrator RL's June 9, 2014 decision. In the agent's June 18, 2014

application for review of that decision, the agent identified June 18, 2014 as the date when the June 9 decision was received. However, the agent's most recent application for review submitted on July 25, 2014 cited June 18, 2014 as the date of the decision and July 22, 2014 as the date when a June 18, 2014 decision was received by the landlord. Throughout this veritable maze of decisions and Review Decisions, there was no decision issued on June 18, 2014. The claim that the decision in question, incorrectly identified by the agent as June 18, 2014 instead of June 9, 2014, was received on July 22, 2014 appears to be an attempt to bring the landlord's July 25, 2014 application for review within the time frames established under section 80(c) of the *Act*.

I find that Arbitrator KL was presented with written evidence from the agent that the decision in question giving rise to this application was received on July 22, 2014, and not June 18, 2014, as was identified in the agent's previous application for review. Had the agent correctly identified the date of the landlord's receipt of the June 9, 2014 decision (and correctly identified the date of that decision) there is every reason to believe that Arbitrator KL would have reached a different determination regarding the application for review that was before him. More importantly, I find that the information provided by the agent, the only information he could consider pursuant to section 81(2) of the *Act*, omitted any mention of the most recent final and binding decision issued by Arbitrator DV on the landlord's previous unsuccessful attempt to obtain a review of the decision of June 9, 2014. Without this essential information, Arbitrator KL proceeded to issue a decision on his assessment of the merits of the landlord's second application for a review on the basis of the same ground as had been denied one month earlier. However, had this information been apparent to Arbitrator KL, I find that he surely would have concluded that he had no jurisdiction to issue a decision on a matter conclusively determined five weeks earlier by another Arbitrator.

Further, section 79(7) of the *Act* provides that a party to a dispute resolution proceeding may make only one application for review per proceeding. Had Arbitrator KL known that he was considering a second review application from the landlord for the same proceeding, I find that he would have dismissed her application on the ground that it was barred by section 79(7).

The legal doctrine of *res judicata* prevents a litigant from obtaining another day in court after the first lawsuit is concluded by giving a different reason or an additional explanation than she gave in the first for recovery of damages for the same invasion of her right. The rule provides that when a court of competent jurisdiction has entered a final judgement on the merits of a cause of action, the parties to the suit are bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that

purpose. A final judgment on the merits bars further claims by the same parties based on the same cause of action.

Res judicata prevents a plaintiff from pursuing a claim that already has been decided and also prevents a defendant from raising any new defense to defeat the enforcement of an earlier judgment. It also precludes relitigation of any issue, regardless of whether the second action is on the same claim as the first one, if that particular issue actually was contested and decided in the first action. Former adjudication is analogous to the criminal law concept of double jeopardy.

In this case, there is no question that the landlord's request for a review of the June 9, 2014 Review Hearing decision was conclusively considered and dismissed by Arbitrator DV on June 25, 2014. This precluded any consideration of the same matter by a subsequent Arbitrator. For this reason, I find that the only legally binding decision before me issued by an Arbitrator with respect to an application for review of the June 9, 2014 Review Hearing Decision is that issued by Arbitrator DV on June 25, 2014. I find that Arbitrator KL's purported decision of August 6, 2014 constitutes a nullity and is of no legal force or effect. His purported decision of that date was made on the basis of incomplete and erroneous information submitted by the agent on the landlord's behalf and without knowledge or mention of a final and conclusive decision issued by another Arbitrator on the exact same issue as was subsequently identified in the agent's July 25, 2014 application for review.

I therefore find that I am bound by the final and binding Review Consideration Decision issued by Arbitrator DV on June 25, 2014, and not the purported Review Consideration Decision of Arbitrator KL of August 6, 2014. I do so as I find that the issue before Arbitrator KL was indisputably *res judicata*, meaning the matter had already been conclusively decided and could not have been decided again by him. In legal terms, I find that Arbitrator KL was *ultra vires*, in his actions in ordering that the June 9, 2014 Review Hearing decision be reconvened as was his order that the original decision be suspended pending the outcome of another Review Hearing. In other words, Arbitrator KL's actions were beyond the powers available to him given the existence of the June 25, 2014 decision on exactly the same issue.

After having received the August 6, 2014 decision and a new Notice of Hearing, I can appreciate that the landlord was understandably surprised to learn that I was without jurisdiction to rehear this matter. However, I also note that this situation has resulted from incorrect and incomplete information having been presented on her behalf, after a final and binding decision had been made with respect to this matter on June 25, 2014,

and after the time limit for seeking reconsideration under section 80(c) of the *Act* had expired.

Conclusion

I dismiss the application before me as I have no jurisdiction to hear this matter. As I find that the most recent legal decision issued with respect to this tenancy is that issued by Arbitrator DV on June 25, 2014, her decision that the original decision and monetary Order issued on April 7, 2014 is confirmed remains in effect. The purported decision of August 6, 2014 is of no legal force or effect as the legal principle of *res judicata* prevented Arbitrator KL from making a determination regarding these same matters already finally and conclusively determined by Arbitrator DV on June 25, 2014.

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 09, 2014

Residential Tenancy Branch