Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, MNDC, FF

Introduction

The Application for Dispute Resolution filed by the Tenant seeks the following:

a. An order to cancel the one month Notice to End Tenancy dated May 12, 2016
b. A monetary order in the sum of $2609.32.
c. An order suspending or setting conditions on the landlord's right to enter the rental unit.
d. An order to recover the cost of the filing fee.

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

I find that the Notice to End Tenancy was served on the Tenant by posting on May 12, 2016. Further I find that the Application for Dispute Resolution/Notice of Hearing was served on the landlord by mailing, by registered mail to where the landlord resides on May 25, 2016. I find that the Amended Application for Dispute Resolution was served on the landlord by mailing, by registered mail on June 13, 2016. :

Issue(s) to be Decided

The issues to be decided are as follows:

a. Whether the tenant is entitled to an order cancelling the one month Notice to End Tenancy dated May 12, 2016?
b. Whether the Tenant is entitled to a monetary order and if so how much?
c. Whether the tenant is entitled to an order suspending or setting conditions on the landlord's right to enter the rental unit.
d. Whether the tenant is entitled to recover the cost of the filing fee?

Background and Evidence

On September 5, 2011 the parties entered into a 12 month fixed term tenancy agreement that provided that the tenancy was to start on October 1, 2011 and end on September 30, 2012. The tenancy agreement provided that the tenant(s) would pay rent of $1900 per month payable in advance on the first day of each month. The tenant(s) paid a security deposit of $950 on September 5, 2011. The Addendum to the tenancy agreement provided that the Tenant agrees that a maximum number of people to be living here is FOUR. On September 3, 2013 the parties signed a month to month tenancy agreement in writing stating the tenancy would be a month to month tenancy. Again, this agreement provided for the maximum number of people to be living in the rental unit was four. .

Grounds for Termination:
The Notice to End Tenancy relies on section 47(1)(c), (f), and (g) of the Residential Tenancy Act. Those sections provide as follows:

> Landlord's notice: cause
>
> 47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:
>
> (c) there are an unreasonable number of occupants in a rental unit;
>
> (f) the tenant or a person permitted on the residential property by the tenant has caused extraordinary damage to a rental unit or residential property;
>
> (g) the tenant does not repair damage to the rental unit or other residential property, as required under section 32 (3) [obligations to repair and maintain], within a reasonable time;

Analysis:
There has been considerable acrimony between the parties. The landlord served a one month Notice to End Tenancy on the Tenant in January 2016. One of the issues in that case was the presence of a 5th bed in the rental unit. At a hearing on March 2, 2016 the parties reached a settlement which was recorded in the arbitrator's decision. The 5th bed was removed and repairs were undertaken by the Tenant.
The landlord then issued 3 evictions notices as follows:

- A two month Notice to End Tenancy for landlord's use dated March 23, 2016.

- A one month Notice to End Tenancy dated April 18, 2016 that set the following reasons “Tenant has not done required repairs of damage to the unit/site
- A one month Notice to End Tenancy dated April 26, 2016 that stated “Tenant has allowed an unreasonable number of occupants in the unit/site” and Tenant has not done the required repairs of damage to the unit/site”

The landlord failed to attend the hearing and in a decision dated May 9, 2016 the arbitrator cancelled the three Notices. The arbitrator held that the Notices were frivolous and vexatious that made the following determination:

> “…
> Having found the Notices to be frivolous and vexatious as stated above, I wish to draw the Landlord’s attention to Section 28 of the *Act,* which states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to reasonable privacy; freedom from unreasonable disturbance.
>
> Residential Tenancy Branch Policy Guideline 6 states that a breach of a tenant’s right to quiet enjoyment occurs with frequent and ongoing interference by the landlord. The repeated issuance of invalid and unsubstantiated Notices to the tenant could be construed as such a breach of the tenant’s rights, for which the tenant could seek compensation.
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> I caution the Landlord that a Tenant is entitled to enjoy his home, free from the worry of further, unfounded eviction notices. That being said, I make no finding of a monetary compensation for devaluation of the tenancy as the Tenant failed to request such monetary compensation and that issue is therefore not before me. However, the Landlord is advised that should he continue to issue such unsubstantiated Notices; the Tenant may very well seek compensation for loss of quiet enjoyment.
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> Furthermore, I draw the Landlord’s attention to section 95(2) of the Act which stipulates any person who coerces, threatens, intimidates or harasses a tenant from making an application under the Act, or for seeking or obtaining a remedy under the Act, may be found to have committed an offence and is subject to a fine or administrative penalty.
>
> <u>Conclusion</u>
>
> The Tenant was successful with his application and **each** of the following 3 Notices to end tenancy were cancelled and are of no force or effect: (1) the 2 Month Notice issued March 8, 2016; (2) the 1 Month Notice issued April 18, 2016; and (3) the 1 Month Notice issued April 26, 2016. The Tenant was awarded recovery of the $100.00 filing fee.

The principle of res judicata 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 Columbia in 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 brought forward at the time."

I determined the principle of res judicata applies to the Notice to End Tenancy dated May 12, 2016 and the grounds set out in that Notice have already been determined against the landlord in previous arbitrations.

Further, the landlord has failed to establish sufficient grounds to end the tenancy and the Notice to End Tenancy dated May 12, 2016 must be set aside on its merits. The

landlord seeks to end the tenancy on the basis that there were 5 people living in the rental unit prior to the May 2, 2016 arbitration hearing and that this amounts to an unreasonable number of people. The Act provides that in order for the landlord to end the tenancy "there are an unreasonable number of people." There is insufficient evidence to prove that as of the date of the Notice to End Tenancy (May 12, 2016) more than four people were living in the rental unit.

The settlement in the decision of March 2, 2016 required that the tenant complete certain repairs within 45 days. The tenant obtained parts on line. One of the parts he ordered was the wrong part and he failed to complete the one of the repair items until a week after the 45 day period. This ground was dealt with in the previous arbitration and is binding on the parties as the arbitrator cancelled the Notice to End Tenancy. Further, I determined the landlord failed to establish sufficient grounds on the merits.

Finally, the landlord alleged that Tenant has caused extraordinary damage particulars of which are as follows:

- The tenant has damaged the bathtub lining (shower head falling on it) and it will cost $600 to re-laminate or $800 to replace.
- There is a hole in the counter top that will cost $400 to fix
- The track in the sliding glass door is coming up and there is a risk that the glass door will fall out.

In my view this ground is barred by the principle of res judicata as it should have been brought up in the previous arbitration. There is insufficient evidence these amount to a new item have arisen since the previous arbitration. The tenant disputes the estimates as to how much it will cost to replace. The individual(s) who gave the estimates did not attend the hearing. The landlord has the burden of proof to establish sufficient cause. I determined that landlord failed to prove that the tenant has caused extraordinary damage to the rental unit.

As a result I order that the Notice to End Tenancy dated May 12, 2016 be cancelled. The tenancy shall continue with the rights and obligations of the parties remaining unchanged.

Tenant's Application for a Monetary Order:

The Application for Dispute Resolution filed by the Tenant seeks a monetary order in the sum of $2609.32. With respect to each of the Tenant's claims I find as follows:

a. I dismissed the Tenant's claim in the sum of $395.42 for loss of work. The claim made Tenant relates to time he has taken off to attend the Residential Tenancy Branch to obtain information and to attend the hearing. This claim relates to the costs incurred in preparing and prosecuting a claim. An arbitrator does not have jurisdiction to make such an award. The only jurisdiction an arbitrator has relating to costs is the cost of the filing fee.

b. I dismissed the tenant's claim of $258 for costs incurred including registered mail, the cost of four usb drives, gas etc. The cost of the filing fee has been claimed separately and will be dealt with as a separate claim.

c. The tenant claimed the sum of $1955 for breach of the covenant of quiet enjoyment which is equivalent of one month rent. The tenant testified as to the impact the excessive number of Notices is having on him as well as the disruptions caused by the landlord when they undertake a monthly inspection and collect the rent. He has audio taped an encounter in which a number of people from the landlord were verbally abusing him.

Section 29 of the Residential Tenancy Act provides as follows:

> **Landlord's right to enter rental unit restricted**
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> **29** (1) A landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:
>
> > (a) the tenant gives permission at the time of the entry or not more than 30 days before the entry;
> >
> > (b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:
> >
> > > (i) the purpose for entering, which must be reasonable;
> > >
> > > (ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;
> >
> > (c) the landlord provides housekeeping or related services under the terms of a written tenancy agreement and the entry is for that purpose and in accordance with those terms;
> >
> > (d) the landlord has an order of the director authorizing the entry;

(e) the tenant has abandoned the rental unit;

(f) an emergency exists and the entry is necessary to protect life or property.

(2) A landlord may inspect a rental unit monthly in accordance with subsection (1) (b).

Where the tenant or his room mates gives the landlord permission to enter the rental unit the landlord has not breached his obligations under the Act even where the landlord failed to give Notice.

I determined the tenant is entitled to nominal damages of $100 for breach of the covenant of quiet enjoyment based on the following:

- I determined that the landlord has acted unreasonably in the number of Notices to End Tenancy and this amounts to a breach of the covenant of quiet enjoyment. However, the last Notice (which is the subject of this hearing) was given prior to the landlord receiving a copy of the arbitrator's decision which warned the landlord.
- I find that on two occasions the landlord acted abusively on the inspections including. However, I find that the tenant has failed to prove the extent of his allegations.

I determined the tenant has established a claim against the landlord in the sum of $100 plus $100 for the cost of the filing fee for a total of $200. The tenant is at liberty to deduct this sum from future rent. If the tenant is not able to reduce his rent payment to collect the $200, a Monetary order has been issued to the Tenant. This Order must be served upon the Landlord and may be enforced through the Small Claims Court.

Application of the Tenant to suspend or impose conditions on the landlord's Right to Enter the Rental Unit:

I dismissed the tenant's application to suspend or impose conditions on the landlord's right to End the Rental Unit. Both parties have operated under a misconception of their rights relating to the right to enter the rental unit. I have enclosed a copy of the section of the Residential Tenancy Act dealing with this issue. There have been disputes between the parties relating to repairs and the condition of the rental unit. I would not be appropriate to restrict the landlord from inspecting the rental unit providing he complies with section 29 of the Act. I have found that on two occasions the verbal abuse given by the landlord has been inappropriate. The tenant has been compensated for this as part of the damage award. If the landlord continues to act

inappropriately the tenant retains the right to bring another monetary claim for subsequent conduct.

Conclusion:

In summary I ordered that the Notice to End Tenancy dated May 12, 2016 be cancelled. I ordered that the landlord pay to the Tenant the sum of $200 and I granted a formal monetary order. I dismissed the tenant's claim for an order suspending or restricting the landlord's right of access.

It is further Ordered that this sum be paid forthwith. The applicant is given a formal Order in the above terms and the respondent must be served with a copy of this Order as soon as possible.

Should the respondent fail to comply with this Order, the Order may be filed in the Small Claims division of the Provincial Court and enforced as an Order of that Court.

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.

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Dated: June 24, 2016

Residential Tenancy Branch