Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding D. BONNIS & SONS LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, ERP, OLC, FFT

Introduction

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

- cancellation of the landlord's One Month Notice to End Tenancy for Cause (One Month Notice) pursuant to section 47 of the *Act*;
- an Order for emergency repairs pursuant to sections 33 and 62 of the *Act*;
- an Order for the landlord to comply with the *Act*, regulation, and/or the tenancy agreement pursuant to section 62 of the *Act*; and
- recovery of the filing fee for this application from the landlord pursuant to section 72 of the *Act*.

The tenant's agent attended the hearing on behalf of the tenant. The landlord's agent attended on behalf of the corporate landlord. Both parties were given a full opportunity to be heard, to present testimony, to make submissions and to call witnesses.

The tenant's agent stated that he served the landlord's agent with the Notice of Dispute Resolution Proceeding for this hearing by registered mail on October 17, 2018. The tenant's agent provided a Canada Post registered mail tracking number as proof of service (noted on the cover sheet of this Decision). The tenant's agent confirmed that no documentary evidence was submitted by the tenant – the only evidence was the description of the claims provided in the tenant's application. With the consent of the parties, I accessed the Canada Post website to confirm that the document was delivered on October 24, 2018. Although the package was sent by registered mail requiring a signature, the Canada Post website tracking report did not show the signature associated with the delivery of the document.

The landlord's agent stated that he never received the registered mail package and therefore did not receive notice of this hearing from the tenant. The landlord's agent explained that he had learned of the tenant's application as it was referred to in the Decision rendered in the previous dispute hearing between the parties held on October 23, 2018 (file number noted on the cover sheet of this Decision). The landlord's agent stated that he contacted the Residential Tenancy Branch to obtain the date, time and telephone access codes for this hearing.

Although service of the notice of hearing for this matter was disputed by the respondent, the respondent was in attendance and prepared to respond to the applicant's dispute, therefore, I deemed the respondent sufficiently served with the notice of this hearing on October 30, 2018, the date the previous decision was rendered, pursuant to section 71 of the *Act*.

Preliminary Issue – Jurisdiction to Hear Tenant's Application

The landlord's agent referred to the prior Decision pertaining to the hearing held on October 23, 2018 between the parties, for which I was also the assigned arbitrator, and stated that the tenant's application before me today was already adjudicated at that previous hearing. The landlord's agent explained that the tenant's current application was brought forward and crossed with the landlord's application for an Order of Possession, and therefore heard and adjudicated at the October 23, 2018 hearing.

During the hearing, I accessed the file number provided by the landlord's agent and reviewed the decision dated October 30, 2018, which I had written. I also confirmed that both parties had a copy of that decision in front of them during the hearing.

I referred the parties to the following paragraph on Page 3 of the decision, which confirms that the tenant's Application to cancel the One Month Notice to End Tenancy was heard at the October 23, 2018 hearing, as follows:

> *Both parties agreed in the hearing to allow the tenant to bring forward the tenant's application to cancel the landlord's One Month Notice to be addressed at this hearing.*
>
> *Therefore, in the hearing, I advised the parties that only the tenant's application to cancel the landlord's One Month Notice was being joined as a cross-application to the landlord's application seeking an Order of Possession on the basis of the One Month Notice. The tenant's other claims pertaining to the Order for the landlord to*

comply with the Act, regulations or tenancy agreement, and the Order for the landlord to complete emergency repairs, were set aside at this time, to be heard at the scheduled November 27, 2018 hearing. The tenant's agent made reference to evidence submitted by the tenant for the November hearing, however, I note that there was no evidence submitted by the tenant for this hearing before me at the time of the hearing.

As such, I find that I have no standing to make a determination on the tenant's Application to cancel the One Month Notice to End Tenancy, given that a previous proceeding before the Residential Tenancy Branch on October 23, 2018 resulted in the tenant's Application being dismissed and an Order of Possession granted to the landlord effective November 30, 2018.

The legal principle of *res judicata* prevents a plaintiff from pursuing a claim that already has been decided and prevents a defendant from raising any new defense to defeat the enforcement of an earlier judgment. It also precludes re-litigation of any issue, regardless of whether the second action is on the same claim as the first one, if that issue was contested and decided in the first action.

Therefore, I find that the tenant's current Application to cancel the One Month Notice to End Tenancy for Cause is *res judicata*, meaning the matter has already been conclusively decided and cannot be decided again.

The tenant's Application on this claim is dismissed as I do not have the jurisdiction to consider a matter that has already been the subject of a final and binding decision under the *Act*. Therefore, the final and binding decision issued on October 30, 2018, pertaining to this tenancy remains in effect.

However, I note that the tenant's other two associated claims seeking orders against the landlord were not adjudicated at the October 23, 2018 hearing, and therefore, I heard submissions from both parties on those two remaining claims in this hearing.

Issue(s) to be Decided

Should the landlord be ordered to make emergency repairs?
Should the landlord be ordered to comply with the *Act*, regulations and/or tenancy agreement?
Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony presented, not all details of the submissions and arguments are reproduced here. Only the aspects of this matter relevant to my findings and the decision are set out below.

The tenant's application provided the following explanation under the claim requesting that the landlord be ordered to make emergency repairs:

> *We have been without a sink or stove in the kitchen for over 2 months and we were unable to cook and have been eating out all this time. This apartment had various floods and the last one happened May 27, 2018 and the landlord did not take care of it properly and the apartment is full of "BLACK MOLD".*

The tenant's application provided the following explanation under the claim requesting that the landlord be ordered to comply with the *Act*, regulations and/or tenancy agreement:

> *The landlord has left us living without a kitchen.*

I confirmed with the tenant's agent that both claims pertain to the same issue that being that the tenant has not had the use of her kitchen and kitchen sink for several months, and that there is black mold in the apartment.

The landlord's agent stated that since the fire in the apartment, the landlord's restoration company has informed the tenant of the need to have their belongings removed from the apartment in order for the repair to be carried out. The landlord's agent further stated that the restoration company had placed dehumidifiers in the apartment after the fire as there was significant water damage as a result of the sprinkler response. The landlord's agent stated that the tenant's agent complained about the dehumidifiers.

Analysis

A tenant can apply for emergency repairs under section 33 of the Act, which reads:

> *33 (1) In this section, "emergency repairs" means repairs that are*
>
> *(a) urgent,*
>
> *(b) necessary for the health or safety of anyone or for the preservation or use of residential property, and*

(c) made for the purpose of repairing

(i) major leaks in pipes or the roof,

(ii) damaged or blocked water or sewer pipes or plumbing fixtures,

(iii) the primary heating system,

(iv) damaged or defective locks that give access to a rental unit,

(v) the electrical systems, or

(vi) in prescribed circumstances, a rental unit or residential property.

I do not find that the tenant's claim pertaining to the kitchen sink and stove meets the criteria provided under section 33 of the *Act*, and therefore, I dismiss this portion of the tenant's application.

The tenant's application also claims black mold as an emergency repair. Although I do find that black mold presents a health and safety issue, the tenant has not provided any evidence of black mold or the extent of the black mold in the rental unit. Therefore, I find that the tenant has not provided sufficient evidence to prove their claim on this ground, and as such I dismiss this portion of the tenant's application.

The tenant has also applied for an order for the landlord to comply with the *Act*, regulations, and/or tenancy agreement regarding the lack of a functioning kitchen. The tenant did not submit any documentary evidence to support the tenant's agent's testimony that the landlord has not been responsive in undertaking the repairs to the rental unit, including the kitchen. The landlord's agent disputed the tenant's agent's version of events and stated that it was the tenant's lack of cooperation in removing belongings and furniture from the rental unit which delayed the restoration company in completing the necessary repair work. While it is always difficult to reconcile conflicting testimony, the tenant bears the burden of proving their claim on a balance of probabilities. Without corroborating evidence, on a balance of probabilities, I find that the tenant has not provided sufficient evidence to prove their claim against the landlord. As such, I dismiss this portion of the tenant's application.

In summary, I have found that I have no jurisdiction to hear the tenant's Application to cancel the landlord's One Month Notice to End Tenancy for Cause as this matter was already adjudicated and a final and binding decision issued on October 30, 2018 pertaining to this tenancy.

The tenant's remaining claims seeking an order for emergency repairs and an order for the landlord to comply with the Act, regulations, and/or tenancy agreement are dismissed.

As the tenant was not successful in their application, the tenant must bear the cost of their own filing fee for this application.

Conclusion

The tenant's Application in its entirety is dismissed.

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 29, 2018

Residential Tenancy Branch