Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFT, MNDCT

Introduction

This hearing convened as a Tenant's Application for Dispute Resolution, filed on April 16, 2018, wherein the Tenant requested monetary compensation from the Landlord in the amount of $35,000.00 and to recover the filing fee.

The hearing was conducted by teleconference at 1:30 p.m. on October 25, 2018.

Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me.

I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Preliminary Matter—Status of Landlord

At the outset of the hearing, the Landlord named on the Application for Dispute Resolution claimed he was not the Landlord. Introduced in evidence was a tenancy agreement which was signed by the Tenant on April 27, 2018 and by the Landlord on April 22, 2018.

Documentary evidence submitted by both parties records the Landlord as the individual named as Landlord on the Tenant's Application for Dispute Resolution.

For the purposes of this my Decision, I will refer to the Applicant as Tenant and Respondent as Landlord. This is for convenience only, and does not indicate I have made a finding as to the validity of the tenancy agreement between the parties.

Preliminary Matter—Naming of Tenants

Counsel for the Tenant confirmed the Tenant is a corporation. As such, and pursuant to section 64(3)(c) I amend the Tenant's Application to include "Ltd." in the name of the Tenant.

Preliminary Matter—Jurisdiction

On October 11, 2017 the parties appeared before the Residential Tenancy Branch on an application by the Tenant for the following relief:

- Monetary compensation in the amount of $34,999.99;
- an Order of Possession to the Tenant;
- an Order requiring the Landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- an Order that the Landlord provide services or facilities required by law pursuant to section 65;
- 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 access to or from the rental unit or site for the Tenant or the Tenant's guests pursuant to section 70; and,
- authorization to recover the filing fee for this application from the Landlord pursuant to section 72.

By Decision dated October 18, 2018 Arbitrator Dunbar declined jurisdiction over the dispute between the parties and held as follows:

> *"The facts are unclear in this matter. I find that this dispute is beyond the realm of a simple tenancy matter and primarily relates to the sale of the property and the circumstances surrounding that sale. I find that this tenancy dispute is inextricably linked to the dispute between the buyer landlord and the seller landlord as one of the issues at this hearing (whether the tenancy should end and whether the end was contemplated in the sale of the property) are central issues in the matter that will be addressed in the court action started by the buyer/new landlord. In all the circumstances, I find that this matter cannot be determined at this time before the Residential Tenancy Branch. I find*

that the hearing of this matter in court supersedes the hearing of this matter at the Residential Tenancy Branch.

…

Based on the party's description of the circumstances between the applicant (tenant) and respondent (buyer/new landlord) in this dispute and hearing, as well as the undisputed testimony of court proceedings in another venue in relation to the sale of this premises, I find that I have no jurisdiction to consider this matter."

Following the hearing the Tenant made a Request for a Correction pursuant to section 78 of the *Residential Tenancy Act.*

In response to the Tenant's Request, and in her Decision on Request for Correction and Clarification, Arbitrator Dunbar explained as follows:

I have not made a determination in my decision as to whether or not this is a residential tenancy matter generally: I have decided that, based on a concurrent Supreme Court action to which the issues at this hearing are substantially linked, the Residential Tenancy Branch does not have jurisdiction to determine this matter. As stated in my original decision, "I find that the hearing of this matter in court supersedes the hearing of this matter at the Residential Tenancy Branch." I refer the tenant to Division 1 of the Residential Tenancy Act regarding determining disputes,

> ***58****(2) Except as provided in subsection (4),* ***if the director accepts an application under subsection (1), the director must resolve the dispute under this Part unless***
>
> *(a) the claim is for an amount that is more than the monetary limit for claims under the* Small Claims Act*,*
>
> *(a.1) the claim is with respect to whether the tenant is eligible to end a fixed term tenancy under section 45.1* [tenant's notice: family violence or long-term care]*,*
>
> *(b) the application was not made within the applicable period specified under this Act, or*
>
> *(c)* ***the dispute is linked substantially to a matter that is before the Supreme Court.***
>
> ***[emphasis added]***

…

While I have provided clarification of the meaning of my decision above, I find that the tenant is not seeking a correction to my decision of an obvious error or an inadvertent admission. I also find that the tenant is using the Request for Correction as an attempt to reargue his position. The Request for Correction process is limited to, as noted above, correct typographic, grammatical, arithmetic or other similar errors in a decision or order, or deal with an obvious error or inadvertent omission in a decision or order and not an opportunity to re-argue their positions.

> *As a result, I find the landlord has failed to request a correction as allowed under Section 78 of the Act and I decline to provide any corrections to my decision of October 18, 2017.*

On February 26, 2018 the Tenant applied for Review Consideration of the October 18, 2017 Decision. The Arbitrator considering the Application for Review Consideration dismissed the Application as it had been filed outside the strict time limits imposed by section 80 of the *Residential Tenancy Act.* The Arbitrator also declined the Tenant's request for more time pursuant to section 66 of the *Act* finding that the Tenant failed to prove exceptional circumstances existed which prevented them from filing within the timelines imposed by section 80.

The evidence confirms that the Supreme Court Proceedings to which Arbitrator Dunbar referred is a Notice of Civil Claim filed by the Landlord named in these proceedings (the Purchaser of the real property) on October 2, 2017 in the Vancouver Registry (the file number is noted on the unpublished cover page of this my Decision). In that action, the Landlord claimed the sellers failed to provide vacant possession of the rental unit due to the fact it was tenanted by the Tenant named in these proceedings.

In response to that claim, the sellers filed a Response to Civil Claim wherein they alleged:

- The purchaser (Landlord in this action) confirmed his intention to continue to rent to the Tenants.
- The purchaser entered into a tenancy agreement with the Tenants, [name withheld], on April 22, 2017.
- That the seller's acceptance of the sale was subject to the purchaser's confirmation that he intended to continue to rent to [the Tenants] was relied upon in the seller's acceptance of the purchaser's offer to purchase the property.
- The sellers extended their tenancy with the Tenants to August 31, 2017.
- The purchaser then attempted to cancel the tenancy agreement which had been entered into with the Tenants on April 22, 2017.
- The purchaser changed the locks to the rental unit on or about the possession date.

On October 25, 2017 the sellers filed a Third Party Notice against their realtor L.C.

On December 20, 2017 L.C. filed a Response to Third Party Notice. In this Response L.C. submitted that the sellers breached the terms of the property sale by entering into an extension of the tenancy agreement to August 31, 2017. Further, she submitted that the purchaser, by entering into a tenancy agreement with the Tenant, forfeited his right to vacant possession of the rental unit.

The evidence further confirms that the Tenant also filed a Petition in the B.C. Supreme Court on December 22, 2017 seeking an Order setting aside the October 17, 2017 Decision of Arbitrator Dunbar, an Order of Possession of the rental unit, return of the Tenant's personal belongings and costs (the "Judicial Review Proceedings"). The file number for that matter is included on the unpublished cover page of this my Decision.

On December 22, 2017 an ex parte hearing (hearing without notice to the Landlord) relating to the Petition occurred before the Honourable Justice Groves, who ordered the return of the Tenants' belongings. The Tenant's request for an Order staying the October 18, 2017 Decision as well as the Tenant's request for an Order of Possession of the rental unit was not granted by Justice Groves on the ex parte proceeding. Neither party provided any submissions with respect to the current status of this proceeding; save and except to acknowledge a Judicial Review had been filed.

An associate of the corporate Tenant named in this Application, D.W., also communicated directly with the Residential Tenancy Branch's Director of Dispute Resolution. In a letter to D.W., dated December 11, 2017 the Director responded in part as follows:

> "*Although your complaint is being looked at, arbitrator's decisions are final and binding. Under the law, neither I nor any other government staff member has the authority to re-examine or disturb the existing decision. If you believe the decision contains and error in law, is biased or unfair, you may apply to the Supreme Court of British Columbia for a judicial review of the decision. If a Supreme Court Justice agrees, the Justice will provide direction to the Residential Tenancy Branch for further action. There is a 60-day time limit for judicial reviews, although this time limit may be extended by the court. If you decide to proceed with a judicial review, you may find this website helpful: www.supremecourtselfhelp.bc.ca/self-help.htm.*

In a further letter dated March 23, 2018 the Director of Dispute Resolution informed the Tenant as follows:

> *In this case, the arbitrator declined to hear your matter based on jurisdiction. Accordingly, a Request for Correction is not intended as a means to change a legal determination or an opportunity to argue, for example, what evidence was considered or not. A judicial review is the process available to parties if they believe the decision contains an error of fact or law or is procedurally unfair. We provided you with a link to that process in our December 11, 2017 letter as follows: www.supremecourtselfhelp.bc.ca/self-help.htm.*
>
> *In addition, you should be aware that if the circumstances change, where the matters that led to the original Arbitrator to conclude the matter was linked to issues before the Supreme Court have been resolved, you remain free to submit a new Application for*

Dispute Resolution. You will need to provide evidence of the resolution with that new Application.

The Tenant filed this Application on April 16, 2018 seeking $35,000.00 in monetary compensation from the Landlord in relation to the same tenancy. While the Tenant did not request all the relief claimed in the Application which was heard before Arbitrator Dunbar, the circumstances giving rise to the April 16, 2018 application are the same as the ones considered by Arbitrator Dunbar on October 11, 2017. More importantly, the monetary claim is essentially the same claim.

The evidence of the parties at the hearing before me was that the issues before the Supreme Court *have not been resolved.*

Conversely, testimony from the Landlord indicates that the Landlord filed a second Supreme Court Civil claim against the Director of the Corporation named as Tenant in this Application, T.K., and his associate, D.W. Counsel for the Tenant confirmed he was aware of the second proceeding against the Director and Associate personally, and stated that the corporate Landlord (his client) was not named in the proceeding and had not been properly served. In any event, there are now *two* separate civil proceedings relating to this tenancy in the B.C. Supreme Court.

Further, and as noted the Tenant has filed for Judicial Review of the October 17, 2017 Decision in the B.C. Supreme Court.

Counsel for the Tenant provided three decisions from the Residential Tenancy Branch on the issue of jurisdiction when parallel proceedings exist, or are contemplated in the B.C. Supreme Court.

In the first Decision dated September 19, 2016, the Arbitrator found they had jurisdiction on the basis that the Residential Tenancy matter and the B.C. Supreme Court matter were not substantially linked.

As noted, Arbitrator Dunbar found that the claim before her and the Supreme Court civil claim were in fact substantially linked.

In the second Decision dated January 30, 2018, the Arbitrator accepted jurisdiction on the basis that the Supreme Court claim had not yet been filed at the time of the Residential Tenancy Branch hearing. Further, the Arbitrator found that they were unable to consider whether such a potential claim was substantially linked to the Residential Tenancy Branch matter.

This case is also distinguishable as in the hearing before Arbitrator Dunbar, Supreme Court proceedings had in fact been commenced.

In the third decision dated March 1, 2017, the Arbitrator declined jurisdiction on the basis that a claim had been filed in the B.C. Supreme Court. The Arbitrator found that Section 58 provides primacy to the Supreme Court's jurisdiction where jurisdiction overlaps, so long as that matter is substantially linked to the matter that is before the Supreme Court.

Arbitrator Dunbar declined jurisdiction in this matter. As communicated by the Director of Dispute Resolution, Sheila Allen, I do not have the authority to re-examine or disturb Arbitrator Dunbar's Decision on this issue.

The October 17, 2017 decision, to decline jurisdiction cannot be changed by submitting a subsequent application. As noted during the hearing, I am precluded, by operation of the legal principle, *Res Judicata,* from reconsidering Arbitrator Dunbar's final and binding Decision on this matter.

Res Judicata ("the matter is judged") is an equitable principle that, when its criteria are met, precludes relitigation of a matter. There are a number of preconditions that must be met before this principle will operate:

1. the same question has been decided in earlier proceedings;

2. the earlier judicial decision was final; and

3. the parties to that decision (or their privies) are the same in both the proceedings.

All three of the above preconditions apply in the case before me. The question of jurisdiction was decided by Arbitrator Dunbar and her decision was final. Further, the claim before me relates to the same parties as in the matter before Arbitrator Dunbar.

Discretion exists to not apply *Res Judicata,* even when the preconditions are met. The Supreme Court of Canada in the 2001 Decision in *Danyluk* and later in the 2013 Decision of *Penner v. Niagara (Regional Police Services Board)* explained that "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." Further, this discretion exists to ensure that "a judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice."

The Court then identified seven factors which could be considered in determining whether it would be fair and just in applying *Res Judicata:*

1. the wording of the statute;
2. the purpose of the legislation;
3. the availability of an appeal;
4. safeguards within the administrative process;
5. the expertise of the administrative decision maker;
6. the circumstances giving rise to the prior decision;
7. any potential injustice that might result from the application or non-application of the principle (which the Court described as "a final and most important factor").

A qualitative assessment of these factors must be carried out as it is possible that the significance of one factor could outweigh a collection of other factors. The question to be decided is "would applying the principle be unfair or unjust?"

I find the first and third factors to be the most significant in the case before me.

In terms of the first factor, section 58(2)(c) of the *Residential Tenancy Act* provides as follows:

> **58** …
>
> (2) Except as provided in subsection (4), if the director accepts an application under subsection (1), the director must resolve the dispute under this Part unless
>
> …
>
> (c) the dispute is linked substantially to a matter that is before the Supreme Court.

As noted, there are two separate civil claims before the B.C. Supreme Court relating to this tenancy. The evidence before me indicates those claims are substantially linked to the validity of the tenancy agreement between the Tenant and Landlord in the case before me. Further, notes claims have not been resolved.

In terms of the third factor, Decisions of the Residential Tenancy Branch may be appealed to the B.C. Supreme Court by way of Judicial Review Proceedings. The evidence before me confirms such proceedings have been commenced.

Again, and as communicated by Ms. Allen, if the parties believe October 17, 2017 decision contains and error in law, is biased or unfair, the proper course is to apply to the Supreme Court of British Columbia for a judicial review of the decision.

I am mindful of the seventh factor listed above as well as the Tenant's counsel's submissions regarding the two year limitation imposed by section 60 of the *Act.*

Section 58(4)(b) provides that the Supreme Court may make any Order that the Director (or her delegates: Arbitrators) may make under the *Residential Tenancy Act.* This includes extending time limits pursuant to section 66.

Conclusion

I decline jurisdiction to hear the Tenant's Application filed April 16, 2018r on the basis of section 58(2)(c) of the *Act* and the prior Decision of Arbitrator Dunbar issued October 17, 2017.

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 21, 2018

Residential Tenancy Branch