Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: OPR, MNRL, FFL

On July 4, 2019, the parties participated in a teleconference hearing of this application. I issued an Interim Decision on July 5, 2019, in which I requested the proper service of documents to one another and to the Residential Tenancy Branch (the RTB) so that I could properly assess this matter.

In my Interim Decision, I provided an Introduction, which included the history of how this matter had come before me, and which I revise as follows:

Introduction

On April 2, 2019, another Arbitrator appointed pursuant to the *Residential Tenancy Act* (the *Act*) considered the landlord's application for an Order of Possession based on a 10 Day Notice to End Tenancy (the 10 Day Notice) issued on January 29, 2019, the landlord's amended application for a monetary award for unpaid rent and the landlord's application to recover the filing fee for that application from the tenants. Although the landlord's 10 Day Notice identified $84,000.00 owing as of January 1, 2019, the landlord's current application for a monetary award seeks $35,000.00 in unpaid rent, the maximum amount that a party can obtain through the *Act*. As the tenants did not attend that hearing, that Arbitrator (the original Arbitrator) issued a decision granting the landlord a monetary award and a 2 Day Order of Possession based on the 10 Day Notice.

The tenant subsequently applied for review consideration, an application initially dismissed by another Arbitrator (the reviewing Arbitrator) appointed pursuant to the *Act* on April 16, 2019. The reviewing Arbitrator decided that the tenant's application was submitted beyond the time limit for doing so.

The review Arbitrator considered a second application for review consideration of the April 16, 2019 review consideration decision. In the reviewing Arbitrator's review consideration decision of May 1, 2019, the reviewing Arbitrator set aside their April 16,

2019 review consideration decision. They described the tenant's application in the following terms and allowed the tenant's application for review for the following reasons:

...In written submissions, the Tenants indicate that the Landlord failed to advise that the matter is before the Supreme Court of British Columbia; deny receipt of documents related to the dispute resolution hearing; describe various evidence, including audio recordings and pleadings in the Supreme Court of British Columbia, that would have been adduced to dispute the Landlord's claims; and raise an issue with respect to a "signed Purchase and Sale agreement", suggesting the Tenants may have an ownership interest in the property. Documents submitted with the Application include portions of documents filed in the Supreme Court of British Columbia after the hearing, and a signed Contract of Purchase and Sale, dated April 1, 2016, relating to the dispute address. I also note the date of the Contract of Purchase and sale roughly coincides with the date the Tenants stopped paying rent, according to the Landlord's ledger. I also note the Landlord's evidence during the original hearing confirmed rent had not been paid in 2 years, and that $84,000.00 was outstanding. I find it unusual that the Landlord did not take steps to end the tenancy much earlier, and was prepared to waive any entitlement to the balance of rent owing that exceeded the monetary jurisdiction of the director...

After careful consideration of the Application, I find that the Tenants have raised serious concerns about the veracity of the Landlord's evidence and the use of that evidence to end a tenancy when it appears much more may be at stake. Then Tenant also denied receipt of documentation related to the original hearing. In these circumstances, I find it appropriate to order that these issues be addressed at a participatory hearing. Therefore, I order that a new hearing of the original application take place, as described below. The decision and orders issued on April 2, 2019, are suspended until that hearing is completed.

As a new hearing has been granted on the basis of fraud, I find it has not been necessary for me to consider the remaining bases indicated on the Application...

(as in original)

In the reviewing Arbitrator's review consideration decision of May 1, 2019, they included the following directions to the tenant, the applicant for review consideration, and to the parties:

...Notices of the time and date of the hearing are included with this Review Consideration Decision for the review applicant to serve to the review respondent within 3 days of receipt of this Decision. *The review applicant must also serve a copy of this Decision to the other party. I further order the review applicant to serve the review respondent with their current address for service together with the notice of hearing and decision. At the new hearing, the review applicant will be required to demonstrate how the documents outlined above have been served to the other party.*

Each party must serve the other and the Residential Tenancy Branch with any evidence that they intend to rely upon at the new hearing...

I have been delegated responsibility pursuant to the *Act* to undertake the new hearing of the landlord's application....

Preliminary Matters

In my Interim Decision, I noted the following:

At the outset of the hearing, the landlord's legal counsel advised that neither the tenant nor the tenant's counsel had followed the directions cited above. This required the tenant to serve the landlord with a copy of the review consideration decision of May 1, 2019, and to provide all of the tenant's information upon which that decision was based, as well as the remainder of the tenant's written evidence. The landlord's legal counsel maintained that the only information they had received about this hearing was from the Residential Tenancy Branch (the RTB). The landlord's counsel also advised that other than the Statement of Claim regarding the tenant's April 8, 2019 legal action initiated with the Supreme Court of British Columbia, the landlord had not received any documentation from the tenant or the tenant's counsel with respect to that legal action.

The tenant's counsel understood that copies of the review consideration decision had been forwarded to the landlord by the tenant. In the event that this had not occurred, the tenant's legal counsel requested an adjournment to ensure that the tenant's documents necessary to consider this matter had been received. The landlord's legal counsel did not oppose this request.

I also note that documents referred to in the tenant's application for review consideration were not properly entered into the RTB's online service portal, which prevented me from accessing documents that the parties would no doubt be referencing, should I proceed to hear this matter.

Adjournment of July 4, 2019 Hearing

After outlining the contents of RTB Rule of Procedure 7.9, I adjourned the July 4, 2019 hearing, as neither I nor counsel for the landlord had been provided with sufficient information by the tenant (or the tenant's counsel). In so doing, I referenced "the difficulty that would ensue if I were to attempt to proceed to consider this matter without all of the necessary documents pertaining to this matter, and the effect of the reviewing Arbitrator's suspension of the orders issued on April 2, 2019 by the original Arbitrator."

I outlined specific directions as to the service and submission of evidence with the RTB's Rules of Procedure. I noted that it was important "to take maximum advantage of this adjournment so as to enable me to make an informed decision with respect to the tenant's claim that the matters that are subject to the landlord's application are significantly linked to the tenant's April 8, 2019 Statement of Claim made to the Supreme Court of British Columbia and should not be dealt with by the RTB until such time as a legal determination has been made by that Court." To that end, I ordered the tenant to provide all documents and evidence referenced in their April 8, 2019 Statement of Claim and in their review consideration application upon which they intended to rely in the consideration of the matter properly before me to the landlord's legal counsel and to the RTB. I also ordered the tenant to provide copies of any documents or evidence that support the assertion made by the tenant's legal counsel that the sale price and terms of the Contract of Purchase and Sale was to have taken into account unpaid rent that had been owing for some time prior to the alleged entering into of that Contract. I also ordered the parties " to submit written evidence that will shed light on the positions expressed at the July 4, 2019 hearing with respect to the extent to which the landlord's current application involves unpaid rent that pre-dates the parties alleged Contract of Purchase and Sale, which the tenant referenced in their application for review consideration."

Preliminary Matter - Is the landlord's application linked substantially to a matter that is before the Supreme Court of B.C.?

At the July 4 and September 3, 2019 hearings, legal counsel for the tenant asserted that the landlord's application, including the landlord's application for an Order of Possession based on a 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) issued on January 29, 2019 involved matters that were linked substantially to a matter that is before the Supreme Court of B.C. Without the Notice of Civil Claim, filed with the Supreme Court of B.C. on April 8, 2019, it was difficult to consider the extent to which the landlord's application was substantially linked to the tenant's application.

The written submission by the tenant's legal counsel referenced paragraph 58(2)(c) of the *Act*, the relevant portions of which read in part as follows:

(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..*

Also of interest in this matter are the other exclusions referenced in section 58(2) of the *Act,* some of which were also identified as concerns by the tenant's legal counsel. These included the following:

> *(a)the claim is for an amount that is more than the monetary limit for claims under the Small Claims Act*,...
> *(b)the application was not made within the applicable period specified under this Act,...*

Background and Evidence with Respect to Consideration of whether or not this matter is linked substantially to a matter that is before the Supreme Court

The Notice of Civil Claim filed with the Supreme Court of B.C. and entered into written evidence by the tenant's counsel identified the numbered company for the landlord's current application, the individual landlord and that landlord's spouse, as well as the municipality, the strata corporation, and a real estate company as Respondents. In addition to a comprehensive explanation of how and why the tenant believed that the Respondents to that legal action were responsible for the damages claimed, the tenant's legal counsel made specific reference to Paragraph 16 of the Notice. The tenant`s legal counsel noted that the matter is currently before the Supreme Court of B.C. and maintained that Paragraph 16, an anonymized version of which appears as follows "deals squarely with the allegedly owing amounts."

16. Over many months, the Plaintiff has withheld the rent from the Defendant due to all issues with the unit not being fixed, the rental agreement of not covering the unities (sic) as promised, the agreement of purchase of sale for (the property address) never be completed as it appeared the Defendant committed Fraud...

The written arguments of the tenant`s counsel included the following allegations:

...The rental amounts allegedly owing prior to the contract of purchase and sale were subsumed by fact that upon entering into the contract, the matter between parties pertained to a purchase and sale scenario as opposed to a tenancy. Moreover, parties orally agreed that any amounts owing would be adjusted for at time of closing of the sale of the property such that amounts owing would be credited to the Vendor at the time of closing. (The tenant) could stay on the premises rent free until the closing of sale. Since Mr. and Ms. J. has to date failed to fulfill their obligation to close on the sale of the property pursuant to the contract, no amounts are owing to the Js until the closing of the sale occurs...

The tenant's legal counsel submitted that "because the matter is before the BC Supreme Court, it is for the Court to decide amounts owing between the parties" and that this dispute lies outside the jurisdiction of the RTB.

The tenant's legal counsel also maintained that the tenancy, which did exist ended when the parties entered into their Contract of Purchase and Sale dated April 1, 2016. Since the landlord's application was filed with the RTB on February 15, 2019, the tenant's legal counsel asserted that the landlord's application was made more than two years following the end of the tenancy and that the landlord was time barred from making their application pursuant to section 60 of the *Act*.

The landlord's legal counsel maintained that the issue of unpaid rent, which the landlord maintains remains owing from a period before the alleged Contract of Purchase and Sale was created, is separate from whether a legally enforceable real estate contract was entered into or consummated between the parties. The landlord's legal counsel claimed that there is no dispute that rent remains owing and that the tenant has continued to reside in this property without paying rent for many years. The landlord's legal counsel asserted that the tenant's inclusion of an assertion in their litigation filed with the Supreme Court that there was an agreement between the parties that unpaid rent would be deducted from the purchase price of the property should not bar the RTB from considering the landlord's current application.

The landlord's legal counsel made reference to an extensive set of transcribed text messages between the parties that they entered into written evidence. In these text messages, the landlord's legal counsel noted that there were frequent and continuous references to outstanding rent, which the tenant allegedly agreed to resolve **before** the contract of purchase and sale would be addressed. The tenant's legal counsel questioned the authenticity of these text messages, noting that they were not actual

screenshots, but transcribed statements that the landlord was maintaining accurately reflected the contents of these text messages.

Analysis

The Courts have described the purpose of consolidating hearings to avoid a multiplicity of proceedings in the following terms, which I find of relevance with respect to the current matter:

...An order for consolidation or the hearing of two matters together is a discretionary one that involves a consideration of the following questions: (1) Do common claims, disputes and relationships exist?; and, (2) Are the actions so interwoven that it will make separate trials at different times and before different judges undesirable and fraught with additional expense? The proper considerations include the saving of time and expense and the better administration of justice that might result from a joint trial, given the existence of common questions of law or fact bearing sufficient importance in proportion to the rest of the action. (See, for example, Merritt v. Imasco Enterprises Inc., [1992] B.C.J. No. 160 (S.C.); Lui v. Tsai, 2017 BCSC 221.)

In applying this test to the current situation, I recognize that the tenant's application filed with the Supreme Court of B.C. names Respondents other than the landlord. However, the Statement of Claim clearly separates actions related to the landlord's actions with respect to the Contract of Purchase and Sale from those attributed to the other Respondents. In addition, there are specific references in the Statement of Claim to deficiencies in the tenancy itself and in the rental premises that would have to be considered by the Supreme Court in considering the monetary value to be attached to the Contract of Purchase and Sale less rent that was owing prior to and after the parties entered into this Contract. Whether or not the parties entered into a legally binding real estate contract, whether the landlord's alleged failure to exercise this contract entitles the tenant to the monetary relief sought and whether there was any consideration to be given to the landlord for amounts owed by the tenant would all appear to be before the Supreme Court of B.C. as part of the tenant's application to that Court.

I also note that the landlord has reduced the amount of their monetary claim from the $84,000.00 identified in the 10 Day Notice of January 29, 2019, to $35,000.00, the maximum amount that can be claimed through an application under the *Act.* In this regard, I find that any monetary award I might make would be substantially linked to additional amounts that the landlord maintains remain owing and which the tenant maintains should be deducted from the overall monetary award that the Supreme Court is being asked to issue in the tenant's favour.

If I were to proceed with consideration of this matter, there also exists the possibility that the monetary amount sought by the landlord and even the landlord's right to obtain an Order of Possession based on the 10 Day Notice of January 29, 2019 might be compromised if I were to accept the argument presented by the tenant' legal counsel that the tenancy, which existed prior to the establishment of the April 2016 Contract of Purchase and Sale, ended at that time, and that more than two years have passed since the tenancy ended. In that event, there might be no need for the landlord to obtain an Order of Possession, or there might exist no mechanism through the *Act* to obtain a monetary award for unpaid rent owing at that time. Both of these determinations would be reliant on a determination by the Supreme Court as to the legal status of the Contract of Purchase and Sale and whether there should be any reduction in the amount that the tenant is entitled to receive as a result of the tenant's failure to abide by the terms of the agreement between the parties.

With all due respect to the position presented by the landlord's legal counsel and with a full appreciation of the position the landlord is facing in attempting to obtain closure on this matter, I cannot see how the landlord's current application can be meaningfully separated from the alleged Contract of Purchase and Sale, the contents of which are the subject of the tenant's application before the Supreme Court. To hear evidence with respect to the terms of that Contract would involve addressing issues that form part and parcel, in fact, a substantive portion of the matters incorporated in the tenant's application to the Supreme Court. Piecing together a decision with respect to this matter without either compromising the Supreme Court's ability to act on this matter, or benefitting from a decision of the Supreme Court of B.C. with respect to a matter that is currently before that Court would only add further complexity to an already confusing situation. I find that these circumstances are so interwoven that it will make separate adjudications at different times and before different decision makers undesirable and would lead to a less efficient administration of justice given the existence of common questions of law or fact bearing on these determinations. For these reasons, I find that the matters before me are linked substantially to a matter that is before the Supreme Court of B.C., and, as such, I am unable to consider the landlord's application.

Should any issues remain after the Supreme Court of B.C's consideration of the tenant's legal action, the landlord would then be at liberty to submit a new application, provided the landlord is within the time frames established pursuant to the *Act*.

Conclusion

I decline jurisdiction to consider the landlord's application pursuant to paragraph 58(2)(c) of the *Act.* On this basis, the April 2, 2019 decision and Orders are set aside and of no continuing force or effect.

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: September 3, 2019

Residential Tenancy Branch