Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRT, MNDCT, OT

Introduction

The Tenants seek the following relief under the *Residential Tenancy Act* (the "*Act*"):

- an order for monetary compensation pursuant to s. 67;
- an order compensating them for emergency repairs pursuant to ss. 33 and 67; and
- other relief under the *Act*.

J.T. and S.T. appeared as the Tenants. They were joined by K.G., who identified herself as their advocate. P.H. appeared as the agent for the Landlord.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

Preliminary Issue – Tenants' Claims

There are a number of procedural and substantive issues with the present matter.

This is not the first time the parties have been before the Residential Tenancy Branch. I was advised by the Landlord's agent at the hearing that the Tenants' had previously filed an application for monetary compensation which had been dismissed without leave to reapply. I was provided the file numbers for the previous application.

Review of the previous matter indicates that the Tenants had sought in an application filed on August 9, 2021 an order for $50,000.00 in monetary compensation among other relief. That matter was originally set for hearing on November 12, 2021, but was

adjourned to March 18, 2022. As summarized in the interim decision of November 22, 2021, the Tenants had advised that they vacated the rental unit on October 31, 2021 such that the only live issue in their application was the monetary claim, which was pared down to $35,000.00 as the amount originally claimed exceeded the small claims limit applicable to disputes before the Residential Tenancy Branch. When the matter reconvened on March 18, 2022, the Tenants did not attend the hearing and their monetary claim was dismissed without leave to reapply. The Tenants filed for review considerations of the March 18, 2022 decision, which was also dismissed as summarized in the decision of May 11, 2022.

Review of the present matter indicates the application was initiated on March 8, 2022 but was finalized on March 17, 2022 due to issues raised by the Residential Tenancy Branch in the Tenants application form. An amendment was also filed by the Tenants on March 18, 2022, adding additional information for the monetary claim, adding the claim for the cost of emergency repairs, and included additional claims, such as orders for repairs and emergency repairs as well as disputing a Two-Month Notice to End Tenancy, which are not relevant as the tenancy is over.

Review of both the August 9, 2022 application, the March 8, 2022 application, and the amendment of March 18, 2022 makes it evident that the monetary claims deal with the exact same issues in dispute. Both claims by the Tenants relate to allegations, among others, of black mould, unreasonable disturbances, and circumstances resulting in one of the Tenants attending the hospital. This raises the issue of *res judicata* as the Tenants' previous application was dismissed without leave to reapply.

The doctrine of *res judicata*, which means a matter decided, prevents a person from litigating a matter a second time. I find the following summary in *Khan v Shore*, 2015 BCSC 830, at paragraphs 29 to 34, helpful:

> [29] The doctrine of *res judicata* is based on the community's interest in the finality and conclusiveness of judicial decisions and the individual's interest in protection from repeated suits for the same cause. In *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180, the BC Court of Appeal reviewed these principles, stating this at para. 26:
>
> > Appellate courts in Canada have emphasized that the importance of finality and the principle that a party should not be 'twice vexed' … for the same cause, must be balanced against the other "fundamental principle" … that courts are reluctant to deprive litigants of the right to have their

> cases decided on the merits: see *Toronto (City) v. Canadian Union of Public Employees, Local 79*, 2003 SCC 63, at para. 55; *Revane v. Homersham,* 2006 BCCA 8, at paras. 16-7; Lange at 7-8.
>
> [emphasis added]

[30] *Res judicata* today comprises both cause of action estoppel and issue estoppel, described in *Erschbamer v. Wallster*, 2013 BCCA 76 at para. 12:

> In brief terms, issue estoppel prevents a litigant from raising an issue that has already been decided in a previous proceeding. Cause of action estoppel prevents a litigant from pursuing a matter that was or should have been the subject of a previous proceeding. If the technical requirements of issue estoppel or cause of action estoppel are not met, it may be possible to invoke the doctrine of abuse of process to prevent relitigation of matters.

[…]

[32] Issue estoppel requires three things: (1) the same question has been decided; (2) the prior judicial decision was final; and (3) the parties to the prior judicial decision or their privies are the same persons as the parties to the current proceedings or their privies. (See *Erschbamer* at para. 13.)

[33] In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, the Supreme Court of Canada cautioned about a mechanical application of the rules governing issue estoppel and noted that the court has a discretion as to whether or not it should be applied. Mr. Justice Binnie (writing the judgment for the court) stated this at para.33:

> The rules governing issue estoppel should not be mechanically applied. 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. (There are corresponding private interests.) The first step is to determine whether the moving party …has established the preconditions to the operation of issue estoppel … If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied: *British Columbia (Minister of Forests) v.*

> *Bugbusters Pest Management Inc.* (1998), 1998 CanLII 6467 (BC CA), 50 BCLR (3d) 1 (CA), at para. 32; *Schweneke v. Ontario* (2000, 2000 CanLII 5655 (ON CA), 47 OR (3d) 97 (CA), at paras. 38-39; *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999,1999 NSCA 77 (CanLII), 176 NSR (2d) 173 (CA), at para. 56.

[34] The court also emphasized the fundamental requirement that the decision in the prior proceeding be a judicial decision on the merits, referring at para. 35 to this passage from Spencer Bower, Turner, and Handley, *The Doctrine of Res Judicata*, (3rd ed. 1996):

> It is of no avail to prove that the alleged res judicata was a decision, or that it was pronounced according to judicial principles, unless it emanated from such a tribunal in the exercise of its adjudicative functions; nor is it sufficient that it was pronounced by such a tribunal unless it was a judicial decision on the merits. It is important, therefore, at the outset to have a proper understanding of what constitutes a judicial tribunal and a judicial decision for present purposes.

I find that the Tenants' present monetary claim triggers issue estoppel. The March 18, 2022 decision clearly dealt with the monetary claim in which nearly identical facts were raised by the Tenants. That previous claim was dismissed without leave to reapply as the Tenants failed to attend to discharge the evidentiary burden of advancing their claim. The Tenants filed for review considerations of that decision, which was also dismissed. The claim has been determined, it is final, the issues are the same, and the parties are the same. Issue estoppel is made out. I find that the monetary claim is res judicata and is dismissed, once more, without leave to reapply.

Looking at the amendment of March 18, 2022, in which an additional claim for compensation for emergency repairs is made, the description of the claim in the amendment indicates the claim is for $5,000.00 with "hospital visit" written above. As pled in the amendment, this matter is likely not a claim for compensation for emergency repairs as per s. 33(5) of the *Act*. Section 33 states the following:

> **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.

(2) The landlord must post and maintain in a conspicuous place on residential property, or give to a tenant in writing, the name and telephone number of a person the tenant is to contact for emergency repairs.

(3) A tenant may have emergency repairs made only when all of the following conditions are met:

(a) emergency repairs are needed;

(b) the tenant has made at least 2 attempts to telephone, at the number provided, the person identified by the landlord as the person to contact for emergency repairs;

(c) following those attempts, the tenant has given the landlord reasonable time to make the repairs.

(4) A landlord may take over completion of an emergency repair at any time.

(5) A landlord must reimburse a tenant for amounts paid for emergency repairs if the tenant

(a) claims reimbursement for those amounts from the landlord, and

(b) gives the landlord a written account of the emergency repairs accompanied by a receipt for each amount claimed.

The amendment, as pled, appears to be a replication of the claim for monetary compensation, which was itself a replication of the claim filed in August 2021. Section 59(2) of the *Act* requires applications, and amendments, to provide full particulars of the dispute. Section 59(5) of the *Act* permits the Director to refuse an application for dispute resolution if it is not sufficiently particularized. In this instance, I find that the Tenants'

claim for compensation for emergency repairs is not sufficiently particularized. Indeed, as pled it appears to be an attempt to obtain monetary compensation above the $35,000.00 monetary claim limit.

In an abundance of caution and as the claim for compensation for emergency repairs was never made, I dismiss this portion of the Tenants claim with leave to reapply as the amendment failed to provide any particulars for which such a claim could be made. Should the Tenants choose to reapply for this claim, I caution the Tenants to consider the applicable section of the *Act* reproduced above to determine whether there is a cause of action given the circumstances.

One final issue arose when canvassing aspects of service at the outset of the hearing, the Tenant's advised that they were seeking compensation equivalent to 12 times the rent payable under the tenancy agreement under s. 51(2) of the *Act* and had filed an amendment with the Residential Tenancy Branch on August 18, 2022. No amendment dated August 18, 2022 was associated with this matter. The hearing ended such that additional inquiries could be made by me whether the amendment had been filed, but somehow missed, with the Residential Tenancy Branch.

No amendment dated August 18, 2022 was ever filed with the Residential Tenancy Branch. Review of the Tenants' evidence shows that on August 29, 2022 they uploaded an amendment form signed August 18, 2022 as evidence in the dispute portal. This is not how an amendment is filed with the Residential Tenancy Branch. No staff member reviews evidence submissions as they are uploaded by the parties to review if an amendment is in the documents. Applicants are required to file their amendment through the proper channel such that the matter can be updated. The Tenants failed to do so in the present circumstances as they merely uploaded the form as evidence rather than submitting it as an amendment.

As the claim under s. 51(2) was not filed, it is not before me. I make no findings or comment on this claim, nor is technically dismissed as it is not before me in the application or filed amendment. I would add that it would be inappropriate to reconvene the hearing for the Tenant's notional claim under s. 51(2) as it was not properly filed with the Residential Tenancy Branch. The Tenants are at liberty to advance their claim under s. 51(2) of the *Act* should they so wish to do so but must file an application and follow the proper process.

Conclusion

The Tenants' claim under s. 67 for monetary compensation has already been decided. It is, once more, dismissed without leave to reapply.

The Tenants' claim for compensation for emergency repairs is not sufficiently particularized and is dismissed with leave to reapply. I caution the Tenants to review s. 33 of the *Act* before refiling to ensure that there is a cause of action.

The other relief claimed is no longer relevant given that they were previously dismissed due to the tenancy ending on October 31, 2022.

The Tenants have not filed an amendment claiming compensation under s. 51(2) of the *Act*. As it is not properly before me, I make no findings or orders with respect to the claim. The Tenants are at liberty to seek that relief should they so wish but must file an application to do so.

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 10, 2022

Residential Tenancy Branch