Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

A matter regarding Macdonald Commercial R.E.S. Ltd and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OL, FFL

Introduction

The Landlord filed an Application for Dispute Resolution on November 30, 2022 seeking rectification on an issue specific to the circumstances. They also applied for reimbursement of the Application filing fee. The matter proceeded by way of a hearing pursuant to s. 74(2) of the *Residential Tenancy Act* (the "*Act*") on April 11, 2023.

Both parties attended the conference call hearing. They were familiar with the process from previous hearings.

Preliminary Matter – parties' disclosure of evidence

At the outset, the Tenant confirmed they received the Notice of Dispute Resolution Proceeding from the Landlord via registered mail on December 7, 2022. Each of the two Tenants confirmed they received prepared evidence from the Landlord in later March 2023.

The Tenant stated they provided evidence they prepared in this matter to the Landlord via registered mail. An image of the envelope they used for this purpose is shown in their evidence. This consisted of a single-page written statement addressing the matter, as well as a copy of each of the two previous hearing decisions from 2018 and 2022.

While the Landlord stated this material was not forwarded to them at their office, I find the Tenant completed service of evidence in line with the service provisions of the *Act*. Where necessary, I give the Tenant's statement full consideration.

Issue(s) to be Decided

Is a specific provision of the tenancy agreement enforceable, and does it apply to end the current tenancy?

Background and Evidence

The copy of the tenancy agreement provided by the Landlord sets out that the tenancy started on June 1, 2000, with the Tenant signing the agreement with their then-landlord on that date. The Landlord highlighted paragraph 17 in the agreement which provides that: "No animals, birds, or pets of any kind shall be kept, sheltered or fed on the premises without prior written permission of the Landlord."

In the hearing, the Tenant set out that they moved into the rental unit in 1998. They reside in the whole of a detached rental unit home. They stated there have been approximately 4 property managers over the years; all have made site inspections and visited when repairs were needed. The current property manager – *i.e.*, the Landlord in this hearing – came into this role in 2016.

In a cover letter written in response to the Landlord's Application, dated December 15, 2022, the Tenant notes they have lived in the rental unit "for nearly 24 years." They noted that the previous tenants had two dogs, and at the time they signed the agreement the Tenant told the agent they had three cats. Since 2000, there have been "at least four property agents", with each agent meeting the tenants and viewing their cats during the "many site inspections."

The only objection to the Tenant keeping cats came in 2018 when the current property manager attempted to end the tenancy because of the Tenant's breach of contract. According to the Tenant in this account, they offered to pay a pet damage deposit; however, the Landlord refused that offer.

In the Tenant's challenge to the first end-of-tenancy notice, the Landlord in that 2018 hearing pointed to three separate terms in the tenancy agreement that they submitted were material terms, any breach of which should end the tenancy. As shown in the written decision that each party submitted in this present matter, the Arbitrator ordered the Landlord's notice to end tenancy cancelled, on the basis that what the Landlord presented in that hearing regarding the Tenant's pet – *i.e.*, paragraph 17 in the tenancy agreement -- was *not* a material term.

A second end-of-tenancy notice from the same property manager on May 19, 2022 was followed by the Tenant's second dispute. As stated on the one-month notice form, the Landlord cited the Tenant having "a new cat . . . without written permission from the Landlord, after their previous cat died." The second Arbitrator in their decision found that the issue of the Tenant's breach of a material term of the tenancy agreement was previously decided in the 2018 decision. With the Landlord then relying on the same paragraph from the same agreement, the Arbitrator found that the matter was *res judicata*, that is 'a matter already judged'.

The Landlord makes this present Application on the basis of the prior Arbitrator's statement in the October 2022 hearing that the paragraph in question in the tenancy agreement is an "enforceable term". On their completed form of November 30, 2022, to specify the "Other Issues", they quote the Arbitrator as stating that this term "is valid and can be heard by an arbitrator to support our claim against our tenants' continued breach and non-compliance of our no pet policy without written consent of the landlord."

In the hearing, the Landlord stated they did not apply for a review consideration through s. 79 on any of the available grounds listed in that separate process after the previous Arbitrator's decision. They also verified that they did not apply to the Supreme Court of British Columbia for judicial review of the previous Arbitrator's decision.

In support of this present Application, the Landlord provided a recording of the previous hearing of October 11, 2022, highlighting the previous Arbitrator's statement in the hearing. In a written statement the Landlord gave more specifics on this Application:

- a consideration of s. 62(3) of the *Act*, to ensure that the "rights, obligations and prohibitions outlined in the Residential Tenancy Act are followed and that a fair and just resolution is reached."
- they have demonstrated in their evidence that the Tenant is "in continuous breach and non-compliance of the enforceable term" in the tenancy agreement
- their request for "an order of compliance for the breach of the enforceable term in Paragraph 17 of our tenancy agreement and for specific performance by way of a retroactive decision necessary to rectify the situation."

In the hearing, the Landlord clarified that they are seeking an "enforceable order": that is a recognition of the "enforceable term" that is paragraph 17 of the tenancy agreement, as well as "enforcement" in the form of an order of possession, following from the 2022 decision.

Analysis

As stated by the Arbitrator in their October 11, 2022 decision, the issue of whether paragraph 17 of the tenancy agreement is a material term, such that the Landlord may end the tenancy for its breach, was previously decided upon. The second Arbitrator cited the principle of *res judicata* as applicable to the issue and granted the Tenant a cancellation of the 2022 end-of-tenancy notice.

The *Act* s. 77 sets out:

> Except as otherwise provided in this Part, a decision or an order of the director under this Part is final and binding on the parties.

Following this, s. 78 allows for a party to seek correction or clarification of an order within 15 days; s. 79 allows a party to apply for a review of the decision on limited grounds within a specific time period. The Landlord undertook neither of these measures as provided for in the *Act*.

Additionally, if a party believes that a decision made by the arbitrator at the hearing was unreasonable or unfair, they may apply for judicial review, where a BC Supreme Court judge reviews the decision and can only properly order for its rehearing based on the merits of a party's application to the Court. In this present hearing, the Landlord confirmed they did not petition for a judicial review of the previous Arbitrators decisions.

Given what the *Act* provides for, and what may be considered in a separate forum, there is simply no authority for an arbitrator to revisit a material issue and deliver a subsequent judgment and/or relief. With no authority to do so, I am precluded from considering the issue. Stated thus, I decline to revisit the issue decided by the Arbitrators previously.

Procedurally, the Landlord is attempting to circumvent the process whereby they may legally end a tenancy. That is only by way of a notice to end tenancy as set out in the *Act* with sections 46 through 49. Though the Landlord here requests support for their claim that the Tenant is breaching the tenancy agreement, and applies for a resolution in the matter, with no current end-of-tenancy notice before me, I decline to make any such judgment based on what equates to a hypothetical. Indeed, no copy of the previous eviction notices (each to which s. 77 applies), or a current end-of-tenancy

notice is before me (which would be the subject of a separate hearing on a separate application).

In sum, the term in question *may* be an "enforceable term" in a particular context, and that context would be a matter for dispute resolution on an applicable ground under the *Act*. Minus an application in which either party is making a claim – either for compensation or other specific actions such as repairs, or an end-of-tenancy notice – I decline to make that judgment where previous Arbitrators have made separate binding decisions.

In effect, I am confirming that the *Act* applies to this tenancy, as per s. 62(3). That means a landlord may end a tenancy only for certain reasons as per sections 46 through 49 and via a proper notice to end tenancy. The *Act* does not allow for a retroactive change of a prior Arbitrator's decision, or the implementation of an order of possession that does not stem from a valid notice to end tenancy. In this situation, the previous Arbitrators decided that the notices were *not* valid, and those decisions are binding. The authority granted by s. 62(3) does not afford a subsequent arbitrator to overrule other sections of the *Act*, or -- as the Landlord is asking for here -- another decision that is governed by s. 77 as set out above.

In sum, I cannot circumvent any section of the *Act*. The Tenant had applied for dispute resolution on each of the end-of-tenancy notices issued by the Landlord in the past, and those matters are concluded with final, binding decisions. There is no back-door avenue for relief available to the Landlord on this issue.

The Landlord was not successful in this Application; therefore, I grant no reimbursement of the Application filing fee.

Conclusion

For the reasons set out above, I dismiss the Landlord's Application without leave to reapply. There is no reimbursement of the Application filing fee in this matter.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under s. 9.1(1) of the *Act*.

Dated: April 11, 2023

Residential Tenancy Branch