

**THE RESIDENTIAL TENANCIES BRANCH**

BETWEEN

**Sandra Louise Kirby and Helene Maria Boersch**

Landlord

- and -

**Michael Masters**

Tenant

-and-

**Winnipeg Condominium Corporation No. 71**

Other

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**ORDER**

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ADDRESS OF RENTAL UNIT: **305 - 811 Grosvenor Avenue Winnipeg MB R3M 0M3**

The Residential Tenancies Branch held a determination hearing on **November 12, 2014**.

Appearances: Landlords: Yes Tenant: Yes  
Other: Yes

By authority of Sections 152 and 154 of *The Residential Tenancies Act*, the director determines that:

The matters brought by the Plaintiffs Kirby and Boersch in CI 13-01-83042, should be dealt with in the Court of Queen's Bench before the landlords bring an action against the tenant at the Residential Tenancies Branch.

The Winnipeg Condominium Corporation No. 71 is not a Landlord.

In light of matters dealt with in *Residential Tenancies Branch* claim orders W2011-018227 and W2011-018228, the landlord is not barred by the doctrine of res judicata from bringing a further claim against the tenant once the Queen's Bench matter is resolved.

December 2, 2014

Date

  
M. Saper  
Residential Tenancies Officer

If you want to appeal this Order you must apply to the Residential Tenancies Commission, 1650 - 155 Carlton Street, Winnipeg MB R3C 3H8 in person or by mail ( telephone: 204-945-2028, toll-free: 1-800-782-8403, fax: 204-945-5453 ) no later than **December 22, 2014**. You must file a copy of this Order with your Notice of Appeal. An appeal suspends the Branch's Order.

This Order, including the Reasons for Decision, is a matter of public record.

## REASONS FOR DECISION

The Residential Tenancies Branch held a hearing on November 12, 2014, to determine questions about jurisdiction of the Director of the Residential Tenancies Branch. The landlords, the tenant and the Winnipeg Condominium Corporation Number 71 (hereinafter referred to as "WCC 71") were notified of the Hearing by the Branch. Legal Counsel for each of the landlord, tenant and condominium corporation came to the hearing and presented their positions with respect to the issues to be determined.

Michael Finlayson of the law firm D'Arcy & Deacon, appeared for the landlords, Helene Maria Boersch and Sandra Louise Kirby.

Celia Fergusson of the law firm Filmore Riley, appeared for the tenant, Michael Masters.

Matthew Duffy of the law firm Pitblado LLP, appeared for Winnipeg Condominium Corporation No. 71.

### ISSUES FOR DETERMINATION:

The questions posed by the parties are:

1. As of November 2010, was WCC 71 a landlord as defined by the *Residential Tenancies Act*, C.C.S.M. c. R119?
2. Is the indemnity of Ms. Kirby and Ms. Boersch by Mr. Masters for damage allegedly caused by Mr. Masters while renting unit 301-811 Grosvenor Avenue within the exclusive jurisdiction of the Residential Tenancies Branch?
3. Has the issue of Mr. Masters' negligence with respect to the incident of November 20, 2010 already been decided by the Residential Tenancies Branch and is therefore, res judicata, in light of Order Nos. W2011-018227 and W2011-018228?
4. If the issue of the indemnity by Mr. Masters is within the exclusive jurisdiction of the Residential Tenancies Branch and the issue of Mr. Masters' negligence is not res judicata, should the Residential Tenancies Branch hearing with respect to indemnity be stayed pending the outcome of the remaining issues in the Court of Queen's Bench File No. CI 13-01-83042?

### AGREED STATEMENT OF FACTS:

An agreed statement of facts was presented at the hearing. In summary the parties agreed that:

- At all material times, Sandra Louise Kirby and Maria Helene Boersch (the "Landlords") owned the condominium unit at 305-811 Grosvenor Avenue in the City of Winnipeg.
- WCC 71 is a corporation charged with responsibility under The Condominium Act, as owner of the land and common elements at 811 Grosvenor Avenue in the City of Winnipeg (the "Complex").
- In or around the summer of 2006, Michael Masters (the "Tenant") and the landlords entered into a residential tenancy agreement.
- On November 20, 2010 a pipe burst along an exterior wall of the unit causing damage to the complex.
- On or about June 2011, the Tenant moved out of the rental unit.
- On September 12, 2011, the Residential Tenancies Branch conducted a hearing with respect to a claim against the Landlords by the Tenant and a counterclaim against the Tenant by the landlords. WCC 71 did not receive notice of the claims nor was anyone on behalf of WCC 71 in attendance at the hearing. The reasons for decision are set out in Order Nos. W2011-018227 and W2011-018228.
- On or about May 21, 2013, WCC 71 filed a lien against the Unit in the amount of \$15,476.02 together with the further sum of \$489.37 per month commencing on May 1, 2013 and interest

thereon at Crosstown Civic Credit Union. The amount of \$15,476.02 of the Lien is in respect of the damages to the Complex as a result of the pipe which burst on November 20, 2010.

- On April 16, 2013, the Landlords filed a Statement of Claim in the Manitoba Court of Queen's Bench against the Tenant and WCC 71. The landlords sought a declaration that WCC No. 71 is not entitled to the Lien against the Unit and in the alternative, an award of damages against the Tenant for the amount of the Lien.
- On June 10, 2013 WCC 71 filed a Statement of Defence.
- On July 17, 2013 the Tenant filed a Statement of Defence.
- On November 14, 2013, the Tenant filed a Notice of Motion seeking a dismissal or stay of the action as against him on the ground that the Landlord's claim against him was within the exclusive jurisdiction of the Director of the Residential Tenancies Branch.
- On March 18, 2014 the Tenant's motion was heard and on March 26, 2014, Justice Toews of the Court of Queen's Bench stayed the proceedings and directed that the parties refer the matter to the director under The Residential Tenancies Act for an investigation and, if possible, a determination or resolution under the provisions of The Residential Tenancies Act.

#### POSITIONS OF THE PARTIES:

##### Michael Masters (the "Tenant"):

The tenant takes the position that WCC 71 is not a landlord under the *Residential Tenancies Act*.

The tenant says WCC 71 does not qualify as a landlord according to the definition of "landlord" in the *Residential Tenancies Act*. The Act says a landlord includes the owner or other person permitting or granting a right to occupancy of the rental unit and WCC 71 is neither the owner of the rental unit nor a person who can permit or grant the right to occupy the unit. The tenant goes on to argue that WCC 71 is not a landlord because the definition of landlord includes a person who is entitled to enforce any of the rights of a landlord under a tenancy agreement or the Residential Tenancies Act, whereas the condominium corporation has no tenancy agreement with the tenant and has to pursue relief under the *Condominium Act*. Finally, the tenant asserts that WCC 71 is not a landlord because it does not fit within section (c) of the definition of landlord because it has no rights under a mortgage or another real property encumbrance to evict a tenant from a rental unit.

The tenant takes the position on issue 2, that the indemnity of the Landlords by the Tenant for damages allegedly caused by the tenant during his tenancy is within the exclusive jurisdiction of the *Residential Tenancies Act*. The tenant cites sections 152(1) and sections 72(1) as applicable and which give the *Residential Tenancies Act* comprehensive power to resolve all damage disputes of a landlord and tenant nature. Being that this is the case, the tenant says WCC 71 would not be a party to such a dispute as they are not a party to the tenancy agreement. In any event the tenant disputes that he left a window open causing a pipe in a wall to burst.

The tenant takes the position on issue 3, that the question of negligence on the part of the tenant leading to the incident on November 20, 2010 has already been decided and is therefore res judicata in light of the Residential Tenancies Branch decision dated October 21, 2011 as set out in Order Nos. W2011-018227 and W2011-018228. The tenant argues that the question of the tenant's liability is res judicata as the decision flowing from the matters already heard in the previous action meets the test criteria for both "issue estoppel" and "cause of action estoppel" as set out in the 2008 Manitoba Court of Appeal case of *Glenko Enterprises Ltd. v Ernst Keller and Gisella Christel Keller*.

According to the *Glenko Enterprises* case, the requirements of "issue estoppel" are met when the same question has been decided; the judicial decision which is said to create the estoppel is final; and the parties to the judicial decision are the same as the parties to the proceedings in which the estoppel is raised. The tenant argues that the fact that his security deposit was ordered to be returned to him by the landlords implies that the tenant was not found to be responsible for the damage to the pipe and

therefore the question has already been decided. Since the order was not appealed, it also met the criteria that the decision that creates the estoppel is final. The parties are the same in this case as they were in the earlier matter already decided.

According to the *Glenko Enterprises* case, the requirements of "cause of action estoppel" are met when the decision is final; the parties to the subsequent matter were the parties or were privy to the prior action; the cause of action in the earlier action is not separate and distinct; and the basis of the cause of action of the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence. The tenant says the current cause of action meets the criteria for cause of action estoppel because the matters all flow from the same incident on November 20, 2010 and if the landlord wanted to make a claim against the tenant for damage that would have been the most opportune and appropriate time to do so.

The tenant takes the position on issue 4 that, if the issue of the indemnity by Mr. Masters is within the exclusive jurisdiction of the *Residential Tenancies Branch* and the issue of Mr. Masters' negligence is not res judicata, the *Residential Tenancies Branch* hearing with respect to indemnity should be stayed pending the outcome of the remaining issues in the *Court of Queen's Bench* File No. CI 13-01-83042. The tenant's reasons for taking this position are that the claim against the tenant may not be necessary at the end of the day if the *Court of Queen's Bench* finds that the lien is not valid and should not have been placed against the condominium unit. There is still the possibility that the landlord may not have to pay and this has to be decided before the landlord can seek to be indemnified by Mr. Masters.

Sandra Louise Kirby and Helene Maria Koersch (the "Landlords"):

The landlords take the position on issue 1, that the Winnipeg Condominium Corporation No. 71 is not a landlord under the *Residential Tenancies Act*, and that the *Residential Tenancies Branch* would not have jurisdiction to hear a dispute between WCC 71 and Mr. Masters.

The landlords argue that this case is really a dispute between the Winnipeg Condominium Corporation and Michael Masters. The landlords do not claim that the tenant damaged the property. However, if it is found that the tenant is the cause of the damage to the property, and the landlords are still responsible to cover the cost, the landlords claim they are entitled to indemnification from the tenant. They say that because this matter is really about a dispute between the tenant and WCC 71 it is not a dispute between the landlords and tenant and so it shouldn't have to be heard by the *Residential Tenancies Branch*.

The landlords' position on issue 3, is that the matter of the tenant's negligence is not res judicata. The issue was not dealt with at the previous hearing since the landlords were not seeking indemnity against the tenant at that time for damages caused to the condominium complex. The lien was filed against the property long after the tenant and landlord claims were heard by the *Residential Tenancies Branch*. The damage at issue here is not to property that belongs to the landlord but to property that forms part of the common elements which belong to the condominium corporation. The landlord also has no access to the information about the structure of the condominium complex and does not have access to information that might help to determine the question of how the pipe was damaged. The landlords argue that the hearing officer didn't decide the cost to repair the floor of the condominium because the landlords didn't own the property that was damaged. The walls, pipes, ducts and floors are considered common elements that belong to the condominium corporation as a whole. The landlord also point out that they need special permission to change anything beyond the paint in the condominium unit.

The landlords' position on issue 4, is that the WCC 71 and Masters should be referred back to the Court of Queen's Bench to determine whether the tenant was at fault or if it is the building that is faulty. The landlords say the Residential Tenancies Branch does not have jurisdiction to determine whether or not WCC 71 had a right to file a lien against the landlords' condominium unit. They assert that this is not really a landlord and tenant dispute but a dispute between WCC 71 and Mr. Masters.

Winnipeg Condominium Corporation No. 71 ("WCC 71"):

The position of WCC 71 on issue 1, is that WCC 71 is not a landlord under the *Residential Tenancies Act*.

The WCC 71 takes no position on issue 2, i.e. whether or not the indemnity of the Landlords by the Tenant for damages allegedly caused by the tenant during his tenancy is within the exclusive jurisdiction of the *Residential Tenancies Act*.

The position of WCC 71 on issue 3, namely whether or not the matter is res judicata is that the matter doesn't meet the tests for *cause of action estoppel* or *issue estoppel* because the WCC 71 was neither aware of, nor a party to, the previous action heard by the Residential Tenancies Branch so their evidence has not been heard. The condominium corporation's losses were not discussed at all at the previous hearing. They argue that it would be unfair to deny the WCC 71 its day in court.

The position of WCC 71 on issue 4, is that the Court of Queen's Bench should determine what caused the damage first. That way, if it can be shown that it is a problem with the structure and not due to negligence on the part of the landlord or tenant, the landlord can take that information to court to have the lien vacated. The question of whether or not the lien should be filed is beyond the jurisdiction of the Residential Tenancies Branch. The landlord should be able to pursue its indemnification claim against the tenant after that.

**ANALYSIS AND CONCLUSIONS:**

Issue 1 - As of November 2010, was WCC 71 a landlord as defined by the *Residential Tenancies Act*, C.C.S.M. c. R119?

The parties all agree that WCC 71 is not a landlord within the definition for landlord provided in the *Residential Tenancies Act*. I find that a condominium corporation does not meet the criteria, namely because:

- it is neither the owner of the rental unit nor a person who can permit or grant the right to occupy the unit.
- it is not a person who is entitled to enforce any of the rights of a landlord under a tenancy agreement or the Residential Tenancies Act, because the condominium corporation has no tenancy agreement with the tenant
- it has to pursue relief under the *Condominium Act* and not the *Residential Tenancies Act*.
- it has no rights under a mortgage or another real property encumbrance to evict a tenant

Therefore the branch does not have jurisdiction to consider the issues raised by WCC 71 in CI 13-01-83042.

Issue 2 & 4

Issue 2 - Is the indemnity of Ms. Kirby and Ms. Boersch by Mr. Masters for damage allegedly caused by Mr. Masters while renting unit 301-811 Grosvenor Avenue within the exclusive jurisdiction of the Residential Tenancies Branch?

Issue 4 - If the issue of the indemnity by Mr. Masters is within the exclusive jurisdiction of the Residential Tenancies Branch and the issue of Mr. Masters' negligence is not res judicata, should the Residential Tenancies Branch hearing with respect to indemnity be stayed pending the outcome of the remaining issues in the Court of Queen's Bench File No. CI 13-01-83042?

I do not agree with the tenant that the indemnity of Ms. Kirby and Ms. Boersch by Mr. Masters for damage allegedly caused by Mr. Masters while renting unit 301-811 Grosvenor Avenue is within the *exclusive jurisdiction of the Residential Tenancies Branch.*

If Queen's Bench finds that the property that was damaged is both the property of the landlords and the property of WCC 71, the landlords and WCC 71 may both seek relief against Mr. Masters if, through his negligence, they have incurred a financial loss.

I find that the issues in *Court of Queen's Bench* File No. CI 13-01-83042 should be heard before any matters are brought by the landlord against the tenant at the *Residential Tenancies Branch.*

It is not clear at this stage of the proceedings whether the *Residential Tenancies Branch* possesses the appropriate jurisdiction to hear this matter since the evidence of all the parties has not yet been heard with respect to whether or not any of the property that has been damaged actually forms part of the condominium unit or is part of the common elements owned by the condominium corporation. That is an issue that will be better resolved at Queen's Bench through an examination of the facts, the terms of the Articles of Incorporation, the By Laws of WCC 71 and the insurance policies for the master building and individual unit have been completed through the discovery process.

Also, considering that there may be various insurance policies that could have covered the loss at the time, it may be that a decision at the Queen's Bench will have the effect of resolving any potential subrogated claims between insurance providers. It is possible that the insurance policies of the condominium corporation or the insurance policy of the unit owners cover "accidents" or liability on the part of the tenant either expressly or implicitly. I have not heard any evidence on this point but if this case becomes a matter of determining the respective insurers' contractual responsibilities, this should be determined at the Queen's Bench.

Finally, the preamble of the *Residential Tenancies Act* says that among the various purposes of the *Act* is the goal to expedite the settlement of disputes through an informal administrative process that is fair, accessible, inexpensive, expeditious and amicable. A claim hearing first heard at the *Residential Tenancies Branch* could possibly be an unnecessary and expensive exercise if it can first be found at the Queen's Bench that the lien against the property should be vacated. I am also considering that the interests of WCC 71 may be significant but even so they would not be a party at a hearing before the *Residential Tenancies Branch.* To first proceed with a hearing that excludes a necessary party would not be consistent with the goal of the *Residential Tenancies Act* i.e. to resolve the dispute through a fair, accessible, inexpensive and expeditious process especially when that would hold up a matter that is already pending at the Queen's Bench which includes WCC 71 as a party.

Issue 3 - Has the issue of Mr. Masters' negligence with respect to the incident of November 20, 2010 already been decided by the Residential Tenancies Branch and is therefore, *res judicata*, in light of its decision of October 21, 2011 and Order Nos. W2011-018227 and W2011-018228?

On October 21, 2011 the *Residential Tenancies Branch* issued two Orders after hearing the evidence of the landlords and evidence of the tenant in support of the landlords' claim and a tenant claim respectively. One is an order directing the landlords to keep \$130.00 for the unauthorized painting of two walls by the tenant but to return the balance of the tenant's security deposit. The other is an order awarding the tenant \$1555.00 for rent, damage to personal property and costs. These orders were not appealed to the *Residential Tenancies Commission.*

The tenant argues that the matter of his responsibility for any damage to the landlords' property is *res judicata* or already decided in the above orders of the *Residential Tenancies Branch.*

In the reasons for decision in order W2011-018228, the burst pipe and damage to laminate flooring was brought up by the tenant as evidence in support of his claim for a rent refund but there is no claim by

the landlords for water damage to the floors or walls of the rental unit against the tenant. The landlords did not assert that the tenant was responsible for the damage and no claim was advanced against the tenant for same. It is explained in the hearing officer's reasons that the management company for the condominium complex turned off the water and hired a contractor to replace the damaged flooring. The cost was going to be the responsibility of either the landlord's insurer or the condominium corporation's insurer but, based on the wording of the reasons for decision, it seems that this question of who was going to cover the cost was not decided by the time of the hearing on September 12, 2011.

It was some time after these orders were issued, on May 21, 2013, that WCC 71 filed a lien against 305-811 Grosvenor Avenue Winnipeg, Manitoba in the amount of \$15,476.02 in respect of the damages to the Complex as a result of the pipe which burst on November 20, 2010.

I find that neither the doctrine of "issue estoppel" nor "cause of action estoppel" applies in this case because there was no evidence heard on the issue of the tenant's negligence nor of the landlord's financial losses from the burst pipe at the time those claims were heard.

According to the 2008 Manitoba Court of Appeal case of Glenko Enterprises Ltd. v Ernst Keller and Gisella Christel Keller, the requirements of "issue estoppel" are met when the same question has been decided.

The tenant argues that the fact that his security deposit was ordered to be returned to him implies that the tenant was not found to be responsible for the damage. This does not necessarily follow, especially when the issue of damage to the complex was not raised by the landlords as the basis of their claim at that time.

According to Glenko Enterprises, the requirements of "cause of action estoppel" are met when the cause of action in the earlier action is not separate and distinct and the basis of the cause of action of the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

At the time that the damage occurred, WCC 71 took action to repair the damage and the landlords had no liability at that time. Therefore there was no cause of action by the landlords against the tenant at that time. The subsequent action could not have been argued at that time. The landlords were not aware at the time that WCC 71 would be filing a lien against their unit as a result of damage caused by the burst pipe. At the time of the earlier hearing, it had not even been decided whose insurance company would be covering the cost of the repairs.

Therefore the issue of the tenant's responsibility for the incident on November 20, 2010 has not been raised or decided in Order Nos. W2011-018227 and W2011-018228 of the *Residential Tenancies Branch*. The landlords are therefore not barred by the doctrine of res judicata from bringing a further claim against the tenant in light of the *Residential Tenancies Branch* decision dated October 21, 2011.

#### SUMMARY:

The matters brought forward by the Plaintiffs Kirby and Boersch in CI 13-01-83042 in the Queen's Bench, should be dealt with before the landlords bring a further action against the tenant at the *Residential Tenancies Branch*.

WCC 71 is not a Landlord within the meaning of the *Residential Tenancies Act* and the branch can not consider the issues raised by WCC 71 in CI 13-0183042.

The *Residential Tenancies Branch* has not yet determined the issue of the tenant's responsibility for the incident on November 20, 2010 in Order Nos. W2011-018227 and W2011-018228. The landlord is therefore not barred by the doctrine of res judicata from bringing a further claim against the tenant.

If the landlords end up paying for all of the damage or they have to pay an insurance deductible but are otherwise covered for the loss, the landlord may bring an indemnification claim against the tenant at the *Residential Tenancies Branch*. This would be for financial losses not covered by insurance.

December 2, 2014

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Date



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M. Saper  
Residential Tenancies Officer