

DECISION AND REASONS

Dispute Codes:

Tenant Application: DRI, MNDC

Landlord Application: MNR, MNSD, FF

Introduction

This was a cross-application hearing.

This hearing was scheduled in response to the Tenant's Application for Dispute Resolution, in which the Tenants have made application for a monetary Order in compensation for a rent increase beyond that allowed by the Act and to dispute a rent increase.

The landlord has applied for Dispute Resolution, in which the landlord has made application for a monetary Order for unpaid rent, to retain the security deposit in partial satisfaction of the unpaid rent and for filing fee costs.

Both parties were present at the hearing. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present oral evidence, to cross-examine the other party, and to make submissions during the hearing.

The landlords entered the hearing seven minutes after the hearing commenced.

Preliminary Matter

The landlord served Notice of this hearing to the tenant at the address provided by the tenants on their Application for Dispute Resolution. The tenants testified that they did not know how the landlord's Notice of Hearing was delivered to the tenant's new address. I have determined that service of the landlord's Notice of Hearing is deemed served.

Issue(s) to be Decided

Are the tenants entitled to a monetary Order for return of a rent overpayment, pursuant to section 43 of the Residential Tenancy Act.

Is the landlord is entitled to rent for May 2009, retention of the deposit and filing fee costs, pursuant to section 67, 38(1)(d) and 72(1) of the Residential Tenancy Act.

Background and Evidence

The tenancy commenced on April 15, 2005 and terminated on May 3, 2009. The Tenants paid a combined security and pet deposit of \$1,100.00 on April 15, 2005. During the hearing the parties agreed that the rental unit had been listed for sale and that the tenants planned on moving due to the impending sale.

Tenant's Claim:

Both parties agree that rent increases occurred as follows:

- May 1, 2006 – from \$1,100.00 to \$1,200.00
- August 1, 2007 – from \$1,200.00 to \$1,300.00

The tenants testified that at the time the Notice of Rent Increase forms were issued they were not served with copies and that the first time they saw the two Notice of Rent Increase Forms was upon receipt of the landlord's evidence for this hearing. The tenants state that the increase effective on May 1, 2006 should not have exceeded the 4% allowed under the Act; \$44.00 and that the increase effective August 1, 2007 should not have exceeded the 4% allowed under the Act; \$45.76.

The tenants claim return of rent overpayments of \$3,317.76 as follows:

- 2006 \$672.00
- 2007 – 2008 \$2,645.76

The landlord testified that the tenants had agreed to the rent increases and that they had made this agreement via email. The landlord supplied a copy of an email dated April 24, 2007 in which the tenants agree to a two year lease at \$1,300.00 per month. The landlord did not provide evidence of any confirmation by the tenants accepting the rent increase applied on May 1, 2006.

The landlord states that their costs had increased, that property taxes had gone up and that rent increases were required to cover costs. The landlord testified that the tenants had agreed to the rent increases, evidenced by the email reply dated April 24, 2007.

The tenants application for dispute resolution included a claim for an increase commencing April 2007 and they agree that this is an error and that landlord evidence of an increase commencing on August 1, 2007 is correct.

Landlord's Claim:

The landlord supplied copies of emails from March 2009 requesting the tenants provide rent cheques for the upcoming month. The landlord also supplied copies of emails as follows:

- April 1, 2009 to tenant requesting rent cheques
- April 7, 2009 to landlord stating that since the realtor had called the tenants had been looking for other accommodation and that they had located a rental and were giving Notice for May 1; the email also indicates that the tenants hope this will not affect return of the deposit
- April 7, 2009 to tenants stating that the landlord is not surprised the tenants are seeking another rental, asking if they would stay if rent was reduced until the property was sold
- April 7, 2009 to landlord stating the tenants did not wish to move so quickly, that the tenants hope they will not be required to pay May rent
- April 11, 2009 to tenants stating that proper Notice to End has not been provided by the tenants but that the landlord “may be open to the possibility of working something out based on the condition and cleanliness, etc. of the house and yard upon your departure. We’ll talk at month end.”
- April 27, 2009 email from realtor to landlord stating that he had talked with the tenants who said they would remain in the rental unit for the month of May. The email states “did I misunderstand; didn’t you say they were out at the end of this month?”

The landlord testified that they had arranged for family members to take possession of the rental unit by May 18 and they did not have any plans to rent the house out for the month of May and that the rental unit had not been advertised. The landlord states that after receipt of the realtor’s email they called the tenants and were told that the tenants would vacate by the end of May or earlier. The landlord testified that due to confusion related to the actual date the tenant’s would vacate they cancelled plans to have family members stay in the home.

The tenant testified that they did speak with the realtor on April 27 and told him if the landlord was going to want May rent the tenants would remain in the rental unit and pay May rent. The tenants stated they told the realtor that if the landlord was agreeable the tenants would vacate by May 3. The tenant stated that he spoke with the landlord on April 28th or 29th and that the landlord wanted to know when the tenants would vacate the property. The tenant testified he told that landlord they would be out of the rental unit by the end of April. The tenant testified that the realtor had caused confusion and got everyone upset.

During the hearing the parties agreed that move-in and move-out condition inspections were not completed.

Analysis

Tenant Claim:

The Residential Tenancy Act determines the timing, amount and form of any rent increase that may be applied to a tenancy. The landlord has supplied copies of two

Notice of Rent Increase – Residential Rental Units forms. One of these forms is dated January 1, 2006 for a \$100.00 rent increase to be effective May 1, 2006. The form dated January 1, 2006 has been issued on an Office of Housing and Construction Standards approved form dated July, 2007. I find that a Notice of Rent Increase form issued on January 1, 2006 on a form that would not have been available for use by the landlord until July, 2007 is of no force or effect. The tenants have testified that they were not served with a copy of the notice of Rent Increase at the time it was issued and only received the Notice with the evidence package served by the landlord for this hearing. Further, a notice of rent increase served on or after the day in the month that the rent is due is effective on the 4th month.

There is no evidence before me that the tenants were served with either of the two Notices to Increase Rent submitted by the landlord as evidence. This is based upon a lack of evidence that the tenants were served with copies and the lack of confidence I have in the landlord's evidence, given the inconsistency in relation to the July 2007 Notice to Increase Rent form, signed by the landlord on January 1, 2006. The only determination I can make from the Notice of Rent Increase form signed in January 2006, on a form issued by the Office of Housing and Construction Standards in July 2007, is that this form was completed during or after July 2007. Even if I were to accept that the Notices were served and issued as required, the amount of the rent increases exceeded that allowed under the Act.

The landlord has provided an email from the tenants dated April 24, 2007 accepting a rent increase to \$1,300.00 per month for a two year lease effective May 1, 2007. The tenants did pay the rent increases. The landlord testimony and evidence that the tenants accepted the two rent increases is not supported by the process required under the Act when issuing rent increases. The failure of the landlord to serve Notice of Rent Increase forms, in the allowable amounts, constitutes a breach of section 41 of the Act. I find that payment of a rent increase which breaches the Act does not form a legal rent increase.

The tenants supplied a copy of the tenancy agreement signed by the parties on April 23, 2005 that indicates monthly rent of \$1,100.00 per month. There is no evidence before me that the parties signed a new tenancy agreement at an increased rent.

Residential Tenancy Branch allowable rent increases were 4% for 2006 and 2007 and 3.7% for 2008 and 2009.

I find that the tenants claim for excess rent payments are accepted as follows:

	Monthly Rent Paid	Total Paid	Allowable Rent (\$1,100.00/month)
April 2005 – April 2006	\$1,100.00 =	\$13,200.00 (12 months)	\$13,200.00
May 2006 – July 2007	\$1,200.00 =	\$16,800.00 (14 months)	\$15,400.00
August 2007 – April 2009	\$1,300.00 =	\$26,000.00 (20 months)	\$22,000.00
Total		\$56,000.00	\$50,600.00

I have determined that the failure of the landlord to provide notice as required by the Act results in the rent remaining at \$1,100.00 per month throughout the complete term of this tenancy. As a result, the tenants have overpaid their rent by \$5,400.00 and I order that the landlord reimburse the tenants for this overpayment. The tenants have not substantiated their claim for loss of interest; therefore I dismiss the claim for interest.

Section 41 of the Act is appended at the conclusion of this decision.

Landlord Claim:

I have determined that the tenants did fail to provide the landlord with written Notice to End Tenancy, as required by the Act. However, I also find that the landlord acknowledged that the tenants were moving out of the rental unit and that a charge for May rent would not be made if the rental unit was in good condition at the end of the tenancy. The landlord testified that they were having family members move into the rental unit in mid-May and they did not have plans to re-rent the house. This is supported by the realtor email dated April 27, 2009. I also accept that the realtor did cause confusion between the parties but that a subsequent discussion between the tenant and landlord confirmed that the tenants would leave the rental unit by May 3, 2009.

I also find the landlord email reply to the tenants which provided the tenants with agreement to end tenancy, dependant upon the state of the rental unit at the end of tenancy is, on the balance of probabilities, sufficient to have led the tenants to believe that the landlord accepted the April, 2009 end of tenancy. The tenants did offer to remain in the rental unit for the month of May if the landlord insisted on the tenants paying May rent; however, this did not occur. Therefore, based on what I have determined is the landlord's tacit agreement that the tenancy would end and the landlord's intent to leave the rental unit vacant, I dismiss without leave to reapply the landlord claim for rental income loss for May 2009 as I find there was no loss suffered by the landlord. This is also supported by the landlord testimony that family members were planning on taking possession of the rental unit in mid-May. I have not accepted the landlord testimony that a loss occurred due to confusion related to the tenant's planned vacancy date and accept that on April 11 the landlord had provided the tenants permission to move, based upon the condition of the rental unit at the end of April.

I find that the landlord is entitled to compensation for rent from May 1 to May 3, 2009 of \$39.45 per day; \$118.35, as the tenants did remain in the rental unit for those days.

The landlord has claimed retention of the deposits paid, in partial satisfaction of their monetary claim. As the landlord's monetary claim for rent income loss for the month of May is dismissed I find that the tenants are entitled to return of the security and pet deposit, plus interest of \$1,190.72.

As the landlord application has limited merit I dismiss without leave the landlord request for filing fee costs. The tenant did not request filing fee costs.

Conclusion

I find that the tenants have established a monetary claim, in the amount of **\$6,590.72**, which is comprised of the overpaid rent of \$5,400.00 and the deposit paid, plus interest of \$1,190.72.

Section 72 of the act allows a dispute resolution officer to set-off amounts owed between the parties; therefore I find that the rent owed to the landlord for the period of May 1 – 3, 2009; \$118.35, is deducted from the amount owed to the tenants.

Based on these determinations I grant the tenants a monetary Order for **\$6,681.65**. In the event that the landlord does not comply with this Order, it may be served on the landlord, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

The landlord claim for loss of May rental revenue beyond May 3, 2009 is dismissed without leave to reapply.

The tenant's claim for interest on overpaid rent is dismissed without leave to reapply.

Dated June 2, 2009.

Dispute Resolution Officer

Rent increases

41 A landlord must not increase rent except in accordance with this Part.

Timing and notice of rent increases

42 (1) A landlord must not impose a rent increase for at least 12 months after whichever of the following applies:

(a) if the tenant's rent has not previously been increased, the date on which the tenant's rent was first established under the tenancy agreement;

(b) if the tenant's rent has previously been increased, the effective date of the last rent increase made in accordance with this Act.

(2) A landlord must give a tenant notice of a rent increase at least 3 months before the effective date of the increase.

(3) A notice of a rent increase must be in the approved form.

(4) If a landlord's notice of a rent increase does not comply with subsections (1) and (2), the notice takes effect on the earliest date that does comply.

Amount of rent increase

43 (1) A landlord may impose a rent increase only up to the amount

(a) calculated in accordance with the regulations,

(b) ordered by the director on an application under subsection (3), or

(c) agreed to by the tenant in writing.

(2) A tenant may not make an application for dispute resolution to dispute a rent increase that complies with this Part.

(3) In the circumstances prescribed in the regulations, a landlord may request the director's approval of a rent increase in an amount that is greater than the amount calculated under the regulations referred to in subsection (1) (a) by making an application for dispute resolution.

(4) [Repealed 2006-35-66.]

(5) If a landlord collects a rent increase that does not comply with this Part, the tenant may deduct the increase from rent or otherwise recover the increase.