Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

Decision

Dispute Codes:

OLC, FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the tenant to cancel a Ten Day Notice to End Tenancy for Unpaid Rent and also seeking an order to force the landlord to comply with the Act.

Both the landlord and the tenant appeared and each gave testimony in turn.

At the outset of the hearing, the landlord advised that the Ten Day Notice to End Tenancy for Unpaid Rent was withdrawn by the landlord.

Preliminary Matters

The landlord requested an adjournment of the basis that :

- The landlord was led to believe that the tenant would be withdrawing this application and therefore refrained from submitting key evidence. The landlord stated that, after discussing this matter, they had successfully reached a verbal agreement that, in exchange for the landlord waiving the Ten Day Notice to End Tenancy for Unpaid Rent and reimbursing the cost of filing, the tenant would refrain from proceeding with his application and the hearing. The landlord stated that this is confirmed in a letter from the landlord dated July 23, 2012. The landlord felt that an adjournment should be granted, given the fact that they were misled.

- The landlord was not given sufficient information within the tenant's application to enable them to respond to the tenant's other request for an order against the landlord to compel them to comply with the Act. The landlord's position was that they required an adjournment to give them an opportunity to respond to the tenant's specific allegations .

The tenant did not consent to an adjournment. The tenant acknowledged that a discussion was held prior to the hearing with respect to the landlord's intention to

rescind the Notice, but the tenant was adamant that he did not commit to withdraw his application. The tenant testified that, after obtaining advice from the Residential Tenancy Branch, he considered the landlord's offer, but decided to proceed with the hearing. The tenant made reference to an email communication from the landlord dated July 23, 2012, indicating that the landlord was withdrawing the Ten Day Notice to End Tenancy for Unpaid Rent and stating:

> "*Upon confirmation of your application with Residential tenancy board being withdrawn, Your rental account will be credited the $50 filing fee*."

The tenant testified that he responded to this communication by sending a return email giving the landlord a "*final opportunity*" to alter the tenant's ledger to, correct "*Adjustments made to the account*" that "*were illegal, incorrect and not in accordance with the Residential Tenancy Act."*

The tenant testified that his communication made it clear that there was another unresolved issue besides the Ten Day Notice. However, according to the tenant, his communication was never answered by the landlord. The tenant's position is that he had never confirmed that he would withdraw the application and the landlord should not have concluded that the hearing would not proceed.

In regard to the landlord's allegation that the landlord had been prevented from submitting all of the relevant evidence, the tenant pointed out that the landlord had ample opportunity to submit their best evidence after receiving the tenant's application which was sent on July 9, 2012. The tenant stated that, in fact, he had already submitted a substantial amount of evidence consisting of the landlord's records as well as copies of communications from the landlord.

The tenant testified that the landlord was also fully apprised of his position with respect to the incorrect ledger entries, the fact that the tenant disputed the landlord's actions relating to the amount of rent charged and other inconsistencies evident in the landlord's records. The tenant testified that no additional evidence, such as a written tenancy agreement, exists.

Analysis of Preliminary Issues

Submission and Service of Evidence

The Residential Tenancy Rules of Procedure, requires that all evidence must be served on the respondent and Rule 3.4 requires that, to the extent possible, the applicant must file copies of all available documents, or other evidence at the same time as the application is filed or if that is not possible, at least (5) days

before the dispute resolution proceeding. I find that the applicant tenant did comply with this requirement.

Rule 4 states that, if the respondent intends to dispute an Application for Dispute Resolution, copies of all available documents or other evidence the respondent intends to rely upon must be received by the Residential Tenancy Branch and served on the applicant as soon as possible and at least five (5) days before the dispute resolution proceeding but if the date of the dispute resolution proceeding does not allow the five (5) day requirement in a) to be met, then all of the respondent's evidence must be received by the Residential Tenancy Branch and served on the applicant at least two (2) days before the dispute resolution proceeding.

I find that the applicant tenant had served the landlord with the application and some of the documentary evidence by registered mail and the landlord was deemed to have received the application before July 14, 2012. Additional evidence was sent to the landlord, and to the file, on or around July 19, 2012. I find that the tenant's evidence, in the form of documents and written submissions was properly served within the statutory deadlines under the Act. I find that, based on the tenant's submissions, the landlord was at liberty to refute the tenant's evidence after July 14, 2012 when it arrived , or submit their own in defence, prior to July 29, 2012, but the landlord chose not to do so.

Waiver and Withdrawal of the Notice or Application

The landlord's position was that the tenant's agreement to withdraw the application had served to prejudice the landlord by influencing them not to send in evidence. However, I found that there was no written mutual agreement of this nature in evidence and the tenant was denying that a verbal agreement had ever been reached.

Despite the landlord's stated belief that their consent to withdraw the Ten Day Notice to End Tenancy for Unpaid Rent should have also resulted in the tenant's reciprocal withdrawal of the application and hearing, I find that there is insufficient evidence to support this.

I find that a landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy once it has been served. A Notice to End Tenancy may be withdrawn or abandoned with the implied or express consent of *both* parties prior to its effective date. In this situation, I do accept the landlord's evidence that there was an implied consent by the tenant to the landlord's proposed waiver of the Ten Day Notice to End Tenancy for Unpaid Rent. For that reason I find that the Ten

Day Notice to End Tenancy for Unpaid Rent was successfully withdrawn and that the matter of the Notice was therefore moot and need not be determined.

Although I accepted that the tenant had implicitly consented to the withdrawal of the Ten Day Notice to End Tenancy for Unpaid Rent, the question of whether or not the tenant then reciprocated by withdrawing the tenant's application is a separate issue. I find that an applicant is at liberty to unilaterally withdraw their own application for a dispute resolution hearing at will, with or without the consent of the other party. However, in this instance, I am not able to find that the tenant ever withdrew his application or waived the remaining issue to be determined.

I find that a withdrawal of the hearing would require written notification from the tenant to the Residential Tenancy Branch or at the very least a statement from the tenant at the outset of the hearing that his application was being withdrawn in its entirety.

Find that the only way the only was to halt these proceedings would be if there was a clear agreement by both parties to the withdrawal of the Notice, accompanied by the tenant's express intent to also withdraw his own application for the hearing as well.

Based on the evidence, I find that the tenant's request for an order to force the landlord to comply with the Act has not been withdrawn and is still an outstanding matter to be determined. Therefore the hearing must proceed.

Adjournment

The landlord has requested an adjournment. Rule 6.1 of the Rules of Procedure states that the Residential Tenancy Branch will reschedule a dispute resolution proceeding if "*written consent from both the applicant and the respondent is received by the Residential Tenancy Branch before noon at least three (3) business days before the scheduled date for the dispute resolution proceeding*."

The *Definitions* section of the *Residential Tenancy Rules of Procedure* provides that when the number of "days" is expressed as "at least" a number of days, the first and last days must be excluded in the calculation. If the date that the document, notice or evidence must be served or given falls on a weekend or holiday, and it must be served on a business, or filed in an office, then it must be served or filed on the previous business day. If the document or notice must be provided to the Residential Tenancy Branch, weekends and holidays are not included in the calculation of days.

In this instance, the hearing was scheduled for July 31, 2012 and the landlord had not submitted a written request for an adjournment, nor had the landlord approached the applicant to obtain consent prior to the hearing.

In some circumstances proceedings can be adjourned after the hearing has commenced. However, the Rules of Procedure contain a mandatory requirement that the Dispute Resolution Officer must look at the oral or written submissions of the parties; consider whether the purpose for which the adjournment is sought will contribute to the resolution of the matter in accordance with the objectives set out in Rule 1 [objective and purpose]; consider whether the adjournment is required to provide a fair opportunity for a party to be heard, including whether a party had sufficient notice of the dispute resolution proceeding; and weigh the degree to which the need for the adjournment arises out of the intentional actions or neglect of the party seeking the adjournment; and assess the possible prejudice to each party.

In my consideration of the respondent's request for an adjournment found that:

- The respondent landlord's request for an adjournment was not received by the Branch nor the applicant/tenant at least 3 days prior to the hearing.
- The applicant was not in agreement with an adjournment.
- The respondent did not establish that they were deprived of the opportunity to submit evidence and some of the evidence sent in by the tenant consisted of the landlord's own written correspondence and ledgers.
- The evidence shows that the respondent was aware of the tenant's position and his evidence relating to the issue of the ledgers and the amount of rent being charged based on the tenant's application.

Accordingly, I found that there was not sufficient justification under the Act or Rules of Procedure to support imposing an adjournment on the unwilling applicant for any of the above reasons put forth by the landlord. The landlord's request for an adjournment to submit evidence was therefore denied. The hearing proceeded as scheduled.

Issue(s) to be Decided

The remaining issue to be determined based on the testimony and the evidence is whether there was a noncompliant rent increase imposed by the landlord and whether the landlord should therefore be ordered to comply with the Act.

The burden of proof is on the landlord to verify that any rent increase imposed was in compliance with the Act and Regulations.

Background and Evidence

The tenant testified that he has been a long-term tenant in this complex for 16 years. The tenant testified that he was a resident in another unit of the complex, at the time that the parties negotiated that he could occupy the dispute address. This rental unit was apparently a vacant commercial unit at that time. The tenant stated that there was an agreement that he would renovate the unit in order to convert it from commercial use to a residential suite, which he would then occupy for rent of $800.00 per month. No written tenancy agreement was submitted into evidence and the tenant testified that no agreement was ever signed. The tenant stated that he also functioned as a care-taker on behalf of the landlord and fulfilled that role until the landlord ended his employment on September 12, 2009. The landlord confirmed that, although the tenant's caretaker functions were terminated, the tenancy continued.

The tenant's position with respect to the rental arrangement, was that he agreed to pay $800.00 rent. The tenant testified that this rent was properly increased by the landlord in accordance with the Act and now stands at $859.00 per month. The tenant testified that he did not agree to any additional rent increases and continued to pay this amount. The tenant testified he received an official copy of his ledger showing rent owed and paid from January 1, 2010 to September 2010 and the tenant pointed out that, as of that date, the balance was shown as "0". The tenant testified that on November 18, 2010 he suddenly received a letter from the landlord indicating that his rent was to revert to "market rent" of $1,000.00 per month and the landlord attached an adjusted ledger imposing retroactive charges of $1,000.00 per month from August 2009 to November 2010 and alleging that the tenant was in arrears in the amount of $2,256.00, payment of which was demanded by the landlord.

The tenant pointed out that in this ledger, the rent was increased from $859 per month to $1,000.00 and was even allocated to a period during which he was still fulfilling the caretaker role.

The tenant testified that the landlord threatened to end his tenancy for the unpaid rental arrears and partial payments were made towards the arrears. The tenant's position is that the landlord violated the Act by improperly increasing the tenant's rent. The tenant testified that there were over 36 charges of $1,000.00 shown on his rental account without the landlord ever serving him with a valid 3-Month Notice of Rent Increase.

The landlord's position is that the tenant agreed to rent the unit with the market rent set at $1,000.00, but was given a reduction in rent in payment for his services as caretaker.

The landlord testified that the care-taker duties ended and the rent was supposed to revert back to $1,000.00 per month. The landlord acknowledged that the parties did not sign a written tenancy agreement or even a separate contract for the caretaker duties. The landlord stated that the ledger showing a balance of “0” was issued in error and the landlord has since corrected the account balance.

The tenant disputed the landlord’s testimony that the increase from $859 to $1,000.00 was pursuant to a contractual agreement removing a rent discount. The tenant stated that if he was being given an “employment discount” or being paid, the landlord had never issued tax statements to confirm what portion of the tenant’s rent was being covered for his labour contribution. The tenant stated that the rent increases he did receive were not based on $1,000.00. The tenant’s position is that this amount of rent was arbitrarily imposed by the landlord.

Analysis

Section 6 of the Act states that a party can make an application for dispute resolution seeking enforcement of the rights, obligations and prohibitions established under the Act or the tenancy agreement.

Section 58 of the Act also states that, except as restricted under the Act, a person may make an application for dispute resolution in relation to a conflict dealing with: (a) rights, obligations and prohibitions under the Act; OR (b) *rights and obligations under the terms of a tenancy agreement.* (My emphasis)

On the question of whether or not the landlord has the right to impose charges under the Act, I find that there is nothing in the Act or the Residential Tenancy Regulations that permits additional charges, beyond rent, to be imposed by the landlord at will. The tenancy agreement signed by both parties may contain provisions that deal with other cost obligations being assumed by the tenant, such as parking, but a tenancy agreement cannot contain any terms that conflict with the Act in any respect.

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With respect to the landlord’s position that the tenant agreed to a market rent of $1,000.00 per month and was given a discount for caretaker services, I find that the remuneration of a caretaker is not governed by the Act. I find that any terms relating to a tenant’s responsibilities that are not detailed in the Act, or terms relating to financial compensation to a tenant for labour, would need to be identified as specific terms in the tenancy agreement signed by both parties or through a separate service contract not governed by the Residential Tenancy Act.

In this instance, the landlord has testified that there were terms agreed-upon, but they were pursuant to a verbal contract.

According to the Act, oral terms contained in verbal tenancy agreements may still be recognized and enforced. Section 1 of the Act, defines “tenancy agreement” as follows:

> ***"tenancy agreement"*** *means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;*

However, section 6(3)(c) of the Act states that a term of a tenancy agreement is not enforceable if the term is not expressed in a manner that clearly communicates the rights and obligations under it.

In the case of verbal agreements, I find that, where verbal terms are clear and both the landlord and tenant agree on the interpretation, there is no reason why such terms can’t be enforced. However, when the parties dispute what was agreed-upon, then these verbal terms, by their nature, are unclear terms and it is not possible for a third party to interpret for the purpose of resolving disputes as they arise.

Without a clear contractual term in a written agreement, I find that the only option is to rely on the provisions contained in the Act with respect to the amount of rent increases permitted by a landlord.

Section 41 of the Act states that a landlord must not increase rent except in accordance with this Part and section 42 provides that:

> (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.

The amount of the rent increase can only be 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.

Section 43(5) states that 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.

The landlord's records clearly indicate that the amount of rent for this unit was changed from $859.00 to $1,000.00 and the evidence confirms that this was not pursuant to a valid and compliant Three-Month Notice of Rent Increase. I find that insufficient evidence has been submitted to support the landlord's allegation that:

- there was an agreement that the market rent was set at $1,000.00,
- that the parties agreed that the tenant would be credited with $200.00 towards the value of rent in exchange for care-taker duties,
- that the parties had agreed that ,once the tenant's services as caretaker were no longer required, he would pay the previously established market rent of $1,000.00.

Accordingly, in the absence of a compliant and enforceable term supporting the landlord's stance, I find that the rent for this tenancy has been historically charged at the rental rate of $859.00 per month and that this monthly rate will continue unless and until it is subject to a valid notice of rent increase that is compliant with the Act.

Conclusion

Based on the evidence and testimony, I order that the current rental rate for this unit has been established by the parties as $859.00 per month

I order that the tenant is entitled to be compensated for the $50.00 cost of this application and the tenant shall deduct this amount from the next month's rent owed to the landlord.

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: July 31, 2012.

Residential Tenancy Branch