Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes DRI, FF

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a determination regarding his dispute of an additional rent increase by the landlords pursuant to section 43; and
- authorization to recover his filing fee for this application from the landlords pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. The tenant testified that he handed copies of his dispute resolution hearing packages to the office of one of the landlords (the landlord) on January 23, 2013. Both landlords confirmed that they received these packages and the tenant's written evidence package. I am satisfied that the tenant served the above packages to the landlords.

Although the landlord provided a copy of a binder of written evidence to the Residential Tenancy Branch (the RTB), he testified that he did not forward a copy of this material to the tenant. He said that he was advised by representatives of the RTB that he did not need to provide the tenant with a copy of the landlords' evidence package.

At the hearing, I advised the landlord with absolute certainty that no one from the RTB would tell a party that there was no need for him to send a copy of the evidence package to the other party. In fact, the first item on the Notice of a Dispute Resolution Hearing provided to the landlords by the tenant states:

1. *Evidence to support your position is important and must be given to the other party and to the Residential Tenancy Branch before the hearing...*

After giving regard to Rule 11 of the RTB's Rules of Procedure, I have not considered the landlords' written evidence. I find that if I were to consider the landlords' written evidence binder I would be in breach of the principles of natural justice as the tenant has not been afforded an opportunity to review that evidence prior to this hearing.

Issues(s) to be Decided

Does this tenancy fall within the jurisdiction of the Act? If so, has the landlord issued a rent increase that exceeds that permitted under the Act? Is the tenant entitled to recover his filing fee from the landlords?

Background and Evidence

The parties agreed that this tenancy for second and third floor space above a commercial establishment commenced in 1978. The most recent tenancy agreement between the parties was a September 1, 2008 Commercial Lease (the Lease) that was entered into written evidence by the tenant. This Lease covered the 24-month period from September 1, 2008 until August 31, 2010. At the expiration of this term, the parties agreed to renew the Lease for a 2 year period at a mutually agreeable amount.

The parties agreed that monthly rent as of December 1, 2012 was set at $1,817.95 plus GST. No security deposit was paid for this tenancy. According to the terms of the Lease, the lessee agreed to accept the premises "as is and/or improvements necessary shall be the responsibility of the Lessee and the Lessor is in no way responsible for such repair, except structural repairs." The Lessee also committed to maintain the premises in accordance with the municipal bylaws and to maintain any necessary business licence.

The parties agreed that the landlord advised the tenant in October 2012, that the monthly rent would be increasing to $3,500.00 plus HST commencing on January 1, 2013. The tenant applied for dispute resolution to limit the landlords to the 3.8% increase allowed under the *Act*.

The tenant maintained that this was a residential tenancy and that the only permitted uses of the second and third floor of this property were for residential use. The tenant testified that, but for a period of time when he was in Bulgaria and when his son stayed in the rental unit, he has been living in the rental unit since 1978. He confirmed that he has also had other living accommodations over some of this period and has lived part-time in other locations in the Lower Mainland. He also testified that he has kept props, equipment and items associated with his movie set business in the premises for much of the time of this tenancy. However, he said that this is and always has been a residential tenancy, which protects him from rent increases of the type requested by the landlords for 2013.

The landlords testified that this is, was and always has been a commercial lease, as noted at the top of the signed contract between the parties, which describes this as a "Lease – Commercial." They also testified that they understand that the tenant has

always used the leased premises for the storage of his business materials. The landlord identified a number of locations where the tenant has kept his principal residence throughout this tenancy. The landlord noted that inspections conducted by the municipality have repeatedly indicated that the premises were being used for the storage of business materials.

Analysis

Section 4(d) of the *Act* establishes that the *Act* does not apply to:

> *(d) living accommodation included with premises that*
>
> *(i) are primarily occupied for business purposes, and*
>
> *(ii) are rented under a single agreement,...*

RTB Policy Guideline 14 provides guidance to Arbitrators in situations where one of the parties claims that the *Act* does not apply because the premises are being primarily occupied for business purposes. This Guideline reads in part as follows:

Neither the Residential Tenancy Act nor the Manufactured Home Park Tenancy Act applies to a commercial tenancy... If an arbitrator determines that the tenancy in question in arbitration is a commercial one, the arbitrator will decline to proceed due to a lack of jurisdiction...

Sometimes a tenant will use a residence for business purposes or will live in a premises covered by a commercial tenancy agreement...

To determine whether the premises are primarily occupied for business purposes or not, an arbitrator will consider what the "predominant purpose" of the use of the premises is...

In this case, there is undisputed evidence that the tenant never signed any agreement under the *Act*. Rather, the landlords gave undisputed sworn testimony that every agreement signed by the tenant since the tenancy began in 1978, was identified as a "Lease – Commercial." The tenant also acknowledged that the most recent lease for the premises was a "Lease- Commercial" using Form 2 established under the *Land Title Act* and not the *Residential Tenancy Act*.

While a landlord cannot avoid the responsibilities of the *Residential Tenancy Act* simply by drafting what would otherwise be a residential tenancy under the *Land Title Act*, I find compelling evidence elsewhere in the signed commercial lease that this agreement is more typical of a commercial lease than a residential tenancy. For example, the tenant is responsible for the payment of GST (and now HST) in addition to the regular monthly

rental payment. The tenant also accepted the property in an "as is" condition and agreed to assume the costs of any repairs or improvements, except for structural repairs. The tenant also agreed to maintain the premises in compliance with municipal bylaws and to "maintain any necessary business licence." The above provisions are far more typical of a lease for business purposes as opposed to a residential tenancy.

Based on a balance of probabilities, I find the landlords' undisputed evidence that the tenant has maintained residences elsewhere since this tenancy began far more credible than the tenant's claim that he has used this as his residence. The tenant conceded at the hearing that he does live in Langley "part-time," although he claimed that he also lived in the "studio" apartment (the rental unit) as well. I also accept the landlord's assertion that the results of municipal inspections have consistently identified the premises as being used for the storage of materials associated with the tenant's business. The tenant testified that he uses some of the rental unit for storage.

The tenant may stay at the rental unit from time to time. The tenant may also be correct in his assertion that the only legally permissible use of the premises at present is for residential use. However, I find that the tenancy he entered into was a commercial one, with the features of commercial leases and not a residential tenancy. I also find it more likely than not that whatever use the tenant has made of the premises as "sleeping quarters" pales in comparison to his predominant use of the premises over the years and at present for business purposes.

RTB Policy Guideline 27.6 reads in part as follows:

…if the primary purpose of the tenancy was to operate a business, then the Act may not apply and the RTB may decline jurisdiction over the dispute.

As I find that the premises in question are primarily occupied for business purposes, this is a commercial tenancy and the tenant's application does not fall within the jurisdiction of the *Residential Tenancy Act*.

Conclusion

I decline jurisdiction over this dispute and refuse to hear the tenant's application as I find that section 4(d) excludes this commercial tenancy agreement from the *Act*.

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: March 13, 2013

Residential Tenancy Branch