Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding WEST SHORE LODGE
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes DRI, MNDC, OLC, FF

Introduction

This hearing dealt with a tenant's application to dispute an additional rent increase; a Monetary Order for overpaid rent; and, Orders for compliance. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary Issue – Jurisdiction

The landlord raised the issue of jurisdiction on the ground the property consists of a mix of independent living units for seniors who are provided hospitality services and assisted living units and that fall under the *Community Care and Assisted Living Act* (CCALA). The landlord indicated that she had received conflicting information as to whether the *Residential Tenancy Act* (the Act) applies to tenancies for the independent living units on the property and the landlord seeks a definitive ruling on the issue. Should the Act apply the landlord stated the landlord will comply with the rent increase provisions of the Act.

I was provided undisputed evidence there are 62 living units on the property and that occupants of six of those units are provided assisted living services. The tenant resides in an independent living unit and is provided hospitality services but is not provided assisted living services or personal care services by the landlord. I was provided undisputed verbal testimony that the tenant is provided hospitality services that include, but not limited to: three meals per day, laundering services, housekeeping services, 24 hour emergency response, and, recreational activities.

The tenant provide a copy of the tenancy agreement entered into in 2010 that shows the tenant is required to pay "a monthly rental and service rate" in the single amount of $1,200.00. The tenancy agreement also specifies that the "monthly rent and service rate" includes:

a) Room occupancy
b) Three meals per day per occupant (two on Sundays)
c) Bi-weekly laundering of bed sheets and towels;
d) Bi-weekly room cleaning to [landlord] standard;
e) All utilities (except telephone).

Term 9 of the tenancy agreement further clarifies that the property is not a health care residence and the landlord does not offer nursing or personal care.

The landlord provided a copy of the landlord's current registration issued by the Assisted Living Registrar of the Ministry of Health that shows the landlord is an assisted living provider and the property is an assisted living facility for six assisted living units. The landlord also provided promotional material with respect to the independent living units, building amenities, and hospitality services included in the monthly rent and those services that are offered for additional fees.

The Act applies to residential tenancy agreements between a landlord and a tenant with respect to possession of living accommodation, use of common areas, and services and facilities provided to the tenant; except, where specifically exempted from the Act pursuant to section 4 of the Act. Section 4 provides, in part, that the Act does not apply to:

> (g) living accommodation
>
> (i) in a community care facility under the *Community Care and Assisted Living Act*,

The CCALA provides a definition for "assisted living residence" and "community care facility". Upon reading the definitions provided under the CCALA, I note that the primary difference between a community care facility and an assisted living residence is as follows: in a community care facility at least three unrelated individuals are provided three or more "prescribed services"; whereas, occupants of an assisted living residence receive hospitality services and no more than two "prescribed services".

Section 2 of the CCAL Regulation defines prescribed services for the purposes of the CCALA to be:

> (a) regular assistance with activities of daily living, including eating, mobility, dressing, grooming, bathing or personal hygiene;

> (b) central storage of medication, distribution of medication, administering medication or monitoring the taking of medication;
>
> (c) maintenance or management of the cash resources or other property of a resident or person in care;
>
> (d) monitoring of food intake or of adherence to therapeutic diets;
>
> (e) structured behaviour management and intervention;
>
> (f) psychosocial rehabilitative therapy or intensive physical rehabilitative therapy.

Part 2 of the CCALA provides that a person must not operate a community care facility without a licence from the Direct or Licensing. Part 3 of the CCALA provides that a person may not operate an assisted living residence without being registered by the Assisted Living Registrar.

Since the CCALA provides a distinction between a community care facility and an assisted living residence and provides for different licencing and registration for each of these types of facilities, I find that registration as an assisted living residence is not equivalent to being a community care facility.

In this case, I was provided a copy of the registration issued to the landlord by the Registrar of the Assisted Living. The landlord did not provide any indication or evidence that it is licensed to operate a community care facility. Based upon the evidence before me, I find the landlord does not provide living accommodation that is in a community care facility. Therefore, I find the subject tenancy is not exempt under section 4(g)(i) of the RTA.

Section 4(g)(v) of the RTA also exempts living accommodation that is

> "in a housing based health facility that provides hospitality support services and personal health care"

Since term 9 of the tenancy agreement stipulates that the property is not a health care residence and the parties were in agreement that the tenant is not provided personal care, I find the exemption under section 4(g)(v) does not apply to this tenancy.

Finally, I am satisfied that no other exemption provided under section 4 of the Act applies to this tenancy.

Having found that none of the exemptions provided under section 4 of the Act apply to this tenancy, I conclude that the Act does apply to this tenancy and I proceed to consider the issues raised by the tenant.

Procedural Matter - Amendment of Application

The tenant filed this Application for Dispute Resolution indicating she was seeking to recover a rent increase of $127.00 that she had paid for four months since April 1, 2014; however, during the hearing she amended her position and stated that she seeks to recover the $100.00 additional rent increase she has paid every month since April 1, 2014. The tenant requested that she be provided a Monetary Order in the total sum of $750.00 so as to recover the $100.00 for the months of April through October 2014 plus $50.00 for the filing fee she paid for this Application. The tenant's request to amend her claim was permitted as it was undisputed that the tenant has paid an additional rent increase of $100.00 since April 2014 through to the current month.

Issue(s) to be Decided

1. Has the tenant overpaid rent for which she is entitled to recover?
2. Is it necessary to issue orders to the landlord for compliance?

Background and Evidence

The tenancy commenced August 1, 2010 and the agreed upon monthly rent was $1,200.00 due on the 1st day of every month. Effective July 1, 2012 the rent was increased 2% to $1,224.00. The landlord issued a Notice of Rent Increase to increase the rent 2.2% to $1,251.00 effective April 1, 2014. The tenant stated during the hearing that she does not dispute these two rent increases. Rather, the tenant's dispute concerns the additional $100.00 the tenant started paying April 1, 2014 bringing the tenant's monthly payment to $1,351.00.

It was undisputed that in February 2014 the parties met and the tenant verbally agreed to pay an additional $100.00 in rent which the landlord started taking by way of automatic withdrawal of $1,351.00 on April 1, 2014 and every month thereafter. This dispute appears to have arisen because the landlord sent the tenant a letter dated March 22, 2014 indicating the $100.00 additional rent increase was part of a three year plan and that the rent would be increased a further $100.00 in each of the following two years. The tenant was of the position she had not agreed to $100.00 increases in the following two years.

It was undisputed that the tenant did not provide written consent with respect to the additional rent increase of $100.00 and the landlord did not issue a Notice of Rent Increase with respect to the $100.00 additional rent increase. Nor, did the landlord seek the Director's authorization for an additional rent increase by making the applicable application.

The landlord offered an explanation as to the reason the landlord requested an additional rent increase of the tenant; however, I found it unnecessary to hear the reasons as additional rent increases must be accomplished in a manner that complies with the Act regardless of the reason the landlord seeks to increase the rent.

Analysis

Part 3 (sections 40 through 43) of the Act and Part 4 (sections 22 and 23) of the Residential Tenancy Regulations provide for rent increases. The Act provides that a landlord must not increase the rent more than once in a 12 month period. Further, any rent increase must be accomplished by the landlord serving the tenant with a Notice of Rent Increase at least three months before the rent increase is to take effect. Finally, the Act provides that the rent must not be increased by more than the allowable "annual rent increase" unless the landlord has the tenant's written consent or the authority of the Director pursuant to an Application for Additional Rent Increase.

Since the landlord did not have the Director's authorization or the tenant's written consent for an additional rent increase and did not issue a Notice of Rent Increase with respect to the $100.00 additional rent increase, I find the landlord failed to comply with the Act with respect to the $100.00 additional rent increase the landlord started collecting as of April 1, 2014. Since the additional rent increase was non-compliant, I order that the monthly rent payable by the tenant remains at $1,251.00 until such time it is legally increased.

As the tenant has been paying $1,351.00 since April 1, 2014 I find the tenant has overpaid rent by $100.00 per month since April 1, 2014 and she is entitled to recover those overpayments pursuant to section 43(5) of the Act which provides "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." Therefore, I order the landlord to repay the tenant $700.00 for the overpaid rent plus $50.00 for recovery of the filing fee she paid for this Application. Provided to the tenant with this decision is a Monetary Order in the total amount of $750.00 as she requested.

Should this decision be received by the parties after the November 2014 rent payment has been withdrawn, I order any amount paid in excess of $1,251.00 for the month of November 2014 must be refunded to the tenant.

Conclusion

The tenant's monthly rent has been set at $1,251.00 until such time it is legally increased again. The landlord is ordered to pay the tenant $750.00 to recover the overpaid rent for the months of April 2014 through to October 2014 and the filling fee. The tenant has been provided a Monetary Order for this amount to ensure payment is made.

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: October 28, 2014

Residential Tenancy Branch