Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, FF; DRI, CNR, FF

Introduction

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

- an order of possession for unpaid rent pursuant to section 55;
- a monetary order for unpaid rent pursuant to section 67; and
- authorization to recover their filing fee for this application from the tenant pursuant to section 72.

This hearing also dealt with the tenant's application pursuant to the Act for:

- cancellation of the landlords' 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- an order regarding a disputed additional rent increase pursuant to section 43; and
- authorization to recover her filing fee for this application from the landlords pursuant to section 72.

All named parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. The tenant's assistant also attended the hearing.

The landlord LL testified that the landlords served the tenant with the dispute resolution package (including all of the landlords' evidence) on 31 December 2014 by registered mail. The landlords provided me with a Canada Post tracking number that showed the same. On the basis of this evidence, I am satisfied that the tenant was deemed served with the dispute resolution package pursuant to sections 89 and 90 of the Act.

The tenant testified that she served the landlords with the dispute resolution package on 24 December 2014 by registered mail. The tenant provided me with a Canada Post tracking number that showed the same. On the basis of this evidence, I am satisfied that the landlords were deemed served with the dispute resolution package pursuant to sections 89 and 90 of the Act.

The landlord LL testified that the landlords served the tenant with the 10 Day Notice on 5 December 2014 by registered mail. The landlords provided me with a Canada Post tracking number that showed the same. On the basis of this evidence, I am satisfied that the tenant was deemed served with the 10 Day Notice on 10 December 2014 pursuant to sections 88 and 90 of the Act.

The tenant provided documentary evidence to the Residential Tenancy Branch; however, the tenant testified that she did not provide any of the utility bills contained in the tenant's evidence package to the landlords. As the tenant did not serve the landlords with the utility bills, I will not consider these bills in making my determination. The utility bills are of marginal utility to the tenant's application, and would not be determinative of the outcome of either application. Thus it was unnecessary to adjourn the hearing in order to allow time for service of these documents on the landlords.

Towards the end of the hearing the tenant became upset. The tenant left the home of her assistant and was not present at the hearing's conclusion. I asked the assistant if she could ask the tenant to rejoin the hearing, but the assistant reported that she could not. No new evidence was received from the landlords in the tenant's absence. The landlords asked various procedural questions, which I answered. I asked the assistant to relay the content of the hearing conducted in the tenant's absence.

Issue(s) to be Decided

Should the landlords' 10 Day Notice be cancelled? If not, are the landlords entitled to an order of possession? Are the landlords entitled to a monetary award for unpaid rent? Is the tenant entitled to an order that the rent increase imposed is contrary to the Act or regulations? Are the landlords entitled to recover the filing fee for this application from the tenant? Is the tenant entitled to recover the filing fee for this application from the landlords?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the both the tenant's claim and the landlords' cross claim and my findings around each are set out below.

The rental unit contains three bedrooms on the upper level of a home. The lower level of the home is occupied by a different tenant. Both of these units share meters for hydro and natural gas.

This tenancy began on or about 1 April 2004. A tenancy agreement was signed by the parties on 10 March 2004. The tenancy was between the tenant and landlords as well as the tenant's now deceased husband. The agreement established that monthly rent of $950.00 was due on the first. The tenancy agreement sets out at clause 9 that the cost of all utilities for the premises is to be paid by the tenants. The "premises" is defined as the rental unit.

The tenant and landlords entered into a separate agreement that provided that the tenant would be responsible for paying the utilities for the home, covering both the upper and lower units. As part of this separate agreement, to compensate the tenant for the lower unit's use of the utilities, the landlords and tenant agreed the tenant would provide copies of the utility bills to the landlords and that the landlords would reimburse the tenants for a portion of their proven expense.

Due to changes in circumstances in relation to additional pets at the beginning of the tenancy, the rent was renegotiated to $1,000.00.

The landlord LL testified that the landlords continue to hold the tenant's security deposit of $500.00 and the tenant's pet damage deposit of $500.00. The landlord LL testified that he received $950.00 on 10 March 2004 and $50.00 on 26 April 2004 towards the deposits.

Prior to the rent increase at issue, monthly rent was $1,348.00. The tenant was permitted by the landlords to deduct a set amount of $108.00 from her rent in order to compensate her for the lower unit's use of utilities.

The landlord LL testified that on or about 16 December 2007 the tenant and tenant's husband entered into an agreement with the landlords to raise rent in excess of the prescribed amount. I was not provided with a copy of this agreement.

The landlords provided me with a letter dated 25 August 2014 from the landlords to the tenant. This letter set out that:

- the tenant was a long standing tenant;
- the tenant's rent had not been increased since 2009; and
- the landlords believed the fair market value of the rental unit was at least $1,600.00.

The landlords also provide the following information to the tenant:

> *On January 1, 2004, the Residential Tenancy Act was changed to provide for "simpler rent increase provisions" per info released by them. Landlords are able to increase rent annually by a percentage equal to the Consumer Price Index + 2%. In addition, landlords may apply for an additional rent increase under specified circumstances.*
>
> *…*
>
> *The Policy Guidelines permit the landlord to ask the tenant to agree to the proposed "additional rent increase". If the tenant does not agree to the additional amount proposed by the landlord, then the landlord may request the same or a higher amount be allowed via the arbitration process. The legislation allows a landlord to apply to an arbitrator for approval. The "annual rent increase" amount is automatically allowed as tenants are not able to dispute this basic amount.*
>
> *The proposed revised rent effective December 1, 2014 is:*
> *Current rate + annual rent increase + additional rent increase = proposed rent*
> *$1,348 + $30 (2.2%) + $96 (6.8%) = $1,474*
>
> *…*
>
> *[Tenant], if you are in agreement with the $1,474 per month revised rent effective December 1, 2014 then you should sign the attached statement and [landlord] will then issue a Notice of Rent Increase Form to lock in this special rate for you. If the attached Form is not signed and returned by August 30, 2014; then we will ask an Arbitrator to set the monthly rental rate at the true fair market value for your unit.*

The landlords provided a Notice of Rent Increase dated 26 August 2014. The Notice of Rent Increase provided that the current rent of $1,328.00 would be increased by $126.00 to a new rent of $1,474.00 as of 1 December 2014. The Notice of Rent Increase included the handwritten notation “see attached statement”.

Attached to the Notice of Rent Increase was a document titled “Rent Increase Summary Agreement”. This agreement set out the following:

The monthly prescribed rent increase is	*$ 30 (2.2%)*
The monthly additional rent increase is	*$ 96 (6.8%)*
The total agreed to rent increase is	*$ 126*
The current rent up to Nov. 30, 2014 is	*$ 1,348*
The new rent effective Dec. 1, 2014 is	*$ 1,474*

The above Rent Increase is hereby agreed to by:
[tenant signature] [date]
[landlord LL signature] [date]

Note
The Utility Credit for #B – 165 Mills will be 30% of the actual total cost for the whole building. The amount to be deducted will be determined later.

The landlords provided me with a document titled “Utility Credit Summary”. This document establishes the calculation of the utility abatement for both hydro and natural gas. These amounts were determined with reference to utility bills provided to the landlords by the tenant for the preceding year. The total monthly costs for both units were divided *pro rata* on the basis of the total approximate area of the two units. This resulted in a 70/30 split between the tenant and the landlords. Total monthly costs for hydro were determined to be $96.00. Total monthly costs for natural gas were determined to be $89.00. On the basis of these amounts, the landlords agreed to pay the tenant $56.00; an amount which the landlords agreed the tenant could deduct from her rent.

I was provided with the working papers the landlord LL created in his determination of the utility abatement. The landlords calculated the hydro amount by determining the total amount of actual new charges per month and reducing that amount by any late payment charges that the tenant incurred. For the period 3 May 2013 to 2 May 2014, the tenant incurred total charge of $1,183.55. Of this total, $30.81 of this amount was composed of late fees. The total actual charges were, therefore, $1,152.74. This annual amount corresponds to a monthly amount of $96.06. Thirty percent of this amount is $28.82. The landlord LL used a similar method to determine the natural gas

amount. The annual amount was $1,066.91. This corresponds to a monthly amount of $88.91. Thirty percent of this amount is $26.67. The two monthly amounts total to $55.49.

The tenant was on a monthly, fixed-payment plan of $170.00 for hydro. This amount exceeded her actual costs in relation to hydro use. The landlord LL testified that the tenant's equal payments were raised at some point because of the tenant's poor payment history. The tenant submitted that the actual cost of the utilities were the amount she actually paid for them.

On 26 August 2014, the landlord LL met with the tenant and the tenant's adult daughter to discuss the rent increase. The landlord LL testified that the tenant's daughter informed him that she was involved in real estate. The landlord LL testified that he read the contents of his 25 August 2014 letter aloud at the meeting. After discussion, the landlord LL and the tenant signed the agreement. The tenant testified that the landlord LL did read the contents of his 25 August 2014 letter to the tenant, but that she does not recall any general conversation about the letter. The tenant agrees that she did sign the agreement, but testified that at the time she signed the agreement she did not understand that the amount to which she was agreeing was in excess of the rent increase amounts established by regulation.

The landlord LL testified that on or about 31 October 2014, the tenant approached the landlord LL to express her concern about the rent increases.

On 30 November 2014, the tenant sent a letter to the landlords. This letter set out that the tenant agreed to pay $1,269.66. The tenant calculated the allowable rent increase using a rent amount net of the $108.00 utility abatement amount. The tenant stated in her letter that she did not agree to the additional amount increase. The tenant provided rent cheques in the amount of $1,269.66.

On 5 December 2014, the landlords issued a 10 Day Notice to the tenant. The 10 Day Notice set out that the tenant failed to pay $204.34 of rent that was due on 1 December 2014. The 10 Day Notice provided an effective date of 15 December 2014. The corrected effective date of the 10 Day Notice is 20 December 2014.

The landlord LL testified that the landlords received payments for $1,269.66 on 1 December 2014 and 1 January 2015. The landlords provided receipts for both these payments to the tenant. The receipts indicated that the payments were received for the tenant's "use and occupancy" of the rental unit.

Analysis

Subsection 26(1) of the Act sets out:

> A tenant must pay rent when it is due under the tenancy agreement....unless the tenant has a right under this Act to deduct all or a portion of the rent.

Subsection 43(5) allows tenants to recover rent increases that do not comply with the Act or regulations by deducting the noncompliant amount from rent.

In this case, the landlords allege that the tenant has not paid her rent as her rent was $1,474.00. The landlords agree that it was their practice to allow the tenant to deduct the utility abatement amount from rent. The tenant argues that she has paid her rent in full as the landlords were only entitled to increase her rent to $1,269.66.

If I find that the rent increase was validly issued, the tenant has not paid her rent in full and the 10 Day Notice is validly issued. If I find that the rent increase was not validly issued, the tenant has paid her rent on time and the 10 Day Notice is invalid.

Pursuant to subsection 43(1) of the Act, a landlord may impose a rent increase only up to the amount:

> (a) calculated in accordance with the regulations,
> (b) ordered by the director, or
> (c) agreed to by the tenant in writing.

The allowable percentage rent increase for each calendar year is calculated according to the inflation rate. The allowable percentage rent increase for 2014 was 2.2%.

The amount of the rent increase is clearly in excess of the amount allowed under paragraph 43(1)(a) and the regulations. The issue is then if the rent increase was agreed to by the tenant in writing pursuant to paragraph 43(1)(c).

The landlords have provided me with a signed document that indicates the tenant agreed to increase her rent amount to $1,474.00. The tenant has said that she did not understand that this amount was greater than the amount calculated in accordance with the regulations. I find that the tenant entered into a valid agreement when she signed the document entitled "Rent Increase Summary Agreement". The tenant has not

provided me with any evidence that would support an argument of duress, undue influence, or unconscionability that would void or avoid the contract. In fact, the landlords took extra steps to ensure that the tenant understood that she was agreeing to amount that was greater than the amounts prescribed by regulation. The landlords explained in great detail the calculations in their letter of 25 August 2014. While some of the law presented in the landlords' letter of 25 August 2014 is imprecise, on balance, it provides an adequate overview of the law regarding rent increases. The landlords even went so far as to read the letter to the tenant while she was accompanied by her adult daughter. While I accept that the tenant may not have understood the calculations and the intricacies of the law behind the agreement, I find that the tenant understood that she was agreeing to pay $1,474.00 in rent by signing the agreement. It is not open to the tenant to say that she did not understand that by signing the "Rent Increase Summary Agreement" she was agreeing to the rent amount.

The tenant says that her rent was the net amount that she paid to the landlords, that is, the amount net of the utility abatement amount. If this was correct, there could be an argument made that the landlords made an innocent misrepresentation that goes to a term of the agreement. If this was the case, the tenant may have been entitled to rescind the contract.

"Rent" is defined in section 1 of the Act:

> "rent" means money paid or agreed to be paid, or value or a right given or agreed to be given, by or on behalf of a tenant to a landlord in return for the right to possess a rental unit, for the use of common areas and for services or facilities, but does not include any of the following…

Integral to this definition, is that the payment (the cash rent amount) or value given (the utility payments on behalf of the lower-level unit) to the landlord are done for the right to possess a rental unit. In this case, the tenancy agreement (that is, the agreement that permits the tenant to possess the rental unit) did not include any reference to the utility abatement amount or any utility abatement payments. I find on the basis of the testimony provided by the landlord LL, that the utility abatement payment was always part of a separate agreement. This is supported by the tenancy agreement's silence on this issue. I find that the utility abatement payment was not part of rent. Accordingly, the landlords made no misrepresentation in the "Rent Increase Summary Agreement".

I find that the note at the bottom of the "Rent Increase Summary Agreement" is sufficient evidence that the landlords and tenant entered into a new arrangement regarding the utility abatement amount. I find that the landlords' calculations in relation to the utility abatement were correct.

Pursuant to section 46 of the Act, a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end tenancy effective on a date that is not earlier than ten days after the date the tenant receives the notice.

I find the tenant did not pay her rent in full when it was due or within the five days provided for pursuant to section 46. As the rent increase was valid, the tenant was not entitled to pay the reduced amount that she provided to the landlords. The landlords have not reinstated the tenancy by accepting the tenant's payments as they have issued receipts that clearly indicate that they are accepting the payment for the rental unit's "use and occupancy only".

As the tenant is not entitled to have the 10 Day Notice cancelled, the landlords were entitled to possession of the rental unit on 20 December 2014, the corrected effective date of the 10 Day Notice. As this date has now passed, I find that the landlords are entitled to a two-day order of possession.

I find that the landlords have proven that the tenant failed to pay a total of $296.68:

Item	**Amount**
Unpaid December Rent	$204.34
December Utility Abatement	-56.00
Unpaid January Rent	204.34
January Utility Abatement	-56.00
Total Arrears	**$296.68**

The landlords are entitled to this amount.

As the landlords were successful in this application, I find that the landlords are entitled to recover the $50.00 filing fee paid for this application.

The landlord LL testified that the landlords continued to hold the tenant's $475.00 security deposit, plus interest, paid on 10 March 2004. Over that period, $16.80 of interest is payable. Although the landlords' application does not seek to retain the security deposit, using the offsetting provisions of section 72 of the Act, I allow the landlords to retain $346.68 of the security deposit in satisfaction of the monetary award.

Conclusion

I dismiss the tenant's application without leave to reapply.

I order the landlords to recover the $346.68 monetary award from the tenant by allowing the landlords to retain $346.68 from the security deposit paid 10 March 2004. I order that the value of the security deposit for this tenancy is reduced from $491.80 to $145.12, inclusive of accrued interest to date.

The landlords are provided with a formal copy of an order of possession. Should the tenant fail to comply with this order, this order may be filed and enforced as an order of the Supreme Court of British Columbia.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: January 16, 2015

Residential Tenancy Branch