Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ST. JOHN THE DEVINE ABBEYFIELD HOUSE SOCIETY
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes DRI, MNDC, FF

Introduction

These hearings were convened by way of conference call in response to an Application for Dispute Resolution (the "Application") made by the Tenant on January 7, 2016. The Tenant applied to dispute an additional rent increase and to seek monetary compensation for an alleged illegal rent increase. The Tenant also applied to recover the filing fee from the Landlord.

Legal counsel, the president, and the treasurer for the Landlord Company named on the Application appeared for the hearings. The person appointed by the Tenant as her power of attorney (the "appointed Tenant") also appeared for the hearings along with the appointed Tenant's husband (the "Tenant's agent"). However, only the appointed Tenant provided affirmed testimony during the proceedings. The president and treasurer also provided affirmed testimony as well as submitting sworn affidavits. Legal counsel confirmed receipt of the Application as well as the Tenant's documentary evidence which had been provided prior to the hearing. The Tenant's agent confirmed receipt of the Landlord's documentary evidence.

The hearing process was explained to the parties and they had no questions about the proceedings. Both parties were given a full opportunity to present evidence, make submissions to me, and cross examine the other party on the evidence allowed. While I have considered the extensive evidence and submissions of both parties provided during these proceedings, I have only documented that evidence which I relied upon to make findings in this decision.

Preliminary Issue – Evidence

During the first hearing legal counsel made reference to evidence he had submitted regarding decisions made by other Arbitrators of the Residential Tenancy Branch for similar cases in order to support the Landlord's arguments. However, this evidence was

not before me at the time of the first hearing as it had been submitted three days prior to that hearing. The Tenant's agent explained that while they had received this additional evidence, they had not been given a sufficient amount of time and opportunity to respond to it as they could have submitted similar decisions to show cases to support their argument. Therefore, I informed legal counsel that this evidence would not be considered in this decision as it had not been provided to the Tenant within the time limits stipulated by the Residential Tenancy Branch Rules of Procedure and that the other party did not have sufficient opportunity to respond to it. In addition, I informed legal counsel that pursuant to Section 64 (2) of the *Residential Tenancy Act* (the "Act") that each proceeding is based on its own merits and I am not bound by decisions issued for other dispute resolution proceedings. However, I did not prevent oral submissions in relation to the late evidence provided.

Preliminary Issue – Jurisdiction

The Tenant's agent explained that effective January 1, 2016 the Landlord had illegally increased the rent from $1,650.00 to $1,850.00 through no proper and legal notice of the rent increase or consent by the Tenant. The Tenant now seeks to recover the illegal rent increase that she has been paying since January 2016. Legal counsel for the Landlord stated that the rent increase was not illegal because there was no jurisdiction of the Act in this matter. Therefore, I first turned my mind to whether the Act has jurisdiction in this case. As the Landlord had raised the issue of jurisdiction, I asked legal counsel to present the arguments on this matter first.

Legal counsel explained that the Landlord in this case is an incorporated non-profit society that is also a registered charity. It was formed as a retirement home offering supported independent living to ten residents at the property. Legal counsel referred to the affidavit submitted by the society president and explained that the society aims to alleviate loneliness and isolation by providing a small scale family like environment with a balance of privacy, companionship, security and independence.

The parties confirmed that they had signed a month to month written agreement, titled "[*Landlord's name] RESIDENT'S AGREEMENT & TERMS OF OCCUPANCY*" for the Tenant to occupy the rental unit starting on October 1, 2013. The agreement was provided into evidence. Section 1 and 2 of the agreement states:

> *"1. The monthly residential charge of $1,650.00 is payable in advance no later than the first day of each month and is subject to periodic review. The initial payment must include first and last month's rent plus a final cleaning fee of*

$100...Rent is to be paid by post-dated cheques through to end of the calendar year"

2. The inclusive monthly payment includes:

- *Occupation, rent and structural insurance of your own unfinished suite*
- *House Coordinator's services*
- *All meals – lunch and dinner are served. Supplies are provided for breakfast and snacks*
- *Light, heat and cable TV*
- *Use of the home laundry facility*
- *Maintenance and repairs of the home"*

[Reproduced as written]

Legal counsel explained that rent for each self-contained suite comprises of heat, light, cable, water and garbage. The Tenant is provided with all meals including shopping, preparation and service, as well as janitorial services. However, the janitorial services are limited to the common areas of the property and the Tenant is required to complete her own laundry, clean the rental unit, and pay for the telephone line.

Legal counsel submitted that the residence is provided to the occupants with focus on their general health. The society president testified that the residents are also provided with activities and outings undertaken by volunteer support. In addition, residents are provided with classes such as tai chi, chair exercises, music therapy, craft classes, and weekly outings. The president testified that the residents were periodically provided with therapeutic activity that was paid for by the society; this included exercises that were designed to support the residents' core strength to prevent falls. Legal counsel submitted that pursuant to Section 4(g) (v) and (vi) of the Act, the society provided the residents with therapeutic services.

Legal counsel explained that the residents, including the Tenant, range in age from 87 to 98 and all demonstrate a variety of health problems including vision and/or hearing impairment, impaired mobility, memory loss, and diminished energy levels and that residents also receive support from external home support agencies.

The Tenant's agent disputed the above submissions stating that the Tenant's tenancy did come under the jurisdiction of the Act. The Tenant's agent explained that Section 4(g) (v) of the Act requires that a health based facility must include one that provides hospitality support services and personal health care, with the emphasis on the word

"and". The agent submitted that the society does not provide any personal health care and that its own brochure, which was provided into evidence, states the following:

> *"Because [Society Name] is NOT a nursing home, applicants should enjoy reasonable health and moderate activity, be physically and mentally independent, and show compatibility with other residents. As some residents' needs may increase with time, they may contract with other social agencies for supportive care, while still residing at [Society Name]"*
>
> [Reproduced as written]

The Tenant's agent submitted that based on the foregoing, the society was not a health care based facility and therefore is not exempt from the Act. The Tenant's agent further referred to the agreement and noted that in paragraph 10 it states that the tenancy maybe terminated if the resident is not able to care for themselves or if the Tenant requires a level of care that cannot be provided by the Tenant's family, home care or private contractors. This therefore suggested that this is not a health based facility. The Tenant's agent confirmed the Tenant was provided with three meals a day. However, meals were included in the rent paid, and each resident is provided with a cold cereal based breakfast which they have to get for themselves, although they do have the use of a microwave.

The Tenant's agent explained that the housekeeping services being provided by the society were not relevant in this case as they were only being provided in the common areas of the property. This was further supported by the fact each resident is responsible for cleaning their own suite.

The Tenant's agent testified that the Tenant was placed into the property because she could no longer walk up the stairs. The Tenant's agent disputed the fact that the society provides health care and therapeutic services but rather the society permits volunteer activities in which the residents can engage in. The Tenant's agent testified that he was one of the volunteers that was involved in providing activities to the residents and that they were not proper professional health based or therapeutic activities. The Tenant's agent explained that he had dogs which he takes to the premises to interact with the residents. The Tenant's agent explained that the dogs acted as a catalyst for conversation and interaction for the residents thereby lowering blood pressure and increasing social activity. The agent submitted that he was not a licensed professional trained to provide a therapeutic service but rather he was recognised by an ambulance service as being able to provide this activity to the society residents. The agent testified that this activity had been recently limited to be undertaken on a one-to-one basis with the residents.

Legal counsel responded by referring to the last section of the agreement which states:

> *"Residents are legally LICENSEES without security of tenure. While the Society aims to offer security, it reserved the right to terminate occupancy with a minimum of one month notice to vacate in accordance with paragraph 10 of this agreement*."
> [Reproduced as written]

Legal counsel submitted that while the agreement did not expressly say that it was not a residential tenancy agreement, the above term suggests that it does not come under the Act. Legal counsel then argued that if the Act does apply then the society is exempt from the rent increase rules provided for in the Residential Tenancy Branch Regulations (the "Regulations"). This is because residents at the rental property receive rent subsidies through the SAFER program which is a program run by the British Columbia government. The president and legal counsel confirmed that they had no involvement with the assessment and decision process that a resident would go through to get a rent subsidy from the SAFER program. However, the president testified that in order for a resident to get a rent subsidy from SAFER they needed a signed letter from the society to confirm the amount of rent a tenant pays.

In addition, the society decided that in 2006 that they would offer a policy to subsidize the rent of residents who could not afford to pay the monthly charge. The president confirmed that one individual had their rent subsidized for ten years and another individual also had their rent subsidised, but was no longer a resident.

The president confirmed that the decision making around whether a resident's rent should be subsidised was done by a panel of the society members through an internal process. The president testified that after they had given the written letter to the Tenant informing her that the monthly charge was going to be increased, the Tenant applied for a rent subsidy with the society. However, her request was declined as she did not qualify based on her income.

Legal counsel then argued that in a recent decision made by the Residential Tenancy Branch on a similar case, the Arbitrator ruling on that case decided that even though the Landlord had no separate agreement with BC Housing or the Canadian Mortgage Corporation, the regulations around subsidized rent still applied because that landlord had provided subsidized rent from the onset of the tenancy.

The Tenant's agent confirmed that the Tenant had applied directly to the SAFER program for a rent subsidy as she was eligible because she paid a rent amount over $650.00. As a result, the Tenant receives $25.00 from the SAFER program to subsidize

her rent. The Tenant's agent asserted that this was a subsidised program that was independent from the Landlord. The Tenant's agent argued that the decision referred to by legal counsel in his oral submissions is not comparable or related to this case.

Legal counsel submitted that if the rent increase provisions do apply then they should only apply to the rent portion of the monthly charge. Legal counsel submitted that as per the analysis done by the treasurer, it determined that $650.00 of the $1,650.00 monthly charge was the rent portion and that any amount beyond that is not subject to the rent increase provisions. Legal counsel pointed to the tenancy agreement at section 1 and stated that the first line referred to the monthly payment of $1,650.00 as a "monthly residential charge" and that this is evidence that the $1,650.00 was not solely for rent. However, legal counsel did admit that in the same section it went on to say that the first and last month's "rent" was also payable under the agreement.

The president confirmed that at no time was the Tenant provided with a written breakdown of the monthly charge which comprised the $1,650.00 although the Tenant was informed of this verbally during the tenancy. The treasurer confirmed that when she had done the analysis of the monthly charge the Tenant was paying, it was determined that the monthly rent for the Tenant based on the society's financial records was determined to be $650.00 as per the breakdown she documented in a report she compiled with her affidavit.

The Tenant's agent denied the evidence relating to the monthly rent being disguised as a monthly charge which incorporates a portion as rent. The Tenant's agent testified that as far the Tenant is concerned the rent amount under the agreement is $1,650.00 and the services and breakdown the Landlord seeks to rely are not individually billed to the Tenant.

The president testified that when they completed the document for the Tenant for her application to SAFER, they had documented that the rent amount was $650.00 and not $1,850.00. The Tenant's agent stated that SAFER are only concerned with knowing that the amount of rent that is paid is above their threshold and the Landlord's cook had signed the SAFER documents verifying the Tenant was paying $1,850.00 as rent. These SAFER documents were not provided into evidence.

The Tenant's agent asserted that the Landlord has arbitrarily determined that the rent portion of the monthly payment is $650.00 and this has never been communicated to the Tenant which is now disputed. The treasurer rebutted this stating that it was not an arbitrary determination but one that was based on proper analysis which is available on line and which has been submitted into evidence.

Jurisdictional Analysis

In making findings on the matter of jurisdiction of the Act in this situation, I first turn my mind to Section 4(g) (v) and (vi) of the Act. This states that the Act does not apply to living accommodation in a housing based health facility that provides hospitality support services **and** personal health care, or living accommodation that is made available in the course of providing rehabilitative or therapeutic treatment or services.

Firstly, I have examined the tenancy agreement which both parties signed and I find that the Tenant entered into residential tenancy agreement with the Landlord on a month to month basis. While I accept the tenancy agreement states that residents are "licencees", I find that this is not sufficient evidence that the parties did not contract into a residential tenancy agreement as suggested by legal counsel. I find that this term alone does not make it clear that the tenancy does not come under the provisions of the Act. Furthermore, the Act defines a "tenancy agreement" as 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.

I find that section 10 of the tenancy agreement specifically states that the Tenant may terminate the tenancy agreement if the Tenant is unable to care for themselves or requires a level of care that cannot be provided for by the Tenant's family or other agencies. Coupled with the fact that the promotional material of the Landlord specifically identifies that it is not a nursing home, I am only able to conclude that the Landlord is a private organisation that does not provide personal health care. Rather, I find that the "services" offered by the Landlord is being provided on the basis of a "pay as requested" or "contract for service" and does not restrict the Tenant from occupying the rental unit on a month to month residential tenancy basis. In addition, I find the Tenant is at liberty to engage in as many services and activities that she wishes and the length of residency is not restricted or limited to a recovery period or a mandated regimen of health based treatment involving doctors, nurses, physiotherapists, or any other qualified medical professionals.

The Act makes it very clear that providing hospitality support services alone is not sufficient to make it exempt from the Act. The Landlord would only be exempt from the Act if they were to provide both hospitality and personal health care. In this case, I find there is insufficient evidence before me that would allow me to conclusively determine that the Tenant is provided with personal health care or rehabilitative or therapeutic services that would make this agreement exempt from the Act.

The Landlord argued that if Section 4 of the Act does not apply then the Landlord is exempt under section 2(g) (i) of the Regulations. This states that if a society has an agreement regarding the operation of the residential property with the government of British Columbia, then they are exempt from the rent increase provisions of the Act if the rent is related to income.

The parties for the Landlord attempted to argue that because the Tenant receives a $25.00 subsidy from SAFER, they are exempt from the rent increase provisions of the Act. However, in this case, I find that there is insufficient evidence before me that the Landlord has an agreement with SAFER or any other organisation with the government of British Columbia for this particular tenancy. I find that the tenancy agreement in this case is not based on a subsidy and is not tied to an annual evaluation of the Tenant's income for the purpose of determining rent and/or subsidy. I find the Tenant receives a subsidy independently from the Landlord and separate from the tenancy agreement through the SAFER program. In addition, I find the Landlord's involvement in supplying the Tenant with documents verifying the monthly rental amount is not a significant or sufficient linkage for the Landlord to fall under this part of the Regulations.

Furthermore, in making this finding, I placed little significance on legal counsel's submission that previous decisions ruled that the section 2(g) (i) of the Regulations did apply even though there was no agreement with the government. This is because I am not bound to follow previous decisions and each case must be analysed and decided upon on its own merits which differ from case to case. I also find the fact that the Landlord provides their own internal process for residents to receive a rent subsidy does not make this tenancy fall under section 2(g) (i) of the Act. This is because the Landlord's process does not involve or require an agreement with the government of British Columbia.

The parties for the Landlord argued that the rent portion of the "residential charge" is $650.00 and the other services provided by the Landlord comprise the remainder of the $1,650.00. The Landlord relies on section 1 of the agreement which specifies that it is a "monthly charge" rather than defining it as "rent". However, the very same section then goes on to say that "rent" for the first and last month must be paid in advance. In this respect I turn to Section 6(3) of the Act. This stipulates that a term of a tenancy agreement is not enforceable if (a) the term is inconsistent with this Act or the regulations, (b) the term is unconscionable, or (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

Based on the foregoing, I find that the Landlord has failed to satisfy me that at the time the tenancy agreement was entered into the rent amount payable under the agreement

was $650.00 and not $1,650.00. I find that the tenancy agreement makes reference to both a “monthly residential charge” and to “rent” in the same section without any clarification of what the “monthly residential charge” was intended to comprise of, such as an amount attributed to meals provided.

In the absence of such clarity in the tenancy agreement, I am only able to conclude that the monthly rent at the time the parties entered into the tenancy was for $1,650.00. I find that at no time was this amount broken down and communicated to the Tenant in writing for agreement. Furthermore, I find the amount cannot be unilaterally changed or defined as to what it constituted based on an analysis completed by the Landlord after the tenancy was entered into, irrespective of how valid the methods used to conduct the analysis may have been.

Therefore, based on the foregoing analysis of the evidence before me, I am only able to conclude that this tenancy is not exempt from the Act and the rent increase provisions provided by Part 3 of the Act apply in this case.

Analysis

Part 3 (Sections 40 through 43) of the Act and Part 4 (Sections 22 and 23) of the Regulations provide for rent increases. The Act provides that any rent increase must be accomplished by the landlord serving the tenant with a Notice of Rent Increase form and serving it to the tenant at least three months before the rent increase is to take effect. The Act also 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 an Arbitrator pursuant to an Application for Additional Rent Increase.

It was undisputed that the Tenant did not provide written consent with respect to the additional rent increase of $200.00 each month paid by the Tenant since January 2016. It is also clear that the Landlord did not issue this rent increase on a proper Notice of Rent Increase form for the additional amount. Nor, did the Landlord seek an Arbitrator’s order for an additional rent increase by making the applicable application.

The Tenant seeks to claim back the additional amount she paid to the Landlord for the illegal rent increase, minus the allowable amount (2.9% of $1,650.00, which translates to $152.15 per month). However, it is my finding that since the Landlord did not have legal authorization or the Tenant’s written consent for an additional rent increase and did not issue a proper Notice of Rent Increase form, the Landlord failed to comply with the Act with respect to the $200.00 additional rent increase the landlord started collecting as of January 1, 2016.

Section 43(5) of the Act 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. Since the additional rent increase was non-compliant with the Act, I order the monthly rent payable by the Tenant remain at $1,650.00 until such time it is legally increased. As the Tenant has been paying $1,850.00 since January 1, 2016 I find the Tenant has overpaid rent by $200.00 per month and is entitled to recover those overpayments pursuant to the Act. Therefore, I order the Landlord to repay the Tenant $800.00 for the overpaid rent plus $50.00 for recovery of the filing fee paid to make this Application.

Provided to the Tenant with this decision is a Monetary Order for a total amount of $850.00. However, it should be noted that pursuant to Section 72(2) (a) of the Act, the Tenant may recover this amount from a future installment of rent if the Landlord does not want to pay this amount directly to the Tenant. The Tenant should attach a copy of this decision to her rent payment if she decides to recover the award from her next installment of rent.

Conclusion

The Tenant's Application is granted. The monthly rent has been set at $1,650.00 until such time it is legally increased. The Landlord is ordered to pay the Tenant $850.00 to recover the overpaid rent for the months of January through to April 2016 and the filling fee. The Tenant has been provided a Monetary Order for this amount to ensure payment is made. In the alternative, the Tenant may deduct this award from a future installment of rent.

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: April 25, 2016

Residential Tenancy Branch