Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

FINAL DECISION

Dispute Codes:

DRI, MNDC, MNSD, FF

Introduction

This hearing was scheduled in response to the tenants' Application for Dispute Resolution, in which the tenant has disputed an additional rent increase, requested compensation for damage or loss under the Act; return of double the security deposit and to recover the filing fee from the landlord for the cost of this Application for Dispute Resolution.

Both parties were present on each of the two dates of the conference call hearing. At the start of the reconvened hearing I introduced myself and the participants. The parties were reminded they continued to provide affirmed testimony.

Preliminary Matters

The tenant confirmed receipt of the landlords' written rebuttal; part of which was supplied outside of the required seven day time limit. The tenants' counsel did not object to the inclusion of that evidence.

The tenants' spouse, L.F., was present with the tenant. Initially the tenant said that L.F. would assist only with accessing documents. Then the tenant said that L.F. would testify. Counsel for the landlord raised the issue of fairness, as the witness would be present throughout the hearing. I explained that if the tenant chose to have L.F. testify then that testimony would be given appropriate weight, as a witness would not normally be privy to the submissions made throughout the extent of a hearing. The tenants' counsel suggested the tenant have L.F. leave the hearing, to return to provide testimony. The tenant rejected that option. L.F. was affirmed.

The tenant did not have the landlords' written submission before him for reference. During the hearing the evidence was again emailed to the tenant by the tenant's legal counsel. I note that tenant had ample opportunity prior to the hearing to have that evidence printed or in a readily available format.

Issue(s) to be Decided

Is the tenant entitled to compensation in the sum of $22,443.00 representing rent increases given contrary to the Act, since May 1, 2005?

Is the tenant entitled to compensation in the sum of $2,557.00 representing the balance of double the security and pet deposits paid?

Background and Evidence

The tenant has supplied a copy of an undated standard Residential Tenancy Branch (RTB) tenancy agreement. The tenancy agreement includes page two to six; the cover page is missing. Clause two of the tenancy agreement indicates that a tenancy commenced on May 1, 2005, for a six month term ending September 30, 2015. The box in section 2.b)ii) is checked, requiring the tenant to vacate at the end of the tenancy. Neither the tenant nor the landlord has initialed this section of the agreement. Clause three of the tenancy agreement indicates that rent is $2,650.00 due on the first day of each month. The agreement indicates a security and pet deposit in the sum of $1,325.00 each was paid. Neither the tenant nor the landlord has signed this document.

The tenant submits that the May 1, 2005 tenancy agreement was partially written and partially oral. The tenant would reside in the rental unit from May 1, 2005 until September 30, 20105, paying $2,650.00 per month.

The tenant submits that, despite a series of fixed term tenancies in evidence that after the initial tenancy agreement which commenced on May 1, 2005 the tenancy continued as a single month-to-month term until the tenancy ended effective April 30, 2016. Counsel for the tenant responded to my question, confirming they are making oral arguments against the terms of written tenancy agreements signed during those years on the basis that the conduct of the parties established a single tenancy rather than a series of fixed term tenancies.

The landlord submitted a copy of a two-page tenancy agreement commencing July 1, 2005. This tenancy agreement indicates a fixed-term to December 31, 2005 at which point the term would convert to month-to-month unless another lease agreement is entered into. Rent is $3,200.00 per month. The tenancy agreement indicates that a security and pet deposit in the sum of $3,200.00 was paid. Page two of the agreement includes a signature for the tenant, dated June 16, 2005. During the hearing the tenant confirmed that it was likely his signature on that document.

The landlord supplied a copy of a July 1, 2005 cheque written to the landlord on an account held by the tenant. The cheque is in the sum of $3,200.00. The notes recorded on the cheque indicate a house number that differs from the rental unit number. The notes also indicate that the cheque was for “rent July.”

Counsel for the landlord suggested an error had been made by the tenant when the cheque was issued; that an incorrect house number was recorded on the cheque. The tenant confirmed that the cheque in evidence was issued from his account and that it was issued during the time the tenant resided in the rental unit. The tenant confirmed that the only home he rented on the street in question was the unit that is in dispute.

In response to counsel for the landlord, the tenant confirmed that he owns a chain of restaurants. The tenant leaves contract negotiation to his lawyers and dealt with the tenancy agreement himself.

Copies of the following tenancy agreements were supplied:

Term	Rent	Tenancy End
May 1, 2005 to September 30, 2005	$2,650.00	Tenant must vacate at the end of the term, this clause is not initialed
July 1, 2005 to December 31, 2005	$3,200.00	Converts to month-to-month unless another lease is signed
May 2, 2007 to April 30, 2008	$3,320.00	Tenant must vacate no later than April 30, 2008
May 1, 2008 to April 30, 2009	$3,443.00	Tenant must vacate no later than April 30, 2009
May 1, 2009 to April 30, 2010	$3,570.00	Tenant must vacate no later than April 30, 2010
May 1, 2010 to April 30, 2011	$3,684.00	Tenant must vacate no later than April 30, 2011
May 1, 2011 to April 20, 2012	$3,769.00	Tenant must vacate no later than April 30, 2012
May 1, 2012 to April 30, 2013	$3,927.00	Tenant must vacate no later than April 30, 2013
May 1, 2013 to April 30, 2014	$4,076.00	Tenant must vacate no later than April 30, 2014
May 1, 2015 to April 30, 2016	$4,076.00	Tenant must vacate no later than April 30, 2016

The tenant said that after the first two years the landlord hired property manager E.K. as agent for the landlord. The agent would email the tenancy agreements and the tenant would sign and return the agreements. The tenant did not thoroughly review the documents he signed. The tenant said that the deposits were paid on one occasion only and that move in and move out condition inspection reports were not requested.

Three months prior to the conclusion of each tenancy term indicated on the tenancy agreements the landlord would issue a Notice of Rent Increase, in the approved form. The rent payable on the subsequent fixed-term tenancy agreement would then align with the Notice of Rent Increase issued in accordance with the legislation. The tenant

agreed that all rent increases set out in the landlords' evidence provided an accurate record of the rent increases included with each of the tenancy agreements.

The tenant submits that, based on the original rent of $2,650.00, the landlord has illegally increased the rent throughout the tenancy. The tenant provided a chart of rent paid and rent increases given since 2005, commencing with monthly rent in the sum of $2,650.00. The tenant submitted copies of a number of rent payment cheques issued from 2007 onward. These reflect the rent shown as payable in the tenancy agreements.

Counsel for the landlord pointed to a chart prepared by the tenant, in evidence, in which the tenant records rent payable in 2005 and 2006 as $2,650.00 per month. Counsel suggested to the tenant that in fact during 2005 and 2006 the rental history shows rent was $3,200.00. The tenant responded in the affirmative; stating "O.K."

Counsel for the landlord supplied copies of emails sent between the landlords' agent and the landlord throughout the tenancy, agreeing to rent increases that would be issued for each tenancy.

On May 5, 2011 the agent for the landlord sent the tenant an email informing that the "renewal lease agreement" had been sent to the tenant. On March 19, 2012 an email was sent to the tenant to remind the tenant the lease would expire on April 30, 2012, asking if the tenant wished to renew for another one year fixed term leave agreement. The tenant responded on the same date to say he would renew and asking if there would be an inspection scheduled.

In response to my question regarding the issuing of the Notices of Rent Increase, counsel for the landlord submitted that the Notices of Rent Increase were not necessary or required.

Counsel for the landlord stated that for the most part new tenancy agreements were issued and signed each year. During the final tenancies which commenced in 2013 and 2015, no rent increase was issued.

The witness for the landlord, E.K. provided affirmed testimony that he was hired in 2006 to act as agent for the landlord. Records were maintained for the tenancy by E.K. At the time E.K. was hired as agent rent, effective February 2006, was $3,200.00.

The landlord supplied a copy of a March 1, 2016 email sent to the tenant by E.K. The landlords' agent informed the tenant the owner had decided to sell the property and would not renew the lease that was due to expire April 30, 2016. The agent wrote that the Notice of Rent Increase that had been issued was cancelled.

The tenant vacated effective April 30, 2016. The landlord requested the tenant be ordered to pay rent in the sum of $4,076.00 which the tenant failed to pay for the final month of the tenancy.

Counsel for the landlord summarized making three points. First, counsel states that the tenant is statute barred from any recovery of any monies as the tenant failed to commence his action within the time limit set out in the *Limitation Ac [RSBC 1996], Chapter 266 and the Limitation Act [SBC 2012] Chapter 13*; both the old and new Act. The *Residential Tenancy Act* contains the same provision. The tenant was required to commence any claim within two years of the date of discovery. Counsel argued that this is the purpose of the Limitation Act; requiring an applicant to bring forward any claim in a timely manner, in order to avoid the problems that can result with the passage of time. As the tenancies were fixed terms the tenant could not wait until the expiry of the last fixed term. If the tenant believes the rent increase to $3,320.00 was illegal the tenant had two years beyond May 9, 2009 to commence a claim and he did not.

Second, counsel for the landlord states the nature of the agreements clearly set out a series of fixed term tenancies over a long period of time. The tenant never challenged the landlord and the rent increases contained in each tenancy agreement was accepted. The landlords' agent was exercising caution when issuing the Notices of Rent Increase, but those Notices do not negate the leases. After 2012 the tenancy did convert to month-to-month and no rent increase was given.

Thirdly, counsel for the landlord sates that even if the tenancies are considered as a single month-to-month term the rent never increased by any more than that allowable. The tenant has stated during the hearing that he can barely recall last week and he has not been able to provide any evidence of the rent he says was payable at the start of the tenancy. The landlord has provided a tenancy agreement signed in 2005 for $3,200.00; this is clear. The tenant did not provide any copy of cheques showing rent was $2,650.00 and his calculation of the rent payable throughout the tenancies is mistaken. The landlords' agent has recalled rent was $3,200.00.

Counsel for the landlord states that the deposit, plus interest, was returned to the tenant on October 14, 2016. A copy of a processed cheque issued to the tenant in the sum of $2,743.88 was supplied as evidence

Counsel for the tenant submits that throughout the time the tenant resided in the rental unit some tenancy agreements were signed and that others remained unsigned and were not returned. Counsel stated that most notable is the landlord and her agents' failure to complete move-in and move-out condition inspection reports at the start and end of each tenancy; that a security deposit was paid only at the very beginning of the tenancy and that the deposits were not returned at the end of each tenancy.

Counsel for the tenant submits that throughout the tenancy the landlord illegally increased the rent, beyond the allowable sum. As a result the tenant set off the rent increases by withholding rent due in April 2016.

Counsel for the tenant submits that the conduct of the parties demonstrates a single tenancy that commenced May 1, 2005 to April 30, 2016. The tenancy agreements suggest a series of fixed terms, but this was not the case. Counsel references section

44(3) of the Act; where in the absence of a term requiring vacant possession at the end of the term the tenancy is deemed to have been renewed as a month-to-month term. The initial tenancy agreement did not require the tenant to vacate; therefore in accordance with section 44(3) of the Act, the tenancy was renewed on the same terms.

Counsel for the tenant submits that given the month-to-month term the landlord illegally ended the tenancy by relying on an end of tenancy date of April 30, 2016 and that the tenancy ended as the landlord wished to sell the home.

Counsel for the tenant referenced a Supreme Court of British Columbia decision *Newman vrs. Hotel Bourbon 2016 BC 1399.* Counsel states that the Court examined the issue of repeated fixed term tenancies, determining that a series of tenancies is unconscionable and used as a way to circumvent the rent increase provision of the Act. Counsel did not supply a copy of this decision or reference this decision in their written submissions.

The landlord allowed the deposits to be carried over from one tenancy to the next. The tenant has received the security and pet deposits from the landlord. The tenant confirmed that he did not provide the landlord with a written forwarding address as the landlord knew where to locate the tenant. The tenant has claimed return of double the deposits as once the landlord was able to locate a forwarding address the landlord did not return the deposits within 15 days.

The landlord confirmed the tenant did not supply a written forwarding address. After the tenancy had ended the landlord was able to locate an address through her realtor. The landlord issued a cheque to the tenant, returning the deposits in full.

Counsel for the tenant argued that the legislation does not require the tenant to provide the written forwarding address; there is only a requirement that the landlord return the deposits within 15 days of receiving the address.

I note that L.F. made few comments during the hearing.

Analysis

I have considered all of the documentary evidence and testimony; however, not all details have been reproduced. I have responded to the principle aspects of the tenants' claim. My findings, on the balance of probabilities are as follows.

First I have considered the nature of the tenancy, by examining the most recent tenancy agreement in evidence. The agreement was signed by the tenant and the landlords' agent, for a term commencing May 1, 2015 ending April 30, 2016. That agreement includes a clause two, which reads in part:

"*The tenant must vacate the premise no later than 1:00 pm on April 30, 2016…*"

(Reproduced as written)

Section 44(1)(b) of the Act provides the method by which a tenancy may end if the tenancy agreement includes a fixed term:

> *(b) the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy*

From the evidence before me I find that the tenant willingly entered into a series of fixed term tenancy agreements with the landlord. This finding is based on the multiple tenancy agreements signed by the parties over the years that were supplied by the landlord, containing an identical clause two. The most recent tenancy agreement that ended effective April 30, 2016 was supplied by the tenant; that agreement is signed by the tenant and the landlords' agent.

I find that effective April 30, 2015; a fixed term tenancy agreement was made which ended effective April 30, 2016 as the result of clause two of that agreement. Therefore; I find that the tenancy made on April 30, 2015 ended in accordance with section 44(1)(b) of the Act.

I have applied the same analysis to the balance of the tenancy agreements signed by the parties; including the agreement made on April 30, 2013, which ended effective April 30, 2014.

I find that the initial tenancy agreement signed by the tenant on June 5, 2005 was followed by a fixed term agreement. I have preferred the landlords' evidence establishing an initial tenancy commencing July 1, 2005. The tenant supplied no evidence of any rent payment made in in the sum of $2,650.00 while the landlord had evidence of payment made in July 2005 in the sum of $3,200.00, which aligns with the tenancy agreement signed on June 5, 2005.

I have then considered the timing of the tenants' application, claiming compensation dating back to 2005. Section 60 of the Act provides:

Latest time application for dispute resolution can be made

> ***60*** *(1) If this Act does not state a time by which an application for dispute resolution must be made, it must be made within 2 years of the date that the tenancy to which the matter relates ends or is assigned.*
> *(2) Despite the Limitation Act, if an application for dispute resolution is not made within the 2 year period, a claim arising under this Act or the tenancy agreement in relation to the tenancy ceases to exist for all purposes except as provided in subsection (3).*
> *(3) If an application for dispute resolution is made by a landlord or tenant within the applicable limitation period under this Act, the other party to the*

> *dispute may make an application for dispute resolution in respect of a different dispute between the same parties after the applicable limitation period but before the dispute resolution proceeding in respect of the first application is concluded.*

Therefore, I find pursuant to section 60 of the Act that any application for dispute resolution related to the tenancy that ended April 30, 2014 must have been made no later than April 30, 2016. This application was made on May 25, 2016. Therefore, I find that the application, relative to the tenancy ending April 30, 2014, was not made within the legislated time limit. As a result I have determined that the portion of the application made which related to any tenancy that pre-dated the tenancy which ended effective April 30, 2014 was not made within the required time limit set out in section 60 of the Act.

In relation to the most recent tenancy agreement, I find that there is no evidence of any rent increase given during that term. Therefore, there is no compensation due to the tenant.

I find that none of the Notice of Rent Increases issued by the landlord was necessary. The landlord was free to increase the rent by any sum when each new tenancy agreement was made and would not have been bound to limit the increases; as one tenancy was ending and a new agreement was signed.

I have located and reviewed a copy of the Supreme Court of British Columbia decision *Newman vrs. Hotel Bourbon 2016 BC 1399*. This decision was issued in relation to an application made on behalf of a tenant who lived in a single-room occupancy hotel for low-income individuals. The tenant submitted he had to sign five consecutive three month fixed term tenancy agreements, commencing in October 2014. The tenant was 64 years old, had mobility issues and low income. The tenant submitted that the landlord took advantage of the tenant due to his age, disability and mobility issues and that to do so was unconscionable. The decision was remitted for reconsideration as the Court determined the arbitrator had failed to give adequate reasons on a central issue.

The Residential Tenancy Regulation defines unconscionable:

> ***3*** *For the purposes of section 6 (3) (b) of the Act* [unenforceable term]*, a term of a tenancy agreement is "unconscionable" if the term is oppressive or grossly unfair to one party.*

I have also considered Residential Tenancy Branch policy regarding unconscionability:

> *A test for determining unconscionability is whether the term is so one-sided as to oppress or unfairly surprise the other party. Such a term may be a clause limiting damages or granting a procedural advantage. Exploiting the age, infirmity or mental weakness of a party may be important factors. A term may be found to be*

unconscionable when one party took advantage of the ignorance, need or distress of a weaker party. The burden of proving a term is unconscionable is upon the party alleging unconscionability.

There was no evidence before me that the tenant was in a position where he was placed at a disadvantage by the landlord. From the evidence before me I find that the tenant freely and voluntarily negotiated multiple tenancies over a period of ten years. There was no evidence before me that the tenant issued any protest during that time. The tenant has not provided any evidence that proves the tenant was exploited due to age, infirmity or mental weakness. In fact the tenant has confirmed that during the time of the successive tenancies he owed a chain of restaurants; leading me to conclude the tenant was not likely to be exploited or sign any contract that would place him at a disadvantage.

Therefore, I find that the tenant has failed to demonstrate that he was in an unequal bargaining position when the consecutive fixed term agreements were negotiated and, as a result, there is no evidence of any unconscionability on the part of the landlord.

I note that the tenant argued the absence of condition inspection reports negated the signed tenancy agreement contracts and I have rejected that argument. From the evidence before me I have concluded that in fact the tenant willingly entered into consecutive fixed term agreements with the landlord.

I find there is no basis to the submission that the absence of move-in and move-out condition inspection reports indicated this was a single month-to-month tenancy term commencing in 2005. The absence of condition inspection reports could present difficulties if any claim for damage were to be made by the landlord; however, the absence of an inspection report does not alter the contractual obligations of either party.

In relation to return of the security and pet deposits, I find that the landlord has returned the sum the tenant paid to the landlord, plus interest. Section 38(1) of the Act provides:

38 *(1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of*

(a) the date the tenancy ends, and
(b) the date the landlord receives the tenant's forwarding address in writing,

the landlord must do one of the following:

(c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
(d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

(Emphasis added)

Counsel for the tenant argues that since the landlord sought out the tenants' forwarding address the landlord must be required to have returned the deposits within fifteen days of the date the address was obtained. In fact, section 39 of the Act provides:

> ***39*** *Despite any other provision of this Act, if a **tenant** does not give a landlord a forwarding address in writing within one year after the end of the tenancy,*
>
> *(a) the landlord may keep the security deposit or the pet damage deposit, or both, and*
> *(b) the right of the tenant to the return of the security deposit or pet damage deposit is extinguished.*
>
> (Emphasis added)

As a result, I find that the landlord had no obligation to return the deposit as the tenant had not supplied the written forwarding address. The landlord took the initiative to return the deposits. It was not the intention of the drafters of the legislation to reward a tenant with double the deposits when the tenant has not made the effort to comply with section 39 of the Act.

Therefore, I find that the application is dismissed in its entirety.

If the landlord has a claim for unpaid rent related to the final tenancy the landlord is at liberty to submit an application for dispute resolution, within the required time limit.

Conclusion

The application is dismissed.

This decision is final and binding and 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: January 16, 2017

Residential Tenancy Branch