



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding DEVON PROPERTIES LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes:

MNDC, OLC, DRI, FF

Introduction

This hearing was convened in response to an Application for Dispute Resolution filed by the Tenant, in which the Tenant applied for a monetary Order for money owed or compensation for damage or loss; for an Order requiring the Landlord to comply with the *Residential Tenancy Act (Act)* or the tenancy agreement; to dispute a rent increase; and to recover the fee for filing this Application.

The Tenant stated that on November 29, 2017 the Application for Dispute Resolution and the Notice of Hearing were sent to the Landlord, via registered mail. The Agent for the Landlord acknowledged receipt of these documents.

On January 08, 2018 the Tenant submitted an Amendment to an Application for Dispute Resolution and 15 pages of evidence to the Residential Tenancy Branch. The Tenant stated that on January 08, 2018 these documents were sent to the Landlord, via registered mail. The Agent for the Landlord acknowledged receipt of these documents and the evidence was accepted as evidence for these proceedings.

The parties were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. The parties were advised of their legal obligation to speak the truth during these proceedings.

Issue(s) to be Decided

Has there been a rent increase that does not comply with the *Act*?

Background and Evidence

The Agent for the Landlord and the Tenant agree that:

- this tenancy began on October 01, 2010;
- rent is due by the first day of each month;
- when the tenancy began the Tenant was paying monthly rent of \$1,390.00;
- when the tenancy began the Tenant was paying \$10.00 per month for one parking space;
- the Respondent commenced managing this residential complex after the Tenant signed this tenancy agreement,
- sometime after the tenancy began the Tenant acquired a second parking space, for which he was paying \$10.00 per month;
- the Tenant was served with a Notice of Rent Increase which increased the rent to \$1,405.00, effective February 01, 2016;
- the Notice of Rent Increase did not serve to increase the parking fees on February 01, 2016, although by that point he was paying \$20.00 for two parking spaces;
- the Tenant was served with a Notice of Rent Increase which increased the rent to \$1,456.00, effective February 01, 2017;
- the Notice of Rent Increase did not serve to increase the parking fees on February 01, 2017;
- the Tenant was served with an undated notice in which he was informed that the fee for a single parking space was being increased to \$20.00 and the fee for a second parking space would be \$45.00, effective March 01, 2017;
- the Tenant was served with a Notice of Rent Increase which increased the rent to \$1,514.00, effective February 01, 2018;
- this final Notice of Rent increase declares that parking fees are now \$65.00.

The Tenant contends that the parking fees are included with his rent and that the rent increase imposed on February 01, 2018 exceeds the amount authorized by the legislation because it includes a parking fee increase of \$45.00.

A copy of the tenancy agreement was submitted in evidence.

The Agent for the Landlord stated that this is not the tenancy agreement normally used by the Landlord. She acknowledges that the tenancy agreement specifies certain services and facilities that will be provided with the Landlord "and included in the rent", including parking, subject to clause 6 of the tenancy agreement.

Clause 6 of the tenancy agreement specifies that "rent" is \$1,390.00; "parking fee(s)" for "1 space" is \$10.00; and "total rent and fees" is \$1,400.00.

The Agent for the Landlord stated that she believes the wording in the tenancy agreement is not entirely clear and that the Landlord is willing to concede that one parking space was included with the rental unit and that rent was \$1,400.00 at the start of the tenancy.

The Agent for the Landlord argued that since the tenancy agreement does not address a second parking space, a second parking space was not included with the rent. She contends that since the second parking space is not included in the rent, it is not subject to the same rent restrictions imposed by the *Act*.

Analysis

Section 1 of the *Residential Tenancy Act (Act)* defines “rent” as 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 a security deposit, a pet damage deposit, or a fee prescribed under section 97 (2) (k) of the *Act*. The definition of “services and facilities” in the *Act* includes parking.

On the basis of the tenancy agreement submitted in evidence, I find that one parking space was provided with this tenancy. In reaching this conclusion I was influenced by clause 3 of the tenancy agreement which indicates that parking is “included in the rent”, subject to clause 6 of the tenancy agreement. In concluding that only one parking space was included with the rent I was influenced by clause 6 of the tenancy agreement which specifies there is a \$10.00 parking fee for “1 space”.

Typically when parking is provided as a service with the tenancy and there is not a separate charge for parking, I find that any payment made for parking is to be considered rent. Conversely, when the tenancy agreement establishes that there is one payment for rent and one payment for parking, I find that parking should not be considered rent.

In these circumstances I find that clause 3 and clause 6 of the tenancy agreement are contradictory. I am therefore guided by *Derby Holdings Ltd. V. Walcorp Investments Ltd.* 1986, 47 Sask R. 70 and *Coronet Realty Development Ltd. And Aztec Properties Company Ltd. V. Swift*, (1982) 36 A.R. 193, in which the Court held that where there is ambiguity in the terms of an agreement prepared by a landlord, the contra proferentem rule applies and the agreement must be interpreted in favour of the tenant. As the information provided in the tenancy agreement is contradictory, I find in favour of the Tenant, which is that one parking space is included with the rent.

As one parking space is included with the rent, I find that any fee for this space must be increased in accordance with the *Act*. As the one parking space was included in the rent I find that the Landlord does not have the right to increase the fee independently of the rent.

Section 43(1)(a) of the *Act* stipulates that a landlord may impose a rent increase only up to the amount that is calculated in accordance with the regulations. Section 22(2) of the Residential Tenancy Regulation stipulates that a landlord may impose a rent increase that is no greater than two percent above the annual inflation rate.

On the basis of the undisputed evidence I find that the rent was increased from \$1,400.00 (with one parking space included in the rent and a second space for \$10.00) to \$1,415.00 (with one parking space included in the rent and a second space for \$10.00), effective February 01, 2016. I find that this was a rent increase of \$15.00, which is 1.07%. As the allowable rent increase for 2016 was 2.9%, I find that this rent increase was in compliance with section 43(1)(a) of the *Act*.

On the basis of the undisputed evidence I find that the rent was increased from \$1,415.00 (with one parking space included in the rent and a second space for \$10.00) to \$1,466.00 (with one parking space included in the rent and a second space for \$10.00), effective February 01, 2017. I find that this was a rent increase of \$51.00, which is 3.6%. As the allowable rent increase for 2017 was 3.7%, I find that this rent increase was in compliance with section 43(1)(a) of the *Act*.

On the basis of the undisputed evidence I find that the rent was increased from \$1,466.00 (with one parking space included in the rent and an additional parking fee of \$45.00) to \$1,534.00 (with one parking space included in the rent and an additional parking fee of \$45.00), effective February 01, 2018. I find that this was a rent increase of \$68.00, which is 4.6%. As the allowable rent increase for 2018 is 4%, I find that this rent increase exceeds the allowable rent increase for 2018.

As the rent increased imposed for February 01, 2018 exceeds the allowable amount, I find that the Landlord is not entitled to collect rent of \$1,534.00 and that rent remains at \$1,466.00. The Landlord retains the right to serve the Tenant with another Notice of Rent Increase for 2018, providing the proposed rent increase (including one parking space) does not exceed 4%.

Section 43(5) of the *Act* stipulates that if a landlord collects a rent increase that does not comply with the legislation the tenant may deduct the increase from rent or otherwise recover the increase. As the Landlord has collected a rent increase of \$68.00 for February of 2018, which did not comply with the legislation, I find that the Tenant is entitled to recover that payment.

As there is no evidence that a second parking space was discussed when this tenancy began, I find that the tenancy agreement does not grant the Tenant the right to a second parking space. Although it is apparent that the Tenant agreed to rent a second parking space for \$10.00 per month at some point in the tenancy agreement, I find that the parking agreement was a separate agreement that was not a part of the additional tenancy. As that second parking agreement was not a part of the additional tenancy, I find that it is not subject to the rent restrictions imposed by the *Act*.

Section 97(2)(k) of the *Act* stipulates that regulations may be created to deal with fees a landlord may charge a tenant. Section 7 of the *Residential Tenancy Regulations* provides for non-refundable fees a landlord may charge a tenant.

Section 7(1)(g) of the Regulations provides that a landlord may charge a tenant a fee for services or facilities requested by the tenant, if those services or facilities are not required to be provided under the tenancy agreement. As a second parking space is not a service or facility the Landlord was required to provide under the tenancy agreement in these circumstances, I find that the Landlord has the right to charge a fee for a separate parking space.

I note that there is nothing in the legislation that limits fees that can be charged for parking when it is provided outside of the tenancy agreement. I note that although Part 3 of the *Act* places limits on rent increases, fees are not subject to Part 3 of the *Act*. I am aware of nothing in the legislation that limits how fees for parking can be increased when the cost of parking is not included in the rent. I therefore find that I have no authority to limit the parking fee for the Tenant's second parking space and I dismiss the Tenant's application for an Order requiring the Landlord to comply with the *Act* in regards to the second parking space.

In determining this matter I note that I have not determined whether the proposed parking fee increase for the second parking space is reasonable, as that is outside of my jurisdiction.

I find that the Tenant's Application for Dispute Resolution has merit and I find that the Tenant is entitled to compensation, in the amount of \$100.00, for the cost of filing this Application for Dispute Resolution.

Conclusion

The Tenant has established a monetary claim, in the amount of \$168.00, which is includes a refund of \$68.00 for the rent increase that was incorrectly collected and \$100.00 in compensation for the fee paid to file this Application for Dispute Resolution. Pursuant to section 72(2) of the *Act*, I hereby authorize the Tenant to reduce one monthly rent payment by \$168.00 in full satisfaction of this monetary claim.

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: February 13, 2018

Residential Tenancy Branch