# Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

## DECISION

Dispute Codes DRI, OLC, FFT

Introduction

This decision is in respect of the tenants' application for dispute resolution made on September 30, 2018, under the *Residential Tenancy Act* (the "Act"). The tenants dispute a rent increase, pursuant to section 41 of the Act, seek an order that the landlord comply with the Act, the *Residential Tenancy Regulation* (the "Regulation"), or the tenancy agreement, pursuant to section 62(3) of the Act, and, seek compensation for recovery of the filing fee pursuant to section 72(1) of the Act.

A dispute resolution hearing was convened and the landlord's agent, and two tenants, attended. The parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The parties did not raise any issues with respect to the service of documents. I note that the landlord's legal name was incorrectly identified in the tenants' application; I have amended it on this Decision.

While I have reviewed all oral and documentary evidence submitted that met the requirements of the *Rules of Procedure* and to which I was referred, only evidence relevant to the issues of this application are considered in my decision.

Issues to be Decided

1. Are the tenants entitled to relief resulting from a dispute of a rent increase?
2. Are the tenants entitled to an order that the landlord comply with the Act, the Regulation, or the tenancy agreement?
3. Are the tenants entitled to compensation for recovery of the filing fee?

Background and Evidence

The rental unit which is the subject of this dispute is a beautiful, two-bedroom and two-bathroom condominium. The rental unit is but an 8-minute walk from ski lifts and a ski gondola, all of which is situated within a world class ski resort.

Moving into the rental unit on June 25, 2018, the tenants entered a fixed term tenancy on this date. The fixed term was to end on October 31, 2018. Monthly rent is $2,900.00, and the tenants paid a security deposit of $1,450.00.

The written Residential Tenancy Agreement (the "Agreement"), which was submitted into evidence by the tenants, indicates that "At the end of this time, the tenancy is ended and the tenant must vacate the rental unit. This requirement is only permitted in circumstances prescribed under section 13.1 of the Residential Tenancy Regulation, or if this is a sublease agreement as defined in the Act." Immediately after this language in the Agreement is a field titled "Reason tenant must vacate (required):" and filled in is the sentence "OWNER WILL USE THE UNIT FROM NOVEMBER 2018 TO MAY 2019". The Agreement indicates that there is a two-page addendum to the Agreement, though a copy of this addendum was not submitted into evidence.

It is the tenants' claim that the landlord has no intention of moving into the rental unit, and therefore the vacate clause in the Agreement is in violation of the Act.

Toward the end of the tenancy, tenant M.L. testified that they were told that the landlord was no longer interested in moving in to the rental unit. Communication was initiated by the landlord's agent (not the agent who attended this hearing, I note) who asked the tenants if they would be interested in continuing to rent the rental unit beyond October 31, but at a higher monthly rent of $4,800.00.

Submitted into evidence by the tenants is a copy of a September 15, 2018, text conversation between the leasing agent and tenant M.L., in which the leasing agent texts as follows:

> Sorry, I heard back from the owner. She's looking for $4800/month.
>
> Hi, [tenant M.L.], pls let me know your thoughts on the owner's offer. If you decide not to take it, would it be fine if I arrange some viewings this coming

> weekend? I will try to organize
> the viewings in one day to
> minimize the inconvenience.
> Thx!

After briefly considering the offer, the tenants declined, citing that the rent was beyond what they could afford. Within days of this communication, the leasing agent started showing the rental unit to prospective renters.

Also submitted and presented into evidence by the tenants is a copy of an email dated September 22, 2018, in which the leasing agent writes:

> Just a quick reminder, I will arrange showings for your unit on Sunday from noon to 3pm. Please put away your valuables. Sorry for the inconveniences. I've tried to put all the showings within the three hours, to minimize the inconvenience.

The leasing agent later sent the tenants a thank you email after completing some showings of the rental unit, writing

> Hi all,
> I just finished all the showing [*sic*] today. Than you very much for getting the unit in such a good order.
> Appreciated! I will let the owner know.
> Thx!

It is not entirely clear from the email or the testimony what the leasing agent refers to when she states that "I will let the owner know." Presumably, that the tenants did a good job of putting the rental unit into a presentable condition.

At some point during, or following the showings, the leasing agent's leasing company listed the rental unit for rent on the company's website. The tenants took a screenshot of the listing, which they submitted into evidence. The listing shows the rental unit available for "Seasonal – Winter" from November 1, 2018 to April 30, 2019 at a monthly rent of $4,800.00. This listing was, according to the tenants' application, "promptly removed from there [*sic*] website" when the tenants had approached the leasing agent about the rent increase.

It is unclear for how long the listing was up or when it was removed. I note that the name and phone number of the leasing agent on the rental listing are the same as the leasing agent who communicated with the tenants by email and text.

Ultimately, the tenants were unable and unwilling to enter into a new tenancy agreement at the proposed new rent of $4,800.00. They have paid rent (in the amount of $2,900.00) for November 2018, I note.

The landlord's agent testified at length about communications between the parties regarding extending the lease, but that this did not result in a successful outcome for the parties. I note that the agent's testimony consisted primarily of hearsay (the leasing agent did not attend the hearing or testify). He testified that had the landlord wanted tenants in the rental unit over the winter months, she would have modified the rent. He further submitted that the landlord "still does intend to come this winter" and stay the full six months. Finally, he testified that the landlord was acting in good faith, and that the landlord had booked a hotel room, waiting to move into the rental unit. He noted that the landlord has come to the rental unit for the past three years in a row, and therefore intends to do so this time.

In his submissions, the landlord's agent asked, rhetorically, "How do the tenants know that the landlord won't intend to move back in?"

The landlord's agent testified that the landlord was seeking an order of possession, as the tenants are overholding the rental unit. (I note that the landlord did not, as of today's date, file an application for dispute resolution seeking an order of possession.)

In rebuttal, and further submissions, the tenants argued that it makes no sense why a landlord owner would be using a property manager if they were intending to move back into the rental unit. Further, they disputed the agent's description and explanation of a conversation between the tenants and the landlord's agent (the leasing agent) about what the tenants could or could not afford.

In rebuttal and final submissions, the landlord's agent pointed out that the rental unit was rented out at summer rates, and that the landlord had no intention of renting out during the winter months, instead intending to move into the rental unit. The landlord's agent submitted into evidence photographs of an email dated October 13, 2018, from a hotel reservation booking email address to the landlord, confirming hotel reservation

dates for November 2 to November 17, 2018. The agent explained that the owner booked this hotel in order to stay close by and in anticipation of moving in.
Also submitted into evidence is an employment verification letter from the landlord's employer, which indicates the landlord's employment as a ski instructor in 2015, 2016, and 2017. The letter, dated January 20, 2018, does not provide any indication as to whether the landlord is to be employed as a ski instructor for the 2018-2019 ski season.

Finally, in explaining the purpose of listing and the showings, the agent explained that this was done "just to determine the value" and not to actually rent the rental unit to prospective tenants. The listing and showing was to determine potential rental values, and nothing more.

Analysis

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

I will turn first to the issue of the Agreement's fixed term and vacate clause, as the issue of a rent increase will flow from my determination of that clause.

As is indicated on the Agreement—which the parties signed and agreed to—at the end of the tenancy "the tenancy is ended and the tenant must vacate the rental unit. This requirement is only permitted in circumstances prescribed under section 13.1 of the Residential Tenancy Regulation."

Section 13.1 of the Regulation reads as follows:

> 13.1 (1) In this section, "close family member" has the same meaning as in section 49 (1) of the Act.
>
> (2) For the purposes of section 97 (2) (a.1) of the Act *[prescribing circumstances when landlord may include term requiring tenant to vacate]*, the circumstances in which a landlord may include in a fixed term tenancy agreement a requirement that the tenant vacate a rental unit at the end of the term are that
>
> (a) the landlord is an individual, and

> (b) that landlord or a close family member of that landlord intends in good faith at the time of entering into the tenancy agreement to occupy the rental unit at the end of the term.

In this case, the tenants dispute that the landlord intends in good faith to occupy the rental unit at the end of the term. The landlord's agent disputes this position and argues that the landlord fully intends to move into (that is, to occupy) the rental unit.

Good faith is a legal concept and means that a party is acting honestly when doing what they say they are going to do or are required to do under legislation or a tenancy agreement. It also means there is no intent to defraud, act dishonestly or avoid obligations under the legislation or the tenancy agreement. In *Gichuru v. Palmar Properties Ltd.* (2011 BCSC 827) the court found that a claim of good faith requires honesty of intention with no ulterior motive. The landlord must honestly intend to use the rental unit for the purposes stated on the notice to end tenancy, or, as in this case, the Agreement. When the issue of an ulterior motive or purpose for ending a tenancy is raised, the onus is on the landlord to establish that they are acting in good faith (see *Baumann v. Aarti Investments Ltd.*, 2018 BCSC 636).

In disputes where a tenant argues that the landlord is not acting in good faith, the tenant may substantiate that claim with evidence. In this case, the tenants submitted documentary evidence of text conversations from the landlord's leasing agent to the tenants regarding the signing of a new tenancy agreement at a significantly higher rent, a copy of an email regarding showings of the rental unit, and a copy of a rental listing.

Where the good faith intent of a landlord is called into question, as it has in this dispute, the onus is on the landlord to establish that they truly intended to do what they said on the notice to end tenancy. The landlord must also establish that they do not have another purpose or an ulterior motive for ending the tenancy.

The leasing agent who testified in the hearing said that the landlord intended to move into the rental unit. He submitted a photograph of a hotel reservation for the landlord. And he submitted a copy of an employment verification letter for the landlord. I note that the leasing agent testified that the landlord is an overseas owner, and that she is, or was, flying into the town. However, the landlord provided no copy of an airline ticket or airline booking reservation documentation. As to the employment verification letter, it does not indicate that the landlord is again to be employed as a ski instructor. Finally, I note that the one person who could have testified and established that she intended to move into and occupy the rental unit—the landlord—did not testify.

Taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the landlord has failed to meet the onus of establishing that she truly intended to occupy the rental unit at the end of the tenancy. I find that the entirety of the evidence of the text and email communication (where the leasing agent is actively trying to rent the rental unit), along with the rental property internet listing, indicates nothing more than an attempt by the landlord and her leasing agents to circumvent the Act and the Regulation. I further find that landlord's agent's explanation that the showings and the listing of the rental unit to be nothing more than market research lacks an air of reality.

The tenants submitted that it "makes zero sense" as to why a landlord—who claims that she intends to move into and occupy the rental unit at the end of the tenancy—would require the services of a property management company leading up to the end of the tenancy. I am inclined to agree: it makes little sense and further calls into question the veracity of the landlord's agent's claims that the landlord intended, or intends, in good faith to occupy the rental unit.

Section 62(3) of the Act states that I "may make any order necessary to give effect to the rights, obligations and prohibitions under this Act, including an order that a landlord or tenant comply with this Act, the regulations or a tenancy agreement and an order that this Act applies."

Having found that the landlord did not intend in good faith to occupy the rental unit at the end of the term, as is required under section 13.1 of the Regulation, I hereby order, pursuant to section 62(3) of the Act, that this tenancy is to continue on a month-to-month basis until the tenancy is ended in accordance with the Act.

Further, I hereby order that the terms of the Agreement, including the current rent of $2,900.00, shall continue until the tenancy is ended or changed in accordance with the Act or the Regulation.

As the tenants are successful in their application, I grant them a monetary award in the amount of $100.00 for recovery of the filing fee. I order that the tenants may retain $100.00 from their rent for December 2018 or January 2019.

Conclusion

I hereby order that the tenancy will continue on a month-to-month basis until it is ended in accordance with the Act. Further, the terms of the Agreement, including the current rent of $2,900.00, shall continue in force until the tenancy is ended, or a term is changed, in accordance with the Act or the Regulation.

I further order that the landlord comply with this Act, the Regulation, and the Agreement for the duration of this tenancy.

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

Dated: November 15, 2018

Residential Tenancy Branch