Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, DRI, FFT

Introduction

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

- a determination regarding their dispute of an additional rent increase by the landlord pursuant to section 41;
- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the "**Notice**") pursuant to section 46;
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Preliminary Issue – Correction of Spelling of Landlord's Name

The landlord's first name is improperly spelled in the style of cause (the letters "ER" should be inverted to "RE"). The tenant acknowledged that the landlord's first name was misspelled, and consented to it being corrected. As such, I order that the first name of the landlord be changed from the spelling in the style of cause to the spelling listed on the cover of this decision.

Preliminary Issue – Service of Documents

At the outset of the hearing, the landlord testified that he had received neither a copy of the tenant's notice of dispute resolution form nor a copy of the application for dispute resolution. As such, he testified he was not certain as to what relief the tenant was seeking.

The landlord did confirm he received two packages sent by registered mail from the tenant containing evidence and other documents.

The landlord testified, and the tenant confirmed, that he served the tenant with evidentiary documents in support of his opposition to the tenant's claim.

The tenant denied that he had failed to serve to the notice of dispute resolution proceeding form or the application for dispute resolution. He testified they were included in the first registered mail package he served on the landlord.

While I made no findings as to the contents of the registered mail packages sent by the tenant, I suggested to the parties that this hearing be adjourned to allow for the tenant to serve (or re-serve) a copy of the documents the landlord said he did not have. The tenant was agreeable to this.

The landlord, however, stated that he would be rather deal with the matter today, and asked that the hearing be briefly stood down to allow for the tenant to email him the notice of dispute resolution proceeding form and the application for dispute resolution, and for the landlord to review them. I confirmed with the landlord that, if he wanted an adjournment, he could have one (as the tenant was agreeable), and that he may be prejudiced by proceeding today. The landlord re-confirmed that he wanted to proceed with the hearing as scheduled. As such, I stood the hearing down for eight minutes to allow the landlord sufficient time to review the documents in question. At the end of the eight minutes the landlord testified that he was ready to proceed with the hearing.

Pursuant to section 71(2)(c) of the Act, I deem that the landlord is deemed served with the notice of dispute resolution proceeding form and the application for dispute resolution in accordance with the Act, by consent of the landlord.

Issue(s) to be Decided

Is the tenant entitled to:

1) an order cancelling the increase if monthly rent;
2) an order cancelling the Notice; and
3) recover the filing fees of this application?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into a month to month, oral tenancy agreement in July 2016. The parties disagree on the amount of monthly rent. The landlord testified it was $1,500.00. The tenant testified it was $750.00. The tenancy agreement did not require that the tenant provide a security deposit.

On October 20, 2016, the parties entered into a fix-term tenancy agreement with monthly rent of $1,500.00. No security deposit was required.

On November 1, 2016, the parties entered into a mutual agreement to end tenancy effective October 31, 2016.

The parties agreed that the written tenancy was entered into at the request of the landlord to assist the landlord in obtaining financing for a mortgage. The tenant testified that the written tenancy was cancelled because it did not reflect the actual amount of monthly rent the parties agreed would be paid. The landlord testified that the written tenancy agreement was terminated because it did not reflect the fact that the tenant did not want to be locked-in to a fixed term lease.

Following the mutual end to tenancy, the tenant continued to reside in the rental unit. The parties agreed that upon the end of the written tenancy, the parties reverted to being governed by the oral tenancy agreement made in July 2016.

Rental Arrears

The tenant testified that he paid his monthly rent ($750.00) plus utilities in cash every month. As the landlord lived in Saskatchewan, the tenant testified he sent these payments to the landlord via priority post. He testified that, starting in January 2019, he switched to making these payments by e-transfer. He testified he has paid his monthly rent every month, including May, 2019.

The landlord testified that he has received very little in the way of rent payments from the tenant since the parties entered into the tenancy agreement. He testified that for the majority of the tenancy, the priority post envelopes he received from the tenant only had payment for utilities in them. The landlord testified he received the following payments for month rent from the tenant:

July 1, 2016	$1,500.00
August 1, 2016	$1,250.00
June 1, 2017	$321.00*
September 1, 2017	$750.00
January 1, 2019	$750.00
February 1, 2019	$750.00
March 1, 2019	$750.00
April 1, 2019	$750.00
May 1, 2019	$750.00
Total	**$7,571.00**

*June 2017 was an invoice for payment of work done to the rental unit by the tenant, which the landlord accepted as partial payment of rent

The landlord testified he kept a ledger of rental payments made by the tenant. However he did not submit this ledger into evidence as he testified that he did not think it would be useful.

The landlord never testified as to how much rental arrears he alleges the tenant owes him, but, on April 3, 2019, he issued the Notice, which stated that the tenant is $23,000.00 in arrears. I note that the total amount of rent the tenant would have been responsible for paying between July 2016 and April 2019, if monthly rent was $1,500.00, is $49,500.00 (33 months x $1,500.00). It is unclear to me how the landlord arrived at the figure of $23,000.00 on the Notice, even accounting for the partial payments the landlord claims the tenant made ($7,571.00).

The tenant testified that the Notice was the first time he had any indication that the landlord believed the tenant owed rental arrears. He testified that this was especially surprising, as previously the landlord sought additional funds from him for the payment of utilities. The tenant argued that, should these arrears be valid, he would have expected the landlord to have sought repayment of them prior to the issuing of the Notice.

The landlord testified that there was “not a lot of mention of arrears during the lease arrangement”, but submitted that his “forcefulness [for seeking rental arrears], or lack of it, does not exclude the tenant from paying” rent pursuant to the tenancy agreement.

In late 2018, the landlord considered selling the rental property the tenant (who lived in the basement suite), and another tenant (who lived upstairs). This sale never occurred,

however. The landlord testified that it was his intention to factor the rental arrears into the sale price of the rental property. The tenant denied that this was ever discussed with him. The landlord testified that he mentioned it "indirectly", but conceded that he "didn't bring arrears up, or put [his demand for them] in writing". He testified that he "considered the sale a saving grace" which would "conclude" the issue of the arrears.

Rental Increase

On January 21, 2019, the landlord emailed the tenants, stating:

> I have to give you notice for changes to the rent. I have to rent the lower suite for a fair market value and I have to activate a lease for the space. I made the assumption in the fall that the sale of the house would have been completed prior to Christmas and therefore, I did not see the need to implement the changes on October 1st, as we had previously agreed. This lease is complicated due to the dynamics of our arrangement and impending sale, but I have to follow through with a monthly lease as soon as possible. The rental of the bottom suite will be set at $1200/month and the lease would be on a month to month basis.

The tenant testified he understood that this email purported to increase his monthly rent from $750.00 to $1,200.00. He replied on January 23, 2019, citing information regarding rent increases:

> **Rent Increases According to the BC Tenancy Act**
> A Landlord can increase rent each year up to (but not greater than) the percentage equal to the inflation rate. The allowable rent increase for each calendar year is available on the Residential Tenancy Branch's website. For 2019, the allowable rent increase is 2.5%.

The landlord replied, in part:

> I am aware or the rent increase regulations as laid out in the Landlord Tenants agreement; however, it is my opinion that we are not bound by this agreement.[…] I cannot afford to rent the lowerer [sic] suite for a fair market value.

At the hearing, the landlord testified that his January 21, 2019 email did not purport to increase the monthly rent. Rather, he testified, that it was meant to *decrease* the monthly rent, as an incentive to the tenant to pay the rental arrears.

The tenant testified he understood the January 21, 2019 email to mean that his rent was to be increased, and responded according, as can be seen in his January 23, 2019 email.

Analysis

In cases where a landlord has issued a notice to end tenancy, the onus to prove the underlying facts supporting the eviction rests with the landlord. Rule of Procedure 6.6 states:

> **6.6 The standard of proof and onus of proof**
>
> 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. In most circumstances this is the person making the application. However, in some situations the arbitrator may determine the onus of proof is on the other party. For example, the landlord must prove the reason they wish to end the tenancy when the tenant applies to cancel a Notice to End Tenancy.

As such, the landlord must prove, on a balance of probabilities, that the tenant owes $23,000.00 in rental arrears (as per the Notice). If he is unable to do this, I must cancel the Notice.

Given the conflicting testimony of the parties regarding the amount of monthly rent owed, much of this case hinges on a determination of credibility. A useful guide in that regard, and one of the most frequently used in cases such as this, is found in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), which states at pages 357-358:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

The landlord testified that monthly rent is $1,500.00. He pointed to the short-lived written tenancy agreement as proof of this. He did not provide any other documentary evidence in support of this assertion.

The tenant testified that the monthly rent is $750.00. He testified that the written tenancy agreement was entered into for the purposes of assisting the landlord in obtaining a mortgage, and does not reflect the terms of the rental agreement.

I do not find it likely that, if monthly rent was $1,500.00, the landlord would have offered to reduce the rent to $1,200.00 in an attempt to entice the tenant to start paying rent on time or at all (as the landlord claims he did in his January 21, 2019 email).

If this were the case, I would have expected the landlord to make an explicit demand for payment of rental arrears at some point, to have explicitly stated the reason for his offering a reduction of rent, or to, at the very least, stated in his January 21, 2019 email that the change is rent is a reduction. He does not do this. Rather, he prefaces the offer to reduce the rent by saying “I have to rent the lower suite for a fair market value.” I find that this means that the landlord is renting the rental unit to the tenant at a below market rate, and now wants to increase the rent to a fair market value.

Based on the tenant’s response to the email, this appears to have been the tenant’s interpretation of the email as well. The tenant replied by citing the rules regarding the increase of rent.

In his response, the landlord, rather than clarifying to the tenant that he was offering to reduce the rent, rather than increase (as could reasonably be expected if he were offering to reduce the rent), instead stated that he is of the opinion that the rent increase regulations do not apply, as they are contained in the written tenancy agreement, and that it has been mutually cancelled. He then reiterates that he cannot afford to rent the rental unit for less than fair market value.

I find that such a reply is not consistent with someone who has offered to reduce the rent.

As such, I find that the landlord’s testimony is not in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances. Where the testimony of the

landlord and the tenant differ, I accept the testimony of the tenant over that of the landlord.

I find that the monthly rent is $750.00.

Rent Increase

Sections 42 and 43 of the Act, in part, state:

Timing and notice of rent increases

42(3) A notice of a rent increase must be in the approved form.

Amount of rent increase

43(1) A landlord may impose a rent increase only up to the amount

(a) calculated in accordance with the regulations,

I find that the January 21, 2019 email is not in the approved format for an increase of rent. As such, it is invalid. Additionally, as I have already found that the monthly rent is $750.00, I find that the maximum amount the monthly rent can be increased is the inflation rate (2.5%), per section 22 of *Residential Tenancy Regulation*, BC Reg 477/2003. An increase from $750.00 to $1,200.00 is far in excess of 2.5%. I find that the increase in rent is invalid on this basis as well.

Rental Arrears

The landlord has not provided any documentary evidence supporting the assertion made on the Notice that $23,000.00 in rental arrears is due from the tenant. The landlord provided no evidence that he ever demanded repayment of the rental arrears at any point during the tenancy before the issuing of the Notice.

The tenant has denied that any arrears are owed, and testified that he paid monthly rent in the amount of $750.00 every month. I accept the tenant's testimony. Upon consideration of the totality of the testimony and documentary evidence, I do not find the landlord's actins consistent with someone who was owed a significant sum of money in rental arrears.

I find that the landlord has failed to discharge his evidentiary burden to show that the Notice was validly issued, and that the rental arrears were, in fact owing.

As such, I order that the Notice is cancelled, and of no force or effect.

I find that the tenant has been successful in his application. As such, I order that the landlord reimburse him his filing fee.

Conclusion

Pursuant to section 46 of the Act, I order that the Notice is cancelled.

Pursuant to section 43 of the Act, I order that the landlord's attempt to increase the monthly rent is invalid.

Pursuant to section 72 of the Act, I order that the landlord pay the tenant $100.00, representing the reimbursement of the filing fee for this application.

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: May 9, 2019

Residential Tenancy Branch