Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, DRI, FFT

Introduction

This hearing dealt with the tenants' 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 43;
- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the "**Notice**") pursuant to section 46; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The landlord attended the hearing. Tenant VD attended the hearing on behalf of herself and tenant GC. The parties were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Preliminary Issue – Tenants' Documents

Tenant VD testified, and the landlord confirmed, that the tenants served the landlord with the notice of dispute resolution package in accordance with the Act. The landlord testified, and tenant VD confirmed, that the landlord served the tenants with their evidence package in accordance with the Act

However, the tenants delivered a number of documents in electronic format to the landlord on a USB stick. The landlord testified that she only has an iPad, which does not have USB port, and was unable to access the tenants' documents.

Rule of Procedure 3.10.5 states:

> **3.10.5 Confirmation of access to digital evidence**

> The format of digital evidence must be accessible to all parties. For evidence submitted through the Online Application for Dispute Resolution, the system will only upload evidence in accepted formats or within the file size limit in accordance with Rule 3.0.2.
>
> Before the hearing, a party providing digital evidence to the other party must confirm that the other party has playback equipment or is otherwise able to gain access to the evidence.
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> Before the hearing, a party providing digital evidence to the Residential Tenancy Branch directly or through a Service BC Office must confirm that the Residential Tenancy Branch has playback equipment or is otherwise able to gain access to the evidence.
>
> If a party or the Residential Tenancy Branch is unable to access the digital evidence, the arbitrator may determine that the digital evidence will not be considered.
>
> [emphasis added]

The tenants testified that they did not follow up with the landlord to confirm that she was able to view the electronic copies of documentary evidence on the USB stick, as required by Rule 3.10.5

I find that the landlord was unable to access the tenants' documentary evidence. I find that the tenants did not confirm with the landlord that she was able to do so. As such, I find that tenants' documentary evidence is excluded from this hearing.

Preliminary Issue – Amendment of Tenants' Claim

The tenants' application includes a claim to set aside a rent increase made in 2016. It does not list a claim for a monetary order for reimbursement of the overpayment of rent. However, at the hearing, tenant VD indicated that she was seeking such an order, and the landlord indicated that she understood that the tenants were seeking such an order.

Rule of Procedure 4.2 states that in circumstances that can reasonably be anticipated the application may be amended at the hearing. As both parties understood that the tenants were seeking a monetary order at the hearing, I find that an amendment to the application allowing the tenants to seek a monetary order could reasonably have been

anticipated. As such, I order that the tenants' claim be amended to include a claim for a monetary order for reimbursement of rent collected pursuant to the rent increase in 2016.

Issue(s) to be Decided

Are the tenants entitled to:

1) the cancellation of the Notice;
2) the setting aside of the rent increase;
3) a monetary order for the reimbursement of improperly collected rent; and
4) recover their filing fee?

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 tenants and the landlord's father (the then-registered owner of the rental property) entered into an oral tenancy agreement. The parties did not provide the exact date that the tenancy started. However, they agree that, at the start of the tenancy, monthly rent was $1,000 and that the tenants did not pay a security deposit to the landlord.

The parties agree that, in October 2016, the landlord increased monthly rent from $1,000 to $1,500. The landlord testified that she did this as she was losing money renting the rental property to the tenants. She testified that she advised the tenants that she would either have to increase the monthly rent to $1,500 or sell the rental property.

The parties agree that tenant GC consented to the rent increase. Tenant VD testified that she did not want to agree to the increase but went along with tenant GC's decision. She testified that she took no steps to oppose the rent increase with the Residential Tenancy Branch at the time it was issued.

The landlord did not provide notice of the rent increase to the tenants in writing, and tenant GC did not provide written consent to the rent increase.

The parties agree that the tenants paid monthly rent of $1,500 from November 1, 2016 to March 1, 2019. The parties agree that the tenants did not pay rent for the months of April 2019 to October 2019.

Tenant VD testified that the tenants were hit by hard financial times and could not afford to pay monthly rent. She testified that the tenants did not make any partial payments of monthly rent during this time.

On August 6, 2019, the tenants filed an application to dispute the rent increase. Tenant VD testified that it was at this time that she learned that the 2016 rent increase was not permitted under the Act. She testified that, in 2016, the allowable monthly rent increase was 2.7%, and that the 2016 increase represented a 50% increase.

On August 19, 2019, the landlord served the tenants personally with the Notice. The tenants amended their application to dispute the Notice on August 20, 2019.

Tenant VD testified that she vacated the rental property at the end of August 2019, but that tenant GC continues to reside at there. She testified that tenant GC is willing to vacate the rental property at the end of October 2019.

The landlord testified that the tenants performed work on the rental property in exchange for one month's rent. So, she claims that the tenants owe $9,000 in unpaid rent, as follows:

April to October 2019 rental arrears	$10,500
Credit for work done (one month's rent)	-$1,500
Total	**$9,000**

The tenants claim to have overpaid monthly rent by $500 every month from November 1, 2016 to March 1, 2019 (28 months). In total, they seek a monetary order of $14,000, representing the reimbursement of 28 months' worth of overpayments.

Analysis

The Act addresses the requirements and conditions for rent increases in sections 42 and 43. The portions of these sections relevant to the tenants' application state:

> **Timing and notice of rent increases**
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> 42(2) A landlord must give a tenant notice of a rent increase at least 3 months before the effective date of the increase.
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> (3) A notice of a rent increase must be in the approved form.
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> **Amount of rent increase**

> 43(1)A landlord may impose a rent increase only up to the amount
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> (a)calculated in accordance with the regulations,
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> (b)ordered by the director on an application under subsection (3), or
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> (c)agreed to by the tenant in writing.
>
> (2) A tenant may not make an application for dispute resolution to dispute a rent increase that complies with this Part.
>
> […]
>
> (5) 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.

In 2016, the allowable rent increase was 2.9%. I find that a rent increase of 50% is not permitted by the Act.

I find that the landlord did not provide the tenants with written notice of the rent increase three months prior to the rent increase taking effect, or at all. I find that the landlord proposed the rent increase to the tenants verbally to go into effect the following month.

I find that the parties verbally agreed to increase the rent and that they did not record this agreement in writing as required by the Act.

Policy Guideline 37 contemplates sections 42 and 43, It, in part, states:

> A tenant may agree to, but cannot be required to accept, a rent increase that is greater than the maximum allowable amount unless it is ordered by an arbitrator. If the tenant agrees to an additional rent increase, that agreement must be in writing. The tenant's written agreement must clearly set out the agreed rent increase (for example, the percentage increase and the amount in dollars) and the tenant's signed agreement to that increase.
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> The landlord must still follow the requirements in the Legislation regarding the timing and notice of rent increases. The landlord must issue to the tenant a Notice of Rent Increase. It is recommended the landlord attach a copy of the agreement to the Notice of Rent Increase given to the tenant. Tenants must be given three full months' notice of the increase.
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> Payment of a rent increase in an amount more than the allowed annual increase does not constitute a written agreement to a rent increase in that amount.

I do not find the landlord's failure to obtain the acceptance of the rent increase in writing to cause the rent increase to be invalid. The writing requirement is intended to provide certainty to the parties as to the terms of the rent increase. A written agreement also assists the arbitrator in determining the true terms of the agreement, in the event of a dispute between the parties. These reasons do not apply in this case. There is no disagreement as to the amount of the rent increase, or when it was intended to go into effect. The parties are not asking me to determine which of their versions of what the terms of the agreement to increase is correct. There is no disagreement.

However, I find the failure of the landlord to deliver written notice of the proposed rent increase in the approved form to cause the rent increase to be invalid. The approved form of notice of rent increase (Form RTB-7) provides significant information to the tenants regarding their rights under the Act. This information includes:

- A landlord must give a tenant at least 3 whole month's notice, in writing, of a rent increase. For example, if the rent is due on the first day of the month and the tenant is given notice any time in January, even January 1st, there must be 3 whole months before the rent increase begins. In this example, the months are February, March, and April, so the rent increase would begin on May 1st. The landlord must use this form, Notice of Rent Increase, and must serve according to the Residential Tenancy Act.
- It is an offence for a landlord or a landlord's agent to collect a rent increase in any other way other than in accordance with Part 3 of the Residential Tenancy Act. […]
- A tenant may not apply for dispute resolution to dispute a rent increase that complies with Part 3 of the RTA.
- A landlord may only impose a rent increase up to the amount calculated in accordance with the regulations or as ordered by an arbitrator. If a tenant believes that the rent increase is more than allowed by the regulations, the tenant may contact the Residential Tenancy Branch for assistance
- For further information on rent increases, see Part 3 of the Residential Tenancy Act and Part 4 of the Residential Tenancy Regulation. You may also call the recorded 24-hour information line or visit the B.C. Government Web site to find out how to contact a Residential Tenancy Branch or to get more information (this information is at the bottom of page 1)

By requiring that the notice of rent increase be delivered to tenants using the approved form, the Act requires that tenants are provided with the above-stated information at the same time they are provided with notice of the rent increase. This information is

designed to inform tenants of their rights under the Act and provide them with the information necessary to dispute the rent increase.

In this case, I find that the tenants did not have this information at the time they were made aware of the landlord's intention to raise the rent. As such, I find they were disadvantaged when they agreed to the rent increase. They did not know their rights under the Act.

I find that the approved form is designed to prevent such an imbalance of bargaining power. By failing to provide the notice of rent increase in the approved form, the landlord deprived the tenants of the knowledge they were entitled to.

I do not, however, find that the landlord *intended* to deprive the tenants of this knowledge, or acted in an underhanded manner. I accept the landlord's evidence that she was faced with a decision to either sell the rental property or raise the rent to $1,500. However, such circumstances do not relieve the landlord of her obligations to comply with the Act. She must still comply with the Act and provide the notice of rent increase in the approved form.

While I am sympathetic to the dilemma faced by the landlord, she was not without recourse to have the rent increased in excess of the proscribed amount (see section 43(3) of the Act and section 23(1) of the Residential Tenancy Regulations).

I find that the landlord breached the Act by failing to provide the tenants with notice of the rent increase in the approved form.

Residential Tenancy Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

> The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:
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> - a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
> - loss or damage has resulted from this non-compliance;
> - the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and

- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

I find that, by paying an extra $500 per month for 28 months pursuant to an improper rent increase, the tenants have suffered damage as the result of the landlord's non-compliance in the amount of the overpayment ($14,000).

I find that there is little in the way of minimization of loss they could have done. They were not made aware of their rights under the Act, as required, so it is not reasonable to expect them to have contested the Notice earlier than they did (as one purpose of the Notice is to advise the tenants of these rights).

As such, I find that that the tenants are entitled to recover the full amount over their overpayment ($14,000).

However, I also find that the tenants have failed to pay rent for from April to October 2019. I also find that the tenants' arrears are not to be calculated based on a monthly rent of $1,500, but rather they should be calculated on based on a monthly rent of $1,000 (the monthly rent prior to the increase).

As such, I find that the tenant is $7,000 in rental arrears. I accept that the landlord agreed to waive one month's rent in exchange for work done to the rental property. As such, I find that the tenants owe the landlord $6,000 in unpaid rent.

I order that this amount is offset against the amount the landlord must pay the tenants.

Validity of the Notice

I have already found that the tenants failed to pay monthly rent from April 2019 to October 2019. Section 26 requires the tenant to pay monthly rent when it is due, unless permitted to deduct it under the Act.

Section 43(5) of the Act states:

> (5) 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.

While I have found that the rent increase does not comply with the Act, I do not find that the tenants deducted any amount of the overpayments from their rent. Section 43(5) is

not mandatory, it provides the tenant with the option to deduct the improper increase. Tenant VD testified that the reason the tenants stopped paying rent was because of their poor financial circumstances, and not because they were deducting an improper rent increase.

Indeed, the tenants made their application to dispute the rent increase in August 2019, five months after they stopped paying rent. Had their intention been to deduct their overpayment of rent, I would have expected the tenants to have made this application much earlier.

As such, I find that the Notice was validly issued.

Section 55 of the Act states:

> 55(1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if
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> (a) the landlord's notice to end tenancy complies with section 52 *[form and content of notice to end tenancy]*, and
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> (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

I find that the Notice complies with section 52. Accordingly, I grant the landlord an order of possession against the tenant effective October 31, 2019.

As the tenants have been successful in the application, they are entitled to recover their filing fee.

In summary, I order that the landlord pay the tenants $8,100, representing the following:

Overpayment of Rent (28 months)	$14,000.00
Filing Fee	$100.00
Rental arrears	-$6,000.00
Total	**$8,100.00**

Conclusion

Pursuant to section 55 of the Act, I order that the tenants provide the landlord with vacant possession of the rental unit by 1:00 pm on October 31, 2019.

Pursuant to sections 67 and 72 of the Act I order that the landlord pay the tenants $8,100.

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: October 16, 2019

Residential Tenancy Branch