Dispute Resolution Services

Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes MNDC ERP RPP FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Tenants to obtain a Monetary Order for money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement, to obtain Orders to have the Landlord make emergency repairs, to have the Landlord repair the unit, and to recover the cost of the filing fee from the Landlord for this application.

Service of the hearing documents, by the Tenants to the Agent, was done in accordance with section 89 of the *Act*, sent via registered mail on February 25, 2011. The Agent confirmed receipt of the hearing documents.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issue(s) to be Decided

1. Does this matter fall within the jurisdiction of the *Residential Tenancy Act*?
2. If so, has the Landlord breached the *Residential Tenancy Act*, regulation or tenancy agreement?
3. If so, have the Tenants met the burden of proof to obtain monetary compensation as a result of that breach?

Background and Evidence

The Landlord testified and raised the issue of jurisdiction. He began by clarifying that he is the owner of the property in question and that the utilities are in his name and paid by him. The Agent, as named as a Respondent to this dispute, uses his property to conduct holiday rentals and that he does not have anything to do with that business. He made reference to his evidence which included a copy of a letter received from his

lawyer which speaks to their interpretation that the *Residential Tenancy Act* does not apply in this situation. Specifically Section 4 (e) of the Act which states the Act does not apply to living accommodation occupied as vacation or travel accommodation. He commented on how the Applicants are guests of his Agent and not guests of his. They were sent confirmations, via e-mails, for each of their vacation rental periods for December 15 – 31, 2010; December 31, 2010 – January 31, 2011; and January 31 – March 1, 2011. They entered into a binding agreement as guests of the vacation property which provides a cancellation policy which allows a full refund.

The Tenants testified and questioned if the male who has presented himself as the owner during this hearing is the Agent's husband. They asked this because after all the research they have done on this property and after being introduced to the Agent's husband they were told his surname was the same as the Agent's as listed in the style of cause on this decision. They referred to their evidence which supports the Agent's company is listed as the owner of this property and not her spouse.

The Agent confirmed the Owner is her spouse. The Owner confirmed that his legal surname is that as listed in the style of cause on page one of this decision and that he has in the past operated under and been introduced using the surname as provided by his wife, the Agent to this dispute.

The Tenants stated they had seen the advertisement to rent this property on a local website. They communicated via e-mails when they first were interested in renting the unit, which is a fully furnished cabin located in a Strata complex. They met with the Agent's Assistant on several occasions to finalize the arrangements. They had built a relationship with the Assistant and were not able to meet with the Agent until after they had occupied the unit because the Agent was travelling. The Agent and Assistant were made aware of their desire to rent a peaceful location, for five months, so they could recover from the recent loss of a family member.

They provided the Agent and Assistant their reference from their previous landlord from the same city, where they had resided for two years, and it was known that they were residents of the area. The male Tenant has resided in the area since 1999 and the female Tenant since the early 1990's. They had owned their own home in this city which they sold a few years ago and began renting. They are both employed fulltime and their two children attend school fulltime, which was known to the Assistant and to the Agent.

They had presented the Assistant with a printed tenancy agreement and the post dated cheques for the rent as she had requested. She was hesitant to sign the tenancy agreement and said she would forward it to the Agent but that she was out of town at

that time. They made reference to their evidence which included copies of the tenancy agreement they had drafted, copies of numerous e-mails between them and the Agent, and the Assistant which included the terms of their original rental agreement. They stated that their tenancy was limited to the five month period because the Agent wanted to rent out the property as a vacation rental during the tourist season at a higher amount. There was never any other duration discussed as it was always a fixed period of time from the onset. The Agent made it very clear over the phone and through e-mails that they did not want anyone else to occupy the property over the winter months.

They were very anxious to meet the Agent and the male Tenant attempted to set up a meeting. During that conversation he asked if she had checked their reference. The Agent began to explain to him that for insurance purposes and taxes she would have to send him an e-mail every month about their stay. She proceeded to tell him that she could not cash his rent cheques because they were made payable to her instead of her company so she was returning them to him and asked if he would be able to pay the entire amount, for the five month period, up front in cash. After considering this he declined to pay the full amount up front and agreed to make the payments in cash each month. After a brief discussion it was agreed that he would deliver the cash to a storefront mailbox location where the Tenants and Agent had mailboxes and where both of them knew the staff well enough. So each month they would take the cash to the storefront mailbox location and watch the clerk open the Agent's mailbox and place their payment inside. During the holiday season the Agent and Landlord were staying at another cabin they own in the complex which finally presented an opportunity for the Tenants to meet them.

The Agent testified that she returned their cheques, through her Assistant, because they were written to her personally. She requested that they pay cash all up front because she travels a lot which makes it difficult to get to the bank. She confirmed the guests continued to pay their rent by cash each month. She stated this was a win-win situation for both parties as a fixed term agreement. They had originally discussed a period of October 15 to March 15, 2011 but the guests wanted April and May as well. This was all done via telephone, e-mail and communication with her Assistant. She argued that the rental property is zoned as commercial space and therefore this does not fall under the jurisdiction of the *Residential Tenancy Act.*

The Assistant testified that she had met with these guests and discussed the details of their stay on several occasions. She confirmed that they provided her with a copy of a tenancy agreement and she did not sign the document because she does not have signing authority. She does have the authority to confirm or deny tenants or guests however the Agent always has the final say. She stated that no one ever signs their

guest agreements as they are usually sent via e-mail. She did not have a copy of the advertisement that was placed on line however she does know there is only one section on this website for short term rentals.

The Tenants application was reviewed at which point they confirmed they applied seeking monetary compensation in the amount of $1,049.00 for having to live without water for seven weeks total and having to deal with the construction noise.

They stated that if they had known there was going to be continual construction outside their door they would not have agreed to rent this property as they said many times they were looking for a tranquil location. Construction began on creating the parking lot in mid January 2011 and the estimated completion date is the end of April 2011, if all goes well. The Tenants advised they are of the opinion that the Agent had to have known about this project as each owner would have had to contribute funds to the Strata Corporation to pay for this construction; yet she failed to disclose this to them prior to their moving in. They referred to their photographic evidence which supports the construction crew are plugging into the power outlet on their unit which will increase their hydro bill.

The male Tenant acknowledged that they were required to pay a deposit towards the cost of hydro but that he was not sure how the hydro bill would be handled. He states they were told the Agent would consider normal usage and would discuss with them when the bills came in. They have never heard back from the Agent about the utilities.

The Agent stated the guests knew all along that they were responsible for the cost of hydro and that this is noted in her monthly e-mails which state the rental amount plus hydro. She confirms she took a deposit of $225.00 to be put towards the cost of hydro and they would reconcile anything over this usage when the bills came in. They decided to leave the hydro account in her husband's name to reduce the paperwork and hassle for the guests. She confirms the hydro bill is invoiced every two months and that even though they have occupied the unit for over three and half months, she has not provided them with a copy of the hydro invoice and has not reconciled the amounts due. She states this manner of dealing with the hydro would be easier for the guests as she did not want to cause them any stress.

The Agent denies knowing about the proposed parking lot construction and denied ever receiving copies of the Strata meeting minutes. She confirmed the owner, her husband, would have received copies of the Strata minutes.

The Landlord confirmed he receives copies of the Strata meeting minutes.

The Tenants continued to occupy the rental unit during the period the water pipes were frozen. The water problems first began on January 12, 2011 and they alerted the Agent to the problems immediately. They felt they were constantly being put off by the Agent. They lost all water services as of February 13, 2011 and called the contact information provided to them, which was the Agent's Assistant. On February 17, 2011, at 7:04 a.m. the Agent sent them an e-mail, a copy was provided in their evidence, which basically stated the Agent was not responsible to provide them with compensation and she suggested they move out of the unit.

They confirmed the water problem was repaired the afternoon of March 4, 2011, so they are withdrawing their requests for Orders to have the Landlord make emergency repairs and repair the rental unit.

In closing, the Landlord stated that he paid a lot of money to have his lawyer investigate this situation. His lawyer is very knowledgeable and confirms their opinion that this is a short term rental, as supported by the different amounts being charged for the different months they have occupied the unit, and short term rentals fall under the *Hotel Keepers Act.* He clarified that while he is the Owner of the property he has no dealings with the rental of the units. The rentals are handled by the vacation rental company owned by his wife. Furthermore, if this proceeds, then he wants to be placed on record that from this point onward, all rent will be accepted as "use and occupancy only".

The Agent wanted to clarify that the guests were only without water from February 13, 2011 to March 4, 2011. She confirmed the units were under a Strata and she did not know about the construction that was planned to create a parking area. The first time she heard of the construction was January 30, 2011. Her husband is the one who receives copies of the Strata meeting minutes.

The Assistant stated she had nothing further to add and then stated she does send out e-mails to guests but only after the Agent has approved the information.

Neither of the Tenants have anything further to add.

Analysis

Based on the foregoing, the relevant written submissions, and on a balance of probabilities, I find as follows:

To determine the matter of Jurisdiction under section 4 (e) of the *Residential Tenancy Act, (this Act does not apply to living accommodation occupied as vacation or travel accommodation),* requires the following rigorous test be met:

1) The summer cottage or winter chalet is rented strictly on a vacation or travel basis; and
2) It is occupied based on a licence to occupy.

In making the determination whether the matter before me is exempt from the *Residential Tenancy Act* and is a license to occupy or a tenancy, I have considered what the intentions were of the parties involved, and all of the factors or circumstances surrounding the occupation of the premises as follows:

- The occupants are long term residents of the municipality where the rental unit is located. The Agent and her Assistant were aware prior to entering into this agreement that these applicants were local residents and had rented their previous home for two years in the same municipality, as supported by their reference. They had knowledge that the occupants were gainfully employed in the municipality and their children were in fulltime attendance in school. Therefore, I find the parties involved were aware from the onset that the property was not being rented for this fixed period of time “strictly” for a vacation or travel period. Rather, the parties were entering into a fixed term lease for the period of December 22, 2010 to May 31, 2011.
- Payment of a security deposit of $500.00 was required, which is indicative of a tenancy agreement. A license to occupy does not require payment of security deposits.
- The occupants (guests) retained access and control over the entire rental unit during the term of the agreement, which is indicative of a tenancy agreement. For agreements that are a license to occupy the owner, or other person allowing occupancy, retains access to or control over the site.
- The occupants (guests) are paying a fixed amount for rent and utilities, which is indicative of a tenancy agreement. A licensee would pay applicable property taxes, hotel taxes, HST, and/or utilities but not a fixed amount for rent.
- The occupants are required to provide notice prior to cancelling their occupancy which is indicative of a tenancy agreement. For a license to occupy the parties agree the occupier may be evicted without a reason or may vacate without notice.

As per the *Residential Tenancy Branch Policy # 9*, the Dispute Resolution Officer will weigh all of the factors for and against finding that a tenancy exists, even where the written contract specifies a license to occupy or a tenancy agreement. It is also important to note that the passage of time alone will not change the nature of the agreement from a license or tenancy.

Based on the aforementioned I find the matter before me does not meet the required test to be exempt from the *Residential Tenancy Act* pursuant to section 4(e) of the Act, and I therefore accept jurisdiction of this matter under the *Residential Tenancy Act*.

I have carefully considered the following on how the Landlord and Agent presented themselves during the hearing:

- Landlord stated he is the owner of the property and introduced himself with a different surname than the Agent, what he later confirmed was his legal surname.
- Agent confirmed the owner is her spouse.
- Landlord confirmed that he has operated under and has been introduced using his Wife's surname.
- Landlord claims he does not have anything to do with the rental business as he has handed this over to his wife's (the Agent) company to manage. He later advises that "he" paid his lawyer a lot of money to research their situation which resulted in the letter provided in his evidence. I note that the letter from the lawyer is addressed to his wife's company, naming his wife (Agent) as the Director and not to the Landlord.
- The Agent claims she had no knowledge of the planned parking lot construction and stated she does not see copies of the Strata meeting minutes.
- Landlord confirms he receives Strata meeting minutes.
- Landlord stated the hydro account is in his name and he pays the bills.
- Agent testified to access the hydro bills and recovering the costs through her company's rental agreement with the occupants.
- There is no evidence before me to support who all the owners of the vacation rental company are (eg: President). The Agent is noted on the lawyer's letter as being the Director of the limited company.

As per Section 1 of the *Act* a **"landlord"**, in relation to a rental unit, includes any of the following:

> (a) the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,
>
> (i) permits occupation of the rental unit under a tenancy agreement, or
>
> (ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement;
>
> (b) the heirs, assigns, personal representatives and successors in title to a person referred to in paragraph (a);
>
> (c) a person, other than a tenant occupying the rental unit, who
>
> (i) is entitled to possession of the rental unit, and
>
> (ii) exercises any of the rights of a landlord under a tenancy agreement or this Act in relation to the rental unit;
>
> (d) a former landlord, when the context requires this;

Applying the above definition, I find that the Owner, Agent, and the Limited Company are proper parties to this proceeding. There was ample evidence that the Agent and the Owner took action to permit occupation of the rental unit and exercised powers while performing duties under the Act which related to the tenancy in the rental property. My finding does not require piercing the corporate veil but rather the application of the definition of landlord contained in the Act.

The Owner and Agent could argue that the Landlord is technically the limited vacation rental company; however based on the aforementioned I find that the Owner, his wife, (the Agent), are also personally responsible and must be named in the proceeding. Therefore the application has been amended to include the Owner, the Agent, and the Limited Company, pursuant to Section 62 of the *Act.*

A "**tenancy agreement**" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit. Therefore, I find that based on the aforementioned definition, oral terms and terms agreed to via e-mail, form part of tenancy agreements and may still be recognized and enforced.

Based on the evidence before me, I find the parties entered into a fixed term tenancy agreement effective December 22, 2010 which is scheduled to end May 31, 2011, at

which time the Tenants are required to vacate the property. Rent is payable on the first of each month in the amount of $1,049.00. The Tenants are required to pay the cost of hydro for the duration of the tenancy agreement.

The Landlord has demanded that rent payments be made in cash. Therefore, I HEREBY ORDER the Landlord to provide the Tenants with signed and dated receipts for all rent payments received (past and future), pursuant to Section 26(2) of the *Act.*

Part 3 of the *Act* provides when a rent increase is allowed as follows:

Meaning of "rent increase"

40 In this Part, **"rent increase"** does not include an increase in rent that is

(a) for one or more additional occupants, and

(b) is authorized under the tenancy agreement by a term referred to in section 13 (2) (f) (iv) *[requirements for tenancy agreements: additional occupants]*.

Rent increases

41 A landlord must not increase rent except in accordance with this Part.

Timing and notice of rent increases

42 (1) A landlord must not impose a rent increase for at least 12 months after whichever of the following applies:

(a) if the tenant's rent has not previously been increased, the date on which the tenant's rent was first established under the tenancy agreement;

(b) if the tenant's rent has previously been increased, the effective date of the last rent increase made in accordance with this Act.

(2) A landlord must give a tenant notice of a rent increase at least 3 months before the effective date of the increase.

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

(4) If a landlord's notice of a rent increase does not comply with subsections (1) and (2), the notice takes effect on the earliest date that does comply.

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,

(b) ordered by the director on an application under subsection (3), or

(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.

(3) In the circumstances prescribed in the regulations, a landlord may request the director's approval of a rent increase in an amount that is greater than the amount calculated under the regulations referred to in subsection (1) (a) by making an application for dispute resolution.

(4) [Repealed 2006-35-66.]

(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 this case the Landlords have notified the Tenants via e-mail that the rent will increase from $1,049.00 per month to $1,250.00 effective April 1, 2011 and then another increase to $1,500.00 on May 1, 2011. These increases do not meet the requirements of the *Act,* as listed above, for the following reasons:

- The amount of each increase is higher than the regulated amount for 2011 of 2.3%; and
- A rent increase cannot be imposed within the first 12 months of the tenancy agreement; and
- The Landlord and Tenant have not agreed to the rental increase, in writing with both parties signatures; and
- The Landlord has failed to provide three months written notice of the proposed increased, in the approved form.

As per the aforementioned, I find the rent increases as noted above, are not valid. Therefore, I find the rent will remain at $1,049.00 per month for the duration of the fixed term tenancy agreement.

The Tenants have sought monetary compensation of $1,049.00 for intermittent water problems from January 12, 2011 to February 12, 2011, for complete loss of water for the period of February 13, 2011 to March 4, 2011, and for having to deal with construction noise every day from mid January 2011 which will last until the parking lot project is completed at the end of April or May 2011.

Section 32 (1) of the *Act* provides a landlord must provide and maintain residential property in a state of decoration and repair that (a) complies with the health, safety and housing standards required by law, and (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant.

Section 27 stipulates that a landlord must not terminate or restrict a service or facility if that service of facility is essential to the tenant's use of the rental unit as living accommodation or providing the service or facility is a material term of the tenancy agreement.

Section 28 of the *Act* states that a tenant is entitled to quiet enjoyment including, but not limited to, rights to reasonable privacy; freedom from unreasonable disturbance; exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with the *Act*; use of common areas for reasonable and lawful purposes, free from significant interference.

In many respects the covenant of quiet enjoyment is similar to the requirement on the landlord to make the rental units suitable for occupation which warrants that the landlord keep the premises in good repair. For example, failure of the landlord to make suitable repairs could be seen as a breach of the covenant of quiet enjoyment because the continuous breakdown of the building envelop would deteriorate occupant comfort and the long term condition of the building.

I accept the Tenants' evidence that the Landlords ought to have known about the Strata project prior to commencement of work, as they would have seen the Strata meeting minutes and would have had to contribute funds towards the project. Therefore, I find they had knowledge of the construction project which they chose not to disclose to the Tenants, which has negatively affected the Tenants' quiet enjoyment of the rental unit.

Residential Tenancy Policy Guideline 6 stipulates that "it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises, however a tenant may be entitled to reimbursement for loss of use of a portion of the property even if the landlord has made every effort to minimize disruption to the tenant in making repairs or completing renovations."

Based on the aforementioned I hereby approve the Tenants' claim of **$1,049.00** as compensation for loss of quiet enjoyment due to intermittent water from mid January 2011 to February 12, 2011; and loss of water from February 13, 2011 to March 4, 2011; and construction of the parking lot area from mid January 2011 to completion.

I accept the evidence that the Tenants are required to pay the cost of hydro for the unit they are occupying and the construction company is using hydro from the Tenants' unit. As the construction company's usage cannot be determined, I hereby award a nominal amount of $75.00 to be deducted for each full month of construction. Therefore the Tenants may deduct $37.50 from the cost of their hydro for January 2011, and **$75.00** for every full month after that, in accordance with section 67 of the Act.

Hydro bills are invoiced every two months; however to date, the Agent and Landlord have failed to provide the Tenants with a copy of the hydro bill and a demand for payment. Therefore, I HEREBY ORDER, pursuant to Section 62, the Agent and/or Landlord provide the Tenants with copies of all hydro bills that have been received to date, with a 30 day written demand for payment, upon receipt of this decision. All future hydro bills are to be provided to the Tenants, with a written 30 day demand, within 15 days after the invoice date. The written demand is to reflect the deduction for the $225.00 deposit and the nominal award, as listed above at $37.50 for January 2011 and $75.00 for every full month of construction.

The Tenants have been successful with their application; therefore I award recovery of the **$50.00** filing fee.

The Landlord has requested to be put on record stating that if jurisdiction is found under the *Residential Tenancy Act*, then he will only accept rent for "use and occupancy only" from this point forward. There is no provision in the Act that would allow a Landlord to unilaterally cancel a valid tenancy agreement and change the terms to "use and occupancy only". Having found jurisdiction and a valid fixed term tenancy agreement in effect, the Landlord's statement holds no merit and is of no force or effect.

I have included with my decision a copy of "A Guide for Landlords and Tenants in British Columbia" and I encourage the parties to familiarize themselves with their rights and responsibilities as set forth under the *Residential Tenancy Act*.

Conclusion

Pursuant to Section 62 of the Act, I hereby order the Tenants to deduct the one time monetary award of **$1,099.99** ($1,049.00 + $50.00 filing fee) from their monthly rent as follows:

April 1, 2011 rent $1,049.00 - $1,049.00 = Rent payable of **Nil** due for April 2011.
May 1, 2011 rent $1,049.00 - $50.00 = Rent payable of **$999.00** for May 2011

The Landlords and Tenants are HEREBY Ordered to comply with my Orders listed above and the *Residential Tenancy Act*, pursuant to Section 62 of the Act.

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: March 22, 2011.

Residential Tenancy Branch