Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes DRI, MNDC, FF, O

Introduction

This hearing was convened by way of conference call in response to an application made by the tenants disputing an additional rent increase; for a monetary order for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement; and to recover the filing fee from the landlord for the cost of this application. The Tenant's Application for Dispute Resolution also requests a ruling regarding the amount of rent payable for the rental unit. Further, the evidentiary material provided by the tenants requests that any Decision or order made in respect of this application be applied to other tenancies within the complex.

One of the tenants attended the hearing represented by an agent, and the tenant and the agent gave affirmed testimony. The landlord corporation was represented by counsel and 3 managers of the landlord attended and provided affirmed testimony. The parties were given the opportunity to cross examine each other and the witnesses on the testimony given and evidence provided, all of which has been reviewed and is considered in this Decision.

Issue(s) to be Decided

- Is the tenants' application disputing an additional rent increase justified?
- Are the tenants entitled to a monetary order for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement?

Background and Evidence

The parties agree that this month-to-month tenancy began on July 1, 2001 and the tenants still reside in the rental unit. Rent in the amount of $854.00 per month is currently payable in advance on the 1st day of each month and there are no rental arrears. The tenants had moved from one apartment to another within the complex in 2001.

The tenants' agent testified that in 2010 the landlord raised the rent by 7.4% without making an application to the Residential Tenancy Branch. In 2009 the rental amount was $778.00 per month; in 2010 rent was $835.00 per month and the increase now brings the rental amount to $854.00 per month. The increase was not provided to the tenants on the approved form provided by the Residential Tenancy Branch, but delivered by way of a letter, relying on Section 2 of the Residential Tenancy Regulations which exempts a landlord from the requirements under the *Act* regarding rental increases. The tenants have paid the rental increase in good faith.

The tenants' agent provided a book of materials as evidence which includes a Decision from the Director, Residential Tenancy Branch, as well as the tenancy agreement regarding that case and the tenancy agreement for this case. The agent further testified that the facts of the cases are the same with the exception of paragraph 3(c) of the tenancy agreements, which sets out the yearly anniversary date for rent review. That paragraph in the earlier case states: "The yearly anniversary date for rent review for the Premises is the 1st day of July unless otherwise permitted by law in which case it will be such date as the Landlord may decide in accordance with the law." That tenancy agreement is dated January 4, 1993. The tenancy agreement provided for this rental unit states at paragraph 3(c): "The yearly anniversary date for rent review for the Premises is the __ day of __ unless otherwise permitted by law in which case it will be such date as the Landlord may decide in accordance with the law. The Landlord is exempt from Section 18 of the Residential Tenancy Act." The dates in the form are not filled in, and the agreement is dated June 15, 2001.

The evidentiary material provided by the tenant also states that as a result of the change to the form of the tenancy agreement used by the landlord, the landlord deliberately attempted to mislead tenants to believe they had no right to apply for arbitration against the landlord.

The evidentiary material provided by the tenant also states that the tenants did not apply for any subsidy when moving into the rental unit. Rent at that time was set at 95% of market rent for similar rental units, and the tenants' rent was established according to the market rate and was treated as such from the beginning of the tenancy. The Corporation's Board of Directors carried a motion to increase rent to a maximum of 7.4% annually. The Board attempted to get a pre-ruling from the Residential Tenancy Branch, but the Branch indicated that would not be possible. The Board then decided to implement the 7.4% increase and leave it to the tenants to dispute the increases rather than the landlord applying to the Residential Tenancy Branch for a 7.4% increase, and decided that the maximum rent would not exceed 30% of a household's gross annual income. The Board took the position that because the landlord was a not-for-profit

landlord, the landlord is exempt from Part 3 of the *Act* and rent could be raised by more than the maximum allowed by statute.

The tenant's agent stated that the onus is upon the landlord to prove entitlement to the exemption, and more specifically that rent is related to the tenants' income, and that the onus is not on the tenant to prove that rent is not related to the tenants' income. Further, if a tenant's income changes, the rent also changes if the rent is related to income. That has never happened during this tenancy.

The tenants' agent also testified that it would be unreasonable for the Decision in this case to be different from a previous case heard by another Dispute Resolution Officer wherein the tenants' agent was the applicant disputing the rent increase. A copy of that Decision, dated March 21, 2011 and amended March 30, 2011, was provided for this hearing. The Dispute Resolution Officer in that case found that:

> "...Overall, I do not find sufficient evidence within the documents entered into written evidence that supports the landlord's assertion that the tenants' rent is related to their income. Based on the evidence presented, it would appear that for many years the landlord saw no purpose in even obtaining annual income information from the tenants. As such, I find it difficult to accept the landlord's claim that the tenants' rent is related to the tenants' income. Rather, I find considerable evidence that LEM tenants, especially those who signed tenancy agreements prior to the section 2 exemption coming into effect, have not had their rents related to their household income until the landlord's 2010 attempt to increase the rent. RGI tenants and the subsidies they receive are described very differently in all of the written evidence presented by the parties."
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> "... Based on the evidence presented by the parties with respect to this tenancy, I find that section 2 of the *Regulation* does not exempt the landlord from the rent increase provisions of the *Act."*

The tenant also provided a table of rents and increases applied by the landlord which shows that in the fall of 2010 the rent increased by 7.3% from $778.00 per month to $835.00 per month. That document also shows that another increase was imposed in the fall of 2011 and was completed on the approved form and within the allowable amount for that year.

The tenants request an order setting the rent at $795.89 and that a monetary order in the amount of $974.55 in overpayments be awarded to the tenants as against the landlord.

The landlord's agent testified that Decisions can be contradictory. Section 64 of the *Act* states that the director must make a decision based on the merits of the case, and there

are factual differences. Further, the *Act* gives black and white framework regarding market and non-market rents, and each are governed differently.

Market rent is based on the market forces and is for profit. Non-market rent is not available to everyone and is based on financial information provided by the tenants. This rental unit falls under the non-market category and the landlord is governed by an elected board. Rents are controlled by the Operating Agreement, a copy of which was provided for this hearing by the tenant, and therefore, tenants benefitted by rents remaining low. In 2001 the tenants in this case paid rent in the amount of $700.00 per month and by 2008 rent had increased to $751.00 per month.

One of the managers of the landlord was called as a witness and testified that there were 3 types of tenancies:

1. Rent geared to income (RGI), which requires annual financial information from tenants;
2. Purely market rent, in which case no operating agreement applies and tenants must only qualify to initially get into the rental unit, known as “rent stabilized;” and
3. Rents determined by the original operating agreement to pay the bills.

The witness also testified that this tenancy falls into either category 1 or 2.

The landlord’s manager extended an offer to each tenant to prove income, and subsidy would be guaranteed. If the tenants didn’t qualify, they would migrate to the market rent over time, being 6 or 7 years. The landlord’s manager relies on the exemption provided by the regulations to get to the market rent over time.

The manager further testified that the type of tenancy determines how rent is calculated. Years ago a formula with respect to the economics of the building was used, but that process was abandoned years ago. The manager has only been involved with the building for 8 years and cannot comment on rent adjustments made prior to that. The amount of money tenants earn had a bearing on the amount of rent payable at the genesis of the program but not anymore. The rent that these tenants paid at the outset of the tenancy was determined by the amount paid by the prior tenant.

The manager agreed during cross examination that the Operating Agreement at paragraph 1(2) states that rents are $3,672.00 annually for a 2 bedroom apartment and $4,704.00 annually for a 3 bedroom apartment, but in order to move in under the Section 27 program the tenant had to be under a specific income threshold. Once that was met, rent was determined by the operating expenses of the building.

In 2010 the increase of 7.4% was applied to all tenants classified as rent stabilized under the Section 27 program and always were (except for overlapping programs for disabilities, but no tenants presently overlap by disability programs). The 191 suites are all rent stabilized, which means the rents are not determined by income each year. The manager referred to a report dated May 18, 2010 addressed to the board of directors from the managers, which states that rent is determined in one of two ways. Tenants pay a lower end of market rent (LEM), or are subsidized under rent geared to the income of the tenant (RGI). Tenants were either subsidized or not, but the intent was that tenants would be transitioned if rent was more than 30% of their gross income. Section 27 buildings are not rented for market rent but would migrate to market rent or the landlord would provide subsidy if the tenants qualified. These tenants did not come to the landlord but told the landlord's managers that they couldn't legally increase the rent by 7.4%.

The document referred to by the witness also differentiates RGI and LEM rents as follows:

> "... RGI rent is for low income families and individuals, and is 30% of a tenant's gross family income. RGI rent is always less than market rent, and does not vary with geographical location, the number of bedrooms or any other factor that normally would decide 'market rent'.
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> "Subsidized rent should be provided only to those who have demonstrated the need. Tenants who cannot afford market rent, can apply for rent assistance. Qualification as an RGI tenant requires a rigorous review of income information...to prove need. Once a tenant is qualified and selected, their financial status is reviewed each year. The difference between the 'RGI rent' and true market rent is called the "subsidy" or "rent assistance".
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> "Market (LEM) Rent and Income Limits: Market rent tenants pay market rent but rents are in the low range of market because (the) buildings provide relatively basic accommodation, typically with shared laundry facilities, smaller suite sizes, and fewer amenities. The rents are in the affordable range for moderate income families... All tenants must provide proof of income before being considered for housing. However, over the MVHC's existence, market tenants have not been required to submit income information after they move in."

Amenities within a rental unit also affected rents payable. Some rental units within the complex have in-suite laundry, dishwasher and fireplace, while others do not. The term LEM (Lower end market rent) is used too freely; LEM today is a rental unit with the lower amenities.

The landlord's evidentiary material shows that the tenants had completed forms entitled "Verification of Income." The first of these forms is signed by one of the tenants and shows the hourly wage earned by the tenant. The form was signed by the tenant on December 1, 1998 and is verified by an employer. The second form provided is signed

by the other tenant dated December 22, 1998 and contains verification from the employer of the stated monthly wage earnings for that tenant. The third form provided is dated June 4, 2001 and appears to be an updated version of the other two forms. The form sets out the annual and monthly earnings of one of the tenants, but the tenant has signed the document certifying that the information is correct, and signed the verification section that was supposed to be signed by the tenant's employer.

The documentary evidence of the landlord also states that the tenants were required to demonstrate that they met the income eligibility criteria. The income verification process is extensive and required the tenants to have employers certify the income reported by the tenants, even when the tenants applied to transfer units.

Further, if the tenants were not subsidized, they would not have been required to provide any income information.

The tenants have paid the landlord the increased amount of rent since receipt of the letter from the landlord stating that rent was increased by 7.4%.

Analysis

Firstly, with respect to the tenants' assertion that it would be unreasonable for me to decide any differently than a previous Dispute Resolution Officer in another case, I accept the cases provided by the tenant's agent, however I do not have the benefit of hearing the testimony or relying on evidence that was presented at that hearing. Further, as pointed out by counsel of the landlord, Section 64 specifically states that I must make each decision or order on the merits of the case as disclosed by the evidence admitted, and the *Act* gives me no discretion in that regard. The word "must" as set out in the legislation is not a discretionary term. The section further states that I am not bound to follow other decisions under Part 5, Resolving Disputes.

The *Residential Tenancy Act* defines a subsidized rental unit as a rental unit that is operated by a public housing body, or on behalf of a public housing body, and is occupied by a tenant who was required to demonstrate that the tenant, or another proposed occupant, met eligibility criteria related to income, number of occupants, health or other similar criteria before entering into the tenancy agreement in relation to the rental unit. The tenant and the tenants' agent testified that no eligibility criteria were required to be demonstrated. The rental amount at the outset of the tenancy was determined by the amount of rent paid by the previous tenant. The landlord's witness and manager also testified to that effect.

However, I do not accept the submissions of the tenants' agent that if rent is related to income, changes in income would affect the amount of rent payable. I would agree that in a case where rent is geared to income that the amount of rent would be adjusted according to income, however, for LEM tenants, I find that tenants are only required to meet the income eligibility before entering into the tenancy agreement. It is clear that the definition of a subsidized rental unit in the *Act* limits the income reporting to prior to entering into the tenancy agreement. Nothing in the *Act* states that the income reporting must be continued on an annual basis or any other continual reporting in order to be considered subsidized or in order for the landlord to qualify for the exemption under Section 2 of the regulations.

The regulations state that:

> **2** Rental units operated by the following are exempt from the requirements of sections 34 (2), 41, 42 and 43 of the Act *[assignment and subletting, rent increases]* if the rent of the units is related to the tenant's income:
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> (a) the British Columbia Housing Management Commission;
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> (b) the Canada Mortgage and Housing Corporation;
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> (c) the City of Vancouver;
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> (d) the City of Vancouver Public Housing Corporation;
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> (e) Metro Vancouver Housing Corporation;
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> (f) the Capital Region Housing Corporation;
>
> (g) any housing society or non-profit municipal housing corporation that has an agreement regarding the operation of residential property with the following:
>
> (i) the government of British Columbia;
>
> (ii) the British Columbia Housing Management Commission;
>
> (iii) the Canada Mortgage and Housing Corporation.

The landlord in this case was previously the Greater Vancouver Housing Corporation and is now the Metro Vancouver Housing Corporation.

The tenant provided a copy of an Operating Agreement between the Central Mortgage and Housing Corporation and the Greater Vancouver Housing Corporation dated May 18, 1976. In that agreement, the Central Mortgage and Housing Corporation is the lender of a loan to a non-profit corporation, and the Greater Vancouver Housing Corporation is the borrower. The agreement states that the Greater Vancouver Housing Corporation will only lease accommodation in the project to "an individual or family of low income who at the time of commencement of the lease or at the time of renewal or extension of the lease is unable within his or their means to obtain accommodation

suitable to his or their needs, but the Borrower shall nevertheless, to the extent possible, give priority to an individual or family of lower income;" and that initially the annual rentals not exceed $3,672.00 for a 2 bedroom unit or $4,704.00 for a 3 bedroom unit, and thereafter at annual rentals authorized from time to time by the Central Mortgage and Housing Corporation. The agreement also states that the borrower must obtain evidence of the income of the lessees at the time of initial occupancy and at such other intervals as requested by the Corporation from time to time.

The tenancy agreement entered into by the parties states:

> "4 (a) All Tenants shall provide income verification a minimum of once a year upon request from the landlord.
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> "(b) If the Tenant's rental is at a reduced level as a result of being assisted under a rental subsidy program, the Tenant shall submit to the Landlord, upon request, such information as the Landlord may require from time to time."

I am satisfied that the landlord is a public housing body, however it's clear in the testimony that the rental amount was set based on the rental amount paid by the previous tenant. I understand that the position of the landlord is that the rental unit is subsidized by the landlord renting the unit at the lower spectrum of market rent and that amount didn't change when these tenants moved into the rental unit, however, in order to claim that the landlord is exempt from the sections of the *Act* that governs rent increases, the landlord must be able to demonstrate that the income of the tenants were considered and met eligibility criteria prior to entering into the tenancy agreement.

The landlord's evidentiary material includes the verification of income as reported by the tenants and it states that the income verification process is extensive and required the tenants to have employers certify that the income information provided was true. However, I cannot accept that the process was so extensive when the tenant signed the form on behalf of the tenant's employer.

In the circumstances, I find that the landlord has not demonstrated that the rent is related to the tenants' income. Further, I find that the tenants have demonstrated that neither the amount of rent, nor the rental increase, have anything to do with the income of the tenants. I see no relationship between the amount of rent payable and the income of the tenants, nor do I see any relationship between the amount of the increase imposed by the landlord and the income of the tenants. It is clear in the circumstances that the rent amount set for this rental unit was determined by the amount paid by the previous tenant, not by the amount of income of the tenants, even though the landlord appears to have collected financial information from the tenants.

I accept the undisputed evidence that the rent collected for the rental unit was $778.00 per month prior to the increase in 2010. The tenants have paid that increase as agreed by both parties, however neither party has provided me with a copy of the letter issued by the landlord, nor has either party provided me with the effective date of that increase. The tenant's evidentiary material states that the tenants paid that increase for 12 months and then received a new notice of rent increase in 2011. I do not have the benefit of that notice either, nor do I know its effective date. The tenants' evidentiary material suggests that the tenants paid the increase for 12 months, and then received another increase for 5 months from the fall of 2011 to the date of this hearing, but I have no evidence before me to substantiate that. In order to be successful in a claim for a monetary order for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement, the onus is on the tenant to prove the amount.

Therefore I find it reasonable in the circumstances to order that the tenants' rent be set at $778.00 until such time that the Notice of Rent Increase issued in 2011 became effective, and that the rent as of that effective date to be increased by 2.3%, or $795.89 per month. I decline to make a monetary order for retroactive overpayments because I find that the tenants have failed to prove what exactly that amount should be.

With respect to the tenants' application for an order that the rulings made at this hearing be applied to all of the tenants whose tenancy agreements are governed by the same operating agreements and tenancy agreements, I find that the tenants have failed to satisfy me that all or any of those tenancies ought to be reviewed, and I dismiss that portion of the tenants' application without leave to reapply.

Since the tenants have been partially successful with the application, I find that the tenants are entitled to recovery of the $50.00 filing fee for the cost of this application.

Conclusion

For the reasons set out above, the tenants' application for a monetary order for money owed or compensation for damage or loss under the *Act,* regulation or tenancy agreement is hereby dismissed without leave to reapply.

I hereby order that the tenants' rent be set at $795.89 per month effective on the same date as the effective date of the Notice of Rental Increase issued to the tenants in 2011.

I further order that the tenants be permitted to reduce rent for a future month by $50.00 in order to recover the filing fee for the cost of this application.

The tenants' application to apply this ruling to other tenants is hereby dismissed without leave to reapply.

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: May11, 2012.

Residential Tenancy Branch