Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, FF

Introduction

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

- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover their filing fee for this application from the landlord pursuant to section 72.

Both parties were represented during this teleconference hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. At the hearing, the landlord's representatives confirmed that the landlord's office staff were handed a copy of the tenants' dispute resolution hearing package on August 28, 2012. They also confirmed that they understood that the reasons identified by the tenants for seeking a monetary award were based on the tenants' assertion that the landlords were not exempt from the provisions of sections 34(2), 41, 42 and 43 of the *Act* by way of section 2 of the *Residential Tenancy Regulation* (the *Regulation*) and as a result the landlord had overcharged the tenants rent since September 1, 2010. This was also confirmed as follows at page 4 of the landlord's written response to the tenants' application:

> *...The Tenants have applied for a monetary order against MVHC, indicating that MVHC was not entitled to the exemption used for the September 2010 rent increase, did not use prescribed forms, and thus contravened section 41-43 of the Act...*

Both parties also confirmed that they had received one another's written evidence packages and were prepared to proceed with this hearing. I am satisfied that the above documents were served by the parties to one another in accordance with the *Act*.

At the commencement of the hearing, Landlord's representative SP corrected a date that was clearly in error in the landlord's written evidence package. The tenant's agent (the agent) said that he had only recently noticed that the landlord had not issued proper notice to the tenants regarding an increase in the tenants' rent that took effect in 2009. As such, he asked to increase the requested amount of the tenants' monetary

award from the $1,438.32 cited in his written evidence package (reflecting an additional month's retroactive rent reduction) to $2,444.76.

At the hearing, I confirmed with the parties that this requested increase in the amount of the monetary award sought by the agent on the tenants' behalf involved issues that differed considerably from those identified in the tenants' original application and the tenants' written evidence. Rather than the dispute as to whether the landlord was truly exempt from the provisions of sections 41-43 of the *Act*, the agent's proposed increase to the monetary award resulted from an alleged error committed by the landlord in how notice of a prescribed increased allowed under the legislation was provided to the tenants. Had I been willing to include this new issue within the tenants' original application, I would be doing so without affording the landlord an adequate opportunity to respond to the agent's new assertions. As natural justice would not be provided to the landlord if I were to allow the agent's request, I advised the parties that I considered the agent's request to increase the monetary award a very different issue than that before me in the tenants' original application. Consideration of this new issue would rest on a totally different set of facts and arguments than the current dispute regarding whether or not the landlord was exempted from sections 41-43 of the *Act*. For these reasons, I advised the parties that I did not consider this new request properly before me. The tenants are at liberty to submit a separate application for dispute resolution with respect to any alleged error with respect to the rent increase obtained in 2009.

Issues(s) to be Decided

Is the landlord exempt from the provisions of sections 34(2), and 41 to 43 of the *Act* by way of section 2 of the *Regulation?* Can the tenants dispute the landlord's 7.4% monthly rent increase applied as of September 1, 2010 as an additional rent increase? Are the tenants entitled to a monetary award for losses arising out of this tenancy? What is the correct monthly rent for this tenancy? Are the tenants entitled to recover their filing fee from the landlord?

Background and Evidence

While I have turned my mind to all of the ample documentary evidence and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the tenants' claim and my findings around each are set out below.

On November 8, 1996, the tenants signed a tenancy agreement with the then Greater Vancouver Housing Corporation (the forerunner to the current landlord) to take occupancy of this two bedroom townhouse unit on December 1, 1996. Monthly rent was then set at $680.00, payable in advance on the first of each month.

The landlord submitted that as a public housing body identified in the following provisions of section 2 of the *Regulation* the landlord is exempt it from the rent increase provisions of sections 41-43 of the *Act*.

> ***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:...*
>
> *(e) Metro Vancouver Housing Corporation...;*

The parties agreed that the monthly rent prior to September 2010 was set at $778.00. As of September 10, 2010, the landlord increased the monthly rent by 7.4 %, an amount that was double the prescribed 3.7% annual rent increase allowed that year by the *Regulation*. The landlord did not dispute the agent's claim that the landlord did not use the prescribed form to notify the tenants of this rent increase. The landlord exceeded the allowable annual rent increase at that time and did not use the prescribed form for notifying the tenants of an additional rent increase because the landlord maintained that the landlord was exempt from the provisions restricting rent increases to the prescribed amount by way of an exemption provided by section 2 of the *Regulation*. In September 2010, the monthly rent was increased from $778.00 to $835.00. The difference between the prescribed amount and the amount charged by the landlord was $28.22 per month.

On October 1, 2011, the landlord increased the tenants' monthly rent by the 2.3% prescribed amount in place for that year. This raised the tenants' monthly rent from $835.00 to $854.00, the current monthly rent charged by the landlord.

The tenants' original application for a monetary award of $1,400.00 was revised to $1,438.32 in the written evidence submitted by the agent. This amount was calculated on the basis of the following:

Item and Period	**Alleged Amount of Overpayment**
September 1, 2010 – October 1, 2011 (13 months @ $57.00 = $741.00	$741.00
October 1, 2011 – September 1, 2012 (12 months @ $58.11 = $697.32)	697.32
Total Monetary Award Requested	**$1,438.32**

In this written submission, the agent also requested that the proper current monthly rent be set at $795.89. This amount is derived by adding the $778.00 in place prior to September 2010 to the landlord's rent increase of $17.89 implemented on October 1, 2011, using the proper form and within the prescribed maximum for that year.

There was no disagreement between the parties that the housing complex is subject to an operating agreement between the landlord (originally signed by the Greater Vancouver Housing Corporation) and the Central Mortgage and Housing Corporation (CMHC), now devolved to the BC Housing Corporation. This agreement was part of the "Section 27 Portfolio" program for affordable rental housing (the Section 27 Program), the former section of the federal *National Housing Act*. All of the rental units in this housing complex are classified as Lower End of Market (LEM) rents. None of the units in this complex are Rent-Geared to Income (RGI) units.

The agent entered written evidence that the tenants do not receive any subsidies to their monthly rent, although they have made enquiries with the landlord as to their eligibility for such subsidies.

The landlord entered written evidence of a May 13, 2010 letter sent to the tenants in which the landlord claimed the following:

> *...Please note that as set out in the Residential Tenancy Act Regulation and/or in our tenancy agreement, your rental unit is a subsidized rental unit and it is exempt from the Residential Tenancy Act requirements that deal with rent increases, timing and notice of rent increase and amount of rent increase...*

The landlord's representatives gave oral and written evidence that the landlord is willing to consider "additional subsidies" for those tenants who are paying more than 30% of their income in rent, provided they also occupy a rental unit suitable for their household size. The landlord's representatives said that the landlord remains willing to consider individual requests for subsidies from tenants in the housing complex where the tenants reside.

Analysis

The primary question before me is whether section 2 of the *Regulation* exempts the landlord's September 1, 2010 rent increase from the provisions of sections 34(2), 41, 42 and 43 of the *Act* (the rent increase provisions of the *Act*). Since the landlord is claiming exemption under section 2 of the *Regulation*, the onus is on the landlord to demonstrate that section 2 exempts the landlord from the rent increase provisions of the *Act*. The essential question reduces to whether "the rent of the units is related to the tenant's income."

The landlord submitted the following explanation as to why the landlord believes that the rent of the units in this complex is related to the tenant's income:

> *...Over the years, different models of operating agreements have evolved, but all are similar in that they impose specific eligibility criteria for tenants related to income and occupancy.*
> *Embedded in these agreements is the provision of subsidized housing. Under the early years of the CMHC programs, projects like ST were constructed whereby all units in the projects were subsidized with below market rents. Rent of the units was related to the tenants income at the time of initial occupancy because no tenant could rent a unit unless they demonstrated that their income was low enough to qualify for public rental housing...*

In essence, the landlord claims that since the tenants initially had to meet an income eligibility requirement in order to obtain a rental unit in this housing complex that this meets the test that the "rent of the units is related to the tenant's income."

Although I have given the landlord's claims in this regard careful consideration, I find many deficiencies in the landlord's position.

The agent entered into written evidence a copy of the original 1976 agreement between the then CMHC and the then Greater Vancouver Housing Corporation (GVHC), an agreement that enabled GVHC to borrow funds to construct this housing complex. At even that earliest stage of the development of this complex, there was a provision that all 18 two bedroom units would be rented for one monthly amount and all 18 three bedroom units would be rented for another higher amount. Although prospective renters were to meet an income eligibility test, the rent to be charged, even at that earliest stage of this project, was to be one rate for all two bedrooms and another for all three bedrooms. I find little support even at this stage that the actual rent charged per month was to be "related to the tenant's income."

Section 1.1(a) of the Rental portion of the Loan Agreement established that GVHC assess the income status of the prospective tenants for a periodic tenancy "at the time of commencement of the lease." I find insufficient provision in the Agreement that requires a tenant to demonstrate ongoing eligibility for this housing or relating changes to the tenants' income to the rent that the landlord can charge. In fact, section 1. (5) of the Rental Section of the Loan Agreement allowed the GVHC to adjust rents if the income generated exceeded or was less than a sum sufficient to cover the approved operating costs of the project. As this Agreement related income from the building (derived from rent) to operating costs and not tenants' income, I find that the landlord has not demonstrated that rent is related to the tenant's income.

Although there is some limited evidence that the landlord did check the tenants' income to ensure that they were eligible for housing in this rental complex, the landlord did not even request income information from the tenants after they moved into the rental complex. In fact, Landlord's representative KB testified that the landlord did not even try to collect income information from tenants in this section 27 (LEM) complex because the landlord realized that there was no way that the landlord could charge more rent if tenant's income had increased to levels far above what would have made them eligible for this housing initially. The landlord does not know their income, had a long-standing practice of not even requesting income after tenants took occupancy in the complex, and admits that the landlord could not link tenants' income in this complex to any increases in income they might have experienced since moving into the complex. Under these circumstances, I am at a loss to understand how the landlord claims that the tenants' rent in this complex is related to their income.

The agent asserted that the tenants' rent has never been related to their income during their tenancy. The agent claimed that the exemption cited in section 2(e) of the *Regulation* does not apply to the tenants and that the landlord has failed to follow the proper mechanism established in the *Act* for seeking an additional rent increase.

Based on the oral and written evidence, I do not find that the landlord is correct in the claim that section 2 of the *Regulation* exempts the landlord from the provisions of section 34(2), 41, 42 and 43 of the *Act* for this tenancy. For many years, the landlord saw no purpose in even obtaining annual income information from the tenants. As such and for the other reasons outlined above, I do not accept the landlord's claim that the tenants' rent is related to the tenants' income.

As the landlord has not sought authorization to increase the tenant's monthly rent in accordance with the rent increase provisions of the *Act*, I find that the landlord's 7.4% increase from September 2010 for this tenancy is invalid and is set aside.

I find that the agent's calculation of the amount of the $1,438.32 monetary award for the period from September 1, 2010 until September 1, 2012, as outlined earlier in this decision, is correct. I find that the tenants are entitled to a monetary award of $1,438.32 for their overpayment of rent and $50.00 for their recovery of their filing fee for their application.

I also find that the correct current monthly rent to take effect on October 1, 2012 is $795.89. This amount reflects the pre-2010 monthly rent of $775.00 plus the landlord's 2.3% increase ($17.89) properly implemented as of October 1, 2011.

Conclusion

I allow the tenants' application and issue a monetary Order in their favour in the amount of $1,488.32, which allows them to recover rent that they have overpaid since September 2010 and to recover their filing fee.

To implement this monetary award, I issue a monetary Order in the tenants' favour which can be obtained if necessary through the courts or by way of reducing upcoming rent owed in this amount. The tenants are provided with these Orders in the above terms and the landlord must be served with a copy of these Orders as soon as possible. Should the landlord fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

I also order that the correct current monthly rent to take effect on October 1, 2012 is $795.89.

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: September 12, 2012

Residential Tenancy Branch