Order under Section 135
Residential Tenancies Act, 2006

Citation: Grodzinski v B&N Property Management, 2023 ONLTB 43089
Date: 2023-07-06
File Number: LTB-T-075294-22

In the matter of: 5, 1549 Maxime Street
Gloucester ON K1B3K9

Between: Karl Grodzinski — Tenant
and
B&N PROPERTY MANAGEMENT — Landlord

Karl Grodzinski (the 'Tenant') applied for an order determining that B& N Property Management (the 'Landlord') and Maurice Neufal (the ‘Landlord’s Agent’) collected or retained money illegally.

This application was heard *de novo* by videoconference on June 2, 2023.

The Landlord’s Agent, Maurice Neufal, and the Tenant attended the hearing. The Tenant spoke with Duty Counsel prior to the start of the proceeding.

Alex Benham was also present as an agent of the Landlord. For the reasons set out below, Mr. Benham was excluded from the hearing until it was time for him to testify. He departed before providing evidence.

Determinations:

1. As explained below, I find the Landlord collected an illegal monthly rent increase from the Tenant in the amount of $50.00 starting July 1, 2020 until September 30, 2021, and so have granted the Tenant’s application for the collection of illegal rent. However, as the Tenant can only claim back one year from when an application is filed under section 135 of the *Residential Tenancies Act, 2006* (the ‘Act’), I have limited the amount payable to the Tenant by the Landlord to $550.00.

2. With respect to the Landlord’s alleged illegal retention of the last month’s rent deposit, I find the tenancy terminated December 31, 2022. As the last month’s rent deposit was applied to December 2022, I find the last month’s rent deposit was not illegally retained and have dismissed this portion of the Tenant’s application.

3. Finally, I find the Tenant's claim with respect to the misappropriation of a washing machine is not valid as the Landlord has not received any compensation for it, the Tenant does not wish it back, and the Tenant has not and will not incur any expenses with respect to replacing it. This portion of the Tenant's application is also dismissed.

Preliminary and Evidentiary Issues

4. Originally two parties were named as landlords: Maurice Neufal and B&N Property Management. The Tenant confirmed he was not seeking an order directly against Mr. Neufal and so he was removed as a named party. That left B&N Property Management as the sole named Landlord.

5. Maurice Neufal and Alex Benham are the joint owners of the Landlord - a partnership operating under the business name of B&N Property Management.

6. Generally, only one agent is permitted to attend a hearing on behalf of a named organization. As a result, I directed that only one agent of B&N Property Management be present during the hearing and Alex Benham was excused unless and until it was time for him to provide evidence.

7. The Tenant filed an amended T1 Application with the Board on June 3, 2022. At the outset of the hearing the Landlord's Agent reviewed the amended application and chose to proceed on the issues in the amended application without seeking an adjournment.

8. The Landlord objected to the admission of a recording of a phone conversation between the Tenant and an agent of the Landlord on the grounds it was illegal. While at the hearing there was discussion surrounding this; ultimately, the *Statutory Powers Procedure Act* permits the admission of all relevant evidence unless repetitious, privileged, or otherwise inadmissible by statute. I am not aware of any statute that prevents the admission of the recording into evidence and the recording was admitted into evidence.

T1 Determinations

9. The Tenant claims the Landlord:

    a. charged an illegal rent increase from July 1, 2020 to September 30, 2021 - after which date he stopped paying the disputed amount. Specifically, the Tenant claims the $50.00 increase that took effect on July 1, 2020 was illegal;
    b. has not returned his last month's rent deposit in the amount of $975.00; and
    c. appropriated a washing machine for which he paid $200.00.

10. While I have heard and considered all of the parties' evidence and submissions, these reasons focus on those most relevant to the issues.

The rent increase is void

11. The Tenant testified his rent increased from $975.00 to $1,025.00 on July 1, 2020 – an increase of $50.00.

12. I find, and it was not disputed, the Tenant agreed to the rent increase of $50.00 on the basis of the Landlord's advice the increase was to address considerable expenses above normal operating expenses for work done on the roof. As a result, I find this rent increase was intended to proceed under section 121 of the Act.

13. Under section 121, parties may agree to an above guideline increase for capital expenditures if the terms set out in the provision are met.

14. Section 121 of the Act provides:

> **121** (1) A landlord and a tenant may agree to increase the rent charged to the tenant for a rental unit above the guideline if,
>
> (a) the landlord has carried out or undertakes to carry out a specified capital expenditure in exchange for the rent increase; or
>
> (b) the landlord has provided or undertakes to provide a new or additional service in exchange for the rent increase.
>
> (2) An agreement under subsection (1) shall be in the form approved by the Board and shall set out the new rent, the tenant's right under subsection (4) to cancel the agreement and the date the agreement is to take effect.
>
> (3) A landlord shall not increase rent charged under this section by more than the guideline plus 3 per cent of the previous lawful rent charged.
>
> (4) A tenant who enters into an agreement under this section may cancel the agreement by giving written notice to the landlord within five days after signing it.
>
> (5) An agreement under this section may come into force no earlier than six days after it has been signed.

15. The rent increase of $50.00 was agreed to in a series of phone conversations, emails, and text messages. At the hearing, the Tenant raised concerns including that he had only learned subsequently that the proper process had not been

followed and that had he been aware of the proper process he would have not have agreed but instead proceeded in that manner.

16. I have some reservations about the Tenant's understanding of what the proper process in this situation entailed, but, given my findings below, I have not considered this in detail. I will note no notice of rent increase on 90 days was required, nor is it mandatory for there to be an application to the Board for an above guideline increase given section 121 – so long as the terms of section 121 are satisfied.

17. Without being exhaustive, I also note it was permissible for the Landlord to approach the Tenant and seek out an agreement under section 121, and for the parties to reach such an agreement, and the rent increase agreed to was within the amount permissible under section 121 of the Act.

18. However, under section 121(2), the parties' agreement must include that the Tenant has five days to cancel the agreement on written notice to the Landlord. This language is clear and mandatory and the purpose of this is to provide protection to the Tenant.

19. There was no evidence the Tenant was ever advised he had five days to cancel the agreement by giving written notice to the Landlord in writing.

20. As a result, I find the agreement between the parties was not in accordance with section 121, is therefore not binding, and is void.

21. There was much discussion at the hearing about the provisions in the Act where an unlawful rent or void rent increase is deemed lawful if the amount in issue has been paid for 12 consecutive months and no application that places the lawfulness of the amount in issue has been brought within one year of the date it was first charged.

22. On further consideration of the lawful rent deeming provisions, I find neither section 135.1 nor section 136 applicable in the circumstances of this application.

23. Section 135.1 of the Act only applies to rent increases deemed void under section 116(4) of the Act. An increase under section 121 of the Act, such as is present here, is exempted from the section 116(4) requirement that written notice of a rent increase be provided 90 days in advance. Therefore, section 135.1 is not applicable.

24. Additionally, I find section 136 does not apply to the within void rent increase because it is not only unlawful, it is also a nullity - meaning it is as if the rent increase never existed. Therefore, I find it cannot be deemed lawful.[1]

25. As a result, I find the void rent increase of $50.00 paid monthly from July 1, 2020 until September 30, 2021, is illegal and is not deemed lawful.

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26. Nonetheless, the Tenant is still not able to claim the entirety of the illegal rent increases paid as section 135(4) provides a tenant only has one year from the date funds were illegally collected or retained to file their application under section 135(1):

> **135** (1) A tenant or former tenant of a rental unit may apply to the Board for an order that the landlord, superintendent or agent of the landlord pay to the tenant any money the person collected or retained in contravention of this Act or the *Tenant Protection Act, 1997*.
>
> (4) No order shall be made under this section with respect to an application filed more than one year after the person collected or retained money in contravention of this Act of the *Tenant Protection Act, 1997*.

27. Notably, section 135 makes a distinction between monies collected and retained. I find the facts before me similar to the case of *Pasternak v. 3011650 Nova Scotia Limited*, 2014 ONSC 1012, where the Divisional Court held void rent increases charged amounted to a collection of an illegal rent on a monthly basis as opposed to a retention.

28. As a result, I find the Landlord collected an illegal rent in the amount of $50.00 each month from July 1, 2020 until September 30, 2021 – when the Tenant ceased paying this amount. Additionally, I find a new one-year limitation period started each month the illegal rent was collected.

29. The within application was filed on October 20, 2021. Therefore, an order may not issue regarding monies illegally collected before October 20, 2020.

30. As of October 1, 2021, the Tenant had ceased paying the additional $50.00 in issue but otherwise paid it from July 1, 2020, until September 30, 2021 for a total of $550.00.

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[1] Relying on similar reasoning in *Price v. Turnbull's Grove Inc*, 2007 ONCA 408 (CanLII), where the Court of Appeal held a rent increase found to be void under section 116(4) prior to the enactment of section 135.1 held that an identically worded predecessor provision to section 136 did not operate to find a void rent increase lawful.

31. As a result, the Landlord shall be ordered to pay the Tenant $550.00.

Tenant's claim under section 122 is moot

32. Concerned section 136 would apply to deem the rent increase lawful, the Tenant submitted he also wished to claim relief under section 122 of the Act as such a claim may be brought within two years.

33. Given I have found section 136 does not apply, the Tenant confirmed he only sought one year's worth of illegal rent, and he has been awarded the amount of illegal rent collected one year before filing, I find this claim moot and it is dismissed.

No return of last month's rent deposit

34. The Tenant gave notice to terminate the tenancy for December 31, 2021. It was not disputed the Landlord applied the last month's rent deposit to the month of December 2021.

35. Nonetheless, the Tenant testified he left the rental unit on December 1, 2021 due to the stress and concerns he had surrounding the uncertainty of what would happen in the apartment and his safety. As a result, he sought the return of the last month's rent deposit.

36. Regardless why the Tenant claims he vacated, the first question to be determined is whether he did and, if so, when.

37. The Tenant did not return the keys to the Landlord when he moved out and these remain in his possession.

38. The Tenant also admitted he returned to the rental unit on December 9, 2021, after which he texted the Landlord's Superintendent and asked who had been in his apartment. He further testified the Landlord's Agents continued to advise him when they were showing the rental unit to prospective tenants throughout December. The Tenant did not testify he told the Landlord to stop letting him know.

39. In the above circumstances, where the Tenant entered the rental unit more than a week after he allegedly vacated, asserted to the Landlord the rental unit was still his at that time, the Landlord continued to advise the Tenant when the apartment would be shown, and the Tenant had not returned the keys, I find the Tenant remained in possession of the rental unit throughout December 2021,

and the tenancy terminated on December 31, 2021, in accordance with the notice of termination he provided.

40. As I have found December 2021 was the last month of the tenancy and the rent deposit was applied to this month, I find the Landlord did not illegally retain the Tenant's rent deposit. The Tenant's claim for the illegal retention of the last month's rent deposit is dismissed.

No claim for washing machine

41. The Tenant claims the Landlord essentially appropriated his property – a washing machine – and did not compensate him the amount he paid for the machine.

42. The Tenant testified when he moved into the rental unit he was told he could buy the washing machine in the rental unit from the former tenant. He testified he sent $200.00 to the former tenant.

43. When the Tenant moved out he testified he did not want to take the washing machine with him and instead wished to have the next tenant purchase it as he had done.

44. The Tenant testified, and the Landlord's Agent admitted, the Landlord prevented this as they thought the washing machine was part and parcel of the apartment.

45. At the hearing, The Landlord's Agent testified the washing machine remained in the rental unit and he had not received any payment for it. As a result, I find the Landlord did not sell washing machine and any claim for the proceeds of sale cannot succeed.

46. Additionally, even if viewed as a claim for the improper disposal of property, which is arguably related to this issue although properly claimed on a separate application (T2 Application), the Tenant admitted he has not and will not incur any costs repairing or replacing the washing machine, or out-of-pocket expenses.

47. At the hearing, the Landlord offered to return the washing machine to the Tenant but the Tenant did not want it. I do not find the Tenant is entitled to monetary compensation in lieu of the return of the actual item he claims was misappropriated.

48. In the above circumstances, where the Landlord did not sell the Tenant's personal property, offered to return it, the Tenant does not wish the property, and the Tenant has not and will not incur any expenses with respect to the property, I

find there is no remedial breach under the Act and the Tenant's claim for the cost of the washing machine must be dismissed.

It is ordered that:

1. The Landlord shall pay to the Tenant $550.00 for the return of the illegally collected rent increase from October 20, 2020, to October 20, 2021.

2. The Landlord shall also pay the Tenant $53.00 for the cost of filing his application.

3. If the Landlord does not pay the Tenant the full amount owing by July 17, 2023, the Landlord will owe interest. This will be simple interest calculated from July 18, 2023, at 6.0% annually on the balance outstanding.

July 6, 2023
Date Issued

Rebecca Case
Vice Chair, Landlord and Tenant Board

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If you have any questions about this order, call 416-645-8080 or toll free at 1-888-3323234.