

## **DECISION**

Dispute Codes      MNDC, FF

### Introduction

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

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

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. The applicant testified that he served the respondent with a copy of the dispute resolution hearing package by registered mail on August 25, 2010. He provided a written copy of the Canada Post Tracking Number to confirm the service of this document to the respondent. The respondent confirmed receiving this material. I am satisfied that the applicant served the dispute resolution hearing package to the respondent in accordance with the *Act*.

### Issues(s) to be Decided

Is the relationship between the applicant and the respondent a tenancy that falls within the *Residential Tenancy Act*? If so, is the applicant entitled to a monetary Order for damage and loss incurred during this tenancy? Is the applicant entitled to recover his filing fee for this application from the respondent?

### Background and Evidence

The respondent, a hospitality management company, signed a "Rental Agreement" with the applicant on October 17, 2003 for a two bedroom condominium. The initial term of this agreement was to expire on April 20, 2004; the agreement was subsequently extended on a month-to-month basis. According to the terms of the Rental Agreement, the owner of the property, the applicant, agreed to enter into a tenancy agreement with the respondent "as its exclusive tenant for the purpose of subletting the Unit on terms

and conditions contained herein.” Rent was set at \$1 per month, with the respondent required to “pay the owner of the unit net rental revenue less 35%” for the respondent’s management of the unit.

The respondent was to operate, manage and rent the premises and agreed to endeavour to meet prescribed target rental rates which varied between rentals of 3-21 nights and over 21 nights. The respondent testified that this was the first time that her company had included the provision including targeted short term rental rates in one of its agreements with property owners. The agreement also allowed the applicant to identify periods for Owner usage of the premises one year in advance, which precluded the respondent from renting for periods of up to 20% each year. The agreement also established a list of expenses to be incurred by the two signatories to the agreement. The agreement could be cancelled by either party on 90 days notice.

The respondent vacated the premises on March 14, 2010, after receiving a 10 Day Notice from the applicant. The applicant has applied for \$2,257.10 in unpaid rent that the applicant maintains is outstanding from February 2010. The respondent presented written evidence that the respondent failed to charge the applicant for annual linen restocking and carpet cleaning from 2004 until 2008, but for a single deduction in January 2006.

Preliminary Issue- Is this a Tenancy Within the Meaning of the *Residential Tenancy Act*?

Under the *Act*, a tenancy agreement is “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 facilities.”

During the hearing, the applicant failed to provide convincing evidence that the agreement entered into with the respondent was a residential tenancy agreement under the terms of the *Act*. After considering all aspects of the Rental Agreement and the evidence provided by the parties, I find that the agreement has more of the features of a

contract between an owner and a commissioned agent than that of a true landlord/tenancy relationship. According to their agreement, the respondent retains 35% of the net rental revenue to locate potential renters, and to operate, manage and rent the premises. The agreement enables the respondent to rent for as little as 3 days. The targeted rental rates indicate that relatively short term rentals were envisioned as part of the agreement. The respondent testified that some short term rentals occurred during this agreement.

Short-term rentals of this nature are comparable to vacation or travel accommodation, excluded by the following provision of section 4(e) of the *Act*.

- 4      *This Act does not apply to...*  
          *(e) living accommodation occupied as vacation or travel*  
          *accommodation,...*

Whether or not the respondent used the premises for vacation or travel accommodation, the eventual occupant of the premises could and did use the premises for short term accommodation of this type. The provisions of section 4(e) exclude living accommodation **occupied** for this purpose from the *Act*.

This rental agreement also contains a provision that the owner can retain use of the premises for as much as 20% of each calendar year, once appropriate notice is given to the respondent. Under these non-standard terms, the owner of the property retains a right to occupy the premises for a significant portion of each year. The owner has not released exclusive use of the premises for the duration of the agreement. This provision ~~positions~~ has similarities to a flexible timeshare agreement where the owner retains a significant right of occupancy and the respondent's rights are limited.

Section 13 of the Rental Agreement also establishes that the agreement may be terminated by either party by giving written notice at least 90 days prior to the end of the agreement. This termination provision is also a non-standard term which would have no force under the *Act*.

The issue that the applicant has asked the Residential Tenancy Branch to adjudicate appears to be a commercial dispute between the applicant and the respondent. The parties entered into a commercial arrangement to use the hospitality management expertise of the respondent to benefit the rental objectives of the applicant. The only guaranteed rent provided by the respondent to the applicant is a monthly rental fee of \$1.00. The remainder of the financial terms of this arrangement require the respondent to remit 65% of the net rental revenue to the applicant each month. Rather than a commission on overall rental receipts, the agreement establishes that the net rental revenue forms the basis for the commission retained. The current application involves a dispute regarding the amount of deductions applied by the respondent during much of the course of the agreement. In general terms, it does not appear to me that the *Residential Tenancy Act* was established to consider disputes regarding claims made by a hospitality management business in the calculation of net rental revenues it received. I see no role for the Residential Tenancy Branch in adjudicating a dispute between the parties to such an agreement.

After reviewing the evidence, the Rental Agreement and the Schedules attached to that Agreement, I find that the applicant has not demonstrated that the application involves a matter that falls within the *Residential Tenancy Act*. As such, the evidence shows that the *Act* does not apply to this rental arrangement. I therefore have no jurisdiction to render a decision in this matter.

### Conclusion

I decline to hear this matter as I have no jurisdiction to consider this application.

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*.