Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, OLC, RPP, LRE, LAT, RR, O

Introduction

This matter initially dealt with an application by the Tenant for an Order that the Landlord return personal property, for an Order restricting the Landlord from entering the rental unit, for an Order permitting the Tenant to change the locks on the rental unit and for a rent reduction. The Landlord did not attend the hearing of the Tenant's application on February 14, 2012. At the hearing, the Tenant abandoned his claims for all but the return of a security deposit. A Monetary Order in the amount of $550.00 was issued to the Tenant which represented double the amount of the security deposit payable under s. 38(6) of the Act. The Landlord's application for a Review of that Decision was granted on February 29, 2012 and the hearing of the Tenant's application was reconvened for hearing on March 23, 2012.

At the beginning of the review hearing, the Landlord claimed that she had not received the Tenant's evidence package which he said he had sent by fax. The Landlord also claimed that she had not served the Tenant with her evidence package because she did not have his forwarding address. Consequently, the review hearing was adjourned and the Parties were ordered by the DRO to re-serve each other with their respective hearing packages. At the reconvened review hearing, however, the Landlord claimed she did not serve the Tenant with her evidence package because he would already have received most of the documents while he resided in the rental property. The Landlord then claimed that she did not serve the evidence package on the Tenant because she was verbally advised by the RCMP in late January 2012 not to have any contact with him.

I find that there is no Court or any other legal process requiring the Landlord not to have contact with the Tenant for the purposes of these proceedings and I specifically note that she made no such claim on the first day of the review hearing. Consequently, I order pursuant to RTB Rule of Procedure 11.5(b) that the Landlord's documentary evidence be and it is hereby excluded. The Tenant served the Landlord with his evidence package by registered mail on March 26, 2012 (which includes his forwarding address in writing) and the Landlord admitted she received this mail.

Issue(s) to be Decided

1. Is there jurisdiction to hear the Tenant's application?
2. Did the Tenant's application include a claim for the return of a security deposit?

Background and Evidence

This tenancy started on December 1, 2011 and ended on January 31, 2012 when the Tenant moved out. Rent was $550.00 per month. A security deposit of $275.00 was paid by the Ministry on behalf of the Tenant at the beginning of the tenancy.

The Parties agree that the Tenant's rent included the exclusive use of a bedroom and the shared use of kitchen, living room and bathroom facilities with up to three other co-tenants on the lower floor of the rental property. Laundry facilities are located in the same area as the kitchen downstairs. The Parties also agree that the Landlord resides in a separate suite in the upper floor of the rental property with another person and that the Landlord's suite has its own kitchen and bathroom facilities which are not shared with the downstairs tenants.

The Landlord claims, however that she has free access to the common areas downstairs and shares the kitchen and bathroom facilities with the tenants downstairs. The Landlord's witnesses claimed that the Landlord frequently cleans the bathroom and kitchen downstairs but never bathes or showers there and does not prepare food in the kitchen (although the witness, K.C., thought she might have on one or two occasions).

The Tenant denied that the Landlord shared kitchen and bathroom facilities with him or his co-tenants. The Tenant said the Landlord only came downstairs to make inspections and to clean the kitchen and bathroom from time to time. The Tenant said the lower kitchen facilities include a hot plate, microwave, refrigerator and a double sink that is also used for the laundry whereas the Landlord's suite contains a full stove and oven, refrigerator, freezer and so forth. The Tenant also claimed that the person who resides with the Landlord in her suite never uses the kitchen or bathroom facilities downstairs. The Tenant, his witness and the Landlord's witnesses agreed that there is a door separating the Landlord's suite from the downstairs suite which is locked on the Landlord's side.

Analysis

Section 4 of the Act sets out a number of situations in which the Act does not apply. The Landlord initially argued that the Act did not apply because she operates a cleaning business from the rental property. However, s. 4(d) of the Act only is relevant to the use to which the tenant puts the rental accommodations; the use to which the Landlord puts the property is irrelevant. In this case, the Tenant did not use the property for a commercial purpose.

Section 4(c) of the Act also says that the Act does not apply to living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation. The Landlord argued that although she had her own kitchen and bathroom facilities in her suite, at all times she retained the right to use and access the common areas of the lower suite and therefore the Act did not apply. With all due

respect, I disagree. Section 4(c) of the Act refers to situations where the Parties must, by necessity, share kitchen and bathroom facilities because there is only one set of them. In this case, it is unnecessary for the Landlord to use the lower tenants' kitchen and bathroom facilities because she has her own in her own residence. Furthermore, I find that the fact that the laundry facilities are located in the kitchen area does not make them kitchen facilities.

I also find the fact that the Landlord cleans the bathroom or kitchen is not the same as sharing them with the tenants for the purpose they are intended. All parties agreed that with the exception of the odd time the Landlord uses the downstairs bathroom when she is gardening, the Landlord does not use the bathroom facilities for showering or bathing and does not use the kitchen facilities for preparing meals. Consequently, I find that the Landlord did not share kitchen and bathroom facilities with the tenants on the lower floor during the tenancy and therefore s. 4(c) of the Act does not apply.

The Landlord also suggested that there was no tenancy in place but rather it was a licence to occupy. RTB Policy Guideline #9 (Tenancy Agreements and Licences to Occupy) states that "if there is exclusive possession for a term and rent is paid, there is a presumption that a tenancy has been created, unless there are circumstances that suggest otherwise." The Guideline then sets out some factors that may weigh against finding a tenancy such as a security deposit not being required and the owner retaining the right to enter without notice.

In this case, I find that the Tenant paid a monthly rent for the exclusive use of a bedroom and the shared use of common areas with up to 3 other co-tenants. Consequently, there is a presumption that a tenancy was created. Although the Landlord retained the right to enter the common areas of the lower suite in the rental property, all Parties and their witnesses agreed that the Landlord did not have the right to enter their respective bedrooms without notice. Given also that a security deposit was required and paid, I find on a balance of probabilities that this was a tenancy rather than a licence to occupy. Consequently, I find that the Act applies to this dispute.

However, the Tenant claimed that when he filed his Application for Dispute Resolution, he initially checked off the box to make a claim for the return of a security deposit but was (correctly) told by an Information Officer that he could not make such a claim until the tenancy had ended. The Tenant admitted that he scratched off the tick mark and the amount of the monetary amount of his security deposit claim with the intention of removing that part of his claim from his application and served it on the Landlord. The Tenant said approximately a week later, he moved out of the rental unit and sometime after that sent the Landlord a letter with his forwarding address and a request to return the security deposit. The Tenant said he did not amend his Application but assumed that as the tenancy had ended and he had given his forwarding address in writing (which the Landlord disputed), he could proceed with a claim for the security deposit at the hearing.

Consequently, I find that there was no application by the Tenant for the return of a security deposit before the Dispute Resolution Officer on February 14, 2012. As a result, the Decision and Order made on February 14, 2012 granting the Tenant a Monetary order for double the amount of the security deposit are set aside or cancelled pursuant to s. 82(3) of the Act and the Tenant will have to make a separate application for Dispute Resolution for the return of the security deposit.

Conclusion

The Decision and Order made February 14, 2012 are cancelled. 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: April 18, 2012.

Residential Tenancy Branch