



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, OLC

Introduction

This hearing was scheduled to deal with the tenant's application for return of double the security deposit and key deposit; and, orders for the landlords to comply with the Act, regulations or tenancy agreement. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Preliminary Issue – Jurisdiction

As a preliminary issued, the landlords questioned whether the *Residential Tenancy Act* (the Act) applies to the agreement between the parties. The landlords submitted that they treated this tenancy as a commercial tenancy.

I heard that the property is a two storey building located in the downtown. The subject property has commercial units on the first storey and on the second storey is an office space rented to a commercial tenant plus the subject space rented to the tenant. The landlords also have two residential apartments in the rear of the property. The property is zoned for commercial use, and acceptable uses under the zoning by-law include: administrative office, hotel accommodation, restaurant, among other things. Under the zoning by-law, residential apartments are permitted provided they are not on the first storey of the building and are the only use on a storey.

Both parties provided consistent testimony that the tenant was seeking for living accommodation when she viewed the rental unit with the landlord and that she would be using the rental unit as living accommodation for herself. The rental unit has a three piece bathroom and a kitchen along with an open space that the tenant could use like a bachelor apartment. The parties entered into a verbal agreement that required the

tenant to pay rent of \$650.00 on the first day of every month. On September 16, 2016 the tenant paid the landlord pro-rated rent of \$303.00 for the days remaining in September 2016 plus a security deposit of \$325.00 and a key deposit of \$50.00.

The landlords did not prepare a written tenancy agreement although the landlords acknowledged that they have written tenancy agreements for their commercial tenants. The landlord stated that she did not prepare a written agreement in this case because the tenancy was to be temporary, such as a few weeks or a couple of months.

The landlords submitted that use of the rental unit in the past has been for an administrative office. The tenant stated that the landlord had told her the space had been used as living accommodation by a chiropractor in the past. The tenant submitted that the landlords were aware she intended to use the space as living accommodation for herself and that she does not operate a business. The landlords did not deny this.

While I accept that a residential apartment on the second storey appears to violate the zoning by-law since there is also a commercial tenant on the second floor, a violation of municipal zoning by-law does not in itself make this a commercial tenancy. Nor is commercial zoning of the property determinative in itself that this is a commercial tenancy. The breach of a zoning by-law or the lack of a written tenancy agreement, which is a breach of a statute, do not allow parties to avoid the Act. If that were the case, many tenants and landlords of illegal basement suites who not prepare a written tenancy agreement would not have the protection of the Act.

The Act applies to tenancy agreements entered into between a landlord and a tenant with respect to the tenant's possession of a rental unit. Under section 1 of the Act, a tenancy agreement includes those which are entered into orally or by implied terms, with respect to a tenant's possession of a rental unit. Accordingly, parties with an oral agreement cannot avoid the Act and benefit from its protection. Rental unit is also defined in the act to mean "living accommodation rented or intended to be rented to a tenant". According, I find the most important consideration to determining whether this is a commercial tenancy or a residential tenancy is the intended use of the property by the tenant. The parties were in agreement that the tenant intended to use the rented space as living accommodation.

The landlords pointed to Residential Tenancy Policy Guideline 14: *Type of Tenancy: Commercial or Residential* in making their submissions. As provided in that policy guideline commercial tenancies are usually those associated with a business operation

like a store or an office. Alternatively, living accommodation included in premises that are primarily occupied for business purposes under a single agreement do not fall under the Act. In this case, the tenant did not and did not intend to operate a business from the rental unit. Accordingly, this was not a commercial tenancy even though the property is zoned commercial.

I find that Residential Tenancy Branch Policy Guideline 20: *Illegal Contracts* is more applicable in this case. As provided earlier, use of the rental unit as a residence is likely a by-law violation; however, the violation does not exempt the tenancy from application of the Act. The policy guideline provides, in part, with my emphasis underlined:

This guideline deals with situations where a landlord rents premises in a circumstance where the rental is not permitted under a statute. Most commonly this issue is raised where municipal zoning by-laws do not permit secondary suites and rental of the suite is a breach of the zoning by-law. However municipal by-laws are not statutes for the purposes of determining whether or not a contract is legal, therefore a rental in breach of a municipal by-law does not make the contract illegal.

Breach of a statute which is only incidental to the rental of premises, where the rental would otherwise be legal, does not make the contract illegal and thus void. For example, while failure to have a written tenancy agreement is a breach of the provisions of the Residential Tenancy Regulation and the Manufactured Home Park Tenancy Regulation, it does not make the tenancy agreement itself illegal and thus unenforceable. The landlord may be liable, on conviction, to pay a fine.

Also of note, is that one of the permitted uses of the property under the zoning by-law is hotel. As provided under Residential Tenancy Policy Guideline 27: *Jurisdiction*, a tenant occupying a hotel room may be found to have a tenancy agreement where the use is not merely for vacation or travel accommodation and the Act apply.

In light of all of the above, I find that the lack of a written tenancy agreement and the likely violation of the zoning by-law is not a basis to find this was a commercial tenancy when in fact the space was used as residential living accommodation and avoid the Act. As provided under section 5 of the Act, a party cannot avoid the Act or agree to avoid the Act. Therefore, I find the Act applies to this tenancy and I accept jurisdiction to resolve this dispute.

I proceeded to hear from both parties as to the terms of tenancy; payment of a security deposit and key deposit; the circumstances surrounding the end of the tenancy; and the tenants efforts to have the deposits returned to her. After both parties had an opportunity to be heard, the parties turned their minds to settling any and all claims against each other. The parties reached a full and final settlement agreement that I have recorded by way of this decision and the Monetary Order that accompanies it.

Issue(s) to be Decided

What are the terms of the settlement agreement?

Background and Evidence

The parties mutually agreed upon the following terms in full and final settlement of any and all claims against each other:

1. The tenant waives any entitlement to doubling of the security deposit.
2. The landlords shall not pursue the tenant for any claims they may against her with respect to this tenancy.
3. The landlords shall refund \$375.00 to the tenant, representing the single amount of the security deposit plus the key deposit, without any further delay.

Analysis

Pursuant to section 63 of the Act, I have the authority to assist parties in reaching a settlement agreement during the hearing and to record a settlement agreement in the form of a decision or order.

I have accepted and recorded the settlement agreement reached by the parties during this hearing and I make the terms an Order to be binding upon both parties.

In recognition of the settlement agreement I provide the tenant with a Monetary Order in the amount of \$375.00 to ensure the agreement is fulfilled.

Both parties are now precluded from filing any other Application for Dispute Resolution against the other with respect to this tenancy.

Conclusion

The parties reached a full and final settlement agreement that I have recorded by way of this decision and the Monetary Order that accompanies it. In recognition of the settlement agreement, the tenant has been provided a Monetary Order in the amount of \$375.00.

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: August 17, 2017

Residential Tenancy Branch