Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding SAINT FRANCIS MANOR BY THE SEA
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC, MNSD, FF

Introduction

This hearing dealt with a landlord's Application for Dispute Resolution whereby the applicant seeks a Monetary Order for damages or loss under the Act, regulations or tenancy agreement, less the security deposit.

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.

In this case, the person that was occupying the subject property is deceased and the respondent is the executor of the deceased's estate. To differentiate the individuals, where appropriate, the tenant who was occupying the subject property is referred to as "the tenant" or "the deceased" and the executor of his estate and respondent in this matter is referred to as "the executor" or "the respondent".

Preliminary Issue – Jurisdiction

At the outset of the hearing, I determined it necessary to consider whether the *Residential Tenancy Act* (the Act) applies to the subject living accommodation and whether I have jurisdiction to resolve the dispute.

Section 4 of the Act provides exemptions of certain types of living accommodation from application of the Act. Paragraph 4(c) exempts "living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation" from application of the Act.

The respondent submitted that the Act does not apply to the subject living accomodation, pursuant to the exemption provided under section 4(c) of the Act,

because the tenant and the owner of the property shared kitchen facilities. The applicants stated that the tenant had his own private bathroom and that the tenant and the owner did not share kitchen facilities.

The owner of the property was at the hearing (herein referred to by initials GS). GS testified that the tenant occupied a room on the second floor and ate his meals in the common dining room located on the main floor and ate snacks in his room. The meals and snacks were prepared by the applicants or their staff in the kitchen and delivered to the dining room or the tenant's room. The tenant had access to a servery (microwave, sink and fridge) on the second floor that the owner did not use. The kitchen at the property was off limits to persons other than the applicants or their staff persons and this is and was communicated by way of a sign posted outside of the entrance to the kitchen.

The respondent testified that when he had visited the tenant at the property he helped himself to a glass of water and cup of coffee in the kitchen with the invitation or consent of the staff working there and suggested the tenant may have also been permitted to use the kitchen. The respondent pointed out that the servery on the second floor would have been accessible to the owner.

The owner responded by stating the tenant was never in the kitchen, although GS acknowledged he was not at the property at all times as he went about his duties and activities. The owner also responded by stating that if the respondent was in the main kitchen he was out of bounds and had no right to be in there, as indicated on the sign posted outside of the kitchen entrance.

As for other possible exemptions from the Act, the applicant submitted that the living accommodation is not in a facility operating under the *Community Care and Assisted Living Act*. This submission was not opposed by the respondent.

I noted that section 4 the Act also exempts living accommodation "in a housing based health facility that provides hospitality support services and personal health care". The applicant stated that personal health care services, such as help with showering and dressing, were not provided to the tenant by the applicant and such support services were provided to the tenant by outside service provides. This information was not disputed by the respondent.

I noted that in the "occupancy agreement" before me, that paragraph 5 specifies that the monthly "occupancy fee" includes use of the suite and "Accommodation and Hospitality

Services described in Schedule A of this Agreement". The applicants did not provide a copy of Schedule A and I asked the landlords to describe the services included in the "occupancy fee" according to schedule A. The applicants described the following, in part: inclusion of utilities (water, heat, and electricity), three meals per day, plus snacks, weekly housekeeping of the suite, laundering of sheets and towels, security, and access to transportation. The respondent stated he had not seen Schedule A but he was in agreement that meals and snacks had been provided to the deceased.

In summary, the applicants described the arrangement between the parties as being akin to providing room and board for seniors. The respondent was of the view the arrangement was more like a nursing home and outside my jurisdiction.

Upon consideration of everything before me, I find I am satisfied that the tenant and the owner of the property were not sharing a kitchen facility. I accept the applicant's testimony that occupants are not permitted to use the kitchen and that it is used by the applicants and/or their staff persons. I find this scenario likely considering all meals and snacks were prepared and delivered to the deceased as part of his agreement with the applicants and there was a separate servery available for the tenant's use. I accept the applicant's testimony that the owner did not use the servery except to maintain it and I find it likely the applicant prepared the tenant's meals and snacks in the main kitchen without using the servery. Although I accept that the respondent may have accessed the main kitchen on two occasions, and it is possible the tenant may have done so as well, I find the mere suggestion of that is insufficient to persuade me that the tenant shared the kitchen with the owner. Therefore, I reject the respondent's position that the living accommodation is exempt under paragraph 4(c) of the Act.

I further find there is insufficient evidence that would indicate the living accommodation is exempt from the Act under other paragraphs of section 4. I find the services provided to the tenant under the agreement are not those one would expect from a "nursing home". The applicants did not provide the tenant with health care or personal care. Rather, they provided hospitality services such as prepared meals and housekeeping which is consistent with what is commonly referred to as "independent living" and independent living units do fall under the Act.

In light of the above, I am satisfied that the Act applies to this subject living accommodation and I accept jurisdiction to resolve this dispute. Having accepted jurisdiction I proceed to consider the applicants' monetary claim against the respondent. Also, the applicants are herein referred to as landlords and the agreement between the parties is referred to as the tenancy or tenancy agreement.

Issue(s) to be Decided

Have the landlord's established an entitlement to recovery the amount claimed against the respondent for damages or loss?

Background and Evidence

The tenancy started on March 1, 2016 and a security deposit of $1,137.00 was collected. The tenancy agreement indicates there was a fixed term; however, the expiry date of the fixed term is unclear as it appears to have been altered or changed without the benefit of initials near the change. The tenant was required to pay an "occupancy fee" of $2,275.00 on the first day of every month. Paragraph 5 of the tenancy agreement provides that the landlord was to provide the tenant occupation of the suite, accommodation and hospitality services as part of the "occupancy fee". The accommodation and hospitality services included in the "occupancy fee" were described previously in this decision.

The tenant had paid the "occupancy fee" for the month of June 2017 and died unexpectedly on June 15, 2017. The tenant's possessions were removed from the rental unit by the executor on June 16, 2017 and possession of the rental unit returned to the landlords. The executor orally authorized the landlords to retain the tenant's security deposit on that date.

The landlords seek compensation equivalent to the "occupancy fee" for the month of July 2017, in the amount of $2,275.00, less the security deposit the landlords continue to hold. The landlords submit that the rental unit was not re-rented until August 2017. The landlords pointed to the tenancy agreement in support of their claim. Paragraph 15 of the tenancy agreement provides:

> "Both the Occupant and/or [the landlord] must lawfully give thirty (30) days written notice from the end of the current month in order to termination this agreement. Such notice shall terminate the occupancy on the last day of the following month."
>
> "The Occupant may vacate the suite at any time prior to the expiration of the notice date period, but will continue to be financially responsible for the suite for the entire notice period."

> "In the event that an occupant moves to a care facility, or in the event of the death of an occupant, the [landlord] must be given thirty (30) days written notice from the end of the current month from either the occupant or the executor of the estate."
>
> [Reproduced as written except as modified for anonymity]

The landlord testified that the neither the tenant nor the executor gave written notice to end the tenancy. This submission was undisputed.

Both parties provided consistent testimony that on June 16, 2017 the executor asked to see a copy of the tenancy agreement when the landlord requested payment of the occupancy fee for July 2017. The executor stated that the landlord presented a copy of a proforma agreement that was not signed by the tenant. The executor stated that the first time he saw the agreement signed by the tenant is with the landlord's evidence package served for this proceeding. The landlord disagreed and claims to have shown the executor the copy of the agreement that had been signed by the tenant.

As for efforts to re-rent the unit, the landlord stated that they have a website and that they have a sign on the front lawn of the property. One landlord did not know when prospective tenants were shown the rental unit and stated that June 2017 was difficult as there was "so much going on" and referred to the tenant's funeral. The other landlord, GS, stated that the rental unit would not have been shown to prospective tenants until after the room was cleaned and painted. The landlord did not know exactly when that was completed but stated it was sometime in June 2017. I heard that the walls repaired patching were the tenant had a TV mounted to the wall. The executor was of the position the landlord failed to demonstrate that reasonable steps were taken to mitigate losses.

The executor also took the position that the landlords did not suffer any losses greater than that already paid to the landlords considering the tenant had paid the full amount of the occupancy fee for the month of June 2017 and stopped receiving the benefits of the hospitality services after his death on June 15, 2017; and, the executor authorized the landlord to retain the security deposit for any losses related to July 2017. The executor submits that these payments are sufficient to compensate the landlords for their losses considering no meals or snacks were provided after June 15, 2017 and no hospitality services were provided at all in the month of July 2017.

As a point of clarity, the executor confirmed during the hearing, that he maintains his position that the landlords may retain the security deposit in satisfaction of any losses they may have incurred.

Finally, the executor submitted that the death of the tenant is a frustrating event and that relief is provided under the *Frustrated Contract Act*, meaning the landlords may not claim anything further from the deceased.

In response, the landlords maintain that the tenancy agreement provides for notice requirements and this requirement was breached.

The landlords had also requested compensation of $125.00 for an “emergency watch”. The landlords did not explain the nature of an “emergency watch” by way of their application or other hearing documents. During the hearing, the landlord explained that it is a device that was provided to the tenant that was not returned to the landlord and the charge for the device is provided for on Schedule A. Since Schedule A was not provided as evidence, to either me or the respondent, I dismissed this claim summarily.

Analysis

Section1 of the Act provides a definition of “tenant” as follows:

> **"tenant"** includes
>
> (a) the estate of a deceased tenant, and
>
> (b) when the context requires, a former or prospective tenant

I am of the view that the definition of “tenant”, as described above, demonstrates that the Act contemplates the death of a tenant. The definition of “landlord” under the Act also permits an interpretation of “landlord” to include an estate or personal representative of a deceased owner of property. Accordingly, if a landlord or tenant dies, the executor or administrator of their estate is responsible for any rights and obligations under the original tenancy agreement. The death of a tenant does not automatically mean the tenancy agreement becomes frustrated. The executor or administrator can choose to pay the rent and retain possession of the rental unit, which is often beneficial to the deceased tenant’s estate or beneficiaries as it allows time to sort and remove the deceased’s personal property from a rental unit or accommodate another occupant who continues to reside in the unit. The executor may also give

notice to end the tenancy, or seek the landlord's consent to assign or sublet the rental unit. I also note that the tenancy agreement before me contemplate the death of the tenant in paragraph 15. Therefore, I reject the respondent's position that the *Frustrated Contract Act* applies and I proceed to consider the landlord's claim under sections 7 and 67 of the Act.

Awards for compensation are provided in section 7 and 67 of the Act. A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

Section 44 of the Act provides for several different ways a tenancy comes to an end. As provided in section 44(1)(d) of the Act, a tenancy comes to an end when the tenant vacates or abandons the rental unit. In this case, I was provided consistent testimony that the rental unit was vacated on June 16, 2017. Accordingly, I find the tenancy came to an end on June 16, 2017.

Section 45 of the Act, imposes an obligation on a tenant to give the landlord advance written notice to end the tenancy. For a tenant with a periodic tenancy (ie: month to month) the tenant is required to give at least one full month of written notice to the landlord. This statutory requirement is consistent with the termination provisions of paragraph 15 in the tenancy agreement. Although it would appear the parties may have agreed to a fixed term tenancy, the termination provisions in the tenancy agreement are inconsistent with fixed term tenancy agreements. Also, considering the expiry date of the fixed term was unclear, the landlord relies upon a termination provisions consistent with periodic tenancies, and the landlord only seeks compensation for one month after the tenancy ended, I proceed on the basis the tenant was required to give one full month of written notice to end the tenancy which is the least onerous notice requirement for a tenant.

I was not presented any evidence to suggest the tenant had given a notice to end the tenancy in May 2017 to end the tenancy at the end of June 2017, or at any other time.

It was also undisputed that the executor did not give the landlord any written notice to end tenancy. As such, I find I am satisfied that there was a breach of the notice to end tenancy requirements as provided in the tenancy agreement and the Act. A breach of a tenancy agreement or the Act does not automatically entitle the applicant to compensation. As explained previously, there are a number of criteria that must be satisfied in order to succeed in obtaining a monetary award. I proceed to consider whether: the landlord suffered a loss as a result of the tenant's breach; and, whether the landlord took reasonable steps to minimize losses.

According to paragraph 15 of the tenancy agreement, the parties agreed that the tenant may vacate prior to expiration of the notice period but will continue to be "financially responsible for the suite" for the entire notice period. This wording is important since the landlords are seeking to recover the "occupancy fee" for July 2017; yet, the occupancy fee is for more than just "the suite". As provided paragraph 5 of the tenancy agreement, the occupancy fee pays for "the suite" and "Accommodation and Hospitality Services described in Schedule A". In interpreting contacts, the words used must be given meaning and if wording is vague or may be interpreted in different ways, the term is interpreted in a way that is least favourable to the drafter of the contract, which is the landlord in this case. Therefore, I find the tenant's obligated to compensate the landlord, as stipulated under the tenancy agreement, is for "the suite" for the month of July 2017.

The fee associated to "the suite" only is unknown as there is no breakdown of amounts that make up the "occupancy fee". Since the landlords only provided some of the hospitality services to the tenant in June 2017 and did not provide any accommodation or hospitality services to the tenant for the month of July 2017, which is a breach of the landlord's obligations under the terms of the tenancy agreement, I find the executor's position that the landlords may retain the tenant's security deposit in satisfaction of the landlords' losses to be a more reasonable approximation of the losses the landlords are entitled to recover. Therefore, I award the landlords the sum of $1,137.00 and I authorize the landlords to retain the tenant's security deposit in satisfaction of this award.

Although I have reservations with respect to the landlords' efforts to advertise and show the rental unit to prospective tenants in a timely manner, I find it unnecessary to further analyze this issue considering I have already found the landlord's entitlement to compensation under the tenancy agreement to approximate $1,137.00 and the executor was agreeable to compensating the landlords this amount by way of the security deposit.

I make no award for recovery of the filing fee.

Conclusion

The landlords have been awarded compensation of $1,137.00 and the landlords may retain the tenant's security deposit in full satisfaction of this award.

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: December 14, 2017

Residential Tenancy Branch