



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, OLC, RPP, FF

Introduction

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

- authorization to obtain a return of a portion of the applicant's security deposit, pursuant to section 38;
- an order requiring the respondent to comply with the *Act*, *Residential Tenancy Regulation* ("Regulation") or tenancy agreement, pursuant to section 62;
- an order requiring the respondent to return the applicant's personal property, pursuant to section 65;
- authorization to recover the filing fee for this application, pursuant to section 72.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. This hearing lasted approximately 22 minutes in order to allow both parties to fully present their submissions.

The respondent confirmed receipt of the applicant's application for dispute resolution and notice of hearing and the applicant confirmed receipt of the respondent's written evidence package. In accordance with sections 88, 89 and 90 of the *Act*, I find that the respondent was duly served with the applicant's application and notice of hearing and the applicant was duly served with the respondent's written evidence package. The respondent confirmed that even though she had not received the applicant's written evidence package, she already had the documents from the package from earlier in the tenancy. I notified both parties that I would consider the applicant's written evidence package since the respondent had the documents, reviewed them and failed to show any prejudice if I considered them.

At the outset of the hearing, I asked both parties to provide verbal submissions on whether I had jurisdiction to hear the applicant's application under the *Act*.

Issue to be Decided

Does the Residential Tenancy Branch (“RTB”) have jurisdiction to consider this application?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the applicant’s claims and my findings are set out below.

Both parties agreed to the following facts. The respondent rented a room to the applicant in the same rental unit where she was already residing. No written tenancy agreement was signed between the parties. Both parties lived in the rental unit at the same time in separate rooms but shared the kitchen and bathroom. The respondent has a written tenancy agreement with the owner of the rental unit and pays her own rent to the owner.

Both parties agreed to the following facts. The applicant moved into the rental unit at the end of August 2016 and vacated on April 30, 2017. Monthly rent in the amount of \$810.00 was payable by the respondent to the applicant on the first day of each month. A security deposit of \$375.00 was paid by the applicant and the respondent returned \$220.00 to the applicant and retained \$155.00.

The applicant seeks the return of the remaining \$155.00 from the security deposit plus the \$100.00 filing fee paid for this application. The applicant confirmed that he was not seeking any other orders from the respondent.

The respondent submits that this is not a residential tenancy and I have no jurisdiction to hear this claim because it is excluded by the *Act*. She claimed that she is not the owner of the rental unit and that this is a co-tenant, roommate-sharing agreement.

The applicant submits that this is a residential tenancy and I have jurisdiction to hear this application under the *Act*. He said that both parties developed a landlord-tenant relationship with each other and the respondent referred to herself as a “landlord” when communicating with the applicant.

Analysis

The respondent is not the owner of the rental unit, so it is unnecessary for me to determine jurisdiction under section 4(c) of the *Act*, which excludes tenancies where an owner and tenant shared kitchen and bathroom facilities.

However, I must decide jurisdiction with respect to the rental unit where the applicant resided, as both parties dispute whether they had a landlord and tenant relationship.

The jurisdiction of the *Act*, and in turn my jurisdiction, is set out in section 2 of the *Act*.

Subsection 2(1) of the *Act* sets out that:

2 (1) Despite any other enactment..., this Act applies to tenancy agreements, rental units and other residential property.

“Tenancy agreement” is defined in section 1 of the *Act* (my emphasis added):

*"tenancy agreement" means 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 services and facilities, and includes a licence to occupy a rental unit...*

“Landlord” is defined in section 1 of the *Act* (my emphasis added):

"landlord", in relation to a rental unit, includes any of the following:

(a) the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,

(i) permits occupation of the rental unit under a tenancy agreement,
or

(ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement;

(b) the heirs, assigns, personal representatives and successors in title to a person referred to in paragraph (a);

***(c) a person, other than a tenant occupying the rental unit,** who*

(i) is entitled to possession of the rental unit, and

(ii) exercises any of the rights of a landlord under a tenancy agreement or this Act in relation to the rental unit;

(d) a former landlord, when the context requires this;

Section 6 indicates that the *Act* is enforceable between a landlord and tenant (my emphasis added):

- 6 (1) *The **rights, obligations and prohibitions established under this Act are enforceable between a landlord and tenant** under a tenancy agreement.*
- (2) *A landlord or tenant may make an application for dispute resolution if the landlord and tenant cannot resolve a dispute referred to in section 58 (1) [determining disputes].*
- (3) *A term of a tenancy agreement is not enforceable if*
- (a) the term is inconsistent with this Act or the regulations,*
 - (b) the term is unconscionable, or*
 - (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.*

In order to have a tenancy agreement, there must be an intention by the parties to form the legal relationship of landlord and tenant. Without this intention, no enforceable agreement under the *Act* arises from the relationship. I find that the respondent was not a “landlord” as defined in section 1 of the *Act*. The definition of a landlord specifically excludes “a tenant occupying the rental unit.” I find that the respondent was a tenant occupying the rental unit. She has a tenancy agreement with the owner of the property, which the applicant did not dispute. Both parties agreed that they did not sign a written tenancy agreement with each other.

Residential Tenancy Policy Guideline 19 entitled “Assignment and Sublet” provides the following definitions of subletting, occupants and roommates (my emphasis added):

C. SUBLETTING

Sublets as contemplated by the Residential Tenancy Act

*When a rental unit is sublet, the original tenancy agreement remains in place between the original tenant and the landlord, and the original tenant and the sub-tenant enter into a new agreement (referred to as a sublease agreement). Under a sublease agreement, **the original tenant transfers their rights under the tenancy agreement to a subtenant. This must be for a period shorter than the term of the original tenant’s tenancy agreement and the subtenant must agree to vacate the rental unit on a specific date at the end of sublease agreement term, allowing the original tenant to move back into the rental***

unit. *The original tenant remains the tenant of the original landlord, and, upon moving out of the rental unit granting exclusive occupancy to the sub-tenant, becomes the “landlord” of the sub-tenant...*

...

Occupants/roommates

*Disputes between tenants and landlords regarding the issue of subletting may arise when the tenant has allowed a roommate to live with them in the rental unit. **The tenant, who has a tenancy agreement with the landlord, remains in the rental unit, and rents out a room or space within the rental unit to a third party. However, unless the tenant is acting as agent on behalf of the landlord, if the tenant remains in the rental unit, the definition of landlord in the Act does not support a landlord/tenant relationship between the tenant and the third party. The third party would be considered an occupant/roommate, with no rights or responsibilities under the Residential Tenancy Act.***

Both parties agreed that the respondent lived in one of the rooms of the rental unit and did not vacate or remove any of her belongings at any point while the applicant was residing in another room at the same rental unit. Both parties agreed that they shared the kitchen and bathroom facilities at the rental unit. I find that this was not a “sublease” as defined above, because the respondent never vacated the property at any time transferring her rights to the applicant.

I find that the respondent rented out a room within the rental unit to a third party, the applicant. I find that the respondent remained in the rental unit during the relevant time period in question. I also find that the respondent was not an agent for the owner of the rental unit. I find that the parties using terms such as “landlord” and “tenant” when communicating with each other does not define their relationship as that of a landlord and tenant. As per the above policy guideline, I find that the applicant and respondent were roommates.

Since the respondent is not a landlord as defined under the *Act*, I find that no landlord and tenant relationship was created between the applicant and respondent. Therefore, no enforceable rights, obligations, or prohibitions can be determined by me under the *Act*. Since a tenancy agreement can only be created between a landlord and a tenant, I find that none has been created here and hence, the *Act* does not apply.

For the above reasons, I find that this is not a matter within the jurisdiction of the RTB. Accordingly, I decline jurisdiction over the applicant's application.

Conclusion

I decline jurisdiction over the applicant's application.

I make no determination on the merits of the applicant's application.

Nothing in my decision prevents either party from advancing their claims before a Court of competent jurisdiction.

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: January 04, 2018

Residential Tenancy Branch