Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MASHINCHI INVESTMENTS LTD. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes FFT MNDCT MNSD

Introduction

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

- authorization to obtain a return of all or a portion of the security deposit pursuant to section 38;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of $35,000.00 pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties were represented by counsel. One of the tenant's employees ("**ML**") attended the hearing as the tenant's agent. The landlord himself attended the hearing. Each party was given a full opportunity to be heard, to present affirmed testimony, to make submissions, to call witnesses, and to cross-examine opposing witnesses. The landlord called one witness ("**MP**") to give evidence. Both ML and the landlord provided testimony.

In his response materials, the landlord raised the issue of jurisdiction. He argued that the Act does not apply to this matter, and, as such, I have no authority to arbitrate the parties' dispute.

Accordingly, I instructed the parties to make submissions on the issue of jurisdiction alone at this hearing. I advised the parties that I would issue a written decision as to whether I find I have jurisdiction to hear the matter, and, if I found I did, I would reconvene this hearing to deal with the balance of the issues.

For the reasons that follow, I decline jurisdiction of this matter. I will continue to, for reasons of clarity, refer to the applicant as the tenant and the respondent as the landlord. However, such references are not intended to signify that I have jurisdiction in this matter. I find that the applicant tenant is not a "tenant" for the purposes of the Act, and that the respondent landlord is not a "landlord" for the purposes of the Act.

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into a written agreement to rent the rental unit starting April 15, 2015 (the "**Agreement**"). Monthly rent was $3,700.00. The rental unit is a two-bedroom apartment located on the 31st floor of the rental property. The Agreement includes an addendum which includes the following terms:

> 9. Tenant is responsible for paying any fines in relation to all bylaw violations
>
> 10. Landlord will give [the tenant] the consent to sub lease the above property through the duration of the lease.

The landlord testified that this addendum was drafted by the director of the tenant. Tenant's counsel did not disagree.

Landlord's Position

The landlord argues that upon entering into the Agreement, the tenant rented out the rental unit to other individuals on short term basis.

In support of this claim, the landlord submitted a statutory declaration into evidence, which, in part, reads:

> 5. On about October 3, 2017, I entered the Property to check the status of the Property with prior notice to the Applicant and the Applicant's permission. To my surprise, I discovered that the Property was extremely clean and there were no personal belongings such as clothing in the Property as other tenant-occupied properties.

6. The Property also had small appliances, towels, and travel brochures typically seen in hotels and bed and breakfasts.

7. When I was about to leave the Property, a stranger who was wearing a backpack and carrying a carry-on opened the door and entered into the Property. She asked me what I was doing in the Property. I replied that I was the owner and asked what she was doing.

8. The stranger replied that she booked the Property online for a short stay.

The landlord testified that when he attended the rental unit, it appeared to be set up as a hotel or bed and breakfast. He testified that no clothes were found in the rental unit, but the closets were full of towels. He testified that travel brochures were also placed in the rental unit.

MP provided testimony in support of the landlord's position that the tenant rented out the rental unit on a short-term basis.

MP testified that she wanted to rent an apartment in the city centre for one night to celebrate her birthday with friends. She went to the website booking.com, and came across a posting for an apartment for rent offered by the company "R Club". The address listed was on "R Ave". She booked the apartment for December 9, 2016 for approximately $700.00.

Prior to December 9, 2016 date, she attended the address on R Ave and discovered that it was a townhouse, which, she testified, turned out to be being used as an office by R Club. She spoke with an employee of R Club, who told her that they had properties around the city and that MP would be staying in one of those properties on December 9, 2016, and not in the unit on R Ave.

During her testimony, ML confirmed that the tenant owns R Club.

On December 9, 2016, MP testified that she met a representative of R Club on "S Street" and was taken into the rental property (which was located on S Street). She testified that she was taken to a unit on the 30th or 31st floor.

MP took photos of the unit, and the landlord submitted these into evidence.

MP was also shown a copy of an advertisement from expedia.ca which listed a unit for rent which included a photo of a kitchen, and listed the unit as being on R Ave. MP identified the kitchen in the photo as the same kitchen as the unit she stayed at in the rental property.

The photos MP took include various pieces of furniture in the unit. Upon review of these photos, and a photo of the rental unit submitted into evidence by the tenant showing pieces of furniture being packed, it shows the items of furniture in the two sets photos are the same (couch, armchair, dining room chairs, throw pillow and floor lamp). Additionally, the layout of the unit in both sets of photos appears identical (vent and blind placement, shape of living room, and size of windows).

The landlord's counsel argued that, as the tenant re-rented the rental unit for short periods of time, the Act does not apply to this dispute. In support of this position he referenced section 4 of the Act, which states:

> **What this Act does not apply to**
>
> 4 This Act does not apply to
>
> (d)living accommodation included with premises that
>
> (i)are primarily occupied for business purposes, and
>
> (ii)are rented under a single agreement,
>
> (e)living accommodation occupied as vacation or travel accommodation,

The landlord's counsel submitted that by renting the rental unit out on short-term bases, the rental unit became a living accommodation used for "business purposes" and was "occupied as vacation or travel accommodation". As such, the landlord's counsel argued, the Act does not apply to this dispute.

Tenant's Position

Tenant's counsel argued that the rental unit was never used as a short-term rental property, but rather that it was sublet by the tenant, as contemplated by the terms of the addendum to Agreement.

ML testified that the tenant sublet the rental unit to corporate clients for terms of between two to three months. ML testified that when the rental unit was not sublet in such a way, it remained vacant.

ML's testimony did not address how MP might have been able to rent rental unit for one night from R Club, or the landlord's evidence that a short-term renter arrived at the rental unit when the landlord attended the rental property in October 2017.

The tenant entered no documentary evidence regarding the existence of any sublets of the rental unit, or as to what purpose the corporate clients were making of the rental unit once sublet.

Tenant's counsel argued that since the tenant sublet the rental unit to corporate clients, it did not fit into the excluded categories set out in section 4 of the Act. She argued that subletting is a permissible use of a rental property both under the Act and as contemplated by the Agreement.

In the alternative, tenant's counsel argued that, if I did find that the tenant rented the rental unit out on a short-term basis, that the rental unit was not used for "vacation or travel accommodation", as, she argued MP was not on vacation, or travelling. Rather, she was staying in the rental unit for her birthday, and MP lived in a neighbouring municipality.

Analysis

Assessment of Credibility

Based on the similarities (as discussed above) in the photographs taken by MP and the photograph of the rental unit entered into evidence by the landlord, I find that unit depicted in the photographs taken by MP is the rental unit owned by the landlord at issue in this application. I find that the unit rented by MP on December 9, 2016 was the rental unit.

The testimony of ML is in direct conflict with that of the landlord and MP. ML testified that the rental unit was never rented out as a short-term rental. MP testified that she rented the rental unit for one night. The landlord testified that he encountered someone on October 3, 2017 at the rental unit, who told him that she was renting the rental unit for a short stay.

Given the conflicting testimony, much of this case hinges on a determination of credibility. A useful guide in that regard, and one of the most frequently used in cases such as this, is found in *Faryna v Chorny* (1952), 2 DLR 354 (BCCA), which states at pages 357-358:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

MP's evidence was clear, internally consistent, and supported by documentary evidence. The tenant offered no explanation as to how MP might have come to rent the rental unit for one night. ML merely offered a blanket denial that the tenant never rented out the rental unit on a short term basis, and that the tenant only sublet the rental unit for two to three months at a time.

The tenant provided no corroborating evidence that it ever sublet the rental unit (for example, copies of sub-leases, advertisements offering to sublet the rental unit or correspondence regarding the sublets). Such evidence was solely within the power of the tenant to provide. As the tenant failed to provide it, I draw a negative inference and find that the rental unit was not sublet exclusively for two to three months at a time and did not remain vacant when not sublet.

I find that ML's testimony is not in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances. Where the testimony of ML and MP & the landlord differ, I accept the testimony of MP and landlord over that of ML.

I find that the tenant rented out the rental unit on a short-term basis, for, on at least one occasion, as short as one night.

<u>Jurisdiction</u>

In addition to section 4 of the Act, Policy Guideline 14 is of assistance in determining whether or not I have jurisdiction to hear this matter. It, in part, states:

> **Tenancies Established for the Purpose of Re-renting**
>
> Sometimes a tenant will rent out a number of rental units or manufactured home sites and re-rent them to different tenants. It has been argued that there is a "commercial tenancy" between the landlord and the “head tenant” and that an Arbitrator has no jurisdiction. This generally occurs in a manufactured home park.
>
> The courts in BC have indicated that these relationships will usually be governed by the Residential Tenancy Act or Manufactured Home Park Tenancy Act. It is the nature or type of property that is regulated by the legislation. If the type of property comes within the definitions in the legislation and does not fall within any of the exceptions in the legislation, the Residential Tenancy Act or Manufactured Home Park Tenancy Act will govern.
>
> *Henricks v Hebert*, 1998 CanLII 1909 (BC SC) and *Blue Rentals Ltd. v Hilbig*, 1999 CanLII 5958 (BC SC)

In *Henricks*, the court considered a case where the tenant applicants each rented seven manufactured home pads in a manufactured home park owned by the respondent landlords. The tenants placed their own mobile homes on the pads and then rented out the mobile homes and pads as single tenancies to other individuals.

The court was asked to consider if the agreements between the tenant applicants and the respondent landlords were subject to the Act. The court, at paras 62 and 63, held:

> [62] The definition of "Residential premises" is the root definition, and means: "a dwelling unit used for residential purposes, and includes, without limitation,
> a) a manufactured home,
> b) a manufactured home pad,
> c) a room or premises in a hotel occupied by a hotel tenant, . . ."
>
> In my view, the plain meaning of these definitions and the choice of the word "possession" in defining a tenancy agreement in respect of residential premises", but the word "occupation" in respect of a room in a hotel makes it

> plain that in respect of residential premises it is the entitlement to possession of the premises rather than occupancy of same that triggers the application of the *Act*.
>
> [63] Plainly a manufactured home pad which is used for residential purposes by a tenant in occupancy does not cease to be a residential premise or cease to be used for residential purposes simply because the head tenant has sublet the right to possession for a commercial purpose. The entrepreneurial head tenant or sublessor who has obtained a lease and re-let it for a commercial gain has not "used" the physical premises at all, yet **they are used for residential purposes by someone**. With the reservations expressed previously, I generally agree with the conclusion in the *RonMary* ARP decision that "the fact that a head tenant is in the business of sub-leasing property does not alter the nature of the property or the relationship governed by the *Act* . . . the *Act* regulates the relationship in respect of a type of property. In this case the type of property falls within the definitions in the *Act* does not fall within any of the exceptions set out in the definitions of residential premises or in s. 3 or elsewhere in the *Act*".
>
> [emphasis added]

Per *Henricks*, a rental unit does not cease to be a residential premises or cease to be used for residential purposes simply because the head tenant has sublet the rental unit for a commercial purpose. So long as the rental unit is used for residential purposes by someone, it remains a residential premises.

As such, just because the tenant rented out the rental unit, and did not have the intention to occupy it for its own use, it does not mean that the Act does not apply to the rental of the rental unit. In order for the Act not to apply, it must be shown that the rental unit was not used for “residential purposes”.

The term “residential purposes” in not defined in the Act. However, section 4 of the Act sets out what manner of use of a premises causes a premises to be excluded from the jurisdiction of the Act. I therefore find that any mode of use described in section 4 would fall outside the scope of “residential purposes.”

Tenant’s counsel argued that the mode of use of the rental unit by MP was not, in fact, for “vacation or travel accommodation”. I do not find that argument persuasive. The terms “vacation” or “travel accommodation”” are not defined in the Act. The Merriam-Webster Dictionary defines “vacation” as:

1: a period spent away from home or business in travel or recreation

I find that MP's use of the rental unit fits within this definition. She was away from her home for the purposes of celebrating her birthday. She travelled from her home in neighbouring municipality to stay at the rental unit. I do not find that an individual must travel a certain distance or engage in a particular form of recreation for it to be considered a "vacation". The term is sufficiently broad as to encompass the conduct of MP.

I find that the rental unit was used for purposes outside of the scope of "residential purposes." I find that it was used by MP as vacation or travel accommodation. Additionally, I find that MP's rental of the rental unit to be illustrative of the use the tenant made or allowed to be made of the rental unit. On the basis of the travel website advertisement and the landlord's testimony that he encountered an individual at the rental unit who advised him she was staying in the rental unit for a short period of time, I find it more likely than not that the rental unit was regularly rented out on a short-term basis as travel or vacation accommodation.

Additionally, I have no credible evidence before me that the rental unit was ever, even in part, used for "residential purposes". As such, I find that, per *Henricks*, the manner in which the tenant used the rental unit causes the relationship between the landlord and the tenant to fall outside the scope of the Act. Accordingly, I find that I have no jurisdiction to hear the tenant's application.

Conclusion

I dismiss the tenant's application without leave to reapply.

As the tenant was unsuccessful in its application, it must bear the cost of its filing fee.

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, 2019

Residential Tenancy Branch