



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, FFL

Introduction

This hearing was scheduled to deal with a tenant's application for return of the security deposit. Both parties appeared or were represented at the hearing and had the opportunity to be make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

Preliminary and Procedural Matters

1. Service of hearing documents

At the outset of the hearing, I explored service of hearing documents. The tenant testified that she sent a package to the landlord via Xpresspost and it was returned to her. The tenant submitted the Canada Post print-out showing she sent the Xpresspost on January 29, 2019 and that it was "refused" by recipient. The tenant then sent another registered mail package to the landlord and it was also returned to her. The tenant provided a photograph of the registered mail package and receipt, including tracking number, which showed the registered mail was sent on February 1, 2019 and returned as being "unclaimed". In addition, the tenant sent the landlord emails to inform him that she was sending documents to him in the mail.

I explored with the landlord his mailing address. The landlord confirmed that he does reside at the address the tenant used to send the hearing documents. As for the reason the Xpresspost package was "refused" the landlord stated that someone else living at the property may have refused it. As for not picking up the registered mail the landlord stated he was out of town at the time. I was satisfied the tenant duly served the landlord with her hearing package in a manner that complies with the Act and the landlord was deemed to be served pursuant to the deeming provision of section 90 of the Act.

The landlord explained that he received an email from the Residential Tenancy Branch and then he made enquiries. The landlord understood that this case involves the tenant's request for return of the security deposit. Since the landlord understood the nature of the claim, I was satisfied the landlord was not unduly prejudiced by proceeding to hear this case. However, considering the landlord did not have the tenant's evidence, for the benefit of the landlord, I read from certain documents so that the landlord may respond.

2. Time limit for making application

The landlord pointed out that over two years had passed since this tenancy ended. I confirmed that the tenancy ended on January 31, 2017 and the tenant had made her application on January 28, 2019 which is within the statutory deadline for filing an application under the *Residential Tenancy Act*.

3. Jurisdiction

I noted that the landlord's address was the same as the rental unit address and I proceeded to explore whether the *Residential Tenancy Act* ("the Act") applies to the subject living accommodation. My jurisdiction to resolve disputes is provided by the Director of the Residential Tenancy Branch under the Act and is limited to tenancy agreements between a landlord and a tenant that fall to which the Act applies.

Section 4 of the Act provides for certain living accommodation that is exempt from application of the Act. Section 4 provides:

4 This Act does not apply to

...

(c) living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation,

In this case, the property was described as a 3 bedroom townhouse and the landlords appearing before me stated they own the subject property.

The parties provided consistent testimony that the tenant rented a room for her exclusive use and had shared use of the common areas including the kitchen starting October 16, 2016 and ending January 31, 2017. When the tenant first moved in the

owners were not residing in the rental unit although they had furniture in the property. The tenant was of the position that the owners were not living in the property when her tenancy formed and their written tenancy agreement indicates the *Residential Tenancy Act* applies to their agreement. The owners testified that they disclosed to the tenant from the outset that they would be moving in to the property. The owners explained that they had purchased the subject property months prior, that it was undergoing extensive renovations, and they were moving furniture over from a condominium that they owned but then sold.

The parties provided consistent testimony that the owner(s) did move into the master bedroom and they shared the kitchen with the tenant at some point although the parties' recollection of when that occurred was somewhat different.

According to the tenant, the owner advised her in late December 2016 that they would be moving into the master bedroom and they did so a week or so later. According to the owners they moved in the master bedroom in November 2016. I note that in text message communication provided as evidence, the owner wrote to notify the tenant on or about December 17, 2016 that they would be moving in by the end of the month. The tenant's text message response did not indicate she was surprised by that statement.

Upon consideration of that before me, I find it more likely than not that the owners of the property did move into the residential property and had shared use of the property starting in late December 2016. Although the tenancy agreement indicates the Act applies, I also note that the tenancy agreement is non-compliant with requirements for tenancy agreements under the Act in several ways. Further, it would appear the tenancy agreement is a generic agreement, likely very old, as it refers to "the Rentals man" and there is nothing in the agreement to indicate what the tenant was renting (ie: a bedroom with shared use of common areas) or that other occupants may be at the subject property. The tenant acknowledged that others would be occupying the other bedrooms and it is apparent from the tenant's text message that she was not surprised that the owners were moving in. As such, I find the written tenancy agreement in itself does not necessarily reflect the entirety of the party's arrangement and I do not rely solely upon the statement in the tenancy agreement that the Act applies.

It appears to me that the owners were within their right to occupy the residential property, with the exception of the bedroom they rented to the tenant and another bedroom rented to another tenant, and share in the use of the kitchen with the tenants, which they did. Therefore, I find the exemption under section 4(c) applies.

As provided in section 5 of the Act, the Act cannot be avoided, and section 6 provides that terms in a tenancy agreement cannot conflict with the Act. As such, the statement in the tenancy agreement that the Act applies, does not in itself make the Act apply where it otherwise would not by virtue of section 4(c). Therefore, I find the Act does not apply to the living accommodation despite what the written tenancy agreement says.

In light of the above, I find I do not have jurisdiction to resolve this dispute.

The parties are at liberty to pursue resolution of their dispute(s) in the appropriate forum, such as Civil Resolution Tribunal, although this does not extend any applicable deadline.

Conclusion

The Residential Tenancy Act does not apply to the living accommodation and I decline jurisdiction to resolve this dispute.

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: May 16, 2019

Residential Tenancy Branch