Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, MNSD, FFT

Introduction

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

- a monetary order for compensation for losses or other money owed under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of all of the security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the Respondent pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

As the Respondent confirmed that they received a copy of the Applicant's dispute resolution hearing package and written evidence sent by the Applicant by registered mail on March 28, 2019, I find that the Respondent was duly served with this package in accordance with section 89 of the *Act.* The Respondent did not submit any written evidence for this hearing.

Issues(s) to be Decided

Does this application fall within the jurisdiction of the *Act*? If so, is the Applicant entitled to a monetary award for losses arising out of this tenancy? Is the Applicant entitled to a monetary award for the return of the security deposit for this tenancy? Is the Applicant entitled to recover the filing fee for this application from the Respondent?

Background and Evidence

On or about October 10, 2017, the Applicant signed a "Guest Contract" with the Respondent that was to enable the Applicant to use and occupy this rental accommodation from January 1, 2018 until January 1, 2019.

Legal counsel for the Applicant maintained that the contract between the Applicant and the Respondent was a residential tenancy for the purposes of the *Act*. They noted that they had reviewed the wording of section 4 of the *Act*, which lists those situations where the *Act* does not apply. Legal counsel for the Applicant said that the only possible exclusion they could identify was the provision in section 4(e) of the *Act* whereby "living accommodation occupied as vacation or travel accommodation" did not fall within the jurisdiction of the *Act*. They said that as the tenant moved to the rental property from their residence overseas and because the Applicant had committed to use this rental unit as their sole residence for a one-year fixed term that the rental was not occupied as vacation or travel accommodation.

The Respondent testified that this Guest Contract was prepared by a company they use to rent out this registered vacation property. Although the Respondent and their legal counsel did not specifically maintain that this was not a residential tenancy, they claimed that this was a standard vacation rental agreement requiring a non-refundable downpayment to enable the guest to stay in the premises for the term of the agreement.

Section 2 of this Guest Contract outlined the monetary terms agreed to by the parties as follows:

*2. **Total Rent Amount**. The total rental amount is $40,089.25 CAD. The Guest shall pay to the Owner during the Term rent (the "Rent") in the amount of $31,600.00 CAD payable in monthly payments of $2,633.33/mo. The Guest shall pay to the owner (the "Down Payment") in the amount of $8,489.25 CAD payable in 3 amounts of $2,829.75 CAD monthly beginning November 1, 2017. The agreement must be returned to the Owner within 24 hours to secure the premise. The down payment is non-refundable.*

Section 3 of the Guest Contract refers separately to a Security Deposit, noting that a credit card is required for a security/damage deposit. The only other reference to a Security Deposit or Damage Deposit in this Guest Contract was at Section 27 where it is noted that the Owner required a $35 non-refundable Security Deposit Waiver fee for all reservations in lieu of an additional Damage Deposit.
The application for a monetary award of $16,978.50 plus recovery of the filing fee included the following items identified on their application for dispute resolution:

Item	Amount
Return of Security Deposit	$8,489.50
Monetary Award for Losses Arising out of this Tenancy	8,489.50
Recovery of Filing Fee for this Application	100.00
Total of Above Items	**$17,079.00**

The Applicant and their legal counsel maintained that the three payments of $2,829.75 totalling $8,489.25 were part of the security deposit for this tenancy and that this amount needed to be returned to the Applicant. Although the Applicant gave sworn testimony that they considered the three Down Payments of $2,929.75 as a security deposit for their tenancy, their legal counsel also maintained that this amount was an overpayment of rent to the Respondent because the stated "Rent" identified in Section 2 of the Guest Contract was $31,600.00. This amount was to be paid in monthly payments of $2,633.00.

The Respondent gave undisputed sworn testimony that the Applicant sent them an email on July 31, 2018, advising the Respondent that they were planning to end their fixed term agreement early and vacate the rental unit by August 31, 2018. The parties agreed that the Applicant vacated the rental unit as of August 31, 2018, returning their keys on that date, after paying their monthly payment of $2,633.33 for August 2018. The parties also agreed that the Applicant made all payments required by the Respondent as outlined in Section 2 of their Guest Contract prior to September 1, 2018, including the three payments of $2,829.75 referenced in Section 2 of their Guest Contract. The Respondent said that they had lost more than $10,000.00 as a result of the Applicant's premature departure from the premises, although the Respondent has not attempted to recover any of these losses to date. The Respondent noted that the Applicant did not provide a written notice to end any tenancy that existed between the parties.

The Respondent and their legal counsel asserted that no security deposit was paid by the Applicant and that the three installments paid by the Applicant in the amounts of $2,929.75 formed part of the Total Rent, the term used in Section 2 of the Guest Contract. The Respondent's legal counsel and the Respondent also questioned whether the two elements of this application were essentially doubling the requested amount that had been paid by the Applicant to the Respondent as part of their Guest Contract. They cited the wording of Section 2 of the Guest Contract, which stated that the total rental amount was to be $40,089.25, of which $8,489.25 was to be pre-paid as

a "Down Payment" in three monthly installments. They also noted that this "Down Payment" amount was specifically identified in Section 2 of the Guest Contract as being "non-refundable."

At the hearing, the Applicant gave sworn testimony that although they vacated the rental unit on August 31, 2018, they have not provided the Respondent with their forwarding address in writing requesting the return of their security deposit.

At the hearing, I advised the parties that in the event that their contractual agreement constituted a residential tenancy as defined under the *Act* that the landlord would not be required to return any security deposit paid by the tenant for this tenancy until the latter of the end of the tenancy or within 15 days of having received the tenant's forwarding address in writing.

Analysis - Does the Guest Contract constitute a Residential Tenancy as Defined in the Act?

I should first note that the only substantive document entered into written evidence by either party with respect to this claim for over $17,000.00 was the Guest Contract, which contained two pages of terms for the agreement between the parties. Neither party supplied any documentation regarding the original listing of this property that attracted the Applicant's interest in approaching the Respondent. The parties supplied no copies of emails or text messages that would have provided helpful background to the intentions of the parties entering into this contract.

In considering this matter, I have reviewed the wording of section 4 of the *Act*, which excludes at section 4(e) "living accommodation occupied as vacation or travel accommodation" from the *Act*. I have also considered the relevant references to this type of situation in the Residential Tenancy Branch's (the RTB's) Policy Guidelines, including RTB Policy Guideline 27, which reads in part as follows:

Vacation or Travel Accommodation and Hotel Rooms

The RTA does not apply to vacation or travel accommodation being used for vacation or travel purposes. However, if it is rented under a tenancy agreement, e.g. a winter chalet rented for a fixed term of 6 months, the RTA applies.

Whether a tenancy agreement exists depends on the agreement. Some factors that may determine if there is a tenancy agreement are:

- • *Whether the agreement to rent the accommodation is for a term;*
- • *Whether the occupant has exclusive possession of the hotel room;*
- • *Whether the hotel room is the primary and permanent residence of the occupant.*
- • *The length of occupancy...*

Whether or not the contractual agreement is labelled a "Residential Tenancy Agreement" or a "Guest Contract" is not determinative as to whether an agreement falls within the jurisdiction of the *Act*. In fact, the *Act* also applies if no written contract exists, but there has been an oral agreement between parties to enter into a tenancy agreement. As is noted in RTB Policy Guideline 27 what matters most is what is contained in the agreement between the parties.

In this situation, there are certainly a number of factors identified in Policy Guideline 27 that would weigh in favour of this contract falling within the jurisdiction of the *Act*. For example, the parties established a one-year fixed term whereby the Applicant had exclusive use of the premises. There is also undisputed sworn testimony that the Applicant intended to and in fact did use the premises as their permanent residence after moving there from overseas.

Other aspects of the Guest Contract lead to a conclusion that the parties knew from the outset that this was not a standard residential tenancy agreement, but an unusually long contract for vacation or travel accommodation. For example, the Respondent gave undisputed sworn testimony that this property was listed as a vacation rental and that the wording of the contract was drafted by a company they use for vacation rentals of the Respondent's properties. The Respondent gave undisputed sworn testimony that this property is a registered and legal vacation rental property. As legal counsel for the Respondent noted during the hearing, Section 2 of the Contract was "unconventional" and used "far from elegant wording." Despite the unusual wording of this monetary segment of the Guest Contract, the wording did convey a commitment by the Applicant to pay $40,089.25 in terms that included a non-refundable "Down Payment" totalling $8,489.25 in three equal instalments to be paid by the time the Applicant was to occupy the premises. Whether or not the Applicant moved into the premises early as the Applicant's legal counsel noted, this has little bearing on the monetary provision that this payment was to be made separate from other monthly payments in the amount of $2,633.33. The Guest Contract also includes wording that would not be typical of a residential tenancy agreement with respect to such features as overholding, cancellation, damage waivers, check in and check out times, mandatory cleanings, and an extensive indemnification clause that references a third party, a vacation home company, that would be involved in finding suitable alternative accommodations should the property become unavailable or unsuitable for the rental

period. Throughout the Guest Contract, the Applicant was described as a "Guest" and the Respondent as the "Owner."

I conclude from this review of the terms of the Guest Contract between the parties and the submissions of the parties that from the outset they were agreeing to terms that varied so considerably from those of a residential tenancy as to remove their contract from the jurisdiction of the *Act*. Based on the evidence before me, it would seem that the premises were advertised as a holiday/vacation rental by an owner who gave undisputed sworn testimony that they had registered the property as a legal vacation rental dwelling with the municipality. The contract between the parties reflected terms that required pre-payment of a significant sum of money before the Applicant could take possession of the premises and commence occupancy there, which again is typical of a holiday/vacation rental as opposed to a residential tenancy. While the term of this contract was unusually long for a holiday/vacation rental and there is undisputed testimony that the Applicant did use it as their permanent residence over that period, most of the important features of their agreement itself are consistent with the terms of a shorter term holiday/vacation rental. On this basis, I find that the original intention as reflected in the wording of the Guest Contract was to enter into a holiday/vacation rental of these premises, albeit one that was in excess of the norm.

If at some point, the parties had varied the wording of their agreement from the standard wording which the Respondent said they employed in other holiday/vacation rentals or was there evidence that the parties were considering changing the terms of their original Guest Contract, such changes might reflect a change in the original intentions of the parties to enter into a holiday/vacation rental. The parties provided no such evidence that would reflect any change in their original intentions with respect to the contract between them. As such, I conclude that the parties from the outset considered their contract to be a holiday/vacation rental and one which they realized from the outset contained terms that were features of that type of rental and not those of a residential tenancy.

In determining on a balance of probabilities that section 4(e) of the *Act* prevents me from considering this application, I recognize fully that there are some features of this relationship that would lead to a different finding with respect to jurisdiction. In a dispute resolution hearing, the party launching the application for a monetary award bears the responsibility for demonstrating entitlement to that monetary award, including a responsibility to demonstrate to the extent required that the application itself falls within the jurisdiction of the *Act*. I find that the Applicant has failed to establish that the application falls within the jurisdiction of the *Act* and conclude on the basis of the evidence before me that I have no authority to make a determination regarding this application.

Conclusion

I find that I do not have jurisdiction in this matter and I dismiss the Application for Dispute Resolution.

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 15, 2019

Residential Tenancy Branch