



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFT OPT

Introduction

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

- an Order of Possession of the rental unit pursuant to section 54; and
- authorization to recover his filing fee for this application from the landlord pursuant to section 72.

The tenant attended the hearing with her advocate GR. Both parties 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.

The landlord confirmed receipt of the tenant's application for dispute resolution ('applications'). In accordance with section 89 of the *Act*, I find that the landlord was duly served with the tenant's application. As both parties confirmed receipt of each other's evidentiary materials, I find that these documents were duly served in accordance with section 88 of the *Act*.

During the hearing, it came to my attention that both parties have applications scheduled for June 5, 2020, and both parties submitted evidence related to the issue of jurisdiction. As the evidence relates to this application and tenancy, and with the permission of both parties, the evidence submitted for the files in related to the issue of jurisdiction will be considered as part of this decision.

Issue(s) to be Decided

Does the tenant's application fall within the provisions of the *Act*?

Is the tenant entitled to an Order of Possession?

Is the tenant entitled to recovery of the filing fee?

Background and Evidence

This tenancy began on January 1, 2020. The tenant pays monthly rent in the amount of \$975.00, payable on the last day of the month. No security deposit was collected for this tenancy.

Both parties confirmed that the landlord resides upstairs in a 2 bedroom suite, while the tenant rents one of the bedrooms in a suite below. All the tenants share the kitchen and bathroom, as well as other common areas in the suite.

The landlord testified that the living accommodation is not a tenancy, but an “independent living program with room and board agreement”. As stated in the landlord’s application, “I understand that this program since it is a supportive living, does not fall under the jurisdiction and would like someone to look into this as my tenant and her lawyer are disputing the eviction issued on March 3rd. I provide meals and support for seniors 55+ the intention of this prog is to provide housing and meals along with medications for seniors who are independent yet need support and supervision to carry their living.”

The landlord testified that she shares the kitchen and bathroom with the tenants, which she has access to. The landlord testified that there is no lock on the door that separates her suite from the tenants’, and that she frequently uses the kitchen and bathroom downstairs, as well as the washer and dryer, which is located inside the bathroom. The landlord called a witness , SK, who confirmed this. The landlord acknowledged that several written rental agreements may exist as the tenancy agreements are amended and improved over time. The landlord argued that she receives referrals for new tenants, and that she had the explicit permission from government agencies to operate the independent living program. The landlord testified that in addition to the services she provides, home health care services are also provided through the health authority and social workers.

The tenant testified that she first moved in with her mother, who is now deceased. The tenant filed this application as the landlord has informed her that she plans on renting out the room to a second occupant as there is a vacant bed in the bedroom. The tenant feels that a second occupant or tenant would pose a serious health and safety risk, and is requesting exclusive use of the bedroom. The tenant pointed out that although the

living area, bathroom, and kitchen are shared, the bedroom is not. The tenant testified that the tenancy agreement does not specify the bedroom as a shared space. The tenant testified that she has never witnessed the landlord using the bathroom or kitchen for her own personal use, and that the landlord has her own suite upstairs with a kitchen and bathroom. The tenant feels that the landlord has included terms on the tenancy agreement for the purposes of avoiding the *Act*, such as the clause that the document is “not a rental agreement and does not fall under the Residential Tenancy Act”. The tenant testified that the landlord has failed to provide sufficient evidence to support the shared use of the kitchen and bathroom, which she has the use of in her own suite.

Issue: Does this Application Fall Within the Jurisdiction of the Act?

Section 4(c) of the *Act* reads in part as follows:

- 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,...*

The evidence of the landlord is that she shares the use of bathroom and kitchen with the tenants, and therefore the tenancy is excluded from the *Act*. Despite the testimony of the landlord and her witness, I do not find the landlord's submissions to be convincing or persuasive, especially considering the fact that the landlord has her own kitchen and bathroom in the same home.

Although the landlord may access the kitchen and bathroom, I find that this is not sufficient to support the shared use of these facilities, especially since the landlord has to access the bathroom in order to use the washer and dryer located inside the bathroom. The landlord's own testimony is that the photographs submitted shows linens that she was laundering. I also accept the landlord's undisputed testimony that she provides services to the tenants, such as meal service and supervision, which requires the landlord to access the common areas such as the bathroom and kitchen. I find that the landlord's ability or right to access the bathroom or kitchen does not necessarily prove the shared usage of these facilities, and in this case I am not satisfied that the evidence provided sufficiently supports the landlord's actual use of the bathroom or kitchen facilities, especially considering the fact that the landlord has her own kitchen and bathroom in the same home. I accept the fact that the landlord accessed these rooms as part of her role in servicing the tenants as part of the agreements, but that this access does not constitute the sharing of the facilities.

Section 4(f) of the *Act* provides that the *Act* does not apply to living accommodations provided for transitional housing. The *Residential Tenancy Regulation* defines transitional housing in section 1(2) as accommodations that are provided:

- (a) on a temporary basis,
- (b) by a person or organization that receives funding from a local government or the government of British Columbia or of Canada for the purpose of providing that accommodation, and
- (c) together with programs intended to assist tenants to become better able to live independently.

Based on the above definition, I am not at all satisfied that this type of accommodation falls under the definition of transitional housing. Although the landlord testified to fact that she had the approval and support of local agencies, I do not find that the evidence supports that the housing is temporary, or that she has received funding for the purposes of providing transitional housing.

Residential Policy Guideline #46 speaks to the definition of supportive housing:

D. SUPPORTIVE HOUSING

Supportive housing is long-term or permanent living accommodation for individuals who need support services to live independently. The *Residential Tenancy Act* applies to supportive housing, unlike emergency shelters and transitional housing which are excluded from the *Act*.

Under section 5 of the *Act*, landlords and tenants cannot avoid or contract out of the *Act* or regulations, so any policies put in place by supportive housing providers must be consistent with the *Act* and regulations.

Based on the definition above, and the fact that the landlord provides living accommodation to individuals who need support to live independently, I find that this tenancy falls under the definition of supportive housing. I find that the landlord clearly states in her own application that she provides living accommodation for those who are independent, and yet need support. As stated above, supportive housing is not excluded from the *Act*.

Although the written agreement includes a clause that the agreement is not a rental agreement and does not fall under the *Residential Tenancy Act*, and references the

agreement as a “room and board agreement”, the landlord may not avoid or contract out of the *Act* by including this clause.

The *Residential Tenancy Act* provides by section 5 that:

This Act cannot be avoided

5 (1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

Section 6 (3) provides:

(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.

Based on the evidence provided to me by the parties, I find that this tenancy falls under the definition of supportive housing, which remains within the *Act*. I find that the term of the Agreement that denies the tenant’s rights under the *Act* to be an attempt by the landlord to avoid the *Act*, and does not exclude the tenant or the landlord from being bound by the *Act*. As I find that this application and tenancy falls under the jurisdiction of the *Act*, I will consider the tenant’s application.

Analysis: Application for an Order of Possession by the Tenant

The tenant requested an Order of Possession for the rental unit as the landlord plans on renting out the room which she currently occupies to another tenant who would share the room with her. The landlord testified that the room is dual occupancy, as it contains two beds, and she has a suitable candidate for the second bed.

The tenant argued that despite the second bed, the tenancy agreement does not specify her room as shared accommodation, and that she would have exclusive use of

the room. The tenant does not give permission for the landlord to allow another occupant or tenant to share her room.

I note that although the written agreement designates certain spaces as “shared” spaces such as the living area, bathroom, kitchen, and laundry, the furnished room is not.

I find that the tenant’s monthly rent payments give her exclusive use of the rented room, and the landlord does not have the right under the *Act* to allow two separate tenancies for the tenant’s room. I find that the presence of a second bed, or designation as a dual occupancy room, does not automatically give the landlord the right to rent out the same room to a second tenant or occupant without the tenant’s express permission.

As stated above, I find that this tenancy falls under the jurisdiction of the *Act*, and the landlord cannot simply contract outside of the *Act*. As the tenant currently still has exclusive use of her room, I find that an Order of Possession is not currently required. I remind the landlord of her obligations under the *Act*. I dismiss the tenant’s application for an Order of Possession with leave to reapply.

I allow the tenant to recover the filing fee for this application. I allow the tenant to implement this monetary award by reducing future monthly rent payments until the amount is recovered in full.

Conclusion

I find that this tenancy is covered under the *Act*.

The tenant’s application for an Order of Possession is dismissed with leave to reapply.

I allow the tenant to recover the filing fee for this application. I allow the tenant to implement this monetary award by reducing future monthly rent payments until the amount is recovered in full

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 22, 2020