



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **CNL, FFT, MNDCT**

Introduction

The words tenant and landlord in this decision have the same meaning as in the *Residential Tenancy Act*, (the "Act") and the singular of these words includes the plural.

The parties were informed at the start of the hearing that recording of the dispute resolution is prohibited under the Rule 6.11 of the Residential Tenancy Branch Rules of Procedure ("Rules"). The parties were informed that if any recording was made without my authorization, the offending party would be referred to the RTB Compliance Enforcement Unit for the purpose of an investigation under the *Act*.

This hearing dealt with an application filed by the tenant pursuant the *Residential Tenancy Act* (the "Act") for:

- An order to cancel a 2 Month Notice to End Tenancy for Landlord's Use, pursuant to sections 49 and 55;
- Authorization to recover the filing fee from the other party pursuant to section 72; and
- A monetary order for damages or compensation pursuant section 67.

The landlord attended the hearing, and the tenant AC attended the hearing with an interpreter. As both parties were present, service of documents was confirmed. The landlord acknowledged service of the tenant's Notice of Dispute Resolution Proceedings Package and the amendment, however the tenant denies being served with any evidence from the landlord.

The landlord testified he sent his evidence to the tenant on November 12th, however the landlord was unable to provide the exact time of the transmission, nor prove me with the tenant's full email address. The landlord could not recall which email service provided the tenant used, such as @gmail.com; @yahoo.com; or @outlook.com, etc. On a balance of probabilities, I was not satisfied the landlord had served the tenant with his evidence in accordance with section 89 of the *Act* or section 43 of the Regulations and

as a result, the landlord's documentary evidence was excluded from consideration in this decision.

Preliminary Issues

The parties agree that after being served with the landlord's 2 Month Notice to End Tenancy for Landlord's Use, the tenant served the landlord with a tenant's 10 Day Notice to End Tenancy on August 18th and vacated the rental unit on September 1st. As a result, I find the tenancy has ended pursuant to section 44(1)(v) with the landlord's service of a 2 Month Notice to End Tenancy for Landlord's Use upon the tenants. The issue of disputing the landlord's notice to end tenancy is no longer an issue that may be determined under Part 5 of the *Act* and pursuant to section 62(4) this portion of the tenant's application is dismissed.

The landlord advised me that after the tenants moved out, he filed his own application for dispute resolution seeking compensation and authorization to retain the tenant's security deposit. A hearing date has been set for April 19, 2021 and the file number of the landlord's application is recorded on the cover page of this decision.

The amendment to the tenant's application for dispute resolution seeks compensation on two fronts. First is an order that the landlord return the tenant's security deposit (doubled). The second issue sought is for compensation of one month's rent for being served with a 2 Month Notice to End Tenancy for Landlord's Use.

As the issue of the security deposit will be determined at a hearing on April 19th and the time to exchange evidence has not yet passed, that issue will not be determined in this hearing. This hearing will solely determine whether the landlord is obligated to compensate the tenant with the equivalent of a month's rent for serving him with a 2 Month Notice to End Tenancy for Landlord's Use.

Issue(s) to be Decided

Is the tenant entitled to the equivalent of one month's notice pursuant to section 51 for being served with a 2 Month Notice to End Tenancy for Landlord's Use?

Background and Evidence

At the commencement of the hearing, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony pursuant to rule 7.4. In accordance with rules 3.6, I exercised my authority to determine the relevance, necessity and appropriateness of each party's evidence.

While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

The parties agree on the following. The rental unit is a half-duplex and the landlord occupies the other half of the duplex/house. A copy of the tenancy agreement was provided as evidence. The fixed term tenancy began on July 1, 2020 and was set to expire on January 1, 2021. Rent was set at \$2,300.00 per month, payable on the first day of each month. Utilities and furniture are included in the rent. The landlord collected a security deposit of \$2,300.00 and an additional deposit of \$2,300.00 representing the last month's rent. The parties agree that the landlord has already returned this additional deposit at the end of the tenancy.

The landlord testified that the tenant originally came to him seeking a quasi-short-term rental, longer than the regular rentals he books through Airbnb. The landlord submits that it would be less expensive for the tenant to enter into an agreement outside the Airbnb platform because Airbnb would take commissions which would ultimately be paid for by the tenant. According to the landlord, the tenant told the landlord that he was only temporarily in the country and that's why the expiry date on the fixed term tenancy was set as January 1st.

The landlord states the unit in question is not zoned for use as permanent housing and that he can only use it for vacation rentals, pointing to the business license he has with the city. He would be in breach of the licensing agreement by having a full-time tenant living in it. The landlord argue that the city zoning does not allow a third rental unit in the duplex and that the city told him to end the tenancy within a month. The landlord submits that it was a mistake to use the RTB form "tenancy agreement" with this tenant because it was not a true tenancy agreement. It was just a short-term vacation rental as described in section 4(e) of the *Act*. The landlord had never had a long-term tenant before, and he should have used another form. During the hearing, the landlord did not say what form he should have used for the tenancy with this tenant.

The landlord acknowledges that sometime in June or July 2021, around the same time he served the tenant with the 2 Month Notice to End Tenancy for Landlord's Use, he listed the house on the market for sale. It did not sell, and the landlord continues to own it.

The landlord acknowledges that when the 2 Month Notice to End Tenancy for Landlord's Use was first sent to the tenants, he only sent two pages, but he subsequently served the tenant with a full copy of the notice to end tenancy when the tenant asked for it.

At 9:52 a.m., the landlord excused himself to look up the date he served the notice to end tenancy. At 9:55 a.m., the landlord's phone disconnected. The landlord called back into the hearing at 10:03 a.m. During the time the landlord was absent, the tenant advised me that he moved out of the property. The tenant testified that the landlord returned the "extra" last month's rent collected from him by the addendum on the tenancy agreement, but the landlord did not return his security deposit or provide compensation to the tenant for serving him with a 2 Month Notice to End Tenancy for Landlord's Use.

The tenant gave the following testimony. This is a true tenancy agreement that falls under the jurisdiction of the Residential Tenancy Act. The original fixed term was set for 6 months because the tenant was waiting for a work permit. If he got it, he would stay longer. He was happy to find this rental unit because it allowed dogs which is difficult to find.

The landlord is trying to escape the requirement of compensating him with the equivalent of a month's rent by claiming the rental is a short-term vacation rental. The tenant points to the landlord's tactic of serving him with only two pages of the 2 Month Notice to End Tenancy for Landlord's Use in an attempt to obfuscate his responsibility to compensate him. The pages informing the tenant of his rights was missing.

In a text message between the parties, the tenant discovers that the landlord is obligated to pay the tenant. The tenant writes, *"I found it. It puts that you have to give us one month of compensation"*. To which the landlord responds, *"No I don't. I'm going to use this space for ourselves"*. Part 3 of the form is then circled and sent to the landlord in the tenant's evidence entitled, conversation 2.

Analysis

Section 51(1) of the Act states:

Tenant's compensation: section 49 notice

51 (1)A tenant who receives a notice to end a tenancy under section 49 [*landlord's use of property*] is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.

Before I can make a determination about whether the landlord is required to pay compensation under section 51, I must first be satisfied the parties are bound by a tenancy agreement under the Residential Tenancy Act.

The landlord argues that section 4(e) of the *Act* applies. According to this section, the Residential Tenancy Act does not apply to living accommodations occupied as a vacation or travel accommodation. Residential Tenancy Policy Guideline PG-27 [Jurisdiction] defines the following:

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. (emphasis in underline added)

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.

Even if a hotel room is operated pursuant to the *Hotel Keeper's Act*, the occupant is charged the hotel room tax, or the occupancy is charged a daily rate, a tenancy agreement may exist. A tenancy agreement may be written or it may be oral. A person occupying a room in a residential hotel may make an application for dispute resolution, without notice to any other party, requesting an interim order that the RTA applies to that living accommodation

Further, PG-9 [tenancy agreements and licenses to occupy] states:

B. TENANCY AGREEMENTS

Under a tenancy agreement, the tenant has exclusive possession of the site or rental unit for a term, which may be on a monthly or other periodic basis. Unless there are circumstances that suggest otherwise, there is a presumption that a tenancy has been created if:

- the tenant gains exclusive possession of the rental unit or site, subject to the landlord's right to access the site, for a term; and
- the tenant pays a fixed amount for rent.

Based on the criteria set out in the policy guideline, I find that there was a fixed term tenancy agreement between the parties. There are no elements of a vacation rental property before me. The tenancy agreement conferred exclusive possession of the rental unit to the tenant for the fixed term of the tenancy. A security deposit was

exchanged, and equal fixed monthly payments were made, without GST. The rental unit became the tenant's primary residence in Canada. Clearly, this is a tenancy agreement and not a short-term vacation rental.

Lastly, PG-20 [Illegal contracts] states:

Breach of a statute which is only incidental to the rental of premises, where the rental would otherwise be legal, does not make the contract illegal and thus void.

The landlord's argument that he rented the unit for a fixed term to the tenant in contravention of the city's bylaws does not make the tenancy agreement illegal and thus void. The parties are still bound by the *Residential Tenancy Act* and are responsible for all the rights and obligations set out therein. Section 58 of the RTA gives the director exclusive jurisdiction to resolve disputes involving the rights, obligations and prohibitions under the *Act*.

Having found that the *Act* applies to the relationship between this landlord and this tenant, I find that section 51(1) also applies. The tenant was served with a notice under section 49 of the *Act*. On or before the effective date, the landlord was obligated to compensate the tenant with the equivalent of one month's rent.

The tenant ended the tenancy before the effective date stated on the notice to end tenancy. Section 50(3) states that if a tenant ends the tenancy before the effective date by giving at least 10 days written notice, his right to compensation under section 51 is not affected. Consequently, I find that the landlord is still obligated to compensate the tenant with the equivalent of one month's rent. As rent was set at \$2,300.00, pursuant to sections 51 and 67, I order the landlord to compensate the tenant with \$2,300.00.

As the tenant's application was successful, the tenant is also entitled to recovery of the \$100.00 filing fee for the cost of this application.

Conclusion

I issue a monetary order in the tenant's favour in the amount of **\$2,400.00**.

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: November 30, 2021