



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL-S, FFL

Introduction

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

- a Monetary Order for damage or compensation, pursuant to section 67; and
- authorization to recover the filing fee from the tenants, pursuant to section 72.

The tenants and the landlord's agent (the "agent") attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they are not recording this dispute resolution hearing.

Per section 95(3) of the Act, the parties may be fined up to \$5,000.00 if they record this hearing: "A person who contravenes or fails to comply with a decision or an order made by the director commits an offence and is liable on conviction to a fine of not more than \$5 000."

Rule 7.4 of the Residential Tenancy Branch Rules of Procedure (the "*Rules*") states:

Evidence must be presented by the party who submitted it, or by the party's agent. If a party or their agent does not attend the hearing to present evidence, any written submissions supplied may or may not be considered.

Only evidence presented will be considered in this decision.

Both parties confirmed their email addresses for service of this decision.

Preliminary Issue- Service

The agent testified that the tenants were served with the landlord's application for dispute resolution via registered mail on January 13, 2022. The tenants confirmed receipt on or around that time. I find that the tenants were served in accordance with section 89 of the *Act*.

The agent testified that the tenants were served with the landlord's evidence via email on July 19, 2022. The tenants testified that they received the July 19, 2022 email on July 19, 2022.

The agent entered into evidence an RTB Form #51 Address for Service which is signed by both tenants and in which the tenants provided the landlord with their e-mail address for service.

The tenants testified that they did not know if they signed the RTB Form #51. The agent testified that the tenants signed the above form.

Section 88 of the *Act* sets out the approved methods of service for evidence as follows:

88 All documents, other than those referred to in section 89 [*special rules for certain documents*], that are required or permitted under this Act to be given to or served on a person must be given or served in one of the following ways:

- (a) by leaving a copy with the person;
- (b) if the person is a landlord, by leaving a copy with an agent of the landlord;
- (c) by sending a copy by ordinary mail or registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
- (d) if the person is a tenant, by sending a copy by ordinary mail or registered mail to a forwarding address provided by the tenant;
- (e) by leaving a copy at the person's residence with an adult who apparently resides with the person;
- (f) by leaving a copy in a mailbox or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord;

- (g)by attaching a copy to a door or other conspicuous place at the address at which the person resides or, if the person is a landlord, at the address at which the person carries on business as a landlord;
- (h)by transmitting a copy to a fax number provided as an address for service by the person to be served;
- (i)as ordered by the director under section 71 (1) [*director's orders: delivery and service of documents*];
- (j)by any other means of service provided for in the regulations.

Section 43(1) of the Regulation to the Residential Tenancy Act states:

For the purposes of section 88 (j) [*how to give or serve documents generally*] of the Act, the documents described in section 88 of the Act may be given to or served on a person by emailing a copy to an email address provided as an address for service by the person.

Based on the RTB Form #51 in evidence and the agent's testimony, which was more convincing than the tenants' uncertain testimony, I find that the tenants provided the landlord with written authorization to serve via email. Pursuant to section 88(j) of the *Act* and section 43(1) of the Regulation, I find that the tenants were served with the landlord's evidence on July 19, 2022. The landlord's evidence is admitted for consideration.

The tenants testified that they did not serve the landlord with their evidence.

Section 3.15 of the *Rules* states that the Respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing. As the landlord was not served with the tenant's evidence, contrary to *Rule* 3.15, I exclude the tenants' evidence from consideration.

Preliminary Issue -Amendment

The agent testified that the landlord is not seeking a Monetary Order but is actually seeking a finding that the tenancy agreement does not include the garage. The agent testified that she is withdrawing the landlord's claim for monetary compensation and is

seeking to amend the landlord's claim and is seeking a finding that the garage is not part of the tenancy agreement.

The tenants did not object to the requested amendment.

The landlord's original claim in the application for dispute resolution states:

This is unique request: upon discovery the Tenants have been using the detached garage, which was not included in their Tenancy Agreement, the Landlord is requesting compensation (\$200/monthly) for use of this space, or requests the Tenants remove their contents as this space is not included as part of their Tenancy Agreement. The Monetary request is for back pay of the space. Additionally, if they continue to utilize this space then the Landlord has requested a secondary agreement be drafted.

Section 4.2 of the Rules states that in circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, the application may be amended at the hearing. If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.

I find that the amendment sought by the landlord should have been reasonably anticipated by the tenant as the original application clearly seeks clarification on the permissibility of the tenant's use of the garage. Pursuant to section 4.2 of the Rules and section 64 of the *Act*, I grant the landlord the amendment sought.

Issue to be Decided

Is the garage included in the tenancy agreement?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

The agent testified that the subject rental property is the lower portion of a duplex, and the garage is a separate free standing building in the rear. This was not disputed by the tenants.

Both parties agreed that tenant K.A. moved into the subject rental property in November of 2018 as a roommate/occupant. The tenant was not on the tenancy agreement when she moved in. Both parties agree that the tenancy agreement in place at that time included use of the garage.

Both parties agree that in October of 2019 the above tenancy ended and tenant K.A. signed a new tenancy agreement with the landlord and another new tenant (tenant "G.E."). Tenant K.A. did not move out of the subject rental property between tenancies. The tenancy agreement does not mention the garage. The October 2019 tenancy agreement was entered into evidence.

Tenant K.A. testified that at the time the October 2019 tenancy agreement was signed, the landlord was represented by a different property manager. The agent testified that she has managed the property since November of 2019. Tenant K.A. testified that at the time the October 2019 tenancy agreement was signed, the landlord's property manager inspected the garage and confirmed that it was included in the tenancy agreement. Tenant K.A. testified that she has had possessions in the garage since she moved into the subject rental property in November of 2018.

Both parties agree that tenant G.E. moved out and a new tenancy agreement between the landlord, tenant K.A. and tenant J.M. (the current tenants) was signed effective October 1, 2020. The October 2020 tenancy agreement was entered into evidence. The tenants testified that they have stored their possessions in the garage for the entire duration of the October 2020 tenancy. The October 2020 tenancy agreement does not mention the garage.

Tenant K.A. testified that an agent of the landlord attended at the subject rental property at the start of the October 2020 tenancy agreement and inspected the garage and did not state that they were in breach of their tenancy agreement.

The agent testified that in a routine inspection on March 8, 2021, the landlord learned that the tenants were storing their possessions in the garage and sent a letter to the tenants dated April 8, 2021 asking the tenants to remove their possessions from the garage. Both parties agree that the tenants refused to comply with the April 8, 2021

letter. The agent testified that due to that refusal, this application for dispute resolution was filed.

The agent testified that the landlord prefers to rent the garage separately from the duplexes but has in the past also included it in the tenancy agreement. The agent testified that in the current tenancy agreement, since the garage is not specifically included in the written tenancy agreement, the tenants are not entitled to occupy that space.

The agent entered into evidence previous Residential Tenancy Branch decisions; however, these decisions were not presented.

Analysis

All tenancy agreements between a landlord and a tenant with respect to a rental unit and residential property are subject to the *Act*, unless specifically exempted. The definition of “tenancy agreement” in section 1 of the *Act* includes tenancy agreements entered into orally, in writing, and by way of implied or express terms. Therefore, in this case, the parties are bound by the terms of their oral agreement and written agreement, including any implied or express terms.

It is undisputed that:

- tenant K.A. has had use of the garage since she was an occupant living at the subject rental property starting in November of 2018,
- tenant K.A. continued to have use of the garage for the entire duration of the October 2019 tenancy, and
- the tenants had undisputed use of the garage for approximately the first five months of the October 2020 tenancy agreement.

Given the significant duration that the garage has been used by tenant K.A. through three separate tenancy agreements, I find that on a balance of probabilities, there was at least an implied term of tenancy in the October 2020 tenancy agreement, that the garage was included in the rent. Therefore, I find that the garage is included in the tenancy agreement and is included in the rent.

I note that the previous RTB decisions entered into evidence were not presented and were therefore not considered. I also note that pursuant to section 64(2) of the *Act*, I am not bound to follow other decisions made by the RTB. This decision is based on the

merits of the case as disclosed by the evidence admitted.

As the landlord was not successful in this application for dispute resolution I find that the landlord is not entitled to recover the filing fee from the tenant, pursuant to section 72 of the *Act*.

Conclusion

The garage is included in the rent and is an implied term of the tenancy agreement. The tenants are entitled to use of the garage.

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: August 10, 2022

Residential Tenancy Branch