



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFL, MNRL-S, MNDL, MNDCL

Introduction

This hearing dealt with a landlord's application against a tenant for monetary compensation for unpaid and/or loss of rent under the *Residential Tenancy Act* ("the Act").

Both the landlord and the tenant appeared for the hearing. The parties were affirmed and the parties were ordered to not record the proceeding. The hearing was held over two dates and an Interim Decision was issued on December 3, 2021. The Interim Decision should be read in conjunction with this decision. At the second hearing session, the landlord was represented by legal counsel.

As seen in the Interim Decision I issued orders with respect to service of materials. At the start of the reconvened hearing, I explored with the parties whether they had served and received the other parties' materials. I was satisfied that the parties had exchanged their respective materials and I admitted them into evidence for consideration in making this decision.

The parties were in dispute as to whether the Act applies to their agreement. Jurisdiction was identified as a preliminary matter and I proceeded to hear from both parties with respect to that issue.

While I was provided a considerable amount of testimony, documentary evidence and arguments, with a view to brevity in writing this decision I have only summarized the parties' respective positions and referenced the most relevant evidence I relied upon.

Preliminary Issue to be Decided – Jurisdiction

Does the *Residential Tenancy Act* apply to the parties' tenancy agreement?

Background and Evidence

It was undisputed that the parties executed a written tenancy agreement dated January 2, 2020. It is also undisputed that a security deposit was collected by the landlord but the tenant did not ever take possession of the rental unit and did not pay any rent to the landlord.

Landlord's position

The landlord testified that the rental unit is a live/work designated unit in 40 unit building where all units are designated to be live/work units. The landlord understands the live/work designation means a person may sleep and work at the same location.

In advertising the rental unit online, the landlord did not indicate a specific purpose for the rental unit. According to the landlord, when the tenant responded to the advertisement and viewed the unit on December 26, 2019, the tenant indicated he wanted to live in the unit and potentially work from the unit. The tenant did not specify what type of work he would be doing and the landlord noted a different address on the tenant's driver's license.

According to the landlord, both parties understood they were entered into a residential tenancy, as supported by the residential tenancy agreement signed by both parties on January 2, 2020.

The landlord pointed to the tenancy agreement and in particular the section that identifies that the named tenant is the only person to permanently occupy the rental unit. The landlord understood this to mean the tenant would be occupy the rental unit as his residence.

The landlord testified that it was not until an email dated February 3, 2020 did the tenant take issue with the tenancy agreement naming the tenant personally rather than his business or that the tenancy agreement was consistent with a residential tenancy agreement.

Tenant's position

The tenant testified that he never intended to occupy the rental unit as his residence. Rather, he rented the space with the intention of setting it up as an office space for 3 – 5 staff persons to run his e-commerce business from that location. The tenant submitted that the rental unit is approximately 800 square feet with one bedroom. The tenant and his life partner live in another country and there is no way he and his partner, along with workstations for 3 to 5 staff persons, could fit in the rental unit.

In support of his position, the tenant pointed to emails whereby he communicated to the landlord that he would need multiple fobs to access the building and rental unit for his employees. Other emails point to the tenant's intention to bring in office furniture but there is no mention of moving in furniture associated with residential use.

The tenant subsequently secured a larger unit in the same building and set that up as the office space. The tenant provided photographs of the office space set up in the larger unit, including his staff persons at work, in support of his position that the rental unit was intended for office space only.

The tenant pointed out that the landlord also maintains a unit in the same building as office space only.

The tenant testified that he did not read the tenancy agreement before he signed it, but that his manager "Mike" did. Also, this was the first time the tenant rented office space. The tenant's office manager "Mike" wrote a letter describing the intended use of the rental unit.

Analysis

Upon consideration of everything before me, I provide the following findings and reasons.

As provided under section 2 of the Act, the Act applies to residential property, rental units and tenancy agreements between a landlord and tenant. Section 16 of the Act further provides that "[t]he rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit." In this case, it is agreed that the parties entered into a single tenancy agreement on January 2, 2020 and the tenant did not ever take possession of the rental unit. As such, taking occupancy is not a

determinative factor and I proceed to consider whether the Act applies to the tenancy agreement.

As stated previously, the parties are in dispute as to whether the tenancy is subject to the Act. More specially, the parties are in dispute as to whether the tenancy was residential or commercial in nature.

There are certain exemptions from the application of the Act, as provided under section 4 of the Act.

Below, I have reproduced section 4(d) specifically:

What this Act does not apply to

4 This Act does not apply to

(d) living accommodation included with premises that

(i) are primarily occupied for business purposes, and

(ii) are rented under a single agreement,

The Residential Tenancy Branch also provides a policy guideline to aid in making a determination between a residential and commercial tenancy and the exemption for commercial tenancies that stem from the exemption provided under section 4(d).

Below, I have reproduced the relevant portions of Residential Tenancy Policy Guideline

14. Types of Tenancy: Commercial or Residential.

Neither the Residential Tenancy Act nor the Manufactured Home Park Tenancy Act applies to a commercial tenancy. Commercial tenancies are usually those associated with a business operation like a store or an office. If an arbitrator determines that the tenancy in question in arbitration is a commercial one, the arbitrator will decline to proceed due to a lack of jurisdiction. For more information about an arbitrator's jurisdiction generally, see Policy Guideline 27 - "Jurisdiction."

Sometimes a tenant will use a residence for business purposes or will live in a premises covered by a commercial tenancy agreement. The Residential Tenancy Act provides that the Act does not apply to "living accommodation included with premises that (i) are primarily occupied for business purposes, and (ii) are rented under a single agreement.

To determine whether the premises are primarily occupied for business purposes or not, an arbitrator will consider what the “predominant purpose” of the use of the premises is. Some factors used in that consideration are: relative square footage of the business use compared to the residential use, employee and client presence at the premises, and visible evidence of the business use being carried on at the premises.

[My emphasis underlined]

Before me is an executed tenancy agreement that is identified as being a residential tenancy agreement in its title and I note that many of its provisions reference the Act or are consistent with what one would expect to see in a residential tenancy agreement, including a provision for occupancy. The tenancy agreement provides that the tenant himself would be the only permanent occupant.

The landlord testified that drafting the tenancy agreement as a residential tenancy agreement is because he understood the tenant intended to reside in the rental unit and that the tenant may “potentially” run a business as well. The tenant denied that to be accurate and testified that he did not represent to the landlord that he would reside in the rental unit and he was clear that the intended purpose was for use as an office. I find the evidence before me supports the tenant’s version of events over the landlord’s for reasons set out below.

On December 31, 2019 the tenant writes an email to the landlord stating, in part:

- We will need at least three fobs with the unit. There will be at least 3-5 people working daily mon-Friday.

One day after the tenancy agreement was executed, on January 3, 2020, the landlord sends the by-laws to the tenant, via email, and in response the tenant writes to the landlord:

Received, thank you.

When can you give me the date we can move in? We need to plan for the furniture to arrive.

Also I'd like Mike to come by and take a look at the office space to plan out our office space.

The landlord responds to the tenant’s request to show “Mike” the office space the same day with “I could show him any time on Saturday between 11 am and 1 pm...” and there

is no indication from the landlord that use of the rental unit for office space had not been previously discussed or anticipated.

The next event was payment of the security deposit, via etransfer, on January 6, 2020. As seen in the landlord's evidence, the sender of the etransfer is identified as the tenant's business name.

On January 8, 2020 "Mike" is shown the rental unit as requested.

Then on January 23, 2020 the tenant sends an email to the landlord stating, in part:

I am sorry to inform you but I can't proceed with renting your unit. We have found another unit that suits my team and our plans better, with a separate office for me, full parking and storage. Your space is amazing and I am positive you will rent it out.
We have just hired 4 more people and it will be very tight.

In the tenant's email of January 23, 2020, I find the tenant points out use of the space for "my team" and that 4 more people have been hired and the space of the rental unit will be tight. I further find this communication also supports the tenant's testimony that the rental unit was intended for office space for employees to work.

On the same day, the landlord responds to the tenant as follows, in part:

Per our conversation, I would like to draw your attention to our Rental Agreement, Section 8 on Page 6, which is initialled and signed by you. Based on this section, if you are to break the contract and move out before the end of your tenancy term, which in this case is exactly 1 year, then you will be responsible for the owing remaining rents until the contract ends!
I hope you understand that I am trying to be very fair and reasonable.
I kindly offer you an option. The place is now rented by you and you must start paying the rent by Feb 1st, 2020. However, we both can start advertising the place using our own platforms and show it to potential *suitable* renters. As soon as any of us find a *suitable* tenant, I will terminate yours and you can move out without paying any compensation.

I find it telling that despite the tenant pointing to his "team" and hiring more staff and desiring a larger unit, the landlord does not exhibit any surprise that the tenant has staff, has hired more staff, and that the unit needs to accommodate his staff.

In addition to all of the communications between the parties that I find points to the intended use of the rental unit for office space for employees working for the tenant's

business, further corroborating evidence is a letter from “Mike”, the tenant’s manager but more so the photographs of the office the tenant set up in the larger unit rented in the same building.

In the photographs, I can see five desks, along with three persons working at the desks, in what appears to be a kitchen/living/dining area of a unit and a desk, with a person working at the desk, and a guest chair in what appears to be a bedroom. Although the photographs were taken of the office space set up after the tenant abandoned the subject tenancy agreement, I find it relevant as far as determining the portion of square footage that would have been for office use versus residential use. The tenant had informed the landlord in advance of the tenancy agreement execution that he intended to have 3 to 5 staff working in the rental unit. Given the rental unit was only 800 square feet, with one bedroom, I cannot imagine the tenant having sufficient residential space and residential furniture along with up to five desks and staff all in the same unit. Accordingly, I find it more likely than not that the majority of the rental unit space, if not all of it as stated by the tenant, was to be used for office space.

Also of interest is the term in the tenancy agreement that provides for parking. Under the tenancy agreement the tenant was limited to use of the parking spot to Monday to Friday between 9 am and 5 pm. Those days and times are more typical of office hours and are in keeping with the days the tenant disclosed to the landlord that his staff would be working in the unit in the email of December 31, 2019. Typically, residential tenants are not prohibited from using the parking spot provided under their tenancy agreement and to prohibit a residential tenant from use of a parking spot in the evenings and weekends would be extremely limiting for a residential tenant.

In light of all of the above, I find that the “predominant purpose” of the rental unit was to be for office space for staff persons and that this was disclosed to the landlord. Just as parties cannot avoid the Act by saying so in writing, parties cannot agree the Act applies when it does not. Accordingly, I find the true nature of the tenancy was that of a commercial one and the executed tenancy agreement does not supersede that. Therefore, I decline to accept jurisdiction to resolve this dispute.

Conclusion

I have declined to accept jurisdiction to resolve this dispute having found the tenancy was commercial in nature and not subject to the Act.

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 26, 2022

Residential Tenancy Branch