



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MARGARET 9888 LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD, FFT

Introduction

This hearing was scheduled to deal with a tenant's application for return of the security deposit.

Both parties appeared for the hearing and were affirmed. Both parties had the opportunity to make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

Preliminary and Procedural Matters

1. Service

The tenant submitted that he had not received any documentation showing the landlord's name and service address. As such, he sent the proceeding package, via registered mail, to the rental unit address; however, the registered mail was returned because there was no name listed for the addressee and the person that did come to retrieve the registered mail did not have identification with the address of the rental unit on it. The tenant also left a copy of the proceeding package in the mailbox at the rental unit. Appearing for the respondent was MW and MW confirmed she found the proceeding package in the mailbox and she was prepared to respond to it. Accordingly, I deemed the proceeding package to be sufficiently served pursuant to the discretion afforded me under section 71 of the Act.

The respondent's evidence was sent to the tenant via registered mail and the tenant confirmed receiving the respondent's evidence package. Accordingly, I admitted the respondent's evidence for consideration in making this decision.

2. Naming of respondent landlord(s)

I noted that in filing the Application for Dispute Resolution the tenant listed a business operating name for the landlord. I explored the correct identity of the owner/landlord with MW.

MW testified that the property is owned by a corporation and that she personally owns 100% of the shares of the corporation.

Rooms at the subject property are rented out under the business operating name listed on the Application for Dispute Resolution but MW operates the business.

As provided in Residential Tenancy Policy Guideline 43: *Naming parties*, the correct legal name of the party must be identified. A business operating name is not a legal entity.

Since the property is owned by a corporation and the corporation was represented by its sole shareholder at the hearing, I amended the application to name the corporation as a respondent landlord..

Having heard MW uses the business operating name to conduct the business of renting out rooms, I amended the application to name MW as a respondent.

3. Jurisdiction

MW submitted that the living accommodation is exempt from the Act for two reasons: because tenants share a kitchen and/or bathroom with the owner and because the rooms are travel or vacation accommodation. The landlord also raised an argument that she had negotiated the contract and took payment from the applicant's mother and she does not recognize the applicant as a tenant. Below, I summarize the parties' respective positions concerning the issue of jurisdiction.

a. Shared kitchen and/or bathroom

MW testified that the tenant was to rent two rooms that had furnishings, for \$1500.00 per month, but that the kitchen and bathrooms at the subject property are shared with other guests, and MW. MW provided letters from other people who rent rooms at the property in support of this position and a previously issued dispute resolution decision of a different Arbitrator.

The tenant did not refute that the kitchen and bathrooms at the property are shared and that MW may use the kitchen and bathroom at the property.

MW argued that she and her corporation and business are one in the same.

b. Vacation or travel accommodation

MW submitted that the property is licensed as a hotel or hostel. As such, the *Hotel and Innkeepers Act* applies to the property and the agreements with the people renting rooms at the property.

MW submitted that tax is collected on stays that are less than 28 days but no tax is collected on stays that exceed 28 days. MW did not know why there is no tax collected on stays longer than 28 days.

The tenant submitted that he was to rent the rooms as his residence while attending university and his stay was to be for the term of four months. The tenant submitted that the landlord was made aware of this and there was no discussion that he was renting the rooms as vacation or travel accommodation. The tenant submitted that collecting a security deposit is inconsistent with renting a hotel and that hotels generally take a credit card to secure a hotel room.

MW stated she did not enquire as to the purpose of the tenant's stay but acknowledged that it was to be four months in duration. MW stated that a credit card imprint would be taken for a person staying one night but that stays longer than that she requires a security deposit.

MW acknowledged that she did not prepare a written agreement or issue a receipt for the security deposit collected. MW was of the position that since the security deposit was paid by e-transfer there is documentation to demonstrate the payment was received.

MW explained that she retained the security deposit since very little notice was given to cancel the agreement. MW also stated that when the tenant did not move into the room, she held the room and did not re-rent it as she was uncertain as to what the tenant was doing.

c. Identity of tenant

The respondent submitted that all of her dealings were with the tenant's mother and that it was the tenant's mother that paid the security deposit. As such, the respondent does not recognize the applicant as the person she has an agreement with.

The tenant stated that his mother spoke to the landlord on the phone and via text messages on his behalf since the landlord and his mother speak the same language and the tenant does not speak or read that language well.

The tenant also stated that when he and his father arrived at the property on January 18, 2022, they met with MW but a dispute arose because MW demanded another \$500.00 for the security deposit and for payment of rent for the entire month of January 2022.

The landlord provided similar statements that when the applicant and his father arrived at the property in January 2022, she informed the applicant and his father that the security deposit was \$500.00 short and that she required payment of the full month's rent for January 2022 as she had informed the applicant's mother before she would allow him to move in.

Analysis – Jurisdiction

Pursuant to section 2 of the Act, the Act applies to rental units, residential property and tenancy agreements between a landlord and a tenant. Section 16 further provides that the rights and obligations of a landlord and tenant commence when the tenancy agreement forms, regardless of whether the tenant ever occupies the unit.

Section 1 of the Act defines a tenancy agreement to mean:

"tenancy agreement" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit

A licence to occupy may include hotel rooms. As such, the licensing of a property as a hotel or hostel does not in itself exempt the rented premises, or the parties' agreement, from the Act. Rather, section 4 of the Act provides for specific exemptions, including:

(e) living accommodation occupied as vacation or travel accommodation,

Residential Tenancy Policy Guideline 27: *Jurisdiction* provides information and policy statements with respect to application of the Act and exempted accommodation. Under the section entitled Vacation or Travel Accommodation and Hotel Rooms, the Policy Guideline states:

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.

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.

[My emphasis underlined]

I find it is the intended use of the rented premises that determines whether the living accommodation is exempt and the licensing of the property as a hostel or hotel is not in itself determinative. In this case, the purported licensing and/or zoning of the property as being for hotel or hostel use supports the landlord's position; however, I find the preponderance of the evidence is indicative of a residential tenancy rather than a vacation or travel accommodation considering the following factors:

- The tenant submitted that he was to occupy the rental unit as his residence, for a term of four months, while he was attending university. The landlord acknowledged that they had agreed to a four month rental term. There is no indication from the respondent that the applicant had made representations that he was using the room while on vacation or travelling.
- The landlord acknowledged she did not charge and would not be charging any tax on the rent due because the rental period exceeded 28 days. Residential rents are exempt from tax; however, the landlord did not produce any evidence to demonstrate that travel and vacation accommodations over 28 days are exempt from tax. I find the exemption from sales and/or hotel tax is more in keeping with a tenancy than vacation or travel accommodation.
- I further find it unusual for a hotel to collect a “deposit” months in advance rather than accepting an imprint of a credit card at “check-in” as is customary for hotel stays and I find the collection of a deposit months prior to arrival is more typical of a tenancy.
- The respondent claims that she held onto the rooms to be rented to the applicant and did not re-rent them even though she also took the position the contract was cancelled. I find it extremely unlikely that travel or vacation accommodation in a hotel would hold a room after the reservation has been cancelled. As such, I find the respondent’s explanation is conflicting and very unlikely.
- Finally, I heard from both parties, the landlord expected payment for the room for the entire month of January 2022 even though it was pre-agreed that the tenant would not be arriving part way through the month and I have never heard of a travel or vacation accommodation charging for several nights before a guest is set to arrive. Paying for a full month, regardless of occupancy, is more typical of a tenancy than vacation or travel accommodation.

As for the landlord’s position that the applicant is not the person who entered into the agreement, clearly a written contract or agreement would have identified the tenant. Also, a receipt issued by the respondent may have also provided evidence as to the identity of the tenant. However, the respondent prepared none of these documents and during the hearing I strongly suggested that it would be a good practice to document the agreement when it forms and/or when payment is accepted.

In this case, it was undisputed that when the agreement was being discussed, the communication was in a different language. I accept that the applicant’s mother was

speaking on behalf of the applicant but that the intended occupant of the room was the tenant. Although occupancy does not in itself determine the identity of a tenant, it is one factor. Identity of the person who pays a security deposit is also a factor in identifying a tenant but that, in itself, is not determinative either. A very common example of a security deposit paid by an entity other than a tenant is payment of a deposit by the government for tenants on government assistance. In those cases, the government is not the tenant even though the government paid the deposit and, in many cases, also pays the rent to the landlord. I have considered when the applicant arrived at the property to move in, the landlord proceeded to demand more money. If the landlord was of the position the applicant was not a tenant then there would be no demand for more money for the security deposit and rent from him. Therefore, considering the applicant was the intended occupant of the subject rental unit and the landlord demanded more money for a security deposit and rent from him upon his arrival at the property, I find on the balance of probabilities, that he has standing as a tenant.

In summary, I find the Act applies to the agreement for rental of the subject property and it is not exempt under section 4(c) or (e) of the Act. I am further satisfied the applicant has standing as a tenant. Accordingly, I accept jurisdiction to resolve this dispute.

Issue(s) to be Decided

1. Is the tenant entitled to return of the security deposit and should it be doubled?
2. Award of the filing fee.

Background and Evidence

The landlord collected a \$1000.00 security deposit and rent was to be \$1500.00 per month payable on the first day of every month although the parties were in dispute as to whether rent would be pro-rated for the month of January 2022.

On January 18, 2022 the tenant arrived at the property to move into the rental unit and a dispute arose. The landlord demanded \$500.00 more for a security deposit and rent for the entire month of January 2022 whereas the tenant was of the position that the \$1000.00 security deposit that had already been paid exceeded the limit of the Act and that rent for January 2022 should be pro-rated. The police were called and attended the property. The landlord did not provide the tenant with access to the rental unit.

On February 7, 2022 the tenant wrote a letter to the landlord, providing his forwarding address. The letter was posted next to the front door of the property. The landlord

stated she did not receive the letter. The tenant took a photograph of the letter taped to the wall next to the front door of the property.

The landlord has retained the security deposit without refunding any part of it. The landlord has not made a Landlord's Application for Dispute Resolution to seek authorization to retain it.

Analysis

Section 38(1) of the Act provides that the landlord has 15 days, from the date the tenancy ends or the tenant provides a forwarding address in writing, whichever date is later, to either refund the security deposit, get the tenant's written consent to retain it, or make an Application for Dispute Resolution to claim against it. Section 38(6) provides that if the landlord violates section 38(1) the landlord must pay the tenant double the security deposit.

In this case, I have found that a landlord/tenant relationship formed between the parties and the landlord collected a security deposit of \$1000.00 on behalf of the tenant. The parties provided consistent statements that the tenancy was to commence in January 2022 although they were in disputes as to the exact date it was to commence in January 2022.

It is undisputed that on January 18, 2022 a dispute arose and the landlord did not permit the tenant occupancy of the rental unit. As such, I find the tenancy came to an end on January 18, 2022.

The tenant submitted evidence that he provided his forwarding address to the landlord, in writing, by posting it next to the front door of the subject property on February 7, 2022. The subject property is where the landlord carries on business as a landlord and based on the photograph, I find I am satisfied that the tenant served the landlord with his forwarding address in a manner that complies with section 88 of the Act by posting it in a conspicuous place.

A document posted on a door or other conspicuous place is deemed to be received three days later. As such, I find the landlord to be deemed in receipt of the tenant's forwarding address on February 10, 2022. Accordingly, I find the landlord had until February 25, 2022 to either refund the security deposit, get the tenant's written consent to retain it, or file an Application for Dispute Resolution to make a claim against it. The

landlord did none of these things and now the tenant is entitled to return of double the security deposit under section 38(6) of the Act.

In keeping with the above, I award the tenant double the security deposit, or \$2000.00. I further award the tenant recovery of the \$100.00 filing fee.

With this decision, the tenant is provided a Monetary Order in the sum of \$2100.00 to serve and enforce.

Conclusion

The tenant was successful in his application and is provided a Monetary Order in the sum of \$2100.00.

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 15, 2022

Residential Tenancy Branch