



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNRT MNDCT MNSD FFT**

Introduction

This hearing was convened by way of conference call in response to the Applicants' application for dispute resolution ("Application") under the *Residential Tenancy Act* (the "Act") in which the Applicants seek:

- an order for the Applicants to be paid back by the Respondent for the cost of emergency repairs made by the Applicants pursuant to section 33(5);
- an order for monetary order for compensation from the Respondent pursuant to section 67;
- an order for the return of Applicants' deposit pursuant to section 38; and
- authorization to recover the filing fee for the Application from the Respondent pursuant to section 72.

One of the two Applicants ("KO") and the Respondent attended the participatory hearing. The parties were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I informed the parties that the *Residential Tenancy Branch Rules of Procedure* ("RoP") prohibit persons from recording dispute resolution hearings and, if anyone was recording the hearing, to immediately stop recording the proceeding.

KO stated the Notice of Dispute Resolution Proceeding and the Applicants' evidence ("NDRP Package") was served on the Respondent by registered mail on May 18, 2022. KO submitted into evidence a copy of the Canada Post receipt dated May 18, 2022 to corroborate his testimony. The Respondent acknowledged she received the NDRP Package. I find the NDRP Package was served on the Respondent in accordance with the provisions of sections 88 and 89 of the Act.

The Respondent stated she served her evidence on the Applicants by email on January 10, 2022. Although the Respondent did not submit any evidence to verify the Applicants agreed in writing that they could be served with documents required by the Act by email, KO admitted the Applicants received the email and the Respondent's evidence. As such, I find the Applicants were sufficiently served with the Respondent's evidence pursuant to section 71(2)(b) of the Act.

Procedural Issue – Jurisdiction of Residential Tenancy Branch to hear Application

The Applicants submitted into evidence a copy of a partial copy the tenancy agreement ("Original Tenancy Agreement") between the owner ("Owner") of the residential unit ("Unit") and the Respondent dated April 20, 2021. The Original Tenancy Agreement stated the tenancy commenced on May 1, 2021, with a fixed term ending May 1, 2023. The parties did not submit a written agreement between them that documents the terms of their living arrangements in the Unit. However, the parties agreed the Applicants were required to pay the Respondent \$1,600.00 per month for rent and pay a deposit of \$800.00. The Respondent acknowledged she received the deposit from the Applicants.

The parties agreed the Applicants used the upper floor of the Unit and the Respondent used the lower floor of the Unit and the parties shared the kitchen located on the upper floor. The Respondent stated she used the kitchen for a period of time but, due to problems, she stopped using the kitchen. There is no evidence before me that the Applicants and Respondent agreed upon a fixed date that the Applicants were required to vacate the Unit. The Respondent argued that the Residential Tenancy Branch ("RTB") does not have jurisdiction to hear the Application.

Section 4(c) of the Act states:

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,

[...]

Based on the testimony of the parties, I find that the Respondent is not an owner of the Unit. As such, the living arrangements between the Applicants and Respondent are not excluded from operation of the Act based on section 4(c) of the Act. Now I must consider whether there was a subtenancy between the Applicants and the Respondent.

Residential Tenancy Policy Guideline 19 ("PG 19") addresses the subletting of a rental unit or manufactured home site. PG 19 states in part:

Sublets as contemplated by the *Residential Tenancy Act*

When a rental unit is sublet, the original tenancy agreement remains in place between the original tenant and the landlord, and the original tenant and the sub-tenant enter into a new agreement (referred to as a sublease agreement). *Under a sublease agreement, the original tenant transfers their rights under the tenancy agreement to a subtenant. This must be for a period shorter than the term of the original tenant's tenancy agreement and the subtenant must agree to vacate the rental unit on a specific date at the end of sublease agreement term, allowing the original tenant to move back into the rental unit.* The original tenant remains the tenant of the original landlord, and, upon moving out of the rental unit granting exclusive occupancy to the sub-tenant, becomes the "landlord" of the sub-tenant. As discussed in more detail in this document, there is no contractual relationship between the original landlord and the sub-tenant. The original tenant remains responsible to the original landlord under the terms of their tenancy agreement for the duration of the sublease agreement.

[emphasis added in italics]

Landlord is defined in the RTA as:

"landlord", in relation to a rental unit, includes any of the following:

- (a) the owner of the rental unit, the owner's agent or another person who, **on behalf of the landlord**,
 - (i) permits occupation of the rental unit under a tenancy agreement, or
 - (ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement;
- (b) the heirs, assigns, personal representatives and successors in title to a person referred to in paragraph (a);
- (c) a person, **other than a tenant occupying the rental unit**, who
 - (i) is entitled to possession of the rental unit, and
 - (ii) exercises any of the rights of a landlord under a tenancy agreement or this Act in relation to the rental unit;
- (d) a former landlord, when the context requires this;

Unlike assignment, a sublet is temporary. In order for a sublease to exist, the original tenant must retain an interest in the tenancy. While the sublease can be very similar to the original tenancy agreement, *the sublease must be for a shorter period of time than the original fixed-term tenancy agreement – even just one day shorter*. The situation with month-to-month (periodic) tenancy agreements is not as clear as the Act does not specifically refer to periodic tenancies, nor does it specifically exclude them. In the case of a periodic tenancy, there would need to be an agreement that the sublet continues on a month-to-month basis, less one day, in order to preserve the original tenant's interest in the tenancy.

The sub-tenant's contractual rights and obligations are as set out in the sublease agreement. Generally speaking, the sub-tenant does not acquire the full rights provided to tenants under the Act. For example, if the landlord ends the tenancy with the original tenant, the tenancy ends for the sub-tenant as well. The sub-tenant would not be able to dispute the landlord ending the tenancy with the original tenant; it would be up to the original tenant to dispute the notice.

[...]

While the *RTA* does not specify what the rights and responsibilities of the original tenant and subtenant are, the common law, pursuant to s. 91 of the *RTA*, may apply. In the event of uncertainty around the rights and responsibilities of parties to a sublease agreement, an arbitrator will consider the individual circumstances and evidence of each case in making a determination.

The sub-tenant typically pays rent to the original tenant; but even if he or she fails to do so, the original tenant's responsibility to pay rent to the landlord is unaffected and the original tenant can be evicted if rent is not paid. Again, it should be noted that there is no contractual relationship between the original landlord and the sub-tenant. *In the event of a dispute, the sub-tenant may apply for dispute resolution against the original tenant, but likely not the original landlord, unless it can be shown there has been a tenancy created between the landlord and sub-tenant.*

Where an individual agrees to sublet a tenancy for the full period of the tenancy and does not reserve some period of time at the end of the sublease, the agreement likely amounts in law to an assignment of the tenancy rather than a sublease; an arbitrator may make that determination in a hearing.

Example: In month four of a twelve month fixed-term tenancy agreement, John (with the written consent of the landlord) sublets his tenancy in a rental unit to Susan for six months because he is going overseas to work. The agreement

between John and Susan states that at month 11, John will return, Susan will vacate the rental unit, and John will re-occupy it (although the parties could agree that Susan stays on as an occupant/roommate). During the six month sublet, Susan pays rent to John, who is responsible for paying rent to the original landlord. The landlord would deal with John if any issues arose with the unit.

The parties did not provide any testimony or submit any evidence to demonstrate that the term of the living arrangements with the Respondent was for a shorter term than the term of the Original Tenancy Agreement or that the Applicants would vacate the Unit on a specific date before the end of the Original Tenancy Agreement. As such, I find the living arrangements between the Applicants and Respondent was not pursuant to a subtenancy agreement.

I will now consider whether there was a license between the Applicants and Respondent. *Residential Tenancy Policy Guideline 27* ("PG 27") states:

DISPUTES BETWEEN TENANTS AND ROOMMATES

The RTA gives the director authority to resolve disputes between landlords and tenants. However, a tenant who is entitled to possession of a rental unit and is occupying that rental unit is excluded by definition from being a landlord in the RTA. That means the director has no jurisdiction to resolve disputes between co-tenants, tenants in common, or roommates.

The basis for this can be found in the Act. Section 2 of the Act states:

What this Act applies to

- 2(1) Despite any other enactment but subject to section 4 [*what this Act does not apply to*], this Act applies to tenancy agreements, rental units and other residential property.

Section 1 of the Act defines "tenancy agreement" as:

"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;

As the Act defines tenancy agreement as an agreement between a landlord and a tenant, and as the Respondent is not a landlord as defined by the Act, the arrangement between the Respondent and the Applicants whereby the Applicants rented parts of the Unit, is not a “tenancy agreement” as defined by the Act.

Similarly, the Act requires that a “rental unit” must be rented or be intended to be rented by a tenant. I find that a “tenant” can only rent a living accommodation from a “landlord” by way of a “tenancy agreement”. I have already found that the Respondent is not a “landlord” and that the agreement between the Applicants and Respondent is not a “tenancy agreement”. As such, I cannot find that the Unit is a “rental unit” as defined by the Act.

Based on the foregoing, I find that the Act does not apply to the dispute between the Applicants and Respondent. Accordingly, I must dismiss the Application, without leave to reapply.

Conclusion

The Application is dismissed without leave to reapply.

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: January 28, 2023

Residential Tenancy Branch