



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes DRI, RP, OLC, FFT

Introduction

The Applicant seeks the following relief under the *Residential Tenancy Act* (the “Act”):

- an order pursuant to s. 43 disputing a rent increase;
- an order pursuant to s. 32 for repairs to the rental unit;
- an order pursuant to s. 62 that the landlord comply with the Act, Regulations, and/or the tenancy agreement; and
- return of the filing fee pursuant to s. 72.

S.C. appeared as the Applicant and was joined by her advocate, D.G.. V.S. appeared as the Respondent’s agent.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The parties advise that they served their application materials on the other side. Both parties acknowledge receipt of the other’s application materials without objection. Based on the mutual acknowledgments of the parties without objection, I find that pursuant to s. 71(2) of the *Act* that the parties were sufficiently served with the other’s application materials.

Preliminary Issue – Procedural Matters

In the Notice of Dispute Resolution, the Applicant notes that the issue of jurisdiction of the *Act* would be a matter of dispute. I confirmed with the parties at the outset of the hearing that this was the case, they confirmed it was.

This matter was scheduled for hearing for one-hour. At the outset of the hearing, I advised the parties of my view that given the extensive claims made in the application and the issue of jurisdiction it would be unlikely everything could get heard in one hour. I proposed the parties provide submissions on jurisdiction, such that it could be dealt with, and should I find the *Act* apply, the matter would be reconvened to deal with the substantive claims.

Both parties consented that this was an appropriate course. As such, the hearing was conducted strictly on the preliminary issue of whether the *Act* applies.

Issue to be Decided

- 1) Does the *Act* apply?

Evidence and Analysis

The parties were given an opportunity to present evidence and make submissions. I have reviewed all included written and oral evidence provided to me by the parties and I have considered all applicable sections of the *Act*. However, only the evidence and issues relevant to the claims in dispute will be referenced in this decision.

As explained by the parties, the premises are a “live-work” space. The Respondent is of the position that this is a commercial tenancy where the tenant has privilege to live in the leased space. The Applicant is of the view that the space is predominantly used for residential purposes such that it is a residential tenancy.

Section 4(d) of the *Act* provides that the *Act* does not apply to living accommodation with premises that are primarily for business purposes and are rented under a single agreement.

There is no dispute that the parties have a single agreement to rent the premises. Both parties confirm signing a memorandum of understanding (the “MOU”) and a lease agreement (the “Lease”). The MOU was signed in September 2020. The Lease is dated December 15, 2020. The parties further confirm that the Applicant moved into the premises on November 1, 2020.

The primary issue is whether the premises were occupied primarily for a business purpose. Policy Guidelines #14 and #27 provide guidance on the application of s. 4(d) of the *Act*, noting the following factors that may be considered in determining this issue:

- municipal bylaws, including how property is zoned;
- relative square footage of the business compared to the area used for residential purposes;
- employee and client presence at the premises; and
- visible evidence of a business use being carried out at the premises.

As explained by the Applicant, the leased premises are approximately 776 square feet. She says she lives in the back, accesses that space from the front entrance, and that there is a commercial frontage. The Applicant advises that the residential portion is approximately 400 square feet. The Respondent's agent was uncertain on the relative proportions of the space, but says that it is closer to a 50/50 split between commercial and residential space.

Neither party has referred me to applicable bylaws in their evidence. The Applicant says that the area was originally zoned for commercial usage but that the municipality has recently expanded that such that live-work rentals could be permitted. The Applicant further advises that premises has a history of commercial use, but this was changed when the municipal use bylaws were amended. According to the Applicant's advocate, the premises is a three-floor structure, with the upper two floors occupied by residential rental units.

Both parties indicated that the space was used by a business prior to the Applicant taking on the lease. The Applicant acknowledges running a sewing business on the front portion of the space. Photographs provided show that the space has a commercial frontage open to the public.

The Applicant argues that the premises were advertised as an apartment, directing me to a screenshot of the advertisement in her evidence. Review of the photograph provided by the Applicant shows it was advertised as a "Work-Live Space" with a "Store & Apartment".

Looking at the factors individually, neither party provided a precise diagram for the space, nor were photographs provided. The Applicant says that slightly less than half the space is for residential use ($400/776=52\%$). I note that the Lease states the

premises is approximately 710 square feet. The Respondent's agent says it is approximately equally divided between the residential and commercial portion.

I accept that the space is approximately equally divided between living space and commercial space. Even if the residential portion is greater than 50% the total square footage, I do not find that this point is determinative one way or the other as neither the *Act* nor the Policy Guidelines indicate this is purely mathematical determination.

I am persuaded by the fact that the premises were strictly used for commercial purposes prior to the tenancy. Neither side advised that the area was rezoned for residential use only or that the space could be used primarily for residential purposes. By implication, the Applicant's business is essential for her occupancy of the space pursuant to municipal rules. I am further persuaded by the fact that the Applicant does carry on a business at the premises and that that business has commercial frontage open to the public, with the Applicant confirming she carries on her business at the premises.

Though not listed in the factors listed above, upon review of the MOU and the Lease I am also persuaded that the parties themselves viewed this as a predominantly commercial arrangement. The MOU explicitly states that the lease was a "commercial lease that allows for a work and live concept". Further, clause 6.1 of the Lease specifies the space is to be used for a seamstress business, including a living area. Most of the terms of the Lease are purely commercial in nature. The fact that the Applicant does live there appears to be ancillary to the dominant purpose of the parties' arrangement, which is commercial in nature.

The Applicant acknowledges she has paid GST on her rent since the tenancy began, which was over two years ago. Payment of GST on rent is not an aspect of residential tenancies. The Applicant did not strike me as naïve or unknowing of whether GST is charged on rent in residential tenancies. It seems inconceivable that the Applicant would have paid GST, including her proportion of the expenses associated with taxes, insurance, and utilities, for over two years if she did not herself also view the lease as a commercial lease.

I find that the dominant purpose of occupancy was commercial or business in nature. I find that s. 4(d) specifically excludes the application of the *Act* from the present circumstances. As such, I do not have jurisdiction to adjudicate the dispute.

Conclusion

Section 4(d) of the *Act* applies under the circumstances. As the *Act* does not apply, I do not have jurisdiction to adjudicate this dispute.

The application is dismissed without leave to reapply in its entirety.

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: June 01, 2023

Residential Tenancy Branch