Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD

Introduction

This hearing dealt with an application by the tenant for an order for the return of her security deposit. Both parties participated in the conference call hearing.

Issues to be Decided

Does this tenancy fall under the jurisdiction of the *Residential Tenancy Act* (the "Act")? Is the tenant entitled to a monetary order as claimed?

Background and Evidence

The parties agreed that the tenancy was set to begin on September 1, 2012 and that sometime in mid-August 2012, the tenant paid a $1,000.00 security deposit. The parties further agreed that the tenant advised the landlord via email that she would not be moving in on September 1 as planned as her circumstances had changed. The tenant seeks to recover her security deposit.

The parties agreed that the landlord Ms. M. does not own the property, but rents the unit from the owner and intended to sublet to the tenant. The tenant was to have exclusive occupation of a bedroom and bathroom and share other common areas such as the kitchen with the landlord.

Analysis

The first question I must address is whether this tenancy falls under the jurisdiction of the Act. Section 1 of the Act defines "landlord" in part as follows:

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

> (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;

It is clear that Ms. M. is entitled to possession of the rental unit by virtue of the tenancy agreement she has in place with the owner of the unit and it is equally clear that in entering into a tenancy agreement with a subtenant, she is exercising the rights of a landlord under a tenancy agreement. Although Ms. M. has the right to occupy the entire apartment, which is the rental unit as defined under her tenancy agreement with the owner, when she entered into a tenancy agreement with the tenant, she agreed to grant the tenant exclusive possession of a specific bedroom and bathroom and to grant her access to common areas which she intended to share with the tenant.

Section 4 of the Act enumerates various living situations to which the Act does not apply, including the following:

> 4 This Act does not apply to
>
> 4(c) living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation,

Although the tenancy agreement between the tenant and Ms. M. provided that the parties would share the kitchen, Ms. M. is not the owner of the rental unit and therefore the agreement is not specifically excepted under this section of the Act. If the legislature had intended to exclude tenancies in which parties share common areas, I find that they would not have specified that only those tenancies in which the kitchen or bathroom is shared with the *owner* fall outside the jurisdiction of the Act. By implication, tenancies in which those rooms are shared with a party who is not the owner would be covered by the Act.

Section 8 of the *Interpretation Act* directs readers to give legislation such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. In *Berry and Kloet v. British Columbia (Residential Tenancy Act, Arbitrator)*, 2007 BCSC 257), Williamson J. made the following observations at paragraph 11:

> I start from the accepted rules of statutory interpretation. I conclude that the *Act* is a statute which seeks to confer a benefit or protection upon tenants. Were it

> not for the *Act*, tenants would have only the benefit of notice of termination provided by the common law. In other words, while the *Act* seeks to balance the rights of landlords and tenants, it provides a benefit to tenants which would not otherwise exist. In these circumstances, ambiguity in language should be resolved in favour of the persons in that benefited group: See *(Canada Attorney General) v. Abrahams*, [19983] 1 S.C.R. 2: *Henricks v. Hebert*, [1998] B.C.J. No. 2745 (QL)(SC) at para. 55:
>
> > I think it is accepted that one of the overriding purposes of prescribing statutory terms of tenancy, over and above specifically empowering residential tenants against the perceived superior strength of landlords, was to introduce order and consistency to an area where agreements were often vague, uncertain or non-existent on important matters, and remedies were relatively difficult to obtain.

Although the issue before Mr. Justice Williamson in *Berry and Kloet* was the interpretation of a section of the Act which permitted the landlord to end the tenancy when the tenant had not given cause, I find that the principles remain the same. Where a tenancy exists, there is usually a power imbalance between the parties and the Act exists to address that imbalance. Accordingly, where the Act is ambiguous, the question should be resolved in favour of jurisdiction .

I have determined that this tenancy falls within the jurisdiction of the Act. The purpose of the Act is to confer a benefit on tenants that they would not otherwise have and to refuse jurisdiction in this case would amount to the tenant being left without a remedy. I find that although the definition of landlord under the Act excludes a tenant who is occupying the rental unit, the rental unit *vis a vis* the applicant and respondent is the bedroom and bathroom to which the tenant was to have exclusive possession and the common areas of the apartment. The rental unit as defined under Ms. M.'s agreement with the owner is distinct from the rental unit as defined under Ms. M.'s agreement with the tenant. As Ms. M. does not occupy those rooms over which the tenant has exclusive possession, I find that she falls under the definition of landlord and that in respect to her relationship with the tenant, Ms. M. is a landlord.

Section 38(1) of the Act provides that within 15 days of the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit to the tenant in full or file an application for dispute resolution against the security deposit. At the hearing, the tenant acknowledged that she did not provide her forwarding address in writing to the landlord for the purpose of obtaining the security deposit.

I find that because the landlord had not received the tenant's forwarding address in writing, the tenant's claim against the deposit is premature as the landlord did not have an obligation to deal with the deposit at the time the application was made. The tenant's application is therefore dismissed with leave to reapply.

At the hearing, the tenant confirmed that the address for service provided in her application for dispute resolution is indeed her forwarding address.

I advised the landlord that as of the date of the hearing, she had 15 days in which to either return the security deposit in full or file a claim against it. For clarity, the landlord must file her claim or return the deposit no later than December 21, 2012.

Conclusion

The tenant's claim is dismissed with 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: December 06, 2012

Residential Tenancy Branch