Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCT, FFT

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for compensation for losses or other money owed under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another. As the landlord confirmed that they received a copy of the tenant's dispute resolution hearing package sent by the tenant by registered mail on March 29, 2019, I find that the landlord was duly served with this package in accordance with section 89 of the *Act.*

The tenant testified that they sent the landlord a copy of their written evidence by registered mail on July 11, 2019. The landlord's advocate gave sworn testimony that the landlord only received this written evidence on July 16, 2019, after the deadline established by the Residential Tenancy Branch (the RTB) for providing evidence by the Applicant to the Respondent. Although the tenant's written evidence was not served at least 14 days prior to the hearing, as is set out in the RTB's Rules of Procedure, the landlord confirmed that they had had time to review the tenant's written evidence in advance of this hearing. As such, I advised the parties that I would be considering the tenant's written evidence as part of my decision-making, as I was satisfied that it had been served in accordance with section 88 of the *Act*, in sufficient time to enable the landlord to know the case against them and to address that case.
The landlord's advocate gave sworn testimony that they sent a copy of the landlord's extensive written evidence package to the tenant by registered mail to the address

identified by the tenant on their application for dispute resolution on July 4, 2019. They provided the Canada Post Tracking Number to confirm this registered mailing. They said that this package was returned to the landlord by Canada Post about a week after the mailing as the tenant was no longer residing at that address. At the hearing, the tenant confirmed that they had moved twice since they filed their application for dispute resolution and had not received any notice from Canada Post that there was an evidence package available for their pickup. The tenant testified that they had only provided the tenant with their new address by way of the address attached to the mailing of the tenant's written evidence on July 11, 2019, after the landlord had tried to send the tenant a copy of their written evidence. Under these circumstances, I advised the parties that the landlord had sent a copy of their written evidence to the address provided by the tenant in their application, and the landlord was in no way responsible for the tenant's failure to provide the landlord with an updated address where the landlord could send the evidence. In accordance with sections 88 and 90 of the *Act,* I find that the tenant was deemed served with the landlord's written evidence on July 9, 2019, the fifth day after the registered mailing.

Issues(s) to be Decided

Was a tenancy established between the landlord and the tenant, and if so, what was the term of this tenancy agreement? Is the tenant entitled to a monetary award for losses arising out of this tenancy? Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

While I have turned my mind to all the documentary evidence, including emails, advertisements, photographs, statements, the testimony of the parties and legal decisions and arbitration decisions provided by the landlord, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the tenant’s claim and my findings are set out below.

The rental arrangements between the landlord and the tenant originated when the tenant responded to a September 2018 advertisement on a popular rental website for the cottage on property owned by the landlord and the landlord's estranged spouse. At that time, the landlord and their spouse had recently separated. The landlord continues to live in the other dwelling on this property.

Neither party entered into written evidence a copy of the original advertisement that the tenant responded to in an email of September 28, 2019. The tenant said that this advertisement was removed from the website shortly thereafter and the landlord gave

sworn testimony that they no longer have a copy of that advertisement or what was included in that advertisement. The tenant also entered into written evidence copies of the landlord's subsequent advertisements placed on a rental website in the spring of 2019. These advertisements described the cottage as being suitable for "Snowbirds or Short Term Rental." The advertised fee for this rental was identified as a daily rate, as well as weekly rates that varied depending on whether the rental was during the winter or spring and summer. Minimum stays of three nights in the summer and spring and seven nights in the winter months were identified in these advertisements. These advertisements also noted that it was possible to consider a monthly rate for the winter months. The parties agreed that the phrase "Snowbirds or Short Term Rental" was likely included in the original advertisement that drew the tenant's original attention as to the availability of this rental opportunity.

The tenant's September 28, 2019 email advised the landlord that they used to live across the street from the landlord and were interested in renting the premises advertised by the landlord. The tenant's email observed that the advertised cost for these premises was "a bit high" and asked "can there be a reduction for 6 months? or longer."

The landlord's September 29, 2019 email to the tenant referenced their meeting that day when the tenant apparently visited the premises and discussed the possibility of renting this cottage. The tenant gave sworn testimony at the hearing that they made it clear to the landlord at that time that they were only interested in renting these premises for some type of fixed term, preferably one year, but at least six months. The landlord testified that they made no commitment at their meeting to rent these premises to the tenant for an extended period of time because the landlord's spouse needed to use this dwelling on an occasional basis to undertake repairs and maintenance work on the property.

The landlord's September 29 email referenced the landlord's efforts to quantify the utility costs to be expected should the tenant move into the rental premises. The landlord stated that subsequent to their meeting, the landlord had contacted the local cable provider and discovered that the cost of cable television would be $25.00 and internet service through that provider would be $89.00, with an additional $5.70 for tax on these services. The landlord also advised the tenant that the hydro costs for the cottage during the previous year when there were not renters present had been $75.00 per month. The landlord summarized their offer to provide all utilities and provided the following breakdown of their offer for rent, utilities and the security deposit to the tenant as follows in their September 29 email:

...Rather than change these accounts into your name and have you pay for them, how does $125/month for all utilities sound?

Rent $1350 per month
+ Utilities $125 per month

September 30th : October 9th - October 31st = 31 days $1,057.26
September 30th; Damage Deposit = $700

November 1st = $1300 + $125
December 1st - $1300 + $125

Less than an hour after the landlord sent the tenant the above email, the tenant responded to the landlord's email advising that they would make an etransfer of the requested funds within the next hour. The landlord responded that this was "ok" and the parties agreed that the tenant sent the landlord an etransfer of the $1,757.26 identified in the landlord's calculation of the amount owing shortly after the tenant sent the landlord. To implement this process, the tenant observed that the parties had to have agreed upon a password whereby the landlord could accept the tenant's $1,757,26 for rent for October and the security deposit. The landlord confirmed that they accepted this etransfer of funds. The tenant sent the landlord an email later on September 29, thanking the landlord for providing the calculations and asking for info on the postal code for the rental unit.

The following day, the tenant apparently contacted the landlord to start making arrangements to move some of their belongings into the landlord's cottage. At that time, the landlord realized that the tenant's expectations and the landlord's were at odds with one another, as the landlord had never intended to rent the premises out to the tenant for an extended period of time. After discussing this matter with their spouse, the landlord contacted the tenant to advise that they were returning the tenant's $1,757,26 payment by etransfer, which the landlord claimed to have done within 48 hours of receiving the tenant's etransfer.

In written evidence provided by the tenant, and as confirmed in the tenant's sworn testimony at this hearing, the tenant maintained that they had taken a number of steps to end their existing tenancy and commence their new tenancy with the landlord. The tenant said that they provided notice to their existing landlord on September 29 or 30, 2018 that they would be ending their tenancy by October 8, 2019, the date at which

their occupancy of the rental cottage was scheduled to begin. At the hearing, the tenant said that did not provide any written notice to their existing landlord at that time, as they had a good relationship with that person, and their existing landlord did not require anything in writing as that landlord considered the notice provided by the tenant was "ample."

The tenant entered into written evidence a copy of their October 3, 2018 email to the landlord. In that email, the tenant noted that they had paid the requested monthly rent and security deposit to the landlord, the landlord had accepted those payments, and the tenant was expecting to take up occupancy for a fixed term on October 9, as agreed to on September 29. Although the tenant maintained in that email that the parties had "discussed my fixed term in detail," the tenant did not describe these details in the email. The tenant stated the following in the email:

...I expect to receive quiet enjoyment of the premises on October 9th as contracted. Period. Or compensation for 12 months if you choose to breach our fixed rental agreement...

I have given notice where I am, made many address changes, taken on some local business, and membership obligations and more. Let's discuss how to resolve this conflict. If you pull out of our rental agreement it leaves me with losses that are your responsibility...

At the hearing, I asked the tenant to clarify the losses that they identified in their October 3, 2018 email. The tenant said that they were basically homeless for a month in October 2018, as a result of the landlord changing their mind on their oral tenancy agreement. The tenant said that they rented a place for November, on a short term basis, and couch surfed for a few weeks, eventually finding a family the tenant could stay with for a period of time. The tenant said that they had moved a third time since October 2018, and had basically spent most of the time since October 2018 moving from one place to another, which would not have occurred had the landlord honoured the tenancy commitment that they entered into with the tenant in late September 2018. The only specific cost that the tenant could identify associated with the landlord's actions in refusing to provide the tenant with a key to the rental home and return of the tenant's payments was an $80.00 truck rental that they said they had made to enable them to move into the rental premises. The tenant also maintained that they did not actually receive and cash the landlord's return of the tenant's payments for almost six weeks.

The tenant applied for a monetary award of $17,100.00, which the tenant calculated as the equivalent of 12 months rent. The tenant maintained that the landlord had evicted him without issuing a proper written notice to end tenancy for reasons that equated to the issuance of a 2 Month Notice to End Tenancy for Landlord's Use of Property. The tenant entered into written evidence copies of advertisements on rental websites in the spring of 2019, in which the landlord was seeking short term rentals, which would have resulted in higher monthly income than would have been paid by the tenant in accordance with the terms of the agreement outlined by the landlord in their September 28, 2018 email. The tenant sought a monetary award of the equivalent of 12 months rent because the landlord was not using the premises for the purposes identified by the landlord as the reason for ending this tenancy, landlord use of the property.

The landlord gave sworn testimony that despite having placed a few advertisements for prospective short term renters, no one other than family or friends had ever stayed in the cottage in question. The landlord said that they had never received an offer by anyone in response to the advertisements cited by the tenant.

The landlord noted in their written evidence and in their sworn testimony that they have a number of health related issues and that the stress caused by their marital breakup and the tenant's interaction with the landlord since the landlord advised the tenant that they were not planning to allow the tenant to reside in the rental cottage has been considerable.

The landlord's advocate provided many documents for consideration in support of the landlord's assertion that no valid tenancy agreement was entered into, primarily because there was no agreement as to the term of the tenant's occupancy of the rental unit. Some of these documents were copies of previous decisions by arbitrators appointed pursuant to the *Act*, and other material was provided with respect to judicial consideration of what constitutes a tenancy. While I have found this material interesting, I note that arbitrators are not bound by precedent in reaching their determinations pursuant to the *Act.* I also note that most judicial interpretations of tenancy agreements and contracts rely on at least some documentary evidence. Although each application submitted to the RTB for an arbitrated decision relies on the circumstances of the dispute, this case is particularly unique in that any tenancy which existed ended within 48 hours of the establishment of that tenancy, and before the tenant was scheduled to occupy the premises. The assistance provided through other arbitration decisions and legal interpretations is of very limited benefit in a unique situation such as this one, due to the most unusual nature of how the parties entered into and departed from their agreement regarding these premises.

Analysis

In considering whether an actual tenancy existed between the parties, I note that while landlords are required to create written Residential Tenancy Agreements, the *Act* also allows less formal agreements and oral agreements to exist. Section 16 of the *Act* establishes that the "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." Thus, the fact that the landlord locked the exterior gate and never provided the tenant with a key to access the rental unit has no bearing on whether or not an actual tenancy existed between these parties.

In determining whether the parties entered into an oral agreement to commence a tenancy that falls under the jurisdiction of the *Act*, it would have been very helpful had the parties retained a copy of the advertisement that first attracted the tenant's interest in this property. In the absence of that document, I accept from the September 29, 2018 email from the tenant to the landlord that this property was advertised by the landlord as a short term rental. Although the tenant clearly enquired as to whether there existed the possibility of extending this rental beyond the typical short term rental to "snowbirds" and "short term renters", the tenant's request for a quote for a monthly rental based on a six month or ideally a twelve month period of rental does not necessarily mean that the landlord's emails to the tenant connoted the landlord's acceptance that there would be a longer term fixed term rental of the property to the tenant. The email chain provided by the tenant at that time does appear to confirm the tenant's claim that the tenant was only interested in renting this property if it could be extended beyond the very short term rental that the landlord eventually decided was a better fit for the landlord's at that time.

I have taken into consideration the position taken in the landlord's written evidence that no tenancy agreement was created because there was never a meeting of the minds as to the term of the tenancy the parties were entering into. I find that the actions taken by the landlord as described in the landlord's own September 28, 2018 email response following the meeting between the landlord and tenant confirm that the landlord intended at that time to enter into an agreement that enabled the tenant to remain on the premises until at least the end of December 2018. The landlord reported a number of steps that extend well beyond what would be expected of a short term rental. The landlord contacted the local cable provider and reported back to the tenant the estimated monthly cable and internet costs. The landlord also provided an estimate of the hydro costs, and settled on an overall utility cost of $125.00 per month. The details

surrounding the beginning of the proposed tenancy then continued in the landlord's email to quantify what the monthly rent would be, indicated that a $700.00 security deposit would be required, gave a pro-rated quote on what the tenant would have to pay for the 23 days between October 9 and October 31, and also specifically mentioned that monthly rent for November and December would be set at $1,425.00. The email chain confirms that the tenant very quickly agreed to these terms, the landlord also agreed to them, the tenant forwarded the requested payment to the landlord by etransfer, which was quickly accepted by the landlord, which would have required an agreed upon password to enable the landlord to accept such a payment. While these details in the email chain are not determinative of the exact length of the term of the tenancy or whether there was agreement that it was a fixed or month-to-month tenancy, I find that this information does confirm that some type of residential tenancy was established whereby the landlord was indicating the possible availability of the rental premises until at least the end of December 2019.

Although no signed tenancy agreement was created, I find sufficient evidence that the parties entered into a legally binding contract, where an offer was made by the landlord. Consideration was exchanged between the parties in the form of both a payment for occupancy of the rental unit until at least the end of October 2019 and the landlord's requested security deposit. Given the landlord's references to the payments to be made in November and December, I also accept that there is sufficient evidence that the contract entered into between the parties constituted a residential tenancy agreement, albeit an informal one.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the tenant to prove on the balance of probabilities that the landlord contravened the *Act*, and that the tenant is entitled to a monetary award for losses arising out of that contravention.

At the hearing, I asked the tenant to identify the provision in the *Act* that formed the basis for the tenant's application for a monetary award equivalent to twelve months of rent that would have been owed had this tenancy proceeded. The tenant maintained that the landlord effectively ended this tenancy by issuing the tenant with a 2 Month

Notice, and that the landlord is therefore responsible for not using the premises for the purposes stated in that Notice. Although the tenant admitted that no 2 Month Notice on the prescribed RTB forms was issued, I will outline the relevant provisions of section 49 and 51 as follows to convey the context of the tenant's claim:

49 (3)A landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit...

51 *(1)A tenant who receives a notice to end a tenancy under section 49 [landlord's use of property] is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.*

(2)Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if

> *(a)steps have not been taken, within a reasonable period after the effective date of the notice, to accomplish the stated purpose for ending the tenancy, or*
>
> *(b)the rental unit is not used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.*

(3)The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as the case may be, from

> *(a)accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, or*
>
> *(b)using the rental unit for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice...*

It would seem that the tenant's application for a monetary award equivalent to 12 month's rent relies on a very broad interpretation of section 51(2) of the *Act*.

At the hearing, the tenant maintained that they should not bear the responsibility for the landlord's failure to provide a proper 2 Month Notice to the tenant. As such, the tenant asserted that they should be eligible for consideration of the monetary claim outlined in section 51(2) of the *Act*. While there is an element of merit to the tenant's assertions in this regard, this would rely on an acceptance of the tenant's interpretation of the reason for ending this tenancy. The landlord maintained that no actual tenancy agreement was entered into because the parties had such contrasting perspectives on whether this was a short term rental, or as the tenant claimed, a fixed term rental for at least six months and possibly twelve months. As I noted at the hearing, since no actual 2 Month Notice was issued to the tenant, I find that the tenant cannot seek the type of compensation outlined in section 51(2)of the *Act*.

Even if I am wrong on this finding, I also find insufficient evidence to support the tenant's claim that the landlord has actually used the premises for short term rentals, and contrary to the reasons cited by the landlord in ending this tenancy. In fact, a strong case could be made that the tenant was the exception to the landlord's previous practice of attempting to identify people who were interested in only short term rentals of this cottage, as family and friends were planning to use the premises on an ongoing but occasional basis.

I emphasize that my finding that the tenant is not entitled to a monetary award pursuant to section 51(2) of the *Act* does not mean that the tenant may not have suffered losses arising out of whatever tenancy existed between the parties.

Section 7(1) of the *Act* reads as follows:
If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.
I find that the tenant is correct in that the landlord had no legal authority to end this tenancy on 48 hours notice when the landlord essentially changed their mind on whether to enter into a rental that was longer than the landlord had wanted to establish. Although the landlord has contravened the *Act*, the landlord did return the tenant's rental payment for October 2019 and security deposit shortly after it was received by the landlord. While the tenant gave sworn testimony that they incurred a cost of about $80.00 for the rental of a truck for the anticipated move on October 9, 2018, the tenant did not enter into written evidence any copy of the receipt for this payment. The tenant did not supply any other evidence to demonstrate actual losses that the tenant incurred as a result of the landlord's actions in refusing to honour the terms of the tenancy agreement they entered into on September 29, 2019. Given that two days after the

landlord entered into this tenancy agreement, the landlord advised the tenant that they were no longer prepared to allow the tenant to move into the rental unit, it is not altogether surprising that the tenant was unable to demonstrate any actual losses. More importantly, the tenant has not applied for any monetary award other than the return of the initial rent they paid and their request for a monetary award for the landlord's failure to use the premises for the purposes stated on a notice to end tenancy that was never formally given to the tenant. Since the tenant has failed to demonstrate any actual losses for which they are entitled to receive compensation, I dismiss the tenant's application for a monetary award for the items noted in the tenant's application without leave to reapply.

Since the tenant's application has been dismissed, I make no order with respect to the tenant's application to recover their filing fee from the landlord.

Conclusion

I dismiss the tenant's application for the items claimed.

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: July 30, 2019

Residential Tenancy Branch