



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes **MNSDS-DR, FFT**

Introduction

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

- authorization to obtain a return of all or a portion of the security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

This matter was reconvened from an *ex parte*, direct request proceeding by way of an interim decision issued July 7, 2022.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

MT testified, and the respondent ("YZ") confirmed, that he served YZ with the notice of dispute resolution package and supporting documentary evidence.

YZ testified that he posted his evidence package on the door of the house which the tenant provided as his address for service. MT testified that he resides at that address, but that YZ did not post anything on his door.

YZ stated that he was accompanied by a witness when he posted these documents and he submitted a signed proof of service statement from the witness. Additionally, he submitted three photographs of MT's current residence, which show an envelope taped to the house's mailbox and the house's street address. MT could not explain how these photos came to be.

Based on these photographs, supported by the witness statement, I find it more likely than not that YZ served MT with his evidence package, and I admit it into evidence.

Jurisdiction

This matter was adjourned from a direct request proceeded due to the presiding arbitrator's doubts as to whether the Act applies to the contractual relationship between the parties. She wrote:

Section 4 of the *Act* establishes that living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation is not governed by the *Act*.

I find that the agreement submitted by the tenant indicates that the tenant is renting a room at the landlord's address. I also note there is no indication as to whether the tenant has access to their own bathroom or kitchen facilities or whether the landlord is the owner of the accommodation being rented out.

Furthermore, the agreement specifies that the agreement falls under the *Hotel Keeper Act* and not the *Residential Tenancy Act*.

For these reasons, I find that there is a question regarding whether I have jurisdiction to decide this matter. I find that a participatory hearing is required in order to determine jurisdiction.

I raised the issue of jurisdiction at the outset of the hearing. The parties agreed that the house had two bathrooms and one kitchen, and that occupants of the house all shared use of the kitchen and the bathrooms. However, they disagreed as to whether YZ lived in the house (the "**House**").

MT testified that YZ never lived in the House during his time there. He stated that he rented a room on the upper floor of the House, which had six bedrooms, five of which were rented to other individuals and one of which was used as storage for building supplies. He submitted a written statement from one of the other occupants which confirmed his testimony. He stated that he had met all the other occupants of the House, and that none of them were YZ. He stated that YZ had someone else pick the monthly rent up on his behalf and infrequently attended the house.

By contrast, YZ testified that he resided in the House the entire time MT lived there. He stated that he lived on the lower floor and mostly kept to himself. He provided a witness statement from another occupant of the House which confirmed that YZ lived in the House at the same time MT did. YZ submitted a copy of his driver's license, a utility bill, statement of account for his chequing account which all list his address as the address of the House.

YZ testified that MT caused damage to the House, and that he intends to pursue MT for compensation for repairs in Small Claims Court. He stated that the author of MT's witness statement was in arrears when he moved out. He suggested that both have motives to lie about him.

MT denied he was lying. Additionally, he stated that he was unfamiliar with the name of the author of the landlord's witness statement but conceded that he did not remember all the names of the co-occupants of the House.

The parties' evidence is so divergent that I can come to no other conclusion that one party has failed to be truthful in their affirmed testimony. As such, the outcome of this decision lies in a credibility assessment of the parties.

In the frequently cited case of *R v Parent*, 2000 BCPC 11, the court sets out factors for assessing credibility:

[4] In assessing credibility, courts have recognized a number of factors as helpful.

[5] These include:

1. the witness' ability to observe the events, record them in memory, recall and describe them accurately,
2. the external consistency of the evidence. Is the testimony consistent with other, independent evidence, which is accepted?
3. its internal consistency. Does the witness' evidence change during direct examination and cross-examination?
4. the existence of prior inconsistent statements or previous occasions on which the witness has been untruthful.
5. the "sense" of the evidence. When weighed with common sense, does it seem impossible or unlikely? Or does it "make sense"?
6. motives to lie or mislead the court: bias, prejudice, or advantage. To consider the obvious possible motive of every accused person to avoid conviction would place an accused at an unfair disadvantage. As a result, I do not consider that possible motive when assessing an accused's testimony.
7. the attitude and demeanour of the witness. Are they evasive or forthcoming, belligerent, co-operative, defensive or neutral? In assessing demeanour a judge should consider all possible explanations for the witness' attitude, and be sensitive to individual and cultural factors, which may affect demeanour. Because of the danger of misinterpreting demeanour, I would not rely on this factor alone.

In considering these factors, I find that YZ is more credible than MT. Both parties recalled events with a sufficient degree of clarity. Both sides provided supporting witness statements, but neither called their witnesses to testify or be subject to cross examination. I assign little weight to these statements. I find both parties' testimony to be internally consistent. Neither parties' attitude suggested they were not credible.

I have not considered the parties' motives for lying when assessing their credibility. In any event, each has a financial motive to want their version of the facts preferred over the others.

However, YZ's testimony is in harmony with the documentary evidence submitted. The agreement by which MT came to reside in the House lists the YZ's address as the House. The YZ's driver's license, chequing account statement, and utility bill all lists his address as the address for the House. These facts make more sense if YZ actually resided at the House than if he did not.

Furthermore, the parties gave differing testimony as to whether YZ served MT with his documentary evidence. YZ provided photographic evidence supporting this aspect of his testimony and I found this to be sufficient reason to prefer YZ's testimony on that point to that of MT. I find that this amounts to a prior inconsistent statement where MT has been untruthful which negatively affects his credibility generally.

For these reasons, I find that YZ was more credible, and where his testimony and MT's differ, I prefer YZ's.

As such, I find that YZ and MT both resided in the House at the same time and that they shared a kitchen and a bathroom.

Section 4(c) of the Act states:

What this Act does not apply to

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,

Additionally, RTB Policy Guideline 27 states:

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

For example, if Person A enters into a tenancy agreement to rent a 2 bedroom rental unit from a landlord and occupies the first bedroom and rents the second bedroom out to Person B, the RTA would not apply to a dispute between Person A and Person B even if Person B has exclusive possession of the second bedroom. The director does not have jurisdiction to resolve these types of disputes.

The parties did not give evidence as to whether YZ owns the House or whether he rents it from the owner and subsequently rents individual rooms to other occupants. This is a distinction without a difference, as under either scenario, the Act does not apply (either pursuant to section 4(c) of the Act or pursuant to Policy Guideline 27).

Accordingly, I find that the Act does not apply to the contractual relationship between the parties and I do not have jurisdiction to adjudicate this dispute.

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: March 14, 2023

Residential Tenancy Branch