



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes OLC, FFT

Introduction

This hearing dealt with an Application for Dispute Resolution (the Application) that was filed by the Tenant on November 25, 2022, under the *Residential Tenancy Act* (the Act), seeking:

- An order for the Landlord to comply with the Act, regulations, and tenancy agreement; and
- Recovery of the filing fee.

The hearing was convened by telephone conference call at 11:00 A.M. (Pacific Time) on April 3, 2023, and was attended by the Tenant and their witness J.S. All testimony provided was affirmed. The participants were provided the opportunity to present their evidence orally and in written and documentary form, to call witnesses, and to make submissions at the hearing.

The participants were advised that interruptions and inappropriate behavior would not be permitted and could result in limitations on participation, such as being muted, or exclusion from the proceedings. The participants were asked to refrain from speaking over me and one another and to hold their questions and responses until it was their opportunity to speak. The participants were also advised that recordings of the proceedings are prohibited, except as allowable under rule 6.12, and confirmed that they were not recording the proceedings.

Although I have reviewed all evidence and testimony before me that was accepted for consideration as set out above, I refer only to the relevant and determinative facts, evidence, and issues in this decision.

At the request of the Tenant, a copy of the decision and any orders issued in favor of the Tenant will be emailed to them at the email address confirmed in the hearing.

Issue(s) to be Decided

Does the Act apply to this tenancy or is it excluded pursuant to section 4(c) of the Act?

If the Act applies, is the Tenant entitled to recovery of the filing fee?

Background and Evidence

The Tenant stated that although they signed a roommate agreement with the Landlord, whom they believe to be the owner of the property, and that the Landlord also resided in the property, they believe that there was a tenancy under the Act in place and that the Landlord was simply attempting to avoid the Act by calling it a roommate agreement rather than a tenancy agreement.

The Tenant stated that they rented a room in the basement and that another tenant under a separate tenancy agreement also rented a room from the Landlord in the basement. The Tenant stated that the basement has a little kitchenette area with a sink, microwave, hot plate, and toaster oven, and that although the Landlord indicated via email that they could use the kitchen upstairs a few times a week for meal prep, they never used it. The Tenant stated that they were told that the downstairs bathroom was for their use and the use of the other downstairs tenant, but acknowledged that the Landlord would not have needed to give notice to come downstairs as they rented only a room not the entire basement. They also acknowledged that although it would be unprecedented and unusual, the Landlord could have used the downstairs bathroom, although they never did.

The Tenant stated that the door to upstairs remained shut and locked, and that they never used the upstairs kitchen or bathroom. They also argued that even though the Landlord granted them permission to use the upstairs kitchen periodically, this would not constitute the sharing of a kitchen or bathroom for the purpose of section 4(c) of the Act, as the access was infrequent and at the Landlord's discretion. As a result of the above, the Tenant argued that the tenancy is not excluded under section 4(c) of the Act and sought an order that the Act applies to it. The Tenant also sought recovery of the filing fee.

Analysis

Section 4(c) of the Act states that the Act does not apply to living accommodation in which a tenant shares bathroom or kitchen facilities with the owner of that accommodation. While the Tenant argued that the tenancy was not excluded under section 4(c) of the Act, I disagree for the following reasons. The tenancy agreement states that it is a roommate agreement, not a tenancy agreement, and at the hearing the Tenant acknowledged that they rented only a room in the basement. The Tenant acknowledged that the Landlord is the owner of the property and that they lived in the same home. The Tenant also acknowledged that neither they nor the other tenant living downstairs had exclusive use and possession of the basement, including common areas and a bathroom, as the Landlord was permitted to come downstairs without notice or permission. The Tenant also acknowledged that they were allowed to use the kitchen upstairs several times a week if they wanted to.

Although the Tenant stated that they never used the upstairs kitchen or bathroom, I find that it is the nature of the agreement in place, not the actual use of the property by the Tenant, that is crucial to whether the Act applies. From the roommate agreement and the testimony of the Tenant, it is clear to me that the Tenant did not have exclusive use and possession of anything except for a room in the basement. It is also clear to me that the Tenant was permitted to use an upstairs kitchen shared with the Landlord/owner, should they wish to, and although it never occurred, the Landlord was permitted to enter the basement and use the bathroom there, as well as other common areas. I find the Tenant's lack of use of the upstairs kitchen does not change the nature of the agreement in place. I also dismiss the Tenant's argument that permitted use of the shared kitchen several times a week is insufficient to constitute shared accommodation with the owner under section 4(c) of the Act, as the Act contains no limit to the number of times a kitchen or bathroom must be shared during a tenancy between a tenant and the owner of the accommodation in order for the Act not to apply to that tenancy.

Based on the above, I am satisfied on a balance of probabilities that the Tenant was permitted to share a kitchen and/or bathroom with their Landlord under the roommate agreement, and that the Act therefore does not apply to that living accommodation pursuant to section 4(c) of the Act, despite the Tenant's failure to avail themselves of the available use of the upstairs kitchen.

I therefore dismiss the Tenant's Application seeking an order that the Act applies and recovery of the filing fee without leave to reapply for lack of jurisdiction.

Conclusion

The Tenant's Application seeking an order that the Act applies, and recovery of the filing fee is dismissed without leave to reapply for lack of jurisdiction.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the Act.

Dated: April 12, 2023

Residential Tenancy Branch