



Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing and Social Development

Decision

Dispute Codes:

MNR

OPR

MNSD

FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the landlord for an Order of Possession based on the Notice to End Tenancy for Unpaid Rent dated January 7, 2009, a monetary order for rent owed and an order to retain the security deposit in partial satisfaction of the claim.

Although served with the Application for Dispute Resolution and Notice of Hearing by registered mail sent on April 20, 2009, the tenant did not appear.

Issue(s) to be Decided

The landlord is seeking an Order of Possession. The landlord is also seeking a monetary order claiming unpaid rent of \$771.00 accrued arrears as of September 2008, \$306.00 arrears remaining for the month of October 2008, and \$860.00 each month for November 2008, December 2008, January 2009, February 2009, March 2009, April 2009 and May 2009 for total rental arrears of \$7,097.00 and \$860.00 loss of rent for the month of June 2009.

The issues to be determined based on the testimony and the evidence are:

- Whether or not the landlord is entitled to an Order of Possession based on the 10-Day Notice to End Tenancy for Unpaid Rent
- Whether or not the landlord is entitled to monetary compensation for rental arrears owed and loss of rent.

Preliminary Issue- Jurisdiction

This matter was originally heard as a cross application, on February 17, 2009 and April 9, 2009 attended by both the landlord and tenant. At that time the issue of jurisdiction was called into question, with the tenant alleging an ownership interest in the property. However, the absence of evidence prevented the Dispute Resolution Officer from making any determination regarding whether or not this tenancy relationship was within the jurisdiction of the Residential Tenancy Act. Both applications were dismissed with leave to reapply and the parties were cautioned that, should the dispute be pursued in future, the matter of jurisdiction would still need to be resolved and the parties must be prepared to submit all data supporting the application and their respective positions. The proceedings before me today are on the landlord's application and the first determination that must be made before proceeding is whether or not this tenancy relationship is under the provisions of the Act.

Arguments

The landlord submitted that the tenant had originally owned the property but was unable to pay the mortgage and on May 15, 2006, the tenant had transferred all her interests in the property to the landlord. The landlord's position is that, from that precise point in time to the present date, the two parties were only functioning in the capacity of landlord and tenant and the tenant retained no further ownership interest in the property. The landlord submitted into evidence a copy of the tenancy agreement signed by the parties on April 19, 2008. The document was titled "*LEASE AGREEMENT*" and purported to be a fixed term tenancy agreement for a period of 3 years with the commencement date shown as "*May 1, 2006*" and termination date as "*May 31, 2009*". The lease agreement

contained the following statement on the first page, "*THIS IS IN CONJUNCTION WITH THE OPTION TO BUY AGREEMENT DATED MAY 15, 2006*". The secondary agreement was not submitted into evidence. However, the landlord testified that the "option to buy agreement," was not a written contract and merely consisted of a verbal promise that the tenant would be given the first opportunity to purchase the property. The written tenancy agreement indicated that the agreement commenced on May 1, 2006. However, it was not signed by the tenant until April 2008, and the landlord explained that the reason for this was that the verbal agreement had been accepted by both parties in May 2006 but was subsequently put in writing and signed by both parties on April 19, 2008 strictly for the purpose of formalizing the agreement.

The landlord submitted additional evidence including:

- A copy of the freehold transfer of 1/100 property interest from the tenant to the landlord effected on May 15, 2006
- A Title Search print showing that on March 27, 2009, the 1/100 interest was registered to the landlord along with the remaining 99/100 interest.
- A copy of the 2009 municipal Property Assessment Notice showing the tenant's name as owner/lessee of the property.

Analysis

A determination of whether or not this is a tenancy relationship that falls under the jurisdiction of the Act, would be contingent upon the question of whether or not there a contract contained any transfer of an ownership interest to the tenant. According to the Residential Tenancy Guidelines, if the relationship between the parties is that of seller and purchaser of real estate, the Legislation would not apply, as the parties would not have entered into a "Tenancy Agreement" as defined in section 1 of the Act, regardless of the fact that the parties may have chosen to call the agreement a tenancy agreement. Certainly, in the case where

the monies that are changing hands constitute part of the purchase price, it follows that a tenancy agreement has not been entered into. The definition of tenancy agreement in section 1 states:

"tenancy" means a tenant's right to possession of a rental unit under a tenancy agreement;

"tenancy agreement" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;

A tenancy agreement is a transfer of an interest in land and buildings, or a license to occupy. The interest that is transferred, under section 1 of the Act, is only the *right to possession* of the residential premises and nothing more. If the tenant takes an interest in the land and buildings which is higher than the right to possession, such as part ownership of the premises, then a tenancy agreement may not have been entered into. In the case of a tenancy agreement with a right to purchase, the issue of jurisdiction will turn on the construction of the agreement(s). If the agreement meets either of the tests outlined above, then the Acts may not apply. However, in situations where the parties intended a tenancy to exist prior to the exercise of the right to purchase, and the right was not exercised, and the monies which were paid were not paid towards the purchase price, then the Act may apply and the arbitrator may assume jurisdiction.

In this instance, it is clear that the respondent did have a genuine ownership interest at some point in time prior to the May 15, 2006 as confirmed by the records showing that the ownership was transferred as of May 15, 2006. According to the landlord, after the tenant relinquished that interest, she then became a bona fide tenant. The landlord conceded that the tenant retained some kind of consideration to do with the property, that being the right to purchase the property at a later date.

In the case before me, there is no indication that the monies changing hands were meant to be used towards the purchase of the property. That being said, there were two complementary agreements involving these parties. The written tenancy agreement was in evidence, However, it is evident that there was some kind of ancillary agreement relating to the tenant's relinquishing her interest in the property and, based on the testimony, some kind of an agreement, verbal or otherwise, pertaining to the tenant's future right to purchase the property. It is also clear that the tenancy agreement/contract was integral to a related purchase agreement by virtue of the fact that the written tenancy agreement specifically states, that it is "*In Conjunction with The Option to Buy Agreement Dated May 15, 2006*". As the evidence submitted by the landlord did not include the copy of the *Option to Buy Agreement*", there was no way to confirm exactly what terms were contained within this reciprocal contract nor how they inter-relate with terms of the tenancy agreement. It appears that, under the two combined contracts, the tenant may have been entitled to an interest that was beyond mere possession of, and license to occupy, the rental unit.

I also take note that the tenancy agreement was stated to be effective as of May 1, 2006, which was prior to the tenant formally relinquishing her ownership interest on May 15, 2009.

Furthermore the fact that the 2009 municipal Property Assessment Notice was addressed to the respondent and shows the respondent's name as owner/lessee of the property could indicate that the respondent may have had some involvement in, or was responsible for, paying the municipal taxes on the subject property. Yet, I find that no mention of property taxes in the written tenancy agreement and have no way of confirming whether or not the tenant had a responsibility that included paying property taxes pursuant to the *Option to Buy Agreement*.

Given the above, I find that I must decline jurisdiction in the matter before me as I have determined that I have no authority under the Residential Tenancy Act to consider or render a decision on the landlord's application.

Conclusion

Based on the determination that this tenancy relationship is not one that falls under the jurisdiction of the Act, I hereby dismiss the landlord's application in its entirety without leave to reapply.

May 2009

Date of Decision

Dispute Resolution Officer