

Interim Decision

Dispute Codes:

MNDC, OPT, FF

Introduction

This is the Tenant's application for an Order of Possession; a Monetary Order for compensation for damage or loss under the Residential Tenancy Act (the "Act"), Residential Tenancy Regulation (the "Regulations") or tenancy agreement; and to recover the cost of the filing fee from the Landlord.

All parties gave affirmed testimony.

Preliminary Matter

At the outset of the Hearing, the Landlord's agent stated that the Landlord questioned whether the Act provides jurisdiction for a Dispute Resolution Officer to consider the Tenant's application. The Landlord's position is that the rental unit is not a "rental unit" as defined by Section 1 of the Act, and therefore the Landlord is not a "landlord" as defined by Section 1 of the Act.

The Landlord's agent stated that, should I find I have jurisdiction, the Landlord would be applying to have the Tenant's Witness AP added as a third party, as he had not been given authority by the Landlord to act on her behalf in renting out the rental unit.

Issues to be Decided

- Does this matter fall within the jurisdiction of the Act, and if so;
- Should the Tenant's Witness AP be added as a third party?

Background and Evidence

Undisputed facts:

The Tenant's Witness AP ("AP") was a friend of the Landlord's family for more than 17 years, and was the Landlord's realtor when the Landlord purchased the subject property. The Landlord started negotiations to purchase the property in February of 2010. The Landlord purchased the property with the intent that her son would eventually live there.

AP and the Tenant entered into a written tenancy agreement on March 21, 2010 to rent the subject property. A copy of the tenancy agreement was entered in evidence. The tenancy agreement was for a term of one year, starting April 1, 2010, and ending March 31, 2011, with options to continue on a month-to-month basis or for another fixed term thereafter. Monthly rent is \$1,800.00 per month, due the first day of each month. The Tenant provided a security deposit in the amount of \$900.00 to AP on March 21, 2010.

AP gave the following testimony:

He has more than 20 years of experience as a property manager and real estate agent.

When the Landlord purchased the property, the mortgage was substantial. There were discussions about how much it could be rented for, and whether the rent would cover the mortgage payments. The Landlord and AP had discussions about the potential for a suite. The Landlord was concerned that the property be rented quickly. The Landlord and AP did not have a written agreement that he would act as her agent in renting the property, but they agreed that he knew the business best and would take care of finding a tenant. AP was not remunerated for his services, as he was doing it as a friend of the family.

The Landlord's son and AP visited the Municipality to enquire about the feasibility of making a suite in the property. The Municipality advised that the suite would have to have a permit and be built to code. The Landlord and AP concluded that it would be too expensive, that they could not separate the utilities, and it would be better to have one

tenant rather than two tenants. AP recommended to the Landlord and her son that they ask a monthly rent of \$1,800.00 for the rental unit, and they agreed on this amount.

The Landlord and AP met on site and talked about what repairs needed to be done to prepare for a tenant. AP advertised the subject property on a popular website on March 13, 2010.

The Landlord decided to do more work than AP recommended, which meant that the budget and the time frame changed each time AP visited the property. The Landlord and her son decided to try to rent the property for April 1, 2010. The Landlord knew that AP was showing the property to potential renters, and had seen the application for tenancy that AP was giving out to potential tenants prior to the Tenant signing the lease. The Landlord and AP had discussions about qualifications for potential tenants. AP had two promising applications to rent: one from 3 young men; and one from the Applicant/Tenant. AP consulted with neighbours and found that they were concerned about having 3 young men move in. On AP's recommendation, the Landlord and AP decided to rent it to the Tenant, who appeared to be a good selection.

The tenancy agreement was signed on March 21, 2010, and AP met with the Landlord the following day to give her the document and the Tenant's cheque. The Landlord provided AP with a copy of the tenancy agreement and cheque. AP emailed copies of these to the Tenant on the March 22, 2010.

The situation began to deteriorate three or four days later when it became apparent the electrical work would not be completed in time for the Tenant to move in on April 1, 2010. On March 26, 2010, the Landlord asked AP to offer the Tenant compensation in the amount of \$1,800.00 to agree to give up the lease. AP made the offer to the Tenant, who did not respond right away. The Landlord then rescinded this offer, saying that she had taken legal advice not to make the offer. The Landlord suggested that AP tell the Tenant that he did not have authority from the Landlord to act as her agent and enter into the lease, but AP refused to lie.

The man AP hired to do work at the property ("BR") obtained the Tenant's personal information and made phone calls to the Residential Tenancy Branch, and to (who he believed to be) the Tenant's current landlord. AP believes BR was trying to intimidate the Tenant. AP was concerned and cautioned BR and the Landlord that any attempts to influence the Tenant could lead to a dispute resolution hearing.

AP believes BR was attempting to manipulate the situation in order to extend his construction contract with the Landlord.

AP stated that he would not act as agent for a landlord without authority of that landlord, as it would have dire consequences to his reputation and his livelihood, up to and including possible sanctions from the Real Estate Board.

The Tenant gave the following testimony:

The Tenant met with AP and the Landlord's son to view the property. The Landlord's son told her that AP was helping the Landlord's family to rent out the property. The Landlord's son represented himself as part owner of the property.

The Landlord's son took the Tenant on a tour of the property, including where to find the beach access.

On March 26, 2010, BR telephoned the Tenant. Another person answered the telephone. The Tenant was concerned because BR had a lot of private information about her and was divulging it to the person who answered the phone.

The Landlord gave the following testimony:

There were discussions about what to do with the property, but there was never any determination made as to what portion, if any, of the unit would be rented. The only

offer of assistance from AP that the Landlord accepted was with respect to purchasing the property. There was never an agreement that AP would act as the Landlord's agent in attempting to rent out the property.

AP told the Landlord, at the time the purchase closed, that he had placed an ad for the rental on the property. The Landlord was surprised, because she was still considering subdividing the property, or putting in a suite.

The Landlord does not believe AP attended at the Municipality to enquire about the feasibility of building a suite in the property. The Landlord believes AP attended at the Municipality three times: to do "due diligence" prior to making an offer to purchase the property; to apply for a variance in order to subdivide the property; and to get a description of the property.

After AP hired BR to make repairs on the property, they discovered that there were more things to repair than was originally contemplated, and that it would take longer and cost more money to complete the renovations. AP knew that the furnace was not working correctly, because he provided a portable heater for the contractors.

The Landlord submitted that if she had an agreement with AP to rent the property for the Landlords, AP would not be doing her a "favour", but would be doing his job.

The Landlord submitted that it is ridiculous for AP to suggest that he was authorized to rent out the property for April 1, 2010, when the Landlord had not yet seen the inspection report; they did not know how much renovation was required; she had not decided whether or not to put in a suite; and the furnace was not working. The Landlord refused to acknowledge the tenancy agreement, as there was no intent to rent on the Landlord's part. The Landlord submitted that AP had simply "over-stepped" a friendship.

The Landlord claims there were other times AP over-stepped his friendship, for example: he berated the Landlord for picking out a paint colour without consulting him; and for considering removal of a pony wall without consulting him. AP told the Landlord's daughter that the only person who should be making decisions about the house was him.

The Landlord, BR and AP met on March 22 to settle BR's account. At the meeting, AP presented the Landlord with the signed tenancy agreement, which the Landlord refused to ratify. Later that evening, the Landlord asked BR to speak to AP and the Tenant, to let the Tenant know that AP was not authorized to act on the Landlord's behalf. BR was not able to contact the Tenant until March 25.

On March 26, the Landlord spoke with the Tenant. Later on that day, AP informed the Landlord's husband that the Tenant had filed an Application for Dispute Resolution, and the Hearing would be the following Wednesday. On March 27, AP tried to convince the Landlord to honour the tenancy agreement and behaved as if he didn't know about the Dispute Resolution Hearing. On March 29, AP told the Landlord he didn't know anything about the Hearing and that realtors are often called as witnesses. The Landlord claims this shows a pattern of dishonesty on the part of AP.

The Landlord's Witness JA gave the following testimony:

The Witness JA is a mortgage broker and has a business relationship with the Landlord. Prior to becoming a mortgage broker, he was a pharmaceutical representative and had a business relationship with the Landlord in that capacity.

He understood that the Landlord was purchasing the property with the view of possibly subdividing it, and as a second home for the Landlord's son. JA understood that the Landlord's son might have friends move into the property with him.

There are some different mortgage qualifying factors for rental properties versus second homes. Depending on the lending institution, there may be an advantage in not disclosing the possibility of renting out a property.

The Landlord's Witness MW gave the following testimony:

The Witness MW was the lawyer for the Landlord for the purchase of the property.

The Landlord told him that the property would be occupied by her son, and that it would be renovated for future sale or rental. The Landlord did not tell the Witness MW that she intended to rent out the whole house.

BR gave the following testimony:

AP hired him to work on the property. The Landlord's son was also working on the property. AP told him that he had a budget of \$2,000.00. Later on, AP told him his budget was \$5,000.00.

BR has been hired to do work on the Landlord's home, and is expecting further jobs from friends of the Landlord's.

BR was present at the Landlord's office when AP told BR he was advertising the property for rent as a favour to the Landlord.

On five different occasions, AP told BR that he had purchased the property with the Landlord.

On March 16, AP brought a portable heater to the property because the furnace was not functioning.

BR met with the Landlord and AP on March 22 for lunch, for the purpose of being paid.

AP had a folder containing the lease. The Landlord asked how long the lease was for, and AP said it was for one year. The Landlord said she was not cashing the security deposit cheque and was not signing the contract because she never authorized AP to enter into the tenancy agreement.

The Landlord's Witness DL gave the following testimony:

The Witness DL is the Landlord's son.

AP was his mentor. DL was interested in becoming a realtor and job shadowed AP from November, 2009 to January, 2010.

He went to the Municipality once with AP to see about the possibility of subdividing the property. DL did not have authority to make decisions about the property.

He did not tell the Tenant that AP was helping his family to rent out the property. He told the Tenant that they had posted the ad to test the market, and that they were still contemplating whether or not to rent it out. DL does not recall telling the Tenant that he was an owner of the property.

DL and the Tenant walked down to the beach together to find the beach access to the property.

The Landlord's Witness HL gave the following testimony:

The Landlord was the Witness HL's office manager in 2007, and is a friend. HL went to the Landlord's wedding.

The Landlord told HL that she bought the property for her son and was hoping to develop it for her son and rent some rooms to friends.

Analysis

Section 1 of the Act provides the following definitions:

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

(a) the owner of the rental unit, **the owner's agent or another person who, on behalf of the landlord,**

(i) permits occupation of the **rental unit** under a tenancy agreement, or

(ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement;

"rental unit" means living accommodation rented or **intended to be rented** to a tenant;

(emphasis added)

The Landlord's position is that the property is not a "rental unit", as it was not the Landlord's intention to rent it. Therefore, the Landlord submits that AP could not be an agent of the Landlord as defined by the Act and, in fact, was not authorized to act on the Landlord's behalf.

In the Landlord's written submission, she writes:

"(AP) informed us around the time of the closing that he had placed an ad for the rental of the property. We were surprised and thought it was premature because we hadn't decided what to do about subdividing the property, or whether we would put in a suite".

The Statement of Adjustments provided in evidence indicates a completion date of March 12, 2010. Therefore, according to the Landlord's written submissions, the Landlord was aware that AP had **advertised the property for rent** on or about March 12, 2010. The Landlord provided no evidence that she made attempts to withdraw the ad, or even to determine what the ad actually said. She left it in AP's hands. In her oral

testimony, the Landlord stated that they were merely “**testing the market**” by placing the ad. This testimony conflicts with the Landlord’s written submission, which indicated her surprise at discovering the existence of the ad.

BR had a business relationship with the Landlord and, according to his own testimony, stood to gain financially from this relationship. BR testified that the first words from the Landlord, upon being provided with the lease agreement on March 22, were with respect to the length of the lease. If the Landlord did not have the intention of renting the property, and did not authorize AP to rent the property on her behalf, I would have expected her first words to have been something quite different.

The Landlord’s son testified that he did not tell the Tenant that he was helping his family to rent out the property, yet he took the Tenant on a search for the beach access. AP testified that applications for rent were available at the property for prospective tenants. This was not disputed by the Landlord or the Landlord’s son. Why would there be applications for rent at the property, if the Landlord did not intend to rent the property?

The Landlord testified that she was aware of the lease on March 22. She did not immediately contact the Tenant to advise that AP did not have authority to act as her agent and that she would not ratify the tenancy agreement. She testified that she asked BR to contact the Tenant on her behalf. It was not until March 26 that the Landlord contacted the Tenant, some 5 days before the tenancy was to begin. The Landlord had a responsibility to **immediately** inform the Tenant that she was not ratifying the lease and that AP was acting without her authority.

There was a great deal of conflicting testimony provided over the course of these two Hearings. For me to accept the Landlord’s position, I would have to accept that AP, of his own volition and without the permission or knowledge of the Landlord, entered into a one year lease with the Tenant. Why would AP, a realtor of substantial experience, do this? There was no financial benefit to AP. There could be dire consequences to his reputation and his livelihood, up to and including sanctions from the Real Estate Board.

Based on the testimony and evidence of all of the parties, and on the balance of probabilities, I find: that the Landlord did intend to rent the property; that the property is a “rental unit” as defined by the Act; and that AP was acting as the Landlord's agent in entering into the tenancy agreement with the Tenant. Therefore, I find that the Tenant's Application falls within the jurisdiction of the *Residential Tenancy Act*.

This matter is adjourned to the date disclosed on the attached Notices of Reconvened Hearing, for the purposes of hearing the merits of the Tenant's Application.

Having found that AP acted as agent for the Landlord, pursuant to the provisions of Section 64(3)(c) of the Act and Rule 13.1 of the Residential Tenancy Branch Rules of Procedure (the “Rules), I hereby grant the Landlord's application to amend the Tenant's Application to include AP as a Third Party.

Pursuant to the provisions of Rule 13.3 of the Rules, I direct the Landlord to serve the Third Party with copies of the Application for Dispute Resolution, this Interim Decision, the Notice of Reconvened Hearing, and relevant evidence, in a manner that complies with the service provisions of Section 89 of the Act, at least five clear business days before the Reconvened Hearing.

Conclusion

I find that the Tenant's Application falls within the jurisdiction of the *Residential Tenancy Act*.

This matter is adjourned to consider the merits of the Tenant's application. Notices of Reconvened Hearing accompany this decision.

AP is hereby added as a Third Party to the Tenant's Application. The Landlord is directed to serve the Third Party with copies of the Application for Dispute Resolution, this Interim Decision, the Notice of Reconvened Hearing, and relevant evidence, in a manner that complies with the service provisions of Section 89 of the Act, at least five clear business days before the Reconvened Hearing.

This interim 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.

April 21, 2010

Date of Decision