

DECISION

Dispute Codes CNC, MT, RR, OPR, MNR, FF, ET

Introduction

This proceeding dealt with cross applications. A Tenant's Application for Dispute Resolution was filed to request cancellation of a Notice to End Tenancy for Cause, more time to make the application, and authorization to reduce rent. A Landlord's Application for Dispute Resolution was filed requesting an Order of Possession and Monetary Order for unpaid rent and an early end to tenancy. Both parties requested recovery of the filing fee paid for their respective applications.

As a preliminary issue, one party requested more time to review and respond to written submissions and evidence of the other party.

Upon consideration of the documentary evidence submitted prior to the hearing, another preliminary issue was raised at the hearing. One party was of the position that I did not have jurisdiction to resolve this dispute and the other party was of the position the *Residential Tenancy Act* applied and that I had jurisdiction to resolve this dispute. Both parties were referred to Residential Tenancy Policy Guideline 27: *Jurisdiction* and instructed to provide written submissions to me and the other party with respect to the interest in the subject property and the applicability of the *Residential Tenancy Act* in this matter.

In light of the above, the parties were provided two weeks from the date of the hearing to submit their written respective position to me and the other party, along with proof of service of the written submission upon the other party. I received written submissions

from both parties within the time limited imposed upon them and I was satisfied those submissions were served upon the other party.

The parties currently residing at and occupying the subject property, who filed the Tenant's Application for Dispute Resolution, will herein be referred to as the "occupants". The party holding the registered interest in the subject property, who filed the Landlord's Application for Dispute Resolution, will herein be referred to as the "owner".

As a procedural note, the occupants had indicated they were seeking to cancel a Notice to End Tenancy for Cause in filing their application; however, from the details for dispute it is clear the Notice to End Tenancy issued is for unpaid rent and the Notice to End Tenancy submitted as evidence is a Notice to End Tenancy for Unpaid Rent. Therefore, I amended the Tenant's Application for Dispute Resolution to reflect a dispute of a Notice to End Tenancy for Unpaid Rent.

Issues(s) to be Decided

Does the *Residential Tenancy Act* apply to the parties and do I have jurisdiction to resolve this dispute?

Background and Evidence

In early 2007 the subject property was in the process of being foreclosed upon by the mortgagee. The registered owner of the subject property was the occupants' limited company (TCEL). Prior to the foreclosure an arrangement was reached between the parties to this dispute and their respective limited companies and on March 31, 2007 several written agreements were executed.

On March 31, 2007 the occupants, TCEL, and the owner's limited company (or nominee) entered into a "Contract of Purchase and Sale". Initially, a Vendor Back Mortgage of approximately \$250,000.00 was contemplated as a form of financing the

property purchase; however, it was later agreed that a \$175,000 loan would be made from TCEL to the owner's limited company. Upon the transfer to the owner, no mortgage was registered on title of the property except for a first mortgage by third party finance company.

On March 31, 2007 TCEL, the owner, and the occupants executed a Joint Venture Option Agreement whereby TCEL had the option to purchase the property from the owner under certain terms and conditions. One of the conditions was that the "Tenancy Agreement" between the owner and the occupants was not in default.

On March 31, 2007 the parties executed a document entitled "Tenancy Agreement". The owner was identified as the "landlord" and the occupants were identified as the "tenants". Key portions of the "Tenancy Agreement" are as follows:

- The term of the "tenancy agreement" was to be a five year term starting April 10, 2007 and ending March 31, 2010 and it was recognized that the occupants may have possession on or before that date.
- The rent was \$6,000.00 per month due on the 1st day of every month (the rent payments).
- Property costs such including taxes and property insurance were to be paid by the occupants.
- Care of the premises, including all fittings and fixtures, and appliances, were to be kept good order and condition by the tenants.
- The agreement was governed by the "Residential Tenancies Act" and any where there is conflict between the agreement and the Act, the Act shall prevail.

It was in dispute as to whether \$2,500.00 was paid to the owner in June 2007. In it undisputed that between June 2007 and February 2008 eight payments of \$4,500.00 were made to the owner and that no payments were made after February 2008.

The owner submitted that a balance owing by the occupants accumulated at the rate of \$6,000.00 per month plus property taxes of \$15,306.54 and property insurance of \$7,452.00 up to March 2010. The owner applied a credit of \$175,000.00 (the amount of the loan between the occupants' limited company and the owner's limited company) in arriving at a balance due from the occupants of \$18,758.54 as of March 1, 2010. On March 10, 2010 the owner issued a *10 Day Notice to End Tenancy for Unpaid Rent and Utilities* (the Notice) and had it posted to the door of the subject property on March 13, 2010. The Notice indicates rent of \$18,758.54 was outstanding as of March 1, 2010 and has an effective date of March 26, 2010.

The occupants filed an Application for Dispute Resolution to dispute the Notice and did so before the five day time limit imposed by the Act. The landlord filed an Application for Dispute Resolution April 22, 2010 to recover unpaid rent of \$24,758.54 (\$18,758.54 + 6,000.00 owing for April 2010).

In response to my request for written submissions, both parties provided logical and well laid out arguments with respect to the applicability of the *Residential Tenancy Act* and my jurisdiction to resolve this dispute which I have summarized below:

Owner's position

- The Contract of Purchase and Sale provides for the following:
 - The Tenancy Agreement shall thereafter be independent of and shall stand separate from the Contract of Purchase and sale;
 - The Parties agree that there shall not be any demand, right, claim, or set off arising from the Contract of Purchase and Sale or the Joint Venture Agreement that can be raised in any way by the Tenants under the Tenancy Agreement, which Tenancy Agreement shall stand separate from all other matters;
 - Should the Tenants default in respect of the Tenancy Agreement causing the Landlord to take legal proceedings to enforce the terms of the Tenancy Agreement... the defences of the Tenants' shall be strictly limited

- The Joint Venture Option agreement granted an option to purchase the property to TCEL, not the occupants, and that any such option has been terminated by the default in the Tenancy Agreement.
- No interest in the property was created by way of a mortgage in favour of the TCEL or the occupants.
- The relationship between the parties is that of a landlord and tenants and has not changed to that of a seller and purchaser.
- The occupants do not have any right or interest in the land and only have rights as tenants with respect to possession of the land.

Occupants' position

- Rent payments were to be approximate the monthly mortgage payments which were \$2,226.00 in June 2007 and \$4,450.22 after July 1, 2007.
 - Emails dated May 31, 2007 between the owner and occupant entitled "June 1 mortgage payment..." describe the owner requesting rent cheques and there is reference to a subsequent verbal discussion resulting in the owner conveying his banking information for a deposit by the occupant and that payments would be \$2,226 and then \$4,450.22 July 1 and thereafter.
- The payments made by the occupant were rounded up to \$2,500.00 in June 2007 (which was not reflected in the owner's ledger) and \$4,500.00 thereafter.
- When a repayment schedule was not set up with respect to the \$175,000.00 loan between the limited companies, the occupants stopped making monthly payments to the owner.
- Where monthly payments equal the mortgage payments are used to determine the balance owed between the parties, the occupant calculates that owner still owes TCEL \$32,757.76 on the \$175,000.00 loan.

- The \$175,000.00 loan is to be considered a second mortgage on the property.
- The owner still owes in excess of \$147,000.00 to TCEL and the occupants based upon the closing costs incurred at the time the property transfer was made and capital improvements made by the occupants.
- The occupants made capital improvements of roofing repairs which were discussed with the owner, as well as installation of stamped concrete, a retaining wall and a retaining fence.

Analysis

In order to find the Act applies to the relationship between the parties and that I have jurisdiction to resolve this dispute, I must be satisfied that there is a tenancy with respect to a rental unit. It not enough to call an agreement a Tenancy Agreement and state that the *Residential Tenancy Act* applies to the agreement to make such a finding. Rather, a tenancy, as defined by the Act, must be found. A tenancy means a tenant's right to possession of a rental unit under a tenancy agreement. A tenancy agreement means an agreement between a landlord and a tenant respecting possession of a rental unit. Where there is an interest in property greater than a tenant's right to possession of the property there is more than a tenancy relationship and the relationship, and disputes that arise out of that relationship, are beyond the scope of the Act.

Upon my review of the submissions of each party, it is apparent to me that each party had a different view of the intended outcome of the various agreements executed on March 31, 2007. It appears as though each party had the view to own the property at

the end of the five year term. It is also clear that the parties also had the view that during the five year term, the owner was not to be "out of pocket" for costs associated with holding the property.

Included in the submissions of both parties is reference to a loan or mortgage between their limited companies and the balance of such a loan. The parties appear to have

opposing positions with respect to interest payable on loans or other amounts outstanding with respect to the property purchase. I refuse to consider the balance of a loan or other amounts payable under the Contract or Purchase and Sale to be a matter to be determined under my jurisdiction. Since I will not consider the balance of the loan or other amounts payable with respect to other agreements between the parties I will not make a finding as to whether the owner owes the occupants a certain balance on the loan or that the occupants owe the owner a net balance for deficient rent payments after deducting the loan.

Whilst the owner's lawyer argues that the Tenancy Agreement is to stand separate and apart from any other agreement entered into between the parties and their respective limited companies, I find that transactions and agreements have been co-mingled. In this case, the owner did not take actions permissible under the *Residential Tenancy Act* in order to end the tenancy when rent payments were late, deficient or non-existent but permitted the occupants to reside in the property and decreased the loan balance that existed between their limited companies. It is unclear as to whether the parties discussed and agreed upon this arrangement to decrease the loan balance; however, I find I was not provided evidence of such an agreement.

I also find the owner did not conduct himself as a landlord ordinarily would. For instance, why would the landlord tolerate partial payments of \$4,500.00 per month, which were usually paid late, when the Tenancy Agreement stipulated rent payments were to be \$6,000.00 on the 1st day of every month? When payments are deficient or non-existent, a landlord ordinarily takes action to end the tenancy or require payment by

issuing a 10 Day Notice to End Tenancy for Unpaid Rent. The owner waited nearly three years after the first deficient payments were received before taking legal steps to regain possession of the property.

In considering whether the Residential Tenancy Act applies in this case I have also considered the terms and scope of the Tenancy Agreement entered into by the parties.

I find the Tenancy Agreement reflects terms not permissible and enforceable under the Act. During a tenancy, a tenant is required to pay rent when due under the terms of the tenancy agreement, utilities within 30 days after written demand is made, and certain other fees provided under the Residential Tenancy Regulations. I find the requirement that the tenant pay property taxes and property insurance is inconsistent with the Act. Further, the Tenancy Agreement requires the tenant to maintain fixtures and fittings in good working condition, yet under the Act a landlord is responsible for repairing and maintaining fittings and fixtures unless damaged by the tenant. Therefore, I find the terms in the Tenancy Agreement that provide the tenant must pay property taxes, property insurance and care of the property to be inconsistent with the requirements of the Act. While terms of a tenancy agreement that conflict with the Act are often dealt with by finding the term unenforceable, in this case, I find the terms indicative of the nature of the relationship between the parties to be more than that of a landlord and tenant given the complex relationship and transactions that involve the parties.

The occupants' position is that monthly payments were to approximate the monthly mortgage payments. I find this position is consistent with the payments actually made by the occupants and there is little evidence to suggest this was unacceptable to the owner at the time. Interestingly, I also noted that provided in the landlord's evidence package was a letter dated May 14, 2007 to TCEL and the occupant from an individual privy to the agreement between the owner and occupants whereby the individual states: "you would pay rent at an approximate amount of the mortgage (which was set roughly at \$6,000 per month) and because the mortgage would be only 75% of the actual market value, the balance of the money you would loan at an interest free rate to [the

owner's limited company]. Accordingly, in effect, the interest on this balance of the purchase price (more or less) would be attributed to the complete rental value of the property." Therefore, I find the occupants' position that payments were to approximate mortgage payments and that the mortgage payments were actually closer to \$4,500.00 than \$6,000.00 has some merit.

The owner also makes reference to previous understandings that the occupants would make payments approximate to monthly mortgage payments in his evidence; however, the owner explains that the rent payment was increased to \$6,000.00 to take into account a balance owing of \$100,000.00 to the owner. I was not provided with a clear explanation as to what comprised the balance of \$100,000.00; however, the evidence suggests this relates to the difference between the anticipated Vendor Back Mortgage and the loan amount, plus legal fees paid by the owner.

Further, the tenant claims to have made capital improvements to the property. While there is not a lot of evidence to support this allegation, I find it reasonably likely that the tenant has made repairs and improvements to the property and further indicative that the occupants and owner have acted in a manner inconsistent with that of a landlord and tenant.

In summary, the parties has co-mingled transactions involving a Tenancy Agreement and a loan between the parties' limited companies that related to the purchase of the property; the amount of rent payable and requirement for the occupants to pay other costs associated to ownership of a property are inconsistent with a tenancy; and the actions and behaviour of the parties is inconsistent with those of a landlord and tenant. Therefore, I find that based on a balance of probabilities, the interest of the occupants in the property is greater than that of a tenants' right to possession of the property and I decline to find jurisdiction to resolve this dispute.

Conclusion

I have declined jurisdiction to resolve the dispute between the parties with respect to the Application for Dispute Resolution filed by each party under the *Residential Tenancy Act*. The parties are at liberty to resolve their disputes in the appropriate form.

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: May 28, 2010.

Dispute Resolution Officer