



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes CNR, FF

Introduction

A Tenant's Application for Dispute Resolution was filed to request cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent and recovery of the filing fee paid for the application.

The party who filed the Tenant's Application for Dispute Resolution will herein be referred to as the "Tenant/Buyer" as listed in a document entered into evidence and as referred to hereafter, and the parties holding the registered interest in the subject property will herein be referred to as the "Landlord/Seller," also as listed in that document.

Upon consideration of the documentary evidence, including the Application itself, submitted prior to the hearing, a preliminary issue was raised and repeated at the hearing. The Tenant/Buyer was of the position that I did not have jurisdiction to resolve this dispute and the Landlord/Seller was of the position the *Residential Tenancy Act* (the "Act") applied and that I had jurisdiction to resolve this dispute.

The Tenant/Buyer's Agent and witness and the Landlord/Sellers appeared, gave affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions to me.

I heard testimony from both parties with respect to jurisdictional issues and the basis for a 10 Day Notice to End Tenancy in the event I found jurisdiction to resolve this dispute.

Issue(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

The Tenant/Buyer's relevant evidence included a 10 Day Notice to End Tenancy for Unpaid Rent (the "Notice") and a document entitled "Lease Agreement with Option to Purchase Real Estate (the "Agreement")."

On January 29, 2010, the parties executed the Agreement. The owners were identified as the "Landlord/Seller" and the Applicant herein was identified as "Tenant/Buyer." Key portions of the "Lease Agreement with Option to Purchase Real Estate" are as follows:

I heard testimony from the Tenant/Buyer's Agent that her company engages in buying and selling properties in financial distress, not residential tenancies, and that the parties entered into a contract for sale. The Agent also testified as further proof, that they, the Tenant/Buyer, receive a monthly statement directly from the Landlord/Seller's mortgage company indicating account balances. The Agent testified that this is done to ensure the Landlord/Seller's good standing with the mortgage company.

I heard testimony from the Tenant/Buyer that normally her company would send the payments directly to the bank or mortgage company, but in this case the company agreed to send the payments directly to the Landlord/Seller for them to mail the mortgage payment. The Agent further testified that the language used in the Document was from the Real Estate board.

I heard testimony from the Tenant/Buyer's witness that she represented the company on this transaction and affirmed that this was not a tenancy agreement, but a contract for sale. The Witness pointed out the clause in the Agreement which stated that there was a payment of \$1.00 and mutual promises and covenants hereinafter stipulated, which she testified is the standard language in a contract for sale of real estate.

The Landlord/Seller's relevant evidence was a two page written statement of their defence of the Application and a copy of Residential Policy Guideline 27 (4) and (5).

I heard testimony from Landlord/Seller EN that the Act applies as the Landlord/Seller pays the monthly mortgage out of their own funds, as well as the taxes and utilities. The Landlord/Seller expressed surprise that the Tenant/Buyer received a statement from their mortgage company.

Landlord/Seller EN testified that the \$2,000.00 received from the Tenant/Buyer does not form any part of the mortgage payment. The Landlord/Seller testified that as proof that

the Act does apply, the purchase price is a set price and does not decrease with each monthly payment received from the Tenant/Buyer.

The Landlord/Seller issued a 10 Day Notice to End Tenancy for Unpaid Rent to the Tenant/Buyer, and testified that they did so as the Tenant/Buyer did not pay a rent increase in January 2011.

Analysis

In order to find the Act applies, I must be satisfied that the parties entered into a tenancy and that the parties had a landlord and tenant relationship.

I have considered whether the evidence indicates that the parties were acting in such a relationship under the Act and policy Guideline.

I have considered the terms in the Agreement, including the following, in making my determination:

- The term of the Agreement was for an initial 24 months with an automatic extension of 11 periods of 24 months;
- The Agreement was entitled Lease Agreement with Option to Purchase Real Estate;
- The rent was an amount equal to \$2,000. The first monthly rent to commence on **November 10, 2009**. The Landlord/Seller at the request of the Tenant/Buyer will be required to provide confirmation of monies being made for payments towards the existing mortgage, property taxes and utilities in order to confirm balances in good standing.
- Consideration of \$1.00 and mutual promises and covenants hereinafter stipulated throughout the Document were agreed to by the parties;
- The Tenant/Buyer, as part of the consideration was granted the exclusive right, option and privilege to purchase the property and the Landlord/Seller was required to provide statements to the Tenant/Buyer confirming that the mortgage payments were being made;
- Taking into account the first mortgage, the Landlord/Seller agreed not to further encumber the Property in any way whatsoever without the prior written consent of the Tenant/Buyer,
- The Tenant/Buyer, after execution of the Document, was to be responsible for all maintenance and repair upon the said property;

- The Tenant/Buyer was to maintain fire and extended coverage insurance on the property.

With the above considerations, I find the Lease Agreement with Option to Purchase Real Estate reflects terms not permissible and enforceable under the Act.

Based on a balance of probabilities, I find the Tenant/Buyer took an interest in the property greater than that of a tenants' right to possession of the property, the nature of the relationship between the parties to be more than that of a landlord and tenant, the length of the term of the Agreement exceeds the allowance of the Act and I decline to find jurisdiction to resolve this dispute.

The parties are at liberty to seek the appropriate legal remedy to this dispute.

Conclusion

I do not find the *Residential Tenancy Act* applies to this dispute and I have declined 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 *Residential Tenancy Act*.

Dated: January 31, 2011.

Residential Tenancy Branch