



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes For the Tenant: CNR, FF
For the Landlord: OPR, MNR, FF

Introduction

This hearing dealt with cross applications.

The Tenant applied to cancel a 10 Day Notice to End Tenancy for Unpaid Rent issued by the Landlord and to recover the filing fee paid for the application.

The Landlord applied for an order of possession for unpaid rent, a monetary order for unpaid rent, and to recover the filing fee for the Application.

The Tenant, the Landlord and his representative were present at the hearing and were provided with the opportunity to submit documentary evidence prior to this hearing, to present relevant oral evidence, to ask relevant questions, and to make submissions to me.

At the outset of the hearing, the Landlord's representative requested to amend the Landlord's application to include a claim for the alleged unpaid rent for March 2011. The request was granted and as a result, I amended the application to include a request for the March 2011 rent.

Issue(s) to be Decided

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

Is the Tenant entitled to an Order cancelling the Landlord's 10 Day Notice to End Tenancy for Unpaid Rent and to recover the filing fee?

Has the Tenant breached the Residential Tenancy Act (the "Act") or tenancy agreement, entitling the Landlord to an Order of Possession and monetary relief?

Background and Evidence

The signed written tenancy agreement entered into evidence by the Tenant indicates that this month to month tenancy began on November 1, 2008, that basic living space was \$400.00 per month and that machinery parking was \$1,000.00 per month, including

\$400.00 for trucks, \$300.00 for a bulldozer, and \$300.00 for a Volvo excavator. The rental unit included a house and 2.3 acres.

Pursuant to the Rules of Procedure, the Landlord proceeded first in the hearing to explain why the Notice to End Tenancy was issued.

The evidence indicates that the Tenant was issued a 10 Day Notice to End Tenancy for Unpaid Rent (the "Notice") on February 3, 2011, in person, for an effective move out date of February 12, 2011. Under the Act, the effective move out date self –corrects to February 13, 2011.

Through the guidance of his representative, I heard testimony from the Landlord that, although the tenancy agreement was executed in November 2008, the Tenant began living in the rental unit in September 2008.

I heard testimony from the Landlord that the reason for separating the parking as indicated in the tenancy agreement was at the Tenant's request for income tax purposes, although he understood the agreement was for a payment of \$1,400.00 per month.

The Landlord testified that he received no money from the Tenant until October 2009, when the Tenant paid a sum of \$7,000.00. The Landlord submitted that \$3,500.00 was for wages paid to him by the Tenant and the other \$3,500.00 was for rent.

The Landlord stated that the Tenant again made a lump sum payment of \$4,000.00 in December 2009. I heard testimony from the Landlord that as of February 2010, he was still waiting for a cheque and a job from the Tenant. The Landlord testified that the Tenant made a \$4,000.00 payment in September 2010, making a total in payments of \$15,000.00. However the Landlord reiterated that of this amount, he considered that \$11,500.00 was for rent and \$3,500.00 was for wages.

I note that part of the Landlord's evidence was a Notice to End Tenancy issued by the Landlord to the Tenant on December 13, 2010, which lists the amount of \$15,000.00 being paid towards rent.

In conclusion, the Landlord submitted that in January 2011, the Tenant mentioned for the first time that he considered rent to be only \$400.00 per month, instead of \$1,400.00 per month, thereby ending their friendship.

In response and in support of his application, I heard testimony from the Tenant denying the statements of the Landlord as to the beginning of his occupancy of the premises. The Tenant stated that the Landlord approached him in the summer of 2008 concerning the Tenant arranging to buy the property in his, the Tenant's name, but for the use and benefit of the Landlord.

The Tenant further testified that he did make arrangements to purchase the property with the Landlord's funds and then transferred the property to the Landlord's name. The Tenant submitted that he then moved into the house with the understanding that he would live there rent free while the property was being developed.

I heard testimony from the Tenant that he heard nothing about a tenancy agreement until mid November 2008, when the Landlord brought the document to him and said it was for his, the Landlord's, records.

The Tenant submitted that the three lump sum payments to the Landlord were due to the Landlord needing money for his income taxes, not for rent.

The Tenant submitted that he runs a business which required the use of heavy machinery and that he takes different pieces of equipment to different job sites.

In response to the Landlord's representative's cross examination, the Tenant testified that there has been no specific piece of equipment parked at the property continuously since the beginning of the tenancy and that he has not made a payment to the Landlord in 2011.

In summary, the Landlord's representative stated that the Tenant's testimony was inconsistent, that the lease agreement was for \$1,400.00 and reiterated that the Tenant has paid only \$15,000.00 since the execution of the tenancy agreement, with \$3,500.00 to be applied to the Landlord's wages.

Analysis

Based on the above testimony and evidence, and on a balance of probabilities, I find as follows:

In order for the Applicant, in this case both Landlord and Tenant, to succeed in this application, the Applicant must show that the *Residential Tenancy Act* applies.

Section 4 (d) (i) and (ii) of the *Act* states that the *Act* does not apply to living accommodation included with premises that are primarily occupied for business purposes and are rented under a single agreement. [*Emphasis added*]

I find, on a balance of probabilities, that the primary purpose of the agreement was for business purposes, that is, for parking of the Tenant's commercial vehicles, and not primarily for living accommodation.

In reaching this conclusion, I was persuaded by the parties' testimony that various pieces of heavy equipment were parked on the 2.3 acres during the term, not just the ones listed in the agreement, and by the fact that the sum listed for machinery parking far outweighed basic living space.

I am further persuaded by the Landlord's inconsistent evidence, with his documentary evidence indicating that the \$15,000.00 paid by the Tenant was for rent, and his testimony indicating that \$3,500.00 was for wages and \$11,500.00 was for rent.

I am further persuaded by the Landlord's failure to diligently pursue a monthly rent, waiting until a year after the execution of the agreement for any payment and in excess of two years before pursuing an end to the tenancy. Rather I find the evidence supports the Tenant's claim that the primary purpose of the parties' relationship was in furtherance of the development of the property, not to enter into a landlord/tenant relationship.

As a result, 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: March 18, 2011.

Residential Tenancy Branch