



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, AS, FF

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution (the “Application”) made by the Applicants for: money owed or compensation for loss or damage under the *Residential Tenancy Act* (the “Act”), regulation or tenancy agreement; permission to sublet the rental suite because the ‘landlord’s’ permission has been unreasonable withheld; and recovery of the filing fee.

The Applicants, the Respondents and the Respondents’ lawyer appeared for the hearing and provided affirmed testimony as well as written evidence prior to the hearing. No issues in relation to the service of the Application and the documentary evidence used by the parties were raised at the start of the hearing.

Jurisdictional Issues

The Respondents had indicated in their written evidence that this was a complex landlord and tenant relationship. Therefore the hearing began with a discussion of this situation in order to determine if the Residential Tenancy Branch has jurisdiction in this matter.

The Respondents explained that they were originally Tenants renting the upstairs portion of the dispute property from the Applicants (who were residing in the lower portion of the property). The tenancy started on November 1, 2010. No written tenancy agreement had been completed between the parties but rent had been established in the amount of \$1,600.00 payable on the first day of each month by the Respondents.

In 2011, the Applicants who were the Landlords at the time, indicated that they would be selling the property they owned. As a result, the Respondents expressed an interest in purchasing the property from the Applicants but were unable to settle on a price because the Respondents were only able to borrow a limited amount of money from the

bank for the proposed sale of the property. As a result, the parties agreed that the property would be sold to the Respondents in the amount of \$635,000.00, although the Respondents were unable to confirm this exact amount.

However, the Respondents explained that as they had borrowed the maximum amount of money from the bank for the sale of the property, they would not be able to meet the full asking price of the property purchase. As a result, the Applicants proposed to the Respondents that they would loan the extra money they needed (\$85,000.00) in order to effect the sale of the property.

However, the Respondents were agreeable to the loan amount but expressed to the Applicants that they would be unable to pay this loan amount of \$85,000.00 because they were already at their maximum monthly payments for the remainder of the sale purchase. As a result, the Applicants suggested that the loan amount could be paid off by the Respondents in monthly rent amounts over a five year period, in addition to interest payable. This amount was calculated by the parties at \$1,604.05 per month monthly over a five year period.

However, this did not address the issue that the Respondents did not have funds to make this monthly payment for the loan to the Applicants. As a result, the Applicants suggested that the Respondents would pay the monthly loan amount to the Applicants on the first day of each month and on the second day of each month the Applicants would pay the same amount back as rent, in exchange for rental of the lower portion of the property; effectively the Applicants were getting free rent in exchange for a loan payment to them by the Respondents.

The parties were agreeable to this and as a result, the parties signed a Loan Agreement for the payment to be made by the Respondents and a residential tenancy agreement for the payment to be made by the Applicants.

The Loan Agreement and the tenancy agreement were provided in documentary evidence. Both agreements were signed in August, 2011.

The Loan Agreement showed that the Respondents, referred to as the "Borrower", were to make monthly payments of \$1,604.05 to the Landlord and that they had a right to not make payment if the Applicants moved out of the rental suite and did not comply with the tenancy agreement, which was referred to in the Loan agreement as "the Lease".

The Loan agreement refers to the tenancy agreement and states in part that:

“The Lender and Borrower have agreed to enter in this Agreement to set forth their respective rights and obligations with respect to the Loan and the relationship between the Loan and the Lease”

[Reproduced as written]

The sale of the property went through and the property ownership exchanged from the Applicants to the Respondents.

However, the Applicants now find themselves at dispute with the Respondents in respect to the subletting of their rental suite.

The Applicants concurred with the Respondents' explanation of the events and confirmed that there were no discrepancies.

When I explained to the parties that I would have to consider whether the Residential Tenancy Branch had jurisdiction in this matter, the Applicants submitted that the Respondents had increased their rent payable under the tenancy agreement through a Notice of Rent Increase form. The Respondents submitted that they had increased the rent during the tenancy but they had also increased the loan payment amount to reflect the same rent increase. The Applicants questioned whether the Landlord was able to make such a change to the Loan Agreement.

I invited the parties to make further submissions and respond to the issue of jurisdiction in this matter but no further evidence or submissions were made.

Analysis

In dealing with this Application, before I consider the details of this dispute and make a legal finding which is binding in law, I must first consider the issue of whether the Residential Tenancy Branch has jurisdiction in this matter and whether the Act applies in this case.

As a result, I turn to Policy Guideline 27 to the Act which explains the jurisdiction Arbitrators have under the Act. Section 5 of this guideline provides guidance on the transfer of an ownership interest and states the following:

“If the relationship between the parties is that of seller and purchaser of real estate, the Legislation would not apply as the parties have not entered into a “Tenancy Agreement” as defined in section 1 of the Acts. It does not matter if the parties have called the agreement a tenancy agreement. If the monies that are

changing hands are part of the purchase price, a tenancy agreement has not been entered into.

Similarly, a tenancy agreement is a transfer of an interest in land and buildings, or a license. The interest that is transferred, under section 1 of the Acts, is the right to possession of the residential premises. 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 such a case the RTB may again decline jurisdiction because the Acts would not apply.

In the case of a tenancy agreement with a right to purchase, the issue of jurisdiction will turn on the construction of the agreement. If the agreement meets either of the tests outlined above, then the Acts may not apply. However, if 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 Acts may apply and the RTB may assume jurisdiction. Generally speaking, the Acts apply until the relationship of the parties has changed from landlord and tenant to seller and purchaser”.

[Reproduced as written]

I have considered the above provisions of the policy guideline along with the oral and written evidence of the Applicants and I find that I must decline jurisdiction in this matter.

I find that the tenancy agreement which was entered into between the Respondents and the Applicants was inextricably linked to the Loan Agreement and was entered into based on the purchase of the property by the Respondents from the Applicants.

The Loan agreement makes several references to the tenancy agreement which is referred to as the Lease and I find that without the agreement of the Applicants to loan the Respondents the money for them to purchase their home, the tenancy agreement would not have come about or entered into.

I find that there is sufficient evidence in this case to show that the relationship between the parties was that of a seller and purchaser of real estate even though there was a tenancy agreement also in place between the parties which I find is interlinked with the relationship.

The parties agreed that the Respondents would pay the loan amount on the first day of each month and the Applicants would pay rent on the second day of each month and

that this was done in relation to both agreements with the ultimate goal of the Respondents finalizing the sale of the property from the Applicants. Therefore, I find that the monies being exchanged were part of the purchase price of the property.

Furthermore, I find that the rental payments being made by the Applicants involve an interest that is more than the right to possession and control of the rental unit and are being made to effect a sale and ultimate transfer of ownership of the property.

Conclusion

For the reasons set out above, I dismiss the Application **without** leave to re-apply, pursuant to Section 62(4) (b) of the Act.

The parties are at liberty to seek alternative legal remedies to address their dispute.

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: November 21, 2014

Residential Tenancy Branch

