



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, CNR

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution (the “Application”) made by both the Owner and the Occupier of the dispute property. Both parties appear as the Applicant and Respondent on each others’ Application and are referred to as the “Owner” and “Occupier” throughout this decision.

The Owner applied for an Order of Possession based on a notice to end tenancy for unpaid rent or utilities. The Occupier applied to cancel this notice to end tenancy.

Both parties appeared for the hearing and provided affirmed testimony; the Occupier had with her an advocate who also made submissions on the Occupier’s case. Both parties also submitted documentary evidence prior to the hearing.

Jurisdictional Issues

At the start of the hearing, the Occupier testified that the dispute address had been purchased by her father who was the Owner of the property. The agreement between them was that Occupier would pay her father \$700.00 every month towards the purchase of the home which was to then pass to her as her inheritance.

The Occupier explained that there was no tenancy agreement in place and that she had not paid her father a security deposit. The Occupier testified that rent was expected to be paid on a monthly basis with no set date as the day rent was payable under the agreement.

The Owner confirmed that there was no tenancy agreement in place but disagreed with the Occupier submitting that the Occupier had paid him a security deposit at the start of the tenancy. However, the Owner did not provide any documentary evidence to support this submission which the Occupier denied.

The Owner submitted that the agreement with his daughter was that she would pay \$700.00 in rent on the first day of each month.

When the Occupier was questioned about the nature of the agreement when it was entered into, the Occupier explained that she did make monthly payments to her father during the tenancy, but for some months she simply did not have the funds to make payment. This was supported by the Owner's documentary evidence which shows that the Occupier had made partial payments during the tenancy in 2011 and had not paid rent for some months in 2014.

The Owner acknowledged that the Occupier was paying monthly rent to him and that this was being used to pay for the mortgage on the property. The Owner explained that he purchased the property for the Occupier to get her off the streets. However, the Owner submitted that as the Occupier had failed to pay him rent she was not entitled to any part of the inheritance of the property.

The Owner now seeks to evict the Occupier because they need to sell the property to recoup losses as a result of the Occupier not paying the rental arrears that have accumulated during the tenancy. The Owner also testified that he had not addressed the issue with the Occupier of the rental arrears in 2011 because the Occupier was going through some hardships at the time.

The Owner also confirmed that he was paying the property taxes and utilities for the property and that he was using money from the Occupier's rent payments to pay these costs. In a handwritten letter by the Owner dated November 1, 2014 to the Occupier, the Owner writes that he has consulted with the Residential Tenancy Branch and has discovered that he can also claim for unpaid utilities.

The Occupier explained that she was willing to move out of the property but that the Owner would have to give her back all of the money she had paid to him as rent. This was because the rent was being paid on the basis that she would have ownership of the property when it was fully paid for or when the Owner passed away.

The Occupier referred to a typed letter submitted in written evidence from the Owner to her. In the letter the Owner carefully documents the expenses incurred by him, including the surplus used from the Owner's income to pay off the loan and the losses the Owner has had to pay to the bank. The letter ends with instructions to the Occupier that she needs to leave the property and is labelled as being from "Mum and Dad".

Analysis

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 9 to the Act which explains when a tenancy under the Act has been entered into and lists a number of conditions an Arbitrator may consider surrounding the occupation of the premises and what the parties intended in the circumstances. The guideline states that *some* of the factors that may weigh against finding that a tenancy exists between the parties are as follows:

- Payment of a security deposit is not required.
- The owner, or other person allowing occupancy, retains access to, or control over, portions of the site.
- The occupier pays property taxes and utilities but not a fixed amount for rent.
- The owner, or other person allowing occupancy, retains the right to enter the site without notice.
- The parties have a family or other personal relationship, and occupancy is given because of generosity rather than business considerations.
- The parties have agreed that the occupier may be evicted without a reason, or may vacate without notice.

The above list is not an exhaustive list of considerations and not every point above needs to be satisfied. Rather that these must be considered along with the circumstances surrounding the nature of the agreement at the time it was entered into.

In this case, I find that the parties had not completed and signed a tenancy agreement. There was also not sufficient evidence provided by the parties that the Occupier had paid a security deposit at the start of the tenancy that was before me.

I find that the parties had a family relationship and agreed that the property in dispute was purchased by the Owner as an act of generosity, even though the purchase had conditions that the Occupier would make monthly payments in order to ensure that the Owner was able to afford the property.

However, although I acknowledge that the Occupier was given exclusive possession of the property with no right of the Owner to enter the suite without notice, I am not

satisfied that sufficient evidence has been provided to show that a tenancy agreement under the Act had been entered into. As a result, I turn my attention 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 Occupier 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 Owner and Occupier to seller and purchaser".

[Reproduced as written]

I have considered the above provisions of the policy guideline with the evidence of the parties in this matter and my findings above regarding the construction and circumstances of the agreement, and I find as follows.

The Occupier explained that the monthly rent payments that were made were paid with the intention that the monies would be paying off the loan the Owner had taken from the bank to purchase the property. The Occupier further explained that these monies would be returned to the Occupier in the form of full ownership of the property, either when it was fully paid for or when the Owner was to pass away at which point the Occupier would inherit the property.

As a result, I find that at the time the parties agreed to enter into this agreement, the Occupier took an interest in the property which was higher than that of the right to possession of the property. The documentary evidence submitted by both parties supports this finding as the Owner is seeking to end the tenancy based on his inability to make bank payments for the loan he took out to purchase the property for the Occupier.

I find that the evidence before me suggests that the agreement between the parties regarding the exchange of monthly payments at the time it was entered into, was inextricably linked to the eventual transfer of the property to the Occupier.

As a result, I find that the balance of evidence and the circumstances of this case all point to the conclusion that the Residential Tenancy Branch has no authority under the Act to make a legal binding decision in this matter. Therefore, I must decline jurisdiction.

Conclusion

For the reasons set out above, I dismiss both Applications **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 26, 2014

Residential Tenancy Branch

