



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the Act) for:

- an order of possession for unpaid rent pursuant to section 55; and
- authorization to recover his filing fee for this application from the tenant pursuant to section 72.

The tenant did not attend this hearing, although I waited until 0955 in order to enable the tenant to connect with this teleconference hearing scheduled for 0930. The landlord's agent attended the hearing and was given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The agent is the landlord's spouse.

At the beginning of the hearing, the agent indicated that the landlord and tenant were engaged in discussions to mutually end the tenancy; however, the agent indicated that she wanted to continue with the hearing.

The agent testified that the landlord served the tenant with the dispute resolution package on 31 January 2015 by registered mail. The agent provided me with a Canada Post tracking number that showed the same. On the basis of this evidence and pursuant to sections 89 and 90 of the Act, I am satisfied that the tenant was deemed served with the dispute resolution package on 5 February 2015, the fifth day after the registered mailing..

The agent testified that the landlord served the tenant with the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice) on 16 January 2015 by registered mail. The agent provided me with a Canada Post tracking number that showed the same. On the basis of this evidence and pursuant to sections 88 and 90 of

the Act, I am satisfied that the tenant was deemed served with the 10 Day Notice on 21 January 2015.

Issue(s) to be Decided

Does the Residential Tenancy Branch have jurisdiction to consider this application?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the agent, not all details of the submissions and / or arguments are reproduced here. The principal aspects of the landlord's claim and my findings around it are set out below.

The tenant and landlord entered into an agreement dated 30 April 2010. This agreement included an option to purchase. The agent testified that it is her understanding that the tenant will not be able to exercise the option to purchase because of changes in the tenant's family circumstances. The agent testified that the landlord and tenant are discussing a return of possession to the landlord for April of this year. The agent testified that the agreement contains a term that if there are issues with performance under the agreement, the option to purchase becomes "null and void".

At the beginning of the agreement, the landlord received \$20,000.00 from the tenant. This payment was received as a non-refundable deposit. The agent testified that the tenant paid this amount by electronic transfer.

On 16 January 2015, the landlord issued the 10 Day Notice to the tenant. That notice set out that it was being given for \$1,000.00 in rent arrears that was payable 1 January 2015. The 10 Day Notice set out that the tenant had until 26 January 2015 to vacate the premises.

The agent testified that the landlord has received two payments since the issuance of the 10 Day Notice totalling \$600.00. The agent testified that the tenant told the landlord that there was another payment for \$350.00 that was in the mail. The agent testified that the tenant had total rent arrears of \$1,100.00, which did not include the payment of \$350.00 that had not yet been received.

I was provided with copies of personal messages sent between the landlord and tenant on a social networking site. The personal messages document a history of late monthly payments. The earliest messages I was provided with are from almost one year ago.

On 6 January 2015, the landlord wrote to the tenant:

...This has been going on for too long. If you happen to be able to pay the rent for the rest of this lease, There will be no renewal of the lease in May so I here by (sic) also give you a 3 month notice to vacate, which is more then what is required of me to do.

On 23 January 2015, the tenant wrote to the landlord:

...tis (sic) isn't a rental it's a rent to own

beings (sic) you asked me to move Jan 19/2015

you owe me 3000 for the last 3 years so i am using that towards the next 3 months

i am not moving

On 23 January 2015, the landlord wrote to the tenant:

No [tenant]...it is a lease with the option to purchase at the end of the lease period. You are currently a tenant with a 3 year lease agreement. The rent with the option to buy is a separate agreement and hence has no bearing on the rent not being paid...the 3000 dollars is only applied to the purchase if you make the purchase at the end of the rental agreement other then (sic) that it is just rent. You have been given your notice and we will do what has to be done.

The agent testified that if the tenant made up the late rent and was able to exercise the option, then the landlord would sell the property to the tenant "in a heartbeat".

I was provided a copy of the agreement. There are the following relevant clauses:

8. The term of the Lease commences at 12:00 noon on May 1, 2012 and ends at 12:00 noon on May 1, 2015.
20. Upon giving written notice no later than 60 days before the expiration of the term of this Lease, the Tenant may renew this Lease for an additional term. All terms of the renewed lease will be the same except for this renewal clause.
36. The landlord agrees to renew the lease for an additional 2 year term upon completion of this lease.

62. Provided the Tenant is not currently in default in the performance of any term of this Lease, the Tenant will have the option to purchase (the "Option") the Premises...

62(a)(1). In consideration for the Option, the Tenant will pay the Landlord a sum of \$20,000.00 (the "Option Fee") which is non-refundable

62(i) Upon expiration of the Option, the Landlord will be released from all obligations to sell the Premises to the Tenant. If the Tenant does not exercise the Option prior to its expiration, the Option Fee and all rents and other charges paid under this Lease will be retained by the Landlord, and neither party will have any further rights or claims against each other concerning the Option. In the event the Option is exercised, the Option Fee will be credited against the Purchase Price.

Lease To Own

Selling Price House	\$195000
7% interest	
<u>\$13650</u>	
Total Selling Price:	\$208650
Deposit:	<u>\$20000</u>
Made in 2 installment	
1 st installment: May 1, 2012 of \$10000	
2 nd installment: June 1, 2012 of \$10000	
	\$188650
Rent Applied for 3 years	<u>\$</u>
<u>3600</u>	
(\$100.00 per month)	
Balance Due after 3 yrs	\$185050

Monthly Rental: \$1000.00 per month
 \$100.00 per month goes towards the purchase price and is non refundable

\$20000 deposit is applied to original purchase price and is non refundable

69. Any waiver by the Landlord of any failure by the Tenant to perform or observe the provisions of this Lease will not operate as waiver of the Landlord's right under this Lease in respect of any subsequent defaults, breaches or non-performance and will not defat or affect in any way the Landlord's rights in respect of any subsequent default or breach.
84. Time is of the essence in this Lease. Every calendar day except Saturday, Sunday, or Canadian national holidays will be deemed a business day and all relevant time periods in this Lease will be calculated in business days. Performance will be due the next business day, if any deadline falls on a Saturday, Sunday or a national holiday. A business day ends at five p.m. local time in the time zone in which the Property is situated.

The agent submits that the agreement was for an option to purchase and not a rent-to-own arrangement.

Analysis

Subsection 2(1) of the Act sets out that:

- 2 (1)** Despite any other enactment..., this Act applies to tenancy agreements, rental units and other residential property.

"Tenancy agreement" is defined in section 1 of the Act:

"tenancy agreement" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit;

Residential Tenancy Policy Guideline, "27. Jurisdiction" (Guideline 27) sets out:

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.

...

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 [if the relationship between the parties is that of

seller and purchaser of real estate or 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 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.

[emphasis added]

In order for me to consider the tenants' application, there must be an agreement that is in respect of possession of a rental unit, but cannot create an interest greater than this by conveying something "extra" to the tenants. Pursuant to subsection 62(2), I have the jurisdiction to make any finding of fact or law that is necessary or incidental to making a decision or order under the Act. In this case, it is necessary that I determine whether any equitable rights of the tenants to the property have been extinguished. If I find that the agreement continues to convey an interest in the land, equitable or otherwise, that entitled the tenants to the possession of the rental property, I would be precluded from considering this issue as the agreement at issue would not be a "tenancy agreement" within the meaning of the Act.

The basis of the "extra" interest in an option agreement is the ability of a buyer to seek specific performance. Specific performance is an equitable remedy that would force a seller to complete the purchase on the basis that completion is the only appropriate remedy given the "uniqueness" of real property.

Key to the creation of an extra interest in the property is whether or not the option agreement had been exercised: See *Chung v Jackson*, 2006 BCSC 220 (*Chung*) and *Lobo v 568570 BC Ltd*, 2011 BCSC 1474 (*Lobo*). In *Chung*, the Court took jurisdiction over a proceeding where jurisdiction had been declined by the Residential Tenancy Branch. In that case, the option price had not been paid in full and the option had been terminated by the non-payment. Additionally, the option date (2007) was beyond the date of the application (2005). In *Lobo*, the Court held that an option agreement did not convey an extra interest in the property that removed the Branch's jurisdiction as that option had not yet been exercised and was subject to a contingent renewal process.

The agreement entered into between the current parties contained a "time is of the essence" clause. Where an agreement states that time is of the essence, there is no waiver, and where a party fails to comply with the timelines prescribed by the agreement, the buyer's right to specific performance is lost (see *Williams Lake Realty*

(1978) *Ltd v Symynuk* (1982), 39 BCLR 313 (CA) (*Symynuk*)). However, a five-member panel of the British Columbia Court of Appeal held that where time is of the essence and the parties subsequently agree to extend the time for performance of an obligation, a court may decline to give effect to a "time is of the essence" clause if insisting on strict compliance would be unjust or inequitable: *Salama Enterprises (1988) Inc v Grewal*, 1992 CanLII 4035 (BCCA) (*Salama*).

Like in *Chung*, the term of the agreement is ongoing. Pursuant to clause 8, the term of the lease ends 1 May 2015. Unlike *Lobo*, the renewal process is not contingent. In particular, the renewal clauses (clauses 20 and 36) in the agreement do not create a contingent renewal process. Rather, the decision to renew is the tenant's. Although the agent believes that the tenant will not be able to complete the sale, I was not provided evidence that the tenant has treated the agreement as at an end. In fact, I was provided with contrary evidence by way of the tenant's social networking messages that she intends to continue to occupy the property.

When the agent submitted that non-performance rendered the agreement "null and void", I believe that she is referring to the "time is of the essence clause". As set out in *Symynuk*, where an agreement contains such a clause, a party fails to comply with the timelines prescribed, and there is no waiver, then that party would lose the right to seek specific performance. In this case, the landlord has provided me with evidence that he has repeatedly extended the time for the tenant to pay the monthly payments. The agreement contains a clause that purports to oust my ability to find that this conduct amounts to waiver; however, it is not necessary that I find that this is waiver as I can rely on the British Columbia Court of Appeal's reasoning in *Salama*. I find that the agreement was not extinguished by the tenant's late payments as it would be unjust. In particular, the tenant has made payment to the landlord towards the purchase price that totals approximately 10% of the total purchase price.

I find that the agreement is not extinguished. Accordingly, I find that the parties have not entered into a tenancy agreement within the meaning of the Act. As such, I do not have jurisdiction to consider the landlord's claim.

As the landlord has not been successful in his application, he is not entitled to recover the filing fee from the tenant.

Conclusion

I decline to hear this matter as I do not have jurisdiction.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: March 19, 2015

Residential Tenancy Branch

