



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding PROMONTORY ENTERPRISES INC
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, MNR, CNR, FF

Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* ("the *Act*"). The landlord applied for:

- an Order of Possession for Unpaid Rent pursuant to section 55;
- a monetary order for unpaid rent pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

The tenants applied to cancel the Notice to End Tenancy and recover the filing fee for their application.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, and to make submissions. Both parties confirmed receipt of the other's evidentiary submissions for this hearing.

Preliminary Issue: Jurisdiction

Before considering the substantive issues in this matter, the issue of jurisdiction arises: Does the Residential Tenancy Branch have jurisdiction to consider this application?

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 No. 27 addresses “jurisdiction”,

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]

Subsection 62(2) of the Act allows an arbitrator to make any finding of fact or law that is necessary or incidental to making a decision or order. 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 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*.

By way of background, the tenants and landlord entered into an agreement dated September 20, 2012. This agreement included an option to purchase. The landlord testified that the agreement provides that, if the tenant fails to pay rent or abide by any other term of the agreement, the option to purchase and the “credit fund” shall be forfeited. As the landlord indicates that the formal written agreement between the parties has expired and that the tenants have failed to pay rent since July 2015.

At the beginning of the agreement between the parties, the landlord received \$5,237.60 as an "option fee" from the tenants. This payment was received as a non-refundable deposit.

On October 1, 2015, the landlord issued the 10 Day Notice to End the Tenancy for Unpaid Rent to the tenants. That notice set out that it was being given for \$5,176.78 in rent arrears that was payable October 1, 2015. The 10 Day Notice set out that the tenants had until October 10, 2015 to vacate the premises. Tenant YS did not dispute that he has failed to pay rent since July 2015.

I was provided with copies of financial documentation as well as a copy of the Agreement and the attached documents (amendment and schedule A). In this case, the agreement submitted as evidence at this hearing indicates that a portion (\$209.50) of "each monthly Rent payment shall apply as a credit to purchasing the Premises provided that the Sub-Tenant is in compliance with the terms of this Agreement at the time of such payment..." and that "the Sub-Tenant has the Option to Purchase the Premises for a Purchase Price of \$ \$141, 624 [sic] ...may exercise this Option to Purchase on any business day during the period that commences the 30th day prior to the end of the Term..."

Schedule A attached to the Agreement states that,

... upon the expiration of the Term or termination of this Agreement , the Sub-Tenant will surrender will surrender the Premises and all of its rights to the Sub-Landlord. At the termination of this Agreement, whether by effluxion of time or otherwise, the Sub-Tenant will vacate and deliver up possession of the Premises.

The original agreement was dated August 31, 2012 with an end date of September 19, 2014. An addendum to that agreement extending the term to December 19, 2014 was signed on September 17, 2014. That addendum included an increase of the purchase price for the premises. As stated by the landlord, the agreement includes provisions to address a portion of the option to purchase funds as well as the credit fund if the tenants default on a portion of the agreement.

I note that correspondence between the parties as late as September 2015, after the first extension date, indicates that both parties continue to act as if the agreement is in place. In an email, the landlord states, "The full amount of funds needs to be in by October 1..." As well, both parties stated, during the course of their testimony that the tenants will still be provided with another opportunity to exercise his option to purchase. Given all of the evidence suggesting a continuing contract, I find that the agreement was not extinguished by the tenants' late payments. In particular, the tenants have

made payment to the landlord towards the purchase price that totals approximately 3% of the total purchase price, as well as an initial payment of \$5237.60 as an “option fee”. In this case, there has been no evidence submitted to indicate that the tenants or landlord has treated the agreement as at an end. I find the agreement continues to convey an interest in the land that entitled the tenants to the possession of the rental property.

The landlord must be clear and unwaivering in his position if he wishes to end this agreement. The tenants, however, should be advised that the landlord has other venues available to him were the tenants not to pay the outstanding amounts to the landlord.

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 *Residential Tenancy Act*. Therefore, I do not have jurisdiction to consider either party’s claim.

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 Section 9.1(1) of the *Residential Tenancy Act*.

Dated: December 18, 2015

Residential Tenancy Branch

