



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 0955633 B.C. LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes: OPB MNR FF CNR

Introduction:

Both parties filed Applications and attended this hearing. The landlord applies for an Order for Possession, a Monetary Order for unpaid rent and filing fee. The tenant applies to set aside the Notice to End Tenancy, for a monetary order for his purchase deposit and other payments and to recover the filing fee. The landlord did not serve a Notice to End Tenancy but relies on a fixed term tenancy agreement as ending the tenancy. Both parties confirmed receipt of each other's Application by registered mail.

Issues:

Is this a landlord-tenant matter or a purchase and sale agreement? Do I have jurisdiction in this matter? If so, is the landlord entitled to an Order of Possession and a monetary order?

Or is the tenant entitled to any relief?

Background and Evidence:

The facts before me were as follows. The parties entered into two separate contracts on February 1, 2015. The tenants' state it was a tenancy agreement with a 'Rent to Own' provision with a verbal agreement to continue renting on a month to month basis until the purchase of the property was concluded. Both parties agreed that \$17,500 was paid as the purchase deposit to the landlord on February 1, 2015. The tenants said they have received mortgage approval and were ready to complete the purchase but the landlord/vendor has raised the purchase price from \$775,000 to \$941,000 and refuses to proceed to completion.

The landlord said \$17,500 was a non refundable deposit and the sale was to be completed by January 31, 2016. The tenants requested an extension but it was denied. They said they have received no rent since February 2016 and this was a fixed term tenancy agreement expiring on January 31, 2016. They did not serve a Notice to End Tenancy as they rely on their fixed term agreement. They require vacant possession now and a monetary order for unpaid rent of \$3500 a month since February 2016.

In evidence is a copy of a cheque dated January 30, 2015 for a property inspection contract, a copy of the cheque for \$17,500 paid to the landlord on February 1, 2015, a

tenancy agreement dated February 1, 2015 with a one page addendum stating the sale price of the property is \$775,000 including GST and the 'non refundable deposit of \$35,000 shall be given at the time of entering of tenancy agreement' to be adjusted when the buyer purchases the property and an email from the landlord to say they were not accepting the rent for February and to vacate the house. There is also an unsigned Purchase Contract stating a closing date of January 31, 2016 and a purchase price of \$775,000. The purchase price was to be payable by \$17,500 deposit and \$17,500 on execution of the agreement. The possession date was to be February 1, 2015 with rent of \$3500 payable until closing date and the rent paid was not to be used towards the purchase price. The tenancy agreement was to be terminated on completion of the purchase of the property or upon breach of the agreement by the Purchaser.

Analysis:

I have weighed the testimony of the parties and I accept the tenants' evidence that they always have wanted to exercise their purchase arrangement and communicated that intention to the landlord orally and in writing. I find that they communicated their problems with some of the clauses in the Purchase Agreement in writing in March 2015 such as the clauses regarding the GST, the agreed upon deductions and a time clarification. They ask that the agreement be clarified and the matter completed 'speedily as it has dragged on too long'. There are various text messages between the parties pointing out deficiencies also.

Section 5 of the Residential Policy Guidelines deals with jurisdiction and states that:

5. TRANSFER OF AN OWNERSHIP INTEREST

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 arbitrator 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 arbitrator may assume jurisdiction. Generally speaking, the Acts apply until the relationship of the parties has changed from landlord and tenant to seller and purchaser.

Pursuant to section 5 of the Policy Guidelines above I find that the parties entered into a Purchase and Sale Agreement and the tenant paid \$17,500 as a deposit. I find the tenant thus obtained an interest in the property which is higher than the right to possession and part of the money changing hands was a part of the purchase price. Although the parties entered into a tenancy agreement at the same time as their Purchase and Sale Agreement, I find that the applicant and the respondent are not landlord or tenant as the agreements were intractably bound up in their contractual relationship of buyer and seller and therefore the *Residential Tenancy Act* does not apply to their relationship. As support for this position, I note that if the landlord succeeded in ending the tenancy, he keeps the 'nonrefundable' \$17,500 according to the addendum to the tenancy agreement. Also, this addendum to the tenancy agreement states the purchase price of \$775,000

I therefore conclude that I do not have jurisdiction to decide the various claims of the parties. I will leave another forum to consider the various claims and rights should the parties wish to pursue this matter further.

Conclusion:

Having found that I do not have jurisdiction in this matter I hereby dismiss all of the applicants' claims made herein. There shall be no recovery of the filing fee herein for either of the parties.

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: April 21, 2016

Residential Tenancy Branch