



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNDC, MNSD, FF, CNR

Introduction

This hearing dealt with three related applications. Two were the landlord's applications against each tenant individually for an order of possession based upon a 10 Ten Notice to End Tenancy for Non-Payment of Rent, a monetary order and an order permitting retention of the security deposit in partial satisfaction of the claim. The other was the tenants' joint application for an order setting aside the notices to end tenancy. Both parties appeared and had an opportunity to give affirmed evidence. No issues regarding the exchange of evidence were identified.

Issue(s) to be Decided

- Does the Residential Tenancy Branch have jurisdiction over this dispute?
- Are the Notices to End Tenancy valid?
- If so, what orders should be made and on what terms?

Background and Evidence

The tenants used to be the registered owners of this property. At the time that the tenants and the landlord made their agreements there were two mortgages registered against the property, both in arrears. The first mortgagee had undertaken foreclosure proceedings and a judicial sale had either been ordered or was about to be ordered.

The tenants agreed to sell the property to the landlord. The basic outline of their agreement was that the buyer would pay up the arrears and stop the foreclosure proceedings as the deposit; pay out all the encumbrances registered against the property as the balance of the purchase price; and rent the property to the tenants.

The sale agreement was prepared by a notary, who testified at the hearing. The notary represented the vendor on the sale; the purchasers were unrepresented.

The relevant terms of the sales agreement, which was executed on March 9, 2016, are:

1. "PURCHASE PRICE: The purchase price of the Property will be the cost to the Buyer to assume or payout the existing charges and taxes, being approximately \$300,000.00 CANADIAN DOLLARS (Purchase Price).
2. DEPOSIT: A deposit will form part of the Purchase Price, will be paid on the following terms:

On or before the possession date, the Buyer will provide the funds to pay the funds to the first mortgage required to bring the first mortgage back from default and will continue to make the payments on the mortgages and other payments, including property taxes and utilities, including any arrears or penalties, as required to ensure that the mortgages are not in default.

3. TERMS AND CONDITION: The purchase and sale of the Property includes the following terms and is subject to the following conditions:

Subject to the holders of the mortgages on the property accepting the payments as removing the mortgages from default, halting judicial action, including but not limited to judicial sale, and allowing the payments of the mortgages to continue in an orderly fashion per the terms of the mortgages, on or before March 18, 2016. This condition is for the sole benefit of the Buyer.

Subject to the Sellers executing a valid Form A Transfer to the Buyer and leaving the Transfer in trust with . . Notary Public, to be used at Completion, on or before March 18, 2016. This condition is for the sole benefit of the Buyer.

Each condition, if so indicated is for the sole benefit of the party indicated. Unless each condition is waived or declared fulfilled by written notice given by the benefiting party to the other party on or before the date specified for each condition, this Contract will be terminated thereupon and the Deposit returnable in accordance with the Real Estate Services Act.

4. COMPLETION: The sale will be completed on September 30, 2016 (Completion Date) at the appropriate Land Title Office.
5. POSSESSION: The Buyer will have vacant possession of the Property at 12 noon on March 18, 2016 (Possession Date).
6. ADJUSTMENTS: The Buyer will assume and pay all taxes, rates, local improvement assessments, fuel utilities and other charges, including arrears and

penalties, from, and including the date set for adjustments, and all adjustments both incoming and outgoing of whatsoever nature will made as of March 18, 2016 (Adjustment Date).

16. RISK: All buildings on the Property and all other items included in the purchase and sale will be, and remain at the risk of the Seller until 12:01 am on the Completion Date. After that time, the Property and all included items will be at the risk of the Buyer.”

The notary testified that the purchase price was intended to be the amount required to pay out all of the encumbrances registered against the property, which is why the price was stated to be an approximate amount. No cash was to be paid to the sellers.

The notary also testified that he understood the agreement was that the buyer was to take over all payments until he could arrange his own financing, at which time title would be transferred into the buyer's name. The completion date was intended to be the deadline because it was not clear when the buyer would finalize his financing. The notary also testified that this clause should probably have been drafted as “on or before September 30”.

At about the same time the parties agreed orally that the sellers would rent the property from the buyer. Both parties testified that the terms of the agreement were that:

- Each seller would pay a monthly rent of \$400.00.
- The rent would include all utilities.
- The first rent payment was due on May 1 and rent would continue to be paid monthly thereafter.
- No security deposit would be paid.

The sellers signed all the transfer documents and left them with the notary. Before March 18 the buyer paid the arrears of \$21,166.95 on the first mortgage, effectively stopping the foreclosure proceedings.

Subsequently, a number of disputes have occurred between the parties. Only the disputes that are relevant to the legal issues here will be referred to in this decision.

On two occasions the interest payment for the second mortgage was automatically deducted from the tenant's bank account. On each occasion, the payment was returned NSF. The tenant confirmed that the landlord reimbursed him for the NSF fees on both occasions.

The utilities remained in the name of the sellers. The tenants filed some evidence of the payments they made towards utilities.

They filed a BC Hydro invoice for the period up to March 22 in the amount of \$147.09 and proof a payment was made to BC Hydro on April 5 in the amount of \$140.99. Clearly this invoice relates to the time before they entered into the sale agreement and is not relevant to this dispute.

The tenants also filed proof of another payment to BC Hydro on July 4 in the amount of \$200.00.

The tenants filed two invoices from Fortis for the periods of April 22 to May 24, and May 24 to June 22. Actual usage for that period is \$247.89. The May 24 invoice refers to a previous payment of \$370.68 and sets the arrears at \$161.95. The tenants filed proof of the following payments to Fortis: \$200.00 on April 5; \$370.68 on May 3; and \$300.00 on July 4. Without the invoices for the months prior to April 22 it is impossible to determine whether any of the payments were towards charges incurred prior to March 18, for which the tenants were responsible, or after March 18, for which the landlord was responsible.

The landlord admitted that he had not done anything about the utilities. He said that when the tenants did not pay the rent he did not change the utilities.

The tenants did not pay the May, June or July rent.

Meanwhile the landlord obtained a new mortgage and paid out the two existing mortgages. As of June 17 the payouts for the first and second mortgages were \$253,998.74 and \$18,266.21 respectively. Title was transferred into the landlord's name on June 12, 2016.

On July 5, 2016, the landlord issued and served each tenant with a separate 10 Day Notice to End Tenancy for Non-Payment of Rent claiming arrears of rent for May, June and July in the amount of \$1200.00 each.

The tenants argue that the landlord has breached the terms of the sale agreement by:

- transferring the property before the completion date;
- not paying the utilities as required; and,
- not paying the interest on the second mortgage when due.

Although they also complained about having to pay the property insurance and provided proof of those payments up and including the month of June I note that clause 16 of the Sale Agreement states that the risk, and therefore the obligation to insure, remained with the sellers until the property is transferred into the name of the buyer. Those payments were properly made by the tenants.

The tenants argue that as the landlord did not comply with the terms of the sale agreement, and they did not agree in writing to any of those variations as required by clause 3 the Sale Agreement is null and void. They argue that title should still be in their name. Finally, they argue that the Residential Tenancy Branch does not have jurisdiction over this dispute because since the buyer should not be the registered owner, he is not a landlord within the meaning of the *Residential Tenancy Act*.

They have talked to a lawyer but not taken any proceedings in Supreme Court.

Analysis

Does the Residential Tenancy Branch have jurisdiction over this dispute?

The Residential Tenancy Branch has been created by statute, the *Residential Tenancy Act*, and can only hear and resolve disputes that are within the jurisdiction created by the statute.

Section 2 of the *Act* states that it applies to tenancy agreements. It defines “tenancy agreement” as 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.

“Landlord” is defined as:

- the owner of the rental unit; or,
- the owner’s agent; or,
- a person acting on behalf of the owner; or
- a person, other than a tenant occupying the rental unit, who is entitled to possession of the rental unit and exercises any of the rights of a landlord under a tenancy agreement.

Pursuant to the terms of the Sale Agreement the landlord was entitled to vacant possession of the rental unit on March 18, 2016. By agreeing to rent the unit to the tenants he exercised the rights of a landlord under a tenancy agreement. This brings him into the definition of a “landlord” and the agreement between the parties within the definition of a “tenancy agreement”.

An arbitrator does not have the legal authority to overturn a sale agreement or set aside the registered ownership of the rental unit; only the Supreme Court does. Until the sale agreement and/or the transfer have been set aside by the court of competent jurisdiction, the arbitrator must proceed on the basis that the sale agreement and/or the transfer are valid.

Section 58(2)(c) of the *Act* provides that the Residential Tenancy Branch does not have jurisdiction over a dispute that is linked substantially to a matter that is already before the Supreme Court. In this case, there is no matter before the Supreme Court.

As both the landlord and the tenancy agreement come within the definitions set out in the *Residential Tenancy Act* and there is no application regarding the sale before the Supreme Court I find that the Residential Tenancy Branch does have jurisdiction over this dispute.

Are the 10 Day Notices to End Tenancy valid?

As set out above there was a valid tenancy agreement between the landlord and the tenants. The notices were in the correct form and were properly served. The tenants do not have a valid legal reason for withholding the rent. Accordingly, I find that the landlord is entitled to an order of possession effective two days after service on the tenant.

I find that the landlord has established a total monetary claim of \$2100.00 comprised of arrears of rent for May, June, July, August and September in the amount of \$2000.00 and the \$100.00 fee paid by the landlord for this application against each tenant and I grant the landlord orders under section 67 for the balance due of \$2100.00 against each tenant..

Conclusion

- a. An order of possession effective two days after service on the tenant has been granted in relation to each tenant. If necessary, this order may be filed in the Supreme Court and enforced as an order of that Court.
- b. A monetary order in favour of the landlord in the amount of **\$2100.00** has been granted in relation to each tenant. If necessary, it may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

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: September 09, 2016

Residential Tenancy Branch

