



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, O

Introduction

This hearing dealt with an Application for Dispute Resolution seeking to cancel a notice to end tenancy.

The hearing was conducted via teleconference and was attended by the applicant; his legal counsel; the male respondent; and their legal counsel.

In the details of his Application the applicant submitted: "The applicant is not a tenant but the beneficial owner of the property. In September 2016, the applicant filed a notice of civil claim in British Columbia Supreme Court and certificates of pending were registered on title to the property. This form is submitted without prejudice to the applicant's position that the branch is without jurisdiction.

At the outset of the hearing, the issue of this dispute being linked to a matter before the Supreme Court of British Columbia was raised. Despite the applicant's legal counsel's testimony that he had provided copies of the Supreme Court pleadings to this file I noted that there were none on file.

Legal counsel for both parties provided oral arguments on their positions as to whether or not this dispute is linked substantially to the matter before the Supreme Court. In order to consider each argument fairly and thoroughly and to ensure I understood the complete details of the matters before the Supreme Court I determined I required a full copy of the pleadings and written submissions of both parties.

Legal counsel for the respondents was concerned that a delay in these proceedings would be prejudicial to them. He submitted that this has been a longstanding dispute between the parties which includes the non-payment of rent which has caused considerable hardship on the respondents.

I noted that I would be willing to proceed on the matters during this hearing time but that based the oral submissions of both parties and the documentary evidence I did have I felt that the matters in this dispute were substantially linked to the matters before the Supreme Court. I offered that I would consider this issue again if each party would like to provide written submissions. Legal counsel for the applicant was willing to proceed based solely on the oral submissions.

I confirmed for both parties that I would ensure the fastest possible response to their submissions and if the need arose to be reconvened I would have it scheduled to be heard as soon as possible. To that end the parties agreed that should we need to reconvene I would have staff from the Residential Tenancy Branch contact their respective legal counsel to advise them of the new hearing time and provide call in procedures. I noted that this may mean that the re-scheduled hearing may be earlier than normally done – both legal counsels indicated they had no issue with this approach.

I ordered both counsel to submit their written arguments and the applicant's legal counsel to submit a full copy of the pleadings before the Supreme Court. I ordered that these submissions be provided by fax no later than the end of business on Monday, January 23, 2017. I provided the parties with the specific fax number to use. I note both parties provided their submissions before 4:00 p.m. on January 23, 2017.

Legal counsel for the applicant submitted the following documents:

- A copy of the applicant's Notice of Civil Claim date stamped as received by the local court registry on September 6, 2016. The Claim sought, among other things, specific performance of a contract between the parties identified as a "contract of purchase and sale" regarding the residential property;
- A copy of the respondents' response to the applicant's Civil Claim date stamped as received by the local court registry on January 11, 2017;
- A copy of the respondents' Counterclaim date stamped as received by the local court registry on January 11, 2017. The Counterclaim sought, among other things, a judgment for unpaid rent in the amount of \$31,000.00 and an order for vacant possession of the property; and
- A copy of the applicant's response to the respondents' Counterclaim date stamped as received by the local court registry on January 16, 2017.

Legal counsel for the applicant submits that the Supreme Court documents submitted show that the parties had entered into contracts "centered on the relationship between the parties as seller and buyer of the Property, with the ultimate question to be resolved being who is the owner of the Property?" The applicant submits that as a result "the landlords' own pleadings confirm the inextricable intertwining between this proceeding and the Action."

Legal counsel for the applicant also submits that the 10 Day Notice to End Tenancy issued by the respondents on December 7, 2016 stipulates that the applicant owes the respondents \$31,800.00 in unpaid rent. Counsel also points out that this claim is also the basis of the respondents' Counterclaim where they are seeking judgment in connection with unpaid rent in the amount of \$31,800.00 and an order of vacant possession of the rental unit.

In regard to the Counterclaim the applicant submits: "...that not only is the dispute "substantially connected" to the court action, the proceedings are in this respect identical. The [respondents] are suing for amounts they classify as "rent" and for vacant possession of the Property, exactly what the Notice seeks."

The respondents' legal counsel submits that Supreme Court action relates only "to a Contract of Purchase and Sale between the Applicant and the Respondents not the tenancy of the Applicant in connection with the Property." They further submit that the applicant seeks relief for the specific performance of the real estate transactions and not any relief in connection with a tenancy of the property.

Counsel submits that "An order of Possession granted under the *Act* in favour of the Respondents will have no affect on the Supreme Court proceedings brought by the Applicant as the relief he seeks in connection with the Claim, specific performance of the Contract, does not hinge on whether or not the Respondent is currently possessed of the property in any event, whether as a tenant or a beneficial owner."

I note counsel for the respondents has made no submissions at all in relation to their Counterclaim.

Section 58(2) of the *Residential Tenancy Act (Act)* states if the director accepts an application under subsection (1), the director must resolve the dispute unless

- (a) The claim is for an amount that is more than the monetary limit for claims under the *Small Claims Act*,
 - (a.1) the claim is with respect to whether the tenant is eligible to end a fixed term tenancy under section 45.1 [tenant's notice: family violence or long-term care],
- (b) The application was not made within the applicable period specified under this *Act*, or
- (c) The dispute is linked substantially to a matter that is before the Supreme Court.

Residential Tenancy Policy Guideline #27 states, in part, the *Act* does not confer upon the Director the authority to hear all disputes regarding every type of relationship between two or more parties. The Director only has the jurisdiction conferred by the *Act* over landlords, tenants and strata corporations.

The Guideline goes on to say the power and authority of the Director is derived from the Legislation. The dispute resolution process does not create a court and so the tribunal does not have inherent powers arising under the common law which are possessed by a judge. For example, the Director does not have jurisdiction in "equity" to grant some forms of relief that a court may grant.

The Supreme Court may, by order, assume jurisdiction over a residential tenancy matter, in which case the Director loses jurisdiction over that dispute. If the dispute is linked substantially to a Supreme Court action then the Director may decline jurisdiction.

Section 1 of the *Act* defines a landlord, in relation to a rental unit, as any of the following:

- The owner of the rental unit, the owner's agent or another person who, on behalf of the landlord
 - Permits occupation of the rental unit under a tenancy agreement or
 - Exercises powers and performs duties under the *Act* or the tenancy agreement;
- The heirs, assigns, personal representatives and successors in title to a person referred to above;
- 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 or the *Act* in relation to the rental unit.

If I only consider the applicant's Civil Claim currently before the Supreme Court, I am not persuaded by the respondent's argument that an order of possession granted through this proceeding would have no effect on the Supreme Court proceedings. Rather, I find what is more relevant is that the outcome of the Supreme Court proceedings may impact whether or not the relationship between the parties at all material times was that of landlord and tenant.

Policy Guideline #27 also states that if the relationship between the parties is that of seller and purchaser of real estate, the *Act* would not apply as the parties have not entered into a "Tenancy Agreement" as defined in Section 1 of the *Act*. 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 *Act*, 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 Director may again decline jurisdiction because the *Act* 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 *Act* 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 *Act* may apply and the Director may assume jurisdiction. Generally speaking, the *Act*

applies until the relationship of the parties has changed from landlord and tenant to seller and purchaser.

It is my finding that in order to make a determination of the relationship between the parties it must first be determined if the applicant has taken an interest in the land and buildings which is higher than the right to possession, such as ownership. I find that determination of the applicant's interest in the property will be determined as part of the Supreme Court action.

Furthermore, if I also consider the respondents' Counterclaim, I am persuaded by the applicant's submissions that by seeking recovery of \$31,800.00 and an order of possession from the Supreme Court the matters before the Court and before this tribunal are identical.

Issue(s) to be Decided

The issues to be decided are whether the applicant is entitled cancel a 10 Day Notice to End Tenancy for Unpaid Rent, pursuant to Section 46 of the *Act*.

Conclusion

Based on the above, I find that the matters raised in this Application for Dispute Resolution are linked substantially to a matter before the Supreme Court. Therefore, I decline jurisdiction on these matters, at this time.

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: January 27, 2017

Residential Tenancy Branch