Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, OPL, FF

Introduction

This hearing was scheduled to deal with a tenant's application to cancel a *2 Month Notice to End Tenancy for Landlord's Use of Property* and a landlord's application for an Order of Possession for landlord's use of property. Both parties appeared were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

It should be noted that the "tenants" in this case profess that they are not tenants but are purchasers of the property. The landlord is of the position that the "tenants" are just that, tenants. Since this is a cross application, the parties are both applicants and respondents. For ease of reference in writing this decision the individuals professing to be "purchasers" of the property but described as tenants by the landlord have been referred to as "the tenants" and the owner of the property as "the landlord". I have described each party's position with respect to the agreement between the parties and whether there is a tenancy agreement or a purchase agreement under the section entitled "Preliminary Issue – Jurisdiction".

Preliminary Issue – Service of hearing documents and Request for Adjournment

At the outset of the hearing I confirmed that each Application for Dispute Resolution was duly served upon the other party via registered mail.

As for the landlord's evidence, I heard that an evidence package was sent to each tenant via registered mail on May 16, 2017. The male tenant picked up the package addressed to him on May 31, 2017 and the female tenant did not pick up her package because she was in the hospital although I was not provided the specific dates she was in the hospital. The male tenant acknowledged that he saw a registered mail notice card for the female tenant in their mail box. Section 90 of the Act deems a person to have received documents five days after mailing. I asked the tenant for the reason for the delay in picking up the evidence package. He stated that there was some confusion since the landlord had sent multiple correspondences to them recently. I was satisfied that the landlord met his obligation to send an evidence package to the tenants within the time limit for doing so and I admitted his evidence package.

The tenants stated that they had faxed evidence to the Residential Tenancy Branch and the landlord on May 31, 2017. I noted that I did not have a copy of the evidence in the files before me. I asked the tenants to describe the nature of their evidence. They described the package as containing a written statement of the tenant, plus three witness statements written by other individuals. The landlord acknowledged receiving a copy of the tenants' evidence by registered mail on June 2, 2017. The landlord pointed out that the tenants' evidence was late and that he was not afforded sufficient time to provide rebuttal evidence if the tenant's evidence was to be admitted.

Under the Rules of Procedure, an applicant must submit evidence at least 14 clear days before the hearing and a respondent must submit evidence at least 7 clear days before the hearing. The day the evidence is received and the day of the hearing are not counted in calculation of clear days. I accepted that the tenants sent their evidence to the landlord on May 31, 2017 and the landlord received the tenants' evidence on June 2, 2017 and as such I find the tenants served very late evidence, with only three clear days before the hearing.

I asked the tenants the reason for the delay in providing their evidence. They stated that it was because they did not pick up the landlord's evidence until May 31, 2017; however, the tenants also testified that the three witness letters were dated May 13, 2017, May 18, 2017 and May 25, 2017 meaning they were gathering evidence before receiving the landlord's evidence package. The tenants proceeded to request an adjournment so that they could gather and submit further evidence to support their position that they have a purchase agreement for the property. The landlord expressed concern over the proceeding being delayed. I noted that in filing their Application on April 28, 2017 the tenants wrote: "There is no tenancy agreement. This is a contract to purchase the subject property". Accordingly, I was of the view that the tenants were aware since April 28, 2017 at the latest that it would be upon them to produce evidence to demonstrate a purchaser agreement exists and that it is the tenants failure to exercise due diligence in gathering evidence in a timely manner. As such, I declined to grant the tenants' request for an adjournment and I did not admit or permit the tenants to resubmit their late evidence to the Residential Tenancy Branch. Rather, the tenants were provided the full opportunity to provide me with their position orally during the hearing. I also permitted the tenants to call witnesses during the hearing. The tenants provided the name and telephone number of one witness who was called to testify during the hearing and I have considered that witness's testimony in making this decision.

Preliminary Issue – Jurisdiction

The tenants are of the position that they have an agreement with the landlord to purchase the property, but that they do not have a tenancy agreement and the Act does not apply. The landlord was of the position that the parties have a tenancy agreement and that while there were discussions concerning the tenants' desire to purchase the property and the landlord entertained the idea a purchase agreement was not reached and the Act applies. I informed the parties that this preliminary issue would be explored before hearing the party's respective

positions with respect to the 2 Month Notice. The vast majority of the hearing time was spent on exploring the issue of jurisdiction. Although a considerable amount of testimony and evidence was provided on this issue, with a view to brevity, I have only summarized each party's respective position and evidence below.

Landlord's position

The landlord testified that in or about September 2010 the landlord and the male tenant were introduced to each other by a mutual acquaintance at that person's barbeque party. At that time the landlord was seeking a tenant for the subject property and the tenant was looking for a place to move to. The landlord submitted that he had been collecting rent of $1,800.00 for the property but the tenant stated he could not afford that much so the parties verbally agreed that the tenant would pay rent of $1,200.00 per month and in exchange for the reduced rent the tenant would be responsible for maintaining the property. The tenant was given possession of the property in October 2010. The landlord collected a security deposit of $1,200.00 from the tenant and has received $1,200.00 most every month on or about the first day of every month since then. Other than the security deposit and the rent payments, the tenants have not paid him any additional monies for the purchase of the property.

The landlord acknowledged that he did not prepare a written tenancy agreement or condition inspection report. The landlord described the agreement as a "handshake deal" and that the landlord lived in another City and the tenant was often away working in another town.

The landlord testified that after the parties met at the barbeque party there have been multiple discussions about the tenant's desire to purchase the property and the landlord entertained the idea of selling the property to the tenant. The parties had discussed a selling price of $500,000.00 and various conversations as to how the tenant intended to come up with the purchase price, including a mortgage and lump sum down payments, but no real offer was received and no additional payments were ever made by the tenants toward the purchase of the property. At a later point in time the tenant indicated that he or his son could qualify for a mortgage of only $350,000.00 but then the tenant's arrangement with his son fell apart because the tenant's son was not working at the time. The landlord stated that nothing ever went beyond discussions for the tenant to purchase the property; and, no real offer to purchase was ever received and accepted. The landlord confirmed that no purchase agreement between the parties was ever written or registered at a land title office.

The landlord understands that the tenants have been acting as though and telling people in the town where the rental unit is located that they purchased the property and the tenants have proceeded to allow others to move recreational vehicles onto the property and live on the property. In fact, the landlord has seen signage pointing to the tenants operating some form of "affordable living" business at the residential property.

The landlord produced his bank statements for numerous months and a “Statement of Real Estate Rentals” that accompanied his tax returns for the tax years of 2010 through 2015 to show that the rental deposits were recorded as rent from the tenant and that he has declared the monthly payment from the tenant as being rental income for tax purposes. Further, the landlord paid the mortgage on the property, property taxes and insurance for the property during all this time even though the tenant had indicated he was willing to pay the property insurance. The landlord acknowledged the tenant has performed repairs and maintenance at the property but was of the position that was agreed upon as part of their tenancy agreement.

Tenant’s position

The tenant was in agreement that he met the landlord at the barbeque party as stated by the landlord; however, the tenant had a much different recollection of the verbal agreement they reached at the party. The tenant stated that the landlord had initially spoke of renting the property but the tenant responded by stating he was not interested in renting a property but wanted to purchase a property. As a result, the parties reached an agreement whereby the tenant would pay $1,200.00 to the landlord every month as payment toward the purchase of the property and that at the end of five years the tenant would pay the remaining balance of the $500,000.00 purchase price. The tenant said there was no discussion that interest would be charged by the landlord in exchange for the tenant making monthly payments toward the purchase price over five years so the tenant assumed it was interest free. The tenant stated that although he did not know the landlord prior to the party he had been at the property before on a few occasions when other people lived on the property.

The tenant acknowledged that shortly after taking possession of the property in October 2010 the landlord had requested a second payment of $1,200.00. The tenant believed this second payment was a further advance on the down payment he was making toward the purchase of the property and not a security deposit.

When asked what happened with respect to the purchase agreement at the end of five year term, the tenant changed his testimony and stated that five years was just “discussed” but that it was not a firm term of their agreement. The tenant went on to state that approximately 1 to 1.5 years ago the tenant approached the landlord about the landlord carrying a mortgage so that the tenants could purchase the property. It appeared that the landlord was considering the idea but the landlord later responded by informing the tenant he could not carry a mortgage for the tenants.

The tenant testified that he offered to pay the property insurance but the landlord would not put the insurance in the tenant’s name.

The tenant acknowledged that $1,200.00 is a reasonable amount to pay in rent for the property.

The tenants did not deny that others are living on the residential property but testified that they do not collect rent from them.

The landlord responded to the tenants' submissions, by stating that he would never agree to give the tenants an interest free mortgage; and, that if all of the monthly payments were to be applied to the purchase price then the tenants were living there without paying any rent, which he would never agree to. The landlord pointed out that a "rent to own agreement" usually consists of a rent plus additional monies to be applied toward the purchase price of the property. The scenario described by the tenant is not accurate but is not even consistent with a rent to own agreement. The landlord acknowledged that he considered whether he could carry a mortgage for the tenant when the tenant suggested that option but that the landlord determined it was not a feasible option.

Witness testimony

The tenants called their witness to testify. All parties were in agreement that this witness was at the barbeque party in September 2010.

The witness stated that he overheard some of the conversation between the landlord and tenant at the barbeque party and that from what he heard during that conversation and from the parties and others after the conversation was over the parties had reached a purchase agreement. The witness was unable to provide specific details or terms he heard the landlord and tenant agree upon. Rather, he described how people were cheering and celebrating that the tenant was going to purchase the property from the landlord.

The witness testified that he has been living in a recreational vehicle on the property for the past few months and upon examination by me he stated he has paid monthly rent of $500.00 to the tenant. The witness also acknowledged that there is another individual residing on the property in a recreational vehicle but the witness does not know whether the other person pays rent. The tenant then asked the witness a leading question with respect to the tenant giving back the rent payment to the witness. The witness agreed the tenant had reimbursed him the rent he had paid in exchange for providing "security" services at the property.

The landlord pointed out that the witness has an interest in maintaining the current arrangement so that he may continue to live on the property. The landlord also pointed out that alcohol and drugs were being consumed at the barbeque party and questioned what the witness actually heard.

Analysis and Findings with respect to issue of jurisdiction

The Act and my authority to resolve disputes is limited to disputes arising between a landlord and tenant with respect to a tenancy agreement, residential property or rental unit.

Section 1 of the Act defines tenancy agreement as follows:

> **"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

As provided in the definition of tenancy agreement, an oral agreement that conveys a right to possess a residential property to a tenant is a tenancy agreement. Since oral agreements are recognized in the definition of tenancy agreement, oral tenancy agreements are enforceable under the Act and rights and obligations provided by the Act apply to the landlord and the tenant. However, where parties have an agreement that is for something greater than a right to possess a residential property under a tenancy agreement the parties must resolve their dispute in the appropriate forum. The parties are in dispute as to whether a tenancy agreement exists or a purchase agreement was entered into. Accordingly, it is before me to determine whether the parties entered in to an oral, express or implied tenancy agreement as submitted by the landlord or a purchase agreement as put forth by the tenants before I proceed to consider whether the *2 Month Notice to End tenancy for Landlord's Use* should be upheld or cancelled. My decision is based upon the evidence before and the balance of probabilities. I have also considered Residential Tenancy Policy Guideline 27*: Jurisdiction* which provides policy statements and information with respect to jurisdiction, including illustrations of agreements that do not fall under the jurisdiction of the Residential Tenancy Branch.

Part B, section 5 of the policy guideline deals with transfers of an ownership interest which I have reproduced below and considered in making my decision:

> **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.
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> 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 RTB may again decline jurisdiction because the Acts would not apply.
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> 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 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.

Upon consideration of everything before me, I find that I prefer the landlord's version of events as being much more likely than that of the tenants. I make this finding based on all of the following factors:

- The landlord provided clear and consistent testimony that the parties entered into a tenancy agreement requiring the tenants to pay rent of $1,200.00 per month.
- The tenant acknowledged that $1,200.00 is a reasonable amount of rent for the property.
- The tenant provided changing and less clear testimony with respect to having a five year term in which to pay the balance of the purchase price off and it remains that at no time was the purchase price ever satisfied.
- The parties provided consistent testimony that they had discussions about the tenant(s) purchasing the property and the landlord has entertained the idea but that the tenants have not secured a mortgage for the purchase price, the tenants made no payments to the landlord other than $1,200.00 per month and one additional payment of $1,200.00 that the landlord has considered a security deposit.
- The parties are dealing with each other at arm's length yet the tenant purports that the landlord did not charge any interest on the purchase price being paid over time or any rent since 2010 which I find to be highly unusual and unlikely for parties who are at arm's length parties.
- A purchase agreement, or rent-to-own agreement, was never reduced to writing or registered on the title of the property.
- The landlord did not take money for property insurance from the tenant or otherwise transfer the property insurance to the tenant's name which is consistent with the landlord's position that this is a tenancy and not a purchase agreement.
- The tenants did not pay the property taxes for the property which is consistent with a tenancy.
- The tenant's witness has an interest in having the tenants remaining in possession of the property so that his living arrangement may continue at the property. Further, the witness essentially provided unspecific and hearsay evidence and changed his testimony after being asked a leading question by the tenant. As such, I did not find his testimony to be very reliable or helpful.

While there is no doubt the landlord and tenant had a number of conversations with respect to the possibility of the tenants purchasing the property I find the key elements of a contract for the purchase and sale did not form and were not performed. Where parties agree to purchase and sell a property, one would expect to see a clear offer and acceptance, with consideration paid to the seller and clear terms such as: the purchase price; the date(s) for the purchaser to pay a deposit and consideration and the amounts to be paid; the interest rate if the owner agrees to

carry the financing for the property and due dates if the seller agrees to take multiple partial payments; the date the contract will be completed and title will be transferred to the buyer; among many other things. None of these elements were recorded in writing and other than a purchase price the tenant's own testimony fails to demonstrate that most of the other elements of a contract were agreed upon and performed as agreed upon.

In light of the above, I reject the tenants' position that they have an ownership interest in the property and I find, on the balance of probabilities, that the agreement between the parties is an oral tenancy agreement and that the payments made by the tenants represent rent payments and payment of a security deposit as opposed to payments toward the purchase of the property.

Accordingly, I proceed to consider whether the *2 Month Notice to End Tenancy for Landlord's Use* should be upheld or cancelled.

Issue(s) to be Decided

Should the *2 Month Notice to End Tenancy for Landlord's Use of Property* be upheld or cancelled?

Background and Evidence

The tenants took possession of the rental unit in October 2010 and are required to pay rent of $1,200.00 on the first day of every month and the tenants paid a security deposit of $1,200.00.

The landlord personally served a *2 Month Notice to End Tenancy for Landlord's Use of Property* ("the 2 Month Notice") upon the male tenant on April 14, 2017. The 2 Month Notice has a stated effective date of July 1, 2017 and indicates the reason for ending the tenancy is because "the rental unit will be occupied by the landlord or landlord's close family member (parent, spouse or child; or the parent or child of that individuals' spouse)". The tenants filed to dispute the 2 Month Notice on April 28, 2017 which is within the time limit for doing so.

The landlord testified that he is the registered owner of the property and that he and his wife will be moving back to the property as their residence. The landlord submitted that he and his wife live in another City where they had jobs but recently he and his wife have received lay-off notices from their respective employers and they do not have job prospects in that City given their age and deteriorating health. Rather than continue to live in that City and pay rent at an apartment where they will both soon be out of work, and pay the carrying costs for the rental unit which are not fully covered by the rent payments, the landlord and his wife have given notice to end their tenancy at the apartment effective June 30, 2017 with the intention of moving back to the rental unit. The landlord has also ordered the cancellation of utilities at the apartment and reserved a moving truck. The landlord has applied for a part job similar to one he had before in a town nearby the rental unit location.

As documentary evidence in support of ending the tenancy for the reason provided, the landlord provided copies of the lay-off notices he and his wife received from their employers; their notice to end their tenancy at the apartment; and the job application the landlord submitted for employment near the rental unit.

The tenants did not offer any argument against the landlord's reasons for wanting to regain possession of the rental unit. Rather, the tenants maintained that they have a purchase agreement and not a tenancy agreement for the property so they cannot be evicted under the *Residential Tenancy Act*.

The tenants questioned whether the landlord is the registered owner of the property. The tenants did not perform a title search of the property and acknowledge that they had always considered the landlord to be the owner up until very recently when a third party suggested to them that he is not the owner or than someone else may have an ownership interest. The landlord responded by stating that he is the registered owner, the only registered owner, and that he has documentation to demonstrate that. I did not require the landlord to produce such proof of ownership. However, I did inform the tenants that if they perform a title search for the rental unit and determine the landlord is not the owner they may file an Application for Review Consideration.

Analysis

Where a landlord seeks to end a tenancy so that the landlord, or close family member of the landlord, may occupy the rental property, the Act provides a mechanism to do that under section 49(4) of the Act. Where a landlord serves the tenant with a 2 Month Notice under section 49(4) of the Act and the tenant disputes the Notice, the landlord must demonstrate that the landlord, or close family member of the landlord, has a good faith intention to occupy the rental unit after the tenancy ends. The burden of proof is based on the balance of probabilities.

In this case, I find the landlord provided unopposed reasons and evidence supporting that he and his wife currently live in a rented apartment different City and that they have both received lay-off notices from their respective employers in that City. I find the landlord provided logical and reasonable reasons for giving up their rented apartment and moving back to the rental property as their residence and those reasons were not opposed by the tenants. Overall, I find the landlord's intentions appear to be genuine and without malice or ulterior motives. Therefore, I find the landlord satisfied me that the tenancy should end so that the landlord may occupy the rental unit in good faith and I uphold the 2 Month Notice.

Since rent is payable on the first day of every month, the earliest an effective date for a 2 Month Notice served in April 2017 would be June 30, 2017. The landlord gave the tenants an extra day in issuing the 2 Month Notice with an effective date of July 1, 2017 and I provide the landlord an Order of Possession with an effective date of July 1, 2017.

As further information for the parties, having upheld the 2 Month Notice the tenants are entitled to compensation equivalent to one month of rent as provided under section 51 of the Act. If the tenants have already paid rent for June 2017 the landlord must refund it to the tenants by the end of the tenancy. If the tenants have not yet paid rent for June 2017 they are entitled to withhold it.

Further, security deposits are limited to one-half of a month's rent. The tenants have over-paid the security deposit and the tenants are entitled to recover the over-payment of $600.00 from the landlord. The balance of the security deposit remains in trust, to be administered in accordance with section 38 the Act after the tenancy ends.

I make no award for recovery of the filing fee to either party for the following reasons: the tenants were unsuccessful in their application and the landlord may have avoided the need for this hearing had the landlord prepared a written tenancy agreement as the landlord was required to do under the Act.

Conclusion

I have made a finding that the parties have a tenancy agreement and I have jurisdiction to resolve this dispute.

I have upheld the 2 Month Notice issued on April 14, 2017 and I order that the tenancy ends on July 1, 2017. The landlord is provided an Order of Possession with an effective date of July 1, 2017 to serve and enforce upon the tenants.

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: June 08, 2017

Residential Tenancy Branch