



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL

Introduction

The tenant applies to cancel a two month Notice to End Tenancy for landlord use of property dated September 28, 2017.

As a preliminary matter the tenant argues that the *Residential Tenancy Act* (the “Act”) does not apply to her relationship with the respondent landlord.

Both parties attended the hearing and were given the opportunity to be heard, to present sworn testimony and other evidence, to make submissions, to call witnesses and to question the other. Only documentary evidence that had been traded between the parties was admitted as evidence during the hearing.

Issue(s) to be Decided

Does the *Act* apply to this relationship? If so, is the Notice a valid Notice to end the tenancy?

Background and Evidence

The rental unit is a six bedroom home of approximately 5400 square feet located on about 7 acres of land. There is another, smaller home, of about 1600 square feet also located on the property and in which the respondent landlord lives (note: the words “landlord” and “tenant” are being used without any predetermination that either party has that legal status).

The land was at one time owned by the applicant tenant’s late husband Mr. P.R. jointly with his brother Mr. T.R. The property had been in the R. family for over 100 years and has been passed down through the R. offspring.

Mr. P.R. passed away in 2010. The land devolved to the remaining joint tenant Mr. T.R.

Mr. T.R. passed away about two years ago. By his will he left the land to his niece, the respondent landlord.

The respondent landlord is the daughter of the applicant tenant and the late Mr. P.R.

The respondent landlord acquired title to the property in August 2017. She wishes to move her family into the larger home and move her mother into the smaller. The parties cannot agree on terms. The respondent landlord issued the two month Notice in question.

The applicant tenant and her late husband built the larger home in the 1981. According to the applicant tenant, she and her family were "in and out" of the home over the years but she has lived there since about 1984. According to the respondent landlord her mother moved in only in 1995.

There is no dispute but that during her occupation of the home the applicant tenant has contributed to property taxes, has insured the home and paid for all its upkeep, as though it was her own property. When the property devolved to her brother-in-law Mr. T.R. she made no written or verbal arrangement with him about her continued occupancy. She did not pay him any money that might be considered to be rent.

There is no written agreement regarding the tenant's occupation of the home since her husband passed away. There is no evidence of any oral agreement with the tenant's late brother-in-law on the subject of her continuing occupancy after the death of her husband.

Analysis

Counsel for the tenant expressed the view that there is no tenancy agreement and that her client's claim to occupy the home is not under a tenancy agreement nor a license to occupy the home. She says that the tenant occupies the home merely through a family relationship.

No authority was cited for the proposition that the fact that her late husband had once been one of the owners of the property or that a previous owner had been the tenant's brother-in-law or that the present owner is her daughter has vested in the tenant a right to occupy the home. I am unaware of any law to support that claim.

Is There a Tenancy Agreement?

Section 1 of the *Residential Tenancy Act* (the “Act”) provides definitions for the terms “landlord” and “tenancy agreement.”

“landlord”, in relation to a rental unit, includes any of the following:

- (a) the owner of the rental unit, the owner's agent or another person who, on behalf of the landlord,
 - (i) permits occupation of the rental unit under a tenancy agreement, or
 - (ii) exercises powers and performs duties under this Act, the tenancy agreement or a service agreement;
- (b) the heirs, assigns, personal representatives and successors in title to a person referred to in paragraph (a);
- (c) a person, other than a tenant occupying the rental unit, who
 - (i) is entitled to possession of the rental unit, and
 - (ii) exercises any of the rights of a landlord under a tenancy agreement or this Act in relation to the rental unit;
- (d) a former landlord, when the context requires this;

“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;

In my view the first consideration is whether or not there is a “tenancy agreement” of some kind. Without a tenancy agreement there can be no “landlord” and no tenancy to which the *Act* would apply.

The tenant must claim to occupy the premises by some means or right or authority, otherwise she would merely be a trespasser. Had the tenant summoned a policeman to remove someone, an unwanted guest for example, and had she been asked by what right she claimed the power to eject that person, I consider it most likely that her reply would have been that her late husband had owned the home, then her brother-in-law owned it and she had his permission to live in the home and now her daughter is the owner and she had her daughter’s permission to live in the home.

In the circumstances of this case that permission would have been implied, not specifically granted by any word or document. The definition of “tenancy agreement” above includes an implied agreement.

When the tenant's brother-in-law acquired title I find that the tenant had his implied permission to continue to reside there. After he passed away and the landlord in this dispute became the owner, the tenant had her implied permission to continue in occupation of and to possess the home.

The fact that the tenant had never paid rent is not determinative in my view. Neither of the definitions above refers to rent or the need for it in order to establish a tenancy agreement.

The right to exclusive possession is a common law marker for the existence of a tenancy. When a person has some right less than a right to exclusive possession it is considered to be a "licence to occupy" the premises (see Residential Tenancy Policy Guideline 9, "Tenancy Agreements and Licenses to Occupy").

For the purpose of this decision it is not necessary to find whether the tenant right to occupy the home was under a bare licence to occupy or an implied tenancy agreement because the definition of "tenancy agreement" above, includes a "license to occupy."

I find that the tenant is in possession of the home under a tenancy agreement.

The respondent is the landlord within the definition provided under the *Act*. She is the owner in fee simple of the property and has, above all others, the right to possess it. Any claim to possess or occupy the property must flow from her basic right. She is the one permitting, even if only tacitly, the tenant's continued occupation and possession of the home.

The Notice

The Notice to End Tenancy claims for its justification that the landlord or the landlord's close family member will be occupying the rental unit. Under s.49 of the *Act* that is a permitted ground for a landlord to end a tenancy with two months' notice.

I find the landlord's explanation that she wants to move herself and her family from the small house on the property to the bigger house, now being occupied solely by the tenant, to be a reasonable explanation. No basis was given to doubt her good faith intention to do so.

As a result I find the Notice in question to be a valid Notice. I dismiss the tenant's application to cancel it.

Section 55(1) of the *Act* mandates that an order of possession be issued in these circumstances. Having regard to all the circumstances, particularly the family relationship and the length of the tenant's time in the home, the order of possession will be effective March 31, 2018.

Conclusion

The tenant's application is dismissed. The landlord will have an order of possession.

As well, it appears that an incomplete draft of this decision had been sent to the parties in error. I wish to apologize to the parties for any inconvenience that may have caused them.

In closing, I urge the parties to come to an accommodation with each other despite this ruling. While the *Act* sweeps this dispute into the realm of residential tenancy law, it is a family matter at heart.

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 10, 2018

Residential Tenancy Branch