



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

CNR

Introduction

This hearing was scheduled to deal with a Tenant's Application for Dispute Resolution to cancel a 10 Day Notice to End Tenancy for Unpaid Rent. Both parties appeared or were represented at the hearing and 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.

At the outset of the hearing, I confirmed that the applicant had sent a hearing package to the respondent via registered mail within three days of filing.

I noted that I had not received any evidence from the respondent to which the respondent stated she had provided evidence under her own Application for Dispute Resolution. The respondent provided a file number (file number provided on cover page of this decision) and upon a search of the file number I determined that a hearing is scheduled to take place on July 10, 2018 to deal with a Landlord's Application for Dispute Resolution for an Order of Possession based upon a 10 Day Notice to End Tenancy for Unpaid Rent.

The respondent stated that she has also served the applicant with a 2 Month Notice to End Tenancy for Landlord's Use of Property and uploaded a copy of that notice with a view to amending her Application for Dispute Resolution to request an Order of Possession based on a 2 Month Notice.

Since both parties have made applications and there was a question raised as to whether a tenancy relationship exists between the parties I proceed to refer to the parties as the "owner" of the property and the "occupant" of the property.

The occupant denied receiving a copy of a Landlord's Application for Dispute Resolution or a 2 Month Notice to End Tenancy for Landlord's Use of Property. The owner stated that she did not receive a hearing package from the Residential Tenancy Branch to serve to the occupant but that she did send the 2 Month Notice to the occupant via registered mail sent on May 19, 2018.

The occupant confirmed receipt of a registered mail package in May 2018 but denied that a 2 Month Notice was in that package. The occupant confirmed that the package contained a copy of a tenancy agreement and a text message referring to a 2 Month Notice.

Given both parties had requested resolution with respect to a 10 Day Notice to End Tenancy for Unpaid Rent I informed the parties that I would make a decision with respect to the 10 Day Notice; however, I would not deal with a 2 Month Notice since it was not requested by the occupant on the application before me. Rather, the hearing scheduled for July 10, 2018 remains as scheduled and the owner may amend her application to include a request for an Order of Possession based on a 2 Month Notice, as appropriate. The owner is also encourage to contact the Residential Tenancy Branch to request another copy of the hearing package generated for her Application for Dispute Resolution so that she may serve a copy upon the occupant, as appropriate.

Issue(s) to be Decided

Does that *Residential Tenancy Act* apply to the relationship between the parties and do I have jurisdiction to resolve this dispute? If so, should the 10 Day Notice to End Tenancy for Unpaid Rent be upheld or cancelled?

Background and Evidence

The occupant testified that she and her husband and their three children moved into the subject property approximately six years ago. The property was registered in the name of her husband's mother ("the owner"). The occupant understood that the property would belong to her and her husband but that the property was registered in her mother-in-law's name to protect the property due to her husband's "line of work" which was unspecified. The occupant testified that approximately 1.5 years ago her husband was sent to prison for a period of 10 years. The occupant and the three children have continued to occupy the property without paying rent or a mortgage payment. The occupant claims her husband assured her when he went to prison that she and the children could remain in the house. The occupant explained that more recently she and her husband had a serious disagreement when she refused to do certain things for her husband which lead to her mother-in-law trying to evict her from the property. The occupant indicated that she is in the process of exploring her options concerning divorce and that she does not intend to leave the property without anything in recognition of her long term marriage and marital property rights.

The owner acknowledged that she registered the property in her name approximately six years ago. The owner testified that her son, the occupant's husband, was paying her the equivalent of the mortgage payment with the understanding that her son would inherit the property upon the owner's death or when the mortgage is paid off. As for the property taxes and house insurance for the property, I heard that the payments were made by the owner and the amount deducted from a debt the owner owed to her son. However, since the owner's son went to prison she has

received no mortgage payment or reimbursement of the property taxes or insurance and the owner's son now owes her approximately \$24,000 due to a variety of payments the owner has made on behalf of her son. The owner explained that when her son went to prison she agreed to continue to make the mortgage payments as long as she could but that she is running out of money since she also maintains her own residence. Also, the owner is of the position that it would be unethical for the occupant to remain in the property if she is no longer going to be her son's wife. The owner stated that she considers the property to be for her grandchildren and that they may remain at the property.

As for the written tenancy agreement provided by the owner, the occupant pointed out that it does not name her as a tenant. The occupant stated that she does not know how or when her husband signed the document although there is a date of December 15, 2012 on the signature page of the document.

The 10 Day Notice to End Tenancy for Unpaid Rent indicates rent of \$1,750.00 was outstanding as of "04/01/2018". The landlord clarified that the date should read April 1, 2018. The owner explained she did not know how to complete the form to reflect all the monies owed to her so she reflected \$1,750.00 which is the approximate monthly mortgage payment on the property and the amount her son would pay toward the mortgage.

As for the 2 Month Notice to End Tenancy for Landlord's Use of Property, the owner stated that she served the occupant with that Notice because she did not intend to enforce the 10 Day Notice as the occupant does not have the money to pay the mortgage/rent and because it is reasonable to give the occupant more time to move out. I noted that pages one and three of the 2 Month Notice that were uploaded to the Residential Tenancy Branch service portal but the second page was not included. The owner stated that a second page was completed although it did not upload. The owner stated that she intends to move into the subject property to save money and make repairs, while her grandchildren may also reside there. The owner indicated she would upload the second page of the 2 Month Notice before the July 10, 2018 hearing. The occupant maintained that she did not have a copy of the 2 Month Notice or a Notice of Hearing for a July 10, 2018 hearing.

Analysis

Section 2 of the *Residential Tenancy Act* provides that the Act applies to tenancy agreements, rental units and other residential property although there are exempt living accommodations under provided under section 4 of the Act. At issue in this case is whether there is a tenancy or tenancy agreement between the parties for the subject property. The definition of a tenancy, under section 1 of the Act is: "a tenant's right to possession of a rental unit under a tenancy agreement". The definition of tenancy agreement is, as provided in section 1: "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".

Residential Tenancy Policy Guideline 27: *Jurisdiction* provides information and policy statements with respect to living arrangements and/or agreements that may or may not fall under the Act, including the following section on page 5:

2. TRANSFERRING OWNERSHIP

A tenancy agreement transfers a landlord's possessory rights to a tenant. It does not transfer an ownership interest. If a dispute is over the transfer of ownership, the director does not have jurisdiction. In deciding whether an agreement transfers an ownership interest, an arbitrator may consider whether:

- money exchanged was rent or was applied to a purchase price;
- the agreement transferred an interest higher than the right to possession;
- there was a right to purchase in a tenancy agreement and whether it was exercised.

The 10 Day Notice to End Tenancy for Unpaid Rent that is before me names the occupant and her husband as the tenants. I heard consistent testimony from both parties that the occupant's husband, who is the owner's son, had been reimbursing the owner for the mortgage payments, property taxes and house insurance for several years before going to prison and that he is liable to repay the owner for mortgage payments, property taxes and house insurance as part of the agreement between the owner and her son that would result in the eventual transfer of ownership of the property to the owner's son, or his children. As provided in the policy guideline section provided above, I consider the payments made by the owner's son to be payments toward the purchase of the property. Accordingly, I am of the view that the owner's son likely has a beneficial interest in the property and that the agreement between him and his mother is more than a mere transfer of the right to use and occupy the property that is conveyed to tenant under a tenancy agreement. Although there appears to be a signed tenancy agreement between the owner and her son, the document does not take precedence over the true agreement between the parties.

There is no indication that the owner and occupant have a tenancy agreement. Rather, I heard consistent testimony from the parties that the occupant has occupied the property as she is the wife of the person who is likely the beneficial owner. Also, the marital status of the occupant may also result in a finding that she is also a beneficial owner although I do not such a finding as it is beyond my jurisdiction and that finding would have to be made in the appropriate jurisdiction.

Considering the above, I find the owner cannot terminate the interest of a beneficial owner by way of Notice to End Tenancy that is used to end a tenancy under the *Residential Tenancy Act* since a beneficial owner holds an interest in the property that is greater than that of a tenant only. Rather, the owner must seek remedy in the appropriate forum. Similarly, the occupant's rights, if any, with respect to marital property and residency must be decided in the appropriate forum.

In light of the above, I find the Act does not apply to the agreement between the owner and her son or the occupant regarding this property. Therefore, I decline to accept jurisdiction and I do not issue an order of Possession to the owner.

Conclusion

I am unsatisfied that there is a tenancy agreement between the parties to which the *Residential Tenancy Act* applies and I decline to accept jurisdiction. Accordingly, I do not issue an Order of Possession to the respondent based on the 10 Day Notice to End Tenancy for Unpaid Rent that was served upon the occupant.

The parties are encouraged to resolve their dispute(s) in the appropriate forum.

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 05, 2018

Residential Tenancy Branch