Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, CNR, MNDCT, LRE, FFT

Introduction

This hearing dealt with applications under the *Residential Tenancy Act* (the *Act*) from FGW and his spouse, MLB, identified as landlords in their application and JSW and his spouse, VAW, identified as tenants in the two applications. FGW is the father of JSW. FGW and MLB, who own the property in question (the owners) applied for an Order of Possession for unpaid rent pursuant to section 55 on the basis of the 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice). JSW and VAW, who reside in the property in question (the residents) applied for:

- cancellation of the 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- an order to suspend or set conditions on the owners' right to enter the rental unit pursuant to section 70; and
- authorization to recover their filing fee for this application from the owners pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

As JSW (the resident) confirmed that the residents received the owners' 10 Day Notice sent by the owners by registered mail on May 11, 2018, I find that the residents were duly served with this Notice in accordance with section 88 of the *Act*. As the resident also confirmed that the residents received a copy of the owners' dispute resolution hearing package and written evidence package sent by the owners by registered mail on June 11, 2018, I find that the residents were duly served with these packages in accordance with sections 88, 89 and 90 of the *Act.* As the owners' legal counsel also

acknowledged having received a copy of the residents' dispute resolution hearing package in which the residents were seeking, among other items, a $35,000.00 monetary award, I find that the owners were duly served with this package in accordance with section 89 of the *Act*. Although the residents only provided a copy of their written evidence package to the owners' legal counsel the day before this hearing, the owners' legal counsel said that he had reviewed the contents of that package and was prepared to proceed with this hearing, rather than seeking an adjournment. I find that the written evidence was duly served in accordance with section 88 of the *Act*.

Issues(s) to be Decided

Does the relationship between the parties qualify as a tenancy pursuant to the Act? If so, should the 10 Day Notice be cancelled? If not, are the parties applying for the Order of Possession entitled to receive one? Should any other orders be issued with respect to this matter. Are the residents entitled to a monetary Order for losses and damages arising out of any tenancy that may exist in this matter? Are the residents entitled to recover the filing fee for their application from the owners?

Preliminary Issue - Does the Relationship between these Parties constitute a Residential Tenancy for the Purposes of the *Act*?

Background and Evidence

While I have turned my mind to all the documentary evidence, including miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of this dispute and my findings are set out below.

Both parties agreed that the property in question was purchased by FGW and MLB on or about August 1, 2014. Both parties agreed that JSW and VAW commenced living in the property in question in September 2014.

Both parties confirmed that there have been no payments made by JSW and VAW to FGW and MLB since the 10 Day Notice seeking payment of $7,108.90 was sent to them on May 11, 2018.

The residents maintained that JSW's parents arranged to purchase this property on the residents' behalf because the residents would not have been able to obtain a mortgage on this property at that time because of bankruptcy proceedings that prevented JSW from obtaining a mortgage at that time. The residents maintained that the owners

convinced the residents that it would be better for FGW and MLB to take out the mortgage at that time, and have the residents' payments applied directly to the mortgage account so that they would be able to build up equity in the property as opposed to paying someone else monthly rent. The parties agreed that at the time this relationship began the expectation was that the residents would take out their own mortgage in five years once the bank mortgage with FGW and MLB came up for renewal.

There was conflicting evidence from the parties as to whose money paid for the $20,000.00 down payment for this mortgage. The owners produced undisputed written evidence and sworn testimony that they paid $20,000.00, the amount of the downpayment into the account used exclusively for this mortgage when they purchased the property in August 2014. JSW testified that the $20,000.00 paid for the downpayment was actually funds that his father owed him from a previous failed partnership that they had entered into. JSW claimed that the $20,000.00 was actually JSW's money that was being used by FGW and MLB to circumvent the bankruptcy problems that JSW was then having. JSW maintained that FGW still owed him hundreds of thousands of dollars from that failed partnership, a claim denied by FGW and MLB. FGW claimed that JSW owed him in excess of $100,000.00.

The parties agreed that from September 2014 until November 2017, the residents paid $775.00 on the first and 15th of each month into an account owned and controlled by the owners to be used for the mortgage payments. in addition to a $246.00 monthly insurance charge by an insurance company. The amounts to be paid and applied to the ownders' mortgage included an amount for municipal property taxes. The above amounts could change each year, depending on the accuracy of the bank's estimate for a property tax allowance and the annual cost of insurance for this property. For example, the bank advised the owners that as of May 2018, the required payments would be reduced from $775.00 to $697.00 semi-monthly.

At the hearing, MLB explained that the original plan with JSW and MLB was that they would take out their own mortgage once the owners' five year mortgage had expired. The new mortgage payments would be subject to the rates charged when the mortgage came up for renewal and would be for the amount remaining on the principal once all of the residents' payments made for the first five years had been applied against the principal.
In the fall of 2017, there is undisputed evidence that JSW and VAW discontinued making payments into the owners' mortgage account. By the time the 10 Day Notice was issued to the residents, a total of $7,108.90 was owing. JSW maintained that they

stopped making these payments because his father owed him a great deal of money from their previous partnership and that this was a way he could secure a part of those funds that were owing. The owners testified that they have put their own money into the bank account to ensure that mortgage payments and insurance payments have been made.

The landlords' legal counsel agreed that this was an unusual type of tenancy, that the amount of the payments could vary over time, that there was an initial potential for the mortgage to be taken over by the residents at the end of the owners' initial five year mortgage and this was "to a certain extent" a rent to own arrangement between these family members. The owners' legal counsel also agreed that no written tenancy agreement was entered into between the parties, although as he noted, oral agreements are allowed under the *Act*. The owners' legal counsel confirmed that there were no written references in any of the documents entered into evidence by either of the parties to the payments made by the residents as "rent."

The owners' legal counsel also observed that there were many features of a residential tenancy in this relationship. He noted that the downpayment was made by the owners, that the bank account used for all payments regarding this property for the mortgage to the bank and to the insurance company, were at all times owned and controlled by the owners. He also presented undisputed evidence that at all times since theowners' purchase of this property in August 2014, the property has been owned by FGW and MLB.

JSW testified that at no time was there any intention that the arrangement whereby he and his wife resided on this property was that of a rental. He maintained that the money used by his father for the downpayment was money that his father owed him, and that the whole history of the property was consistent with his claim that FGW and MLB took out the mortgage at a time when JSW and VAW would not have qualified for a mortgage because of his bankruptcy insolvency issues.

Analysis

The *Act* defines a tenancy and a tenancy agreement in the following terms:

> ***"tenancy"*** *means a tenant's right to possession of a rental unit under a tenancy agreement;*
>
> ***"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;

The owners' counsel asserted that the relationship between the owners and the residents is a tenancy as defined under the *Act*. JSW maintained that there had never been any mention or reference to this relationship as being between landlords and tenants until well after JSW and VAW withheld making contributions to the mortgage account. Although there is no dispute that the mortgage account has always been under the names of FGW and MCB, JSW maintained that the account had been created to enable them to live on this property when they were unable to obtain a mortgage of their own due to bankruptcy proceedings involving JSW.

In addition to the parties never having drafted anything remotely resembling a tenancy agreement, there is no evidence that a security deposit was requested or paid for this arrangement between family members.

Unlike a standard tenancy agreement, the semi-monthly amounts could and did vary, depending on the accuracy of the bank's calculations of property taxes and the insurance costs. Legal counsel for the owners confirmed that the standard rent increase provisions of the *Act* would not apply in this type of situation. I find from September 2014 until November 2017, for all important purposes, JSW and VAW were allowed to step into the shoes of the mortgage holders, although they did not at that time, nor have they ever had actual title to the property. All of the amounts identified for consideration in the contract between the residents and FGW and MLB were dependent on the needs of the bank and the insurance company as opposed to any traditionally set monthly or semi-monthly rental fee that would be subject to the *Act*.

As discussed at the hearing, the situation as presented to me by the parties was similar to a "rent to own" situation. The owners' legal counsel confirmed that "to a certain extent it is a rent to own" relationship.

In this regard, I find RTB Policy Guideline 27 of assistance in considering the nature of the agreement between these parties. This Guideline reads in part as follows:
2. TRANSFERING 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.*

MLB's sworn testimony and the written evidence supplied by the residents regarding her statement to a Crown Counsel confirmed that the expectation was that the residents would be allowed to get their own mortgage for this property after the first five years for what remained on the mortgage at that time. JSW read into sworn testimony some of the following portions of MLB's May 25, 2018 statement to a Crown Counsel:

> *...because... when we got the mortgage for them, um back in I...believe it was Sept 2014,...a verbal agreement that we, well um, we would get a mortgage for them and then in five years, after they'd gone through the bankruptcy thing..the would be um assuming the mortgage in five years time...*

I find that this testimony and that provided by JSW is similar in some ways to a "rent-to-own" situation where payments made by those occupying the property are recorded by the parties and applied towards the eventual purchase of the property should those occupying the premises decide to purchase it from the owner. These types of situations do not fall within the jurisdiction of the *Act*.

I find that there are several important distinctions between this relationship and a more traditional rent to own relationship that occasionally requires a decision from arbitrators as to whether the relationship falls within the jurisdiction of the *Act*. Traditional rent to own disputes can require determinations as to jurisdiction for a number of reasons. For example, disputes may arise as to the sale price for the property. This may happen when the owners contact the people residing there with a proposed sale price, which the residents feel is higher than they anticipated. Disputes arise as to the true market value of the property at the time of the sale and whether any deterioration in the value of the property has resulted from actions taken by those who have been living there and have the first right of refusal as established by their rent to own agreement. When a sale price has already been established, other disputes may arise as to whether the value set beforehand remains an accurate assessment of the value of the property when it is offered for sale. Typically, these are arms length relationships between unrelated parties, with no element or little element of good will involved.

The current situation varies considerably from the norm in that no sale price even needed to be negotiated at the time the property was to be transferred over to the tenants. Rather, I find that there is convincing evidence from the parties that both parties envisioned that JSW and VAW would simply take out the new mortgage

themselves directly once JSW's bankruptcy issues had been resolved. This direct relationship between JSW, VAW and the mortgagee would take the place of the previous third party arrangement whereby FGW and MLB acted as intermediaries, intermediaries whose principal function was to act on behalf of JSW and VAW because they could be approved for a mortgage when it was first taken out, whereas JSW and VAW could not.

The element of good will between the parties prior to the discontinuation of payments by JSW and VAW also appears to have contributed to a situation where both parties were exceedingly informal as to establishing anything in writing with respect to the arrangement that they had made with respect to these matters. This good will was reflected both in the original proposal to assist JSW and VAW, as well as the subsequent action whereby the mortgage holders, FGW and MLB made additional $100.00 monthly contributions so as to reduce the length of the mortgage without informing JSW and VAW, who had thought that they were looking after all mortgage related, property tax and insurance aspects of this property. Since the fall of 2017 when payments from JSW and VAW stopped, FGW and MLB have had to make the monthly payments to the bank and the insurance company themselves in order to avoid the initiation of foreclosure proceedings against them as the registered owners and mortgagors. Since this was an arrangement between close family members, neither party obtained clear documentation to support their current portrayal of the nature of their relationship with respect to this property.

As noted, this informality between the parties also extended as far as the conflicting testimony presented by the parties with respect to whose money was used for the $20,000.00 downpayment. A dispute of this nature also demonstrates the unusual nature of this situation as opposed to the normal rent to own situation. While it has no real bearing on the jurisdictional issues before me, I find that JSW supplied little other than his sworn testimony that his father had ever agreed to allow this downpayment to be deducted from any debt that FGW owed JSW. From the outset, this demonstrates that from the commencement of this arrangement there was not only a lack of consent by the parties to the terms of this relationship, but even a lack of agreement as to whose money was actually used to pay for the downpayment required to take out this mortgage.

I find that the variations between this situation and a traditional rent to own situation make it even more difficult to accept that the relationship between these parties is that of landlords and tenants that fall within the jurisdiction of the *Act*. Rather than a rent to own situation, which would not fall within the jurisdiction of the Residential Tenancy

Branch, this situation appears to be more of a "mortgage payment to own situation." For the reasons outlined above, I find this arrangement is even closer to actual property ownership than is a traditional rent to own arrangement between two unrelated parties. No final agreement as to the value of the property to be exchanged needed to be finalized prior to JSW and VAW taking over the mortgage they had been paying for up until the fall of 2017. Until then their payments were immediately transferred over to the bank that held this mortgage and the insurer. There is no evidence before me to contradict JSW's undisputed sworn testimony that there was never any reference to the payments as rent until shortly before the 10 Day Notice was issued. At that point, and no doubt realizing the precariousness of their position as mortgage holders, FGW and MLB started behaving for what appears to be the first time as landlords in a traditional landlord/tenancy dispute. This change in behaviour eventually led to their issuance of the 10 Day Notice, which prompted the residents' application.

While I can appreciate the difficulties that both parties may encounter in attempting to obtain the recourse that they are both seeking through their applications, I find that I have no jurisdiction with respect to the relationship they have entered into with respect to the property in question. As I do not find that this is a tenancy for the purposes of the *Act*, I am without jurisdiction to consider their applications for dispute resolution. Therefore, I find that neither party is governed by this *Act*.

Conclusion

As the *Act* does not apply to these parties, I find that I do not have jurisdiction in this matter and I dismiss their Applications for Dispute Resolution.

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: July 14, 2018

Residential Tenancy Branch