



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: OPR

Introduction

The Application for Dispute Resolution filed by the landlords seeks an Order for Possession for non payment of rent.

A hearing was conducted by conference call in the presence of representatives of both parties. On the basis of the evidence presented and the submissions of both parties, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

I find that the 10 Notice to End Tenancy was served on the Tenant by posting on October 4, 2019. Further I find that the Application for Dispute Resolution and Notice of Dispute Resolution Hearing was served on the Tenant by mailing, by registered mail to where the Tenant resides on November 3, 2019. With respect to each of the applicant's claims I find as follows:

Issue(s) to be Decided

The issues to be decided are as follows:

- Whether the Residential Tenancy Branch has jurisdiction
- If so, whether the landlords are entitled to an Order for Possession for non-payment of rent?

Background and Evidence:

The landlords gave the following evidence in the form of a written summary:

- They originally purchased the property in 2001. Their son lived in the residence until he passed away in 2015. During this period the respondent LP resided in the residence with their son as his common law partner.
- After the passing of their son in 2015, they entered into an oral agreement with Respondent that she could remain at the property as tenant. Under this agreement, she was to pay rent of \$1,000 per month (starting in August or September 2015). As well she was to be responsible for all non-mortgage costs associated with the property including utilities and maintenance. The agreement was for monthly rent to be dividend into two payments of \$500 each which were due on the 1st and 15th days of each month.
- At Respondent's choice, she elected to make the vast majority of her rent payments in cash. She made a small number of rent payments by check. The landlord included copies of three of these checks as part of my evidence.
- From 2015 to 2018, the Respondent generally made rent payments in accordance with our agreement. However, since late 2018, the Respondent began missing rent payments and accumulating a significant rental deficit (\$5,300 as of October 17th, 2019).
- The landlords provided a written ledger of rent payments made and the balance owing since October 31st, 2018.
- Throughout 2019, the Respondent has been persistently behind on her rent and we have not been able to receive any payments from her (despite numerous requests) since August 1st.
- The landlords are now nearly 90 years old and both of us have encountered numerous serious health issues over the past several months.
- The Tenant owes \$7800 in outstanding rent to the end of December 2019.

The solicitor for the Respondent made the following submission::

- The Respondent filed a Notice of Civil Claim and a Certificate of Pending Litigation in the Supreme Court of British Columbia on October 31, 2019.
- The Notice of Civil Claim alleges the Respondent has a claim for unjust enrichment and an interest in property based on equity and a constructive trust along with other claims of relief.
- The Notice of Civil Claim alleges that the Applicants and the Deceased purchased the property for \$109,000 on or about March 7, 2001. At the time of purchase the Applicants had a 99% interest and the Deceased had a 1% interest.
- On or about April 2, 2015 the Deceased transferred his interest in the Property to the Applicants for consideration of \$1.00.

- The Respondent and the Deceased resided in the property in a common-law relationship for 18 years. They were married shortly before the Deceased's death on July 2, 2015.
- The Respondent and the Deceased paid for all expenses related to the property, including but not limited to mortgage payments, property insurance, property taxes, repair and upkeep expenses and improvement expenses.

Preliminary Matter:

Does the Residential Tenancy Branch have Jurisdiction?:

Section 58 (2), (3) and (4) of the Residential Tenancy Act provides as follows:

(2) Except as provided in subsection (4), if the director accepts an application under subsection (1), the director must resolve the dispute under this Part 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.

...

(3) Except as provided in subsection (4), a court does not have and must not exercise any jurisdiction in respect of a matter that must be submitted to the director for dispute resolution under this Act.

(4) The Supreme Court may

(a) on application, hear a dispute referred to in subsection (2) (a) or (c),
and

(b) on hearing the dispute, make any order that the director may make under this Act.

The solicitor for the Respondent submits:

- The solicitor for the Respondent submits that the Residential Tenancy Act does not have jurisdiction to hear the matter because it is linked substantially to a matter before the Supreme Court.
- The parties and the property in question are identical.
- The Notice of Civil Claim seeks a legal and beneficial interest in the property. Incidental to such a claim is the right of possession.
- The granting of an Order of Possession would significantly prejudice the rights of the parties in the Supreme Court.
- The solicitor uploaded four recent decisions of the Residential Tenancy Branch which state where a party has filed a Notice of Civil Claim seeking an equitable interest in the property that the Residential Tenancy Branch does not have jurisdiction.

The solicitor for the Applicants made the following submission:

- The Notice of Civil Claim does not make a claim for possession and thus the matter before the Supreme Court is not linked substantially to the issue in this arbitration.
- The granting of an Order of Possession would not adversely prejudice the Respondent's claim for compensation in the Supreme Court.
- The property is falling into disrepair as the Respondent has not taken steps to maintain it.
- At all material times over the last 3 years the conduct of the parties is consistent with a tenancy relationship.

After carefully considering all of the evidence and submission of the parties I determined that the dispute in the arbitration proceeding is linked substantially to a matter that is before the Supreme Court for the following reasons:

- It involves the same parties and the same property.
- The Respondent's action involves a claim in equity for unjust enrichment and a constructive trust with respect to the property. The Supreme Court has the jurisdiction to award a possessory interest in the property. While the Respondent

has not specially set out a claim for possession in the Notice of Civil Claim I determined that occupancy and possession is incidental to the claims being made by the Respondent.

- While the decisions of previous arbitrators are not binding on me I find them persuasive in this case.

Conclusion:

I find that I do not have jurisdiction over this matter and decline to hear it for lack of jurisdiction.

This decision is final and binding on the parties.

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: December 17, 2019

Residential Tenancy Branch