



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND MNR FF

Introduction

This hearing dealt with an Application for Dispute Resolution, made on April 7, 2020 (the “Application”). The Applicant applied for the following relief, pursuant to the *Residential Tenancy Act* (the “Act”):

- a monetary order for damage;
- a monetary order for unpaid rent or utilities; and
- an order granting recovery of the filing fee.

The Applicant and the Respondents attended the hearing and provided affirmed testimony.

The Applicant confirmed that the Notice of Dispute Resolution Proceeding package was served on the Respondents by email and registered mail. The Respondents acknowledged receipt. The Respondents testified that the documentary evidence upon which they intended to rely was served on the Applicant by email. The Applicant acknowledged receipt. No issues were raised during the hearing with respect to service or receipt of the above documents. The parties were in attendance and were prepared to proceed. Therefore, pursuant to section 71 of the *Act*, I find the above documents were sufficiently served for the purposes of the *Act*.

The parties were provided with a full opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure and to which I was referred. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Is the Applicant entitled to a monetary order for damage?
2. Is the Applicant entitled to a monetary order for unpaid rent or utilities?
3. Is the Applicant entitled to an order granting recovery of the filing fee?

Background and Evidence

The Applicant submitted a copy of a House Lease With Option To Purchase document into evidence. It confirms the agreement between the parties began on December 1, 2018 and was expected to continue for a period of five years. The agreement confirms the Respondents were to pay \$1,400.00 to the Applicant each month, due in two payments of \$700.00 on the 6th and 21st of each month. The agreement confirms that \$700.00 was allocated to rent and that \$700.00 was allocated to the purchase price each month. However, the Respondents vacated the property on or about November 30, 2019. During the period the Respondents occupied the property, the parties agreed the monthly payment would be reduced to \$1,300.00 per month but no evidence was adduced to confirm how it was to be allocated. The parties confirmed the Respondents did not pay a security deposit.

With respect to default the agreement states:

Should the lessee default on any payments or be in default under any other terms and conditions...then the Lease herein and this Option to Purchase shall be null and void at the lessor's sole discretion, and all monies paid by the lessee to the date of default shall be deemed to be rental monies only (notwithstanding the lessors continued right to payment of rent in the amount of \$1,400.00 per month to the date of the lessee's vacating the premises)...

[Reproduced as written.]

Further, the agreement stipulates that disputes are to be settled by arbitration pursuant to the *Arbitration Act* of the Province of British Columbia.

Analysis

Based on the affirmed oral testimony and documentary evidence, and on a balance of probabilities, I find:

Section 2 of the *Act* confirms that the *Act* applies to tenancy agreements, rental units and other residential property. It does not apply to a transfer of ownership of a residential property. In this case, I find that the predominant purpose of the agreement between the parties was to transfer ownership of the residential property to the Respondents over time and that the *Act* does not apply to the agreement between the parties.

I am supported in the above conclusion by the Residential Tenancy Policy Guidelines. For example, Policy Guideline #27 confirms there is no jurisdiction to hear a dispute if it is over a transfer of ownership and sets out some factors to consider: (1) whether money exchanged was rent or was applied to a purchase price; (2) whether the agreement transferred an interest higher than the right to possession; (3) there was a right to purchase in a tenancy agreement and whether it was exercised. Considering these factors, it appears the agreement entered into between the parties was primarily about transferring ownership and was not covered by the *Act*. There are several reasons for this conclusion. First, half of the money exchanged during the term of the agreement was to be applied to the purchase price. It was not until default that all of the money exchanged was to be applied to rent. Second, the agreement transferred to the Respondents an interest higher than a mere right to possession. It transferred a right of ownership if the terms of the agreement were complied with. Finally, although not an enumerated factor to consider, I find it significant that the agreement specifically attempted to exclude the application of the *Act* in the event of a dispute.

In addition, Policy Guideline #9 indicates there is a presumption a tenancy is created if the tenant gains exclusive possession of the unit for a term and pays a fixed amount for rent. However, in this case, the parties agreed the Applicant returned to the residential property from time to time outside of his right of access under the *Act*. As a result, I find the Respondents did not have exclusive possession. In addition, it appears the Respondents did not pay a fixed amount for rent. Rather, they initially paid \$1,400.00 per month which was allocated as described above. Further, as noted above, the agreement stipulates that the full payments are only deemed to be rent if there is a default under the agreement.

Finally, notwithstanding section 5 of the *Act*, which prevents parties from contracting outside the *Act*, the parties agreed that disputes would be resolved by arbitration under the *Arbitration Act* and not under the *Act*. Although ineffective to avoid the application of the *Act*, I find it is more likely than not that the parties specifically intended that disputes would not be resolved under the processes established under the *Act* because it was at all times primarily an option to purchase agreement.

In light of the above, I find the *Act* did not apply to the relationship between the parties and that I do not have jurisdiction to consider the Applicant's claim. The Application is dismissed for lack of jurisdiction.

Conclusion

The Application is dismissed for lack of jurisdiction.

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 10, 2020

Residential Tenancy Branch