



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Kekinow Native Housing Society
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes:

CNR

Introduction

This hearing was convened in response to the Tenant's Application for Dispute Resolution, in which the Tenant applied to set aside a Notice to End Tenancy for Unpaid Rent, served pursuant to section 46 of the *Residential Tenancy Act (Act)*. The Tenant filed the Application for Dispute Resolution on September 25, 2013.

Both parties were represented at the hearing. They were provided with the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions.

The Tenant submitted documents to the Residential Tenancy Branch, copies of which were couriered to the Landlord on October 25, 2013. The Landlord acknowledged receipt of the Tenant's evidence and it was accepted as evidence for these proceedings.

The Landlord submitted documents to the Residential Tenancy Branch, copies of which were personally served to the Tenant on October 29, 2013. The Tenant acknowledged receipt of the Landlord's evidence and it was accepted as evidence for these proceedings.

Although the Tenant's evidence was not served in accordance with rule 3.4 of the Residential Tenancy Branch Rules of Procedure, it was served in accordance with rule 3.5.

Although the Landlord's evidence was not served in accordance with the timelines established by rule 4.2 of the Residential Tenancy Branch Rules of Procedure, it was accepted as evidence, in part, because it was only one day late and, in part, because the Landlord did not receive the Tenant's evidence until October 25, 2013. I do not find that the delay disadvantaged the Tenant.

All of the evidence submitted has been reviewed, but is only referenced in this decision if it has been directly relevant to my decision.

Issue(s) to be Decided

Should the Notice to End Tenancy for Cause be set aside?

Preliminary Matter

The Landlord and the Tenant agree that this tenancy was the subject of a dispute resolution proceeding on July 08, 2013, after which Ms. O, an Arbitrator with the Residential Tenancy Branch, determined that the Tenant owed the Landlord \$1,867.94 in unpaid rent, for which she granted the Landlord a monetary Order. The parties also agree that Ms. O determined that the Landlord had reinstated the tenancy when the Landlord accepted rent for June of 2013 because the Landlord did not indicate that the rent was being accepted for use and occupancy only.

The Tenant argues that there has been a final decision in this matter and that section 77(3) of the *Act* prevents me from considering the issues currently in dispute. The Tenant argues that the current dispute is based on the same facts that were adjudicated by another Arbitrator, Ms. O. and that the rule of *res judicata* applies. I disagree.

I find that one of the issues in dispute in these proceedings relates to a Notice to End Tenancy that was served after Ms. O. rendered her decision on July 09, 2013. Essentially what is in dispute at these proceedings is whether the Landlord now has grounds to end a tenancy that Ms. O. determined had been reinstated. I find that the newly served Notice to End Tenancy is a significant difference between this matter and the matter before Ms. O., and I therefore find that I am able to consider the merits of the Tenant's Application for Dispute Resolution.

In support of the argument that the rule of *res judicata* applies, the Tenant argues that the Landlord no longer has the right to end the tenancy on the basis of unpaid rent that had accrued prior to Ms. O's decision, as Ms. O. determined that the Landlord waived that right by reinstating the tenancy. While I accept that Ms. O determined that the Landlord reinstated the tenancy, I cannot conclude that she concluded that the Landlord could not end the tenancy in the future if rent remained unpaid. I find that this issue is yet to be determined and will be determined at these proceedings.

Background and Evidence

The Landlord and the Tenant agree that this tenancy began in 2006 and that the Tenant is currently required to pay monthly rent of \$334.00.

The Landlord and the Tenant agree that since the hearing on July 09, 2013 the Tenant paid \$334.00 in rent on August 01, 2013, she paid \$334.00 in rent on September 01, 2013, she paid \$334.00 in rent on October 01, 2013; the rent arrears remain at

\$1,867.94; and that the Landlord declined the Tenant's offer to enter into a payment plan for the arrears.

The Landlord and the Tenant agree that the Tenant was personally served with a Ten Day Notice to End Tenancy, which is dated September 23, 2013. The Tenant Relations Coordinator stated that the Notice was served on September 23, 2013 and the Tenant stated that she cannot recall when it was received, although she believes it was received sometime in September of 2013. The Landlord submitted a copy of a Proof of Service of the Ten Day Notice to End Tenancy, which is signed by the Tenant and the Tenant Relations Coordinator, which corroborates the Tenant Relations Coordinator's testimony that the Notice was served on September 23, 2013. A copy of the Ten Day Notice to End Tenancy was also submitted in evidence.

The Landlord served the Notice to End Tenancy, dated September 23, 2013, as the \$1,867.94 in rent that Ms. O determined was due had not been paid.

The Tenant argued that the Landlord is attempting to end the tenancy on the basis of the unpaid monetary Order, which is not rent; that the *Act* does not authorize a landlord to end a tenancy on the basis of an unpaid monetary Order; and that the monetary Order may be filed with the Provincial Court if the Landlord wishes to enforce the monetary Order.

The Tenant argued that even if the Landlord did have the right to end the tenancy on September 23, 2013, pursuant to section 46 of the *Act*, the Landlord waived the Notice to End Tenancy when the Landlord accepted rent for October without clearly informing the Tenant that the payment did not wish the tenancy to continue. The Tenant stated that when she paid the rent in October she believed that the tenancy would continue.

The Tenant Relations Coordinator stated that the Tenant was not provided with a receipt that indicates the payment is being accepted "for use and occupancy only" and that when the payment was made the Tenant was not advised that the tenancy would end in spite of the payment. The Administrative Assistant for the Landlord argued that the payment did not serve to waive the Notice to End Tenancy as all of the overdue rent was not paid.

Analysis

I find that the Tenant owed rent of \$1,867.94 on July 08, 2013. I base this decision on the wording of Ms. O's decision, dated July 09, 2013, in which she writes: "As for the monetary order, I find that the landlord is entitled to \$1,867.94 in unpaid rent". As this matter was previously decided by Ms. O, I am bound by that decision.

Until this debt is satisfied, I find that the Tenant continues to owe rent to the Landlord. I find that the monetary Order granted by Ms. O simply provided the Landlord with a means to collect the debt, in accordance with section 67 of the *Act*. I do not find that the monetary Order alters the nature of the debt. I therefore do not accept the Tenant's

argument that the Landlord is attempting to end the tenancy on the basis of the monetary Order or that the debt should not be considered unpaid rent, as defined by the *Act*.

In the event my conclusion that the monetary Order did not alter the nature of the debt of \$1,867.94 is incorrect, which I do not believe it is, I would then put my mind to the rent paid in August, September, and October of 2013. It is my understanding of general accounting principles that the Landlord has the right to apply rent paid to any rent currently in arrears. I would therefore conclude that the Landlord had the right to apply the \$1,002.00 in rent paid in August, September, and October to the arrears of \$1,867.94, leaving arrears of \$865.94 from the period prior to July 31, 2013 and that an additional \$1,002.00 in unpaid rent had accrued since August 01, 2013.

Section 46 of the *Act* authorizes a landlord to end a tenancy if rent is not paid on any day after the rent it is due, by providing proper notice. As the Tenant had not paid all of the rent due for this tenancy by September 23, 2013, I find that the Landlord had the right to serve the Tenant with a Ten Day Notice to End Tenancy for Unpaid Rent.

On the basis of the undisputed evidence I find that the Ten Day Notice to End Tenancy, dated September 23, 2013, was personally served to the Tenant on September 23, 2013.

Section 46(4)(a) of the *Act* stipulates that a Ten Day Notice to End Tenancy for Unpaid Rent is of no effect if the Tenant pays the outstanding rent within five days of receiving the Notice. As the Tenant did not pay all of the outstanding rent, I find that the Notice was not rendered ineffective pursuant to section 46(4)(a) of the *Act*.

On the basis of the undisputed evidence, I find that the Landlord declined the Tenant's offer to enter into a payment plan for the debt of \$1,867.94. There is nothing in the *Act* that requires the Landlord to provide the Tenant with time to pay the rent that is due.

Residential Tenancy Branch Policy Guidelines suggest that a Notice to End Tenancy can be waived only by the express or implied consent of both parties and that the question of waiver usually arises when the landlord has accepted rent or payment from the tenant after the Notice to End has been given. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End, no question of "waiver" can arise as the landlord is entitled to that rent. I concur with these guidelines.

As the Tenant received the Notice to End Tenancy on September 23, 2013; the Tenant filed the Application for Dispute Resolution on September 25, 2013; and this hearing was not scheduled until November 04, 2013, I find that the Tenant had the right to remain in possession of the rental unit in October of 2013, regardless of the declared effective date of the Notice. As the Tenant was entitled to possess the rental unit in October of 2013, the Landlord was also entitled to collect rent for that period so the issue of "waiver" does not apply to this payment.

Neither party raised the issue of whether rent was paid for November so I am unable to determine whether rent was accepted for that month and, if so, whether a receipt was issued that indicates it was accepted for use and occupancy only.

Residential Tenancy Branch Policy Guidelines define an implied waiver as a set of circumstances where one party has pursued such a course of conduct with reference to the other party so as to show an intention to waive his or her rights or a set of circumstances where the conduct of a party is inconsistent with any other honest intention than an intention of waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has changed his or her position to his or her detriment. I also concur with this guideline.

The Residential Tenancy Branch Guidelines also suggest that to show implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amount to an estoppel. I also concur with this guideline. The burden of proving that there has been an implied waiver rests with the party who is alleging there has been a waiver which, in these circumstances, is the Tenant.

Even if the Landlord did accept rent for November without issuing a receipt for “use and occupancy” and without clearly informing the Tenant they did not wish to continue the tenancy, I find that it is not reasonable, in these circumstances, to conclude that the Landlord waived the Notice to End Tenancy, dated September 23, 2013.

In reaching this conclusion I was influenced, in part, by the fact that on October 29, 2013 the Landlord served the Tenant with evidence for the hearing on November 03, 2013. This, in my view, is indicative of the Landlord’s intent to dispute the Tenant’s application to set aside the Notice to End Tenancy and is a reasonable indicator that the Landlord intended to pursue the Notice to End Tenancy.

In reaching this conclusion I was influenced, in part, by the letter dated September 23, 2013 which was submitted in evidence. In this letter the Landlord clearly informs the Tenant that if the arrears of \$1,867.94 are not paid within five days the Landlord can apply for an Order of Possession. Although the letter does not specifically declare that the Landlord will apply for an Order of Possession it does, in my view, provide the Tenant with reasonable notice that the Landlord believes all the rent owing must be paid within five days.

When considered in its entirety, I find that the evidence before me is insufficient to conclude that the Landlord has waived the Notice to End Tenancy that is dated September 23, 2013.

Conclusion

As I have determined that the Landlord has the right to end this tenancy pursuant to section 46 of the *Act* and that there is insufficient evidence to indicate that the Landlord

has waived the Notice to End Tenancy, I dismiss the Tenant's application to set aside the Notice to End Tenancy, dated September 23, 2013. I specifically note that the Landlord did not request an Order of Possession during the hearing.

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: November 05, 2013

Residential Tenancy Branch

