



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

OPC, MNR, MNSD, FF

Introduction:

This hearing was convened in response to the Landlord's Application for Dispute Resolution, in which the Landlord applied for an Order of Possession for Cause, a monetary Order for unpaid rent, to retain all or part of the security deposit, and to recover the fee for filing an Application for Dispute Resolution.

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

The Agent for the Landlord stated that the Application for Dispute Resolution, the Notice of Hearing, and evidence the Landlord wishes to rely upon as evidence was sent to the Tenant, via registered mail, on January 21, 2014. The Agent for the Tenant acknowledged receipt of these documents and they were accepted as evidence for these proceedings.

The Landlord submitted additional documents to the Residential Tenancy Branch on February 07, 2014. The Landlord and the Agent for the Landlord stated that they were both present when these documents were posted on the Tenant's door on February 07, 2014. The Agent for the Tenant stated that she does not believe these documents were received by the Tenant, who is her son.

The Landlord submitted additional documents to the Residential Tenancy Branch on February 24, 2014. The Landlord and the Agent for the Landlord stated that they were both present when these documents were posted on the Tenant's door on February 22, 2014. The Agent for the Tenant stated that she does not believe these documents were received by the Tenant.

On the basis of the testimony of the Landlord and the Agent for the Landlord, who is the Landlord's son, I find that documents were posted on the Tenant's door on February 07, 2014 and on February 22, 2014 and they were accepted as evidence for these proceedings. I find this testimony more compelling than the testimony of the Agent for

the Tenant, as it is entirely possible that the Tenant did receive the documents and simply neglected to tell his mother about those documents.

The Tenant submitted additional documents to the Residential Tenancy Branch on February 24, 2014. The Agent for the Tenant stated that these documents were personally served to the Landlord on February 22, 2014. The Landlord acknowledged receipt of these documents and they were accepted as evidence for these proceedings.

Issue(s) to be Decided:

Is the Landlord entitled to an Order of Possession; to a monetary Order for unpaid rent; and to keep all or part of the security deposit?

Background and Evidence:

The Landlord and the Tenant agree that the parties entered into a fixed term tenancy agreement, the fixed term of which began on September 13, 2013 and ended on March 31, 2014. The parties agree that the tenancy agreement inadvertently stipulated that the fixed term ended on March 31, 2013.

The Landlord and the Tenant agree that the Tenant agreed to pay monthly rent of \$600.00 by the first day of each month and that the Tenant paid a security deposit of \$300.00.

The Landlord stated that the Landlord personally served the Tenant with a Notice to End Tenancy for Cause on November 28, 2013, a copy of which was submitted in evidence. The Agent for the Tenant stated that this Notice was personally served to the Tenant on December 04, 2013 and that the Tenant did not file an Application for Dispute Resolution seeking to set aside this Notice. The Notice declared that the Tenant must vacate the rental unit by December 31, 2013.

The Landlord and the Tenant agree that the Tenant paid no rent in December of 2013; that on January 28, 2014 the Landlord was given a cheque for rent, in the amount of \$750.00; that on February 22, 2014 the Landlord was given a rent cheque for \$250.00; and that no rent was paid after February 22, 2014.

The Agent for the Tenant stated that the Landlord agreed that the Tenant did not have to pay rent for December, in compensation for the Tenant being unable to use the kitchen facilities in the rental unit. The Landlord stated that he never told the Tenant or the Agent for the Tenant that the Tenant did not have to pay rent for December.

The Agent for the Tenant stated that the Landlord agreed that the Tenant only had to pay \$250.00 in rent for the remainder of the tenancy, in compensation for the Tenant being unable to use the kitchen facilities in the rental unit. The Landlord stated that he never told the Tenant or the Agent for the Tenant that the rent would be reduced to \$250.00.

The Agent for the Tenant argued that the Landlord's acceptance of the cheque for \$750.00, which was dated January 28, 2014, serves as proof that the Landlord agreed to a rent reduction. The cheque for \$750.00, which was submitted as evidence by the Landlord, clearly indicates that the payment was for rent of \$250.00 for December of 2013, \$250.00 for January of 2014; and \$250.00 for February of 2014.

The Agent for the Tenant argued that the Landlord reinstated the tenancy after serving the One Month Notice to End Tenancy by accepting rent.

The Agent for the Tenant was denied the opportunity to discuss the merits of the Notice to End Tenancy. She was informed that the tenancy was ending on the conclusion presumption clause of section 47(5) of the *Act* and not on the merits of the Notice. She was therefore informed that the merits of the Notice are no longer relevant, as I was compelled to end the tenancy in accordance with section 47(5) of the *Act*.

The Agent for the Tenant was also denied the opportunity to argue that the Tenant is entitled to a rent reduction, as the Tenant has not filed an Application for Dispute Resolution seeking a rent reduction. The Tenant retains the right to file an Application for Dispute Resolution, in which the Tenant seeks compensation for deficiencies with the rental unit and/or costs of moving. The parties are encouraged to attempt to seek a settlement for any deficiencies with the rental unit and/or moving costs before engaging in further dispute resolution proceedings.

Analysis

Section 47 of the *Residential Tenancy Act (Act)* authorizes a landlord to end a tenancy for a variety of reasons, by serving the tenant with a One Month Notice to End Tenancy. The onus of proving the date of service of the Notice to End Tenancy rests with the Landlord.

I find that the Landlord has submitted insufficient evidence to establish that the Notice was personally served on November 28, 2013. In reaching I was heavily influenced by the absence of evidence that corroborates the Landlord's testimony that it was served on that date or that refutes the Agent for the Tenant's testimony that it was served on December 04, 2013. On the basis of the testimony of the Agent for the Tenant, I find that the Notice had been personally served by December 04, 2013.

Section 47(2) of the *Act* stipulates that a One Month Notice to End Tenancy for Cause must end the tenancy effective on a date that is not earlier than one month after the date the notice is received and the day before the day in the month that rent is payable under the tenancy agreement. As I have concluded that the Tenant was served with this Notice on December 04, 2013 and rent is due by the first of each month, the earliest effective date of that Notice was January 31, 2014.

Section 53 of the *Act* stipulates that if the effective date stated in a Notice is earlier than the earliest date permitted under the legislation, the effective date is deemed to be the earliest date that complies with the legislation. Therefore, I find that the effective date of this Notice to End Tenancy was January 31, 2014.

Section 47(5) of the *Act* stipulates that tenants are conclusively presumed to have accepted that the tenancy ends on the effective date of a notice received pursuant to section 47 of the *Act* and that the tenants must vacate the rental unit by that date unless the tenant disputes the notice within ten days of receiving it. As there is no evidence that the Tenant filed an Application for Dispute Resolution in which he disputed the Notice to End Tenancy, I find that the Tenant accepted that the tenancy was ending on the effective date of the Notice, pursuant to section 47(5) of the *Act*. As the Tenant is conclusively presumed to have accepted that the tenancy has ended, I grant the Landlord's application for an Order of Possession.

Section 26(1) of the *Act* requires a tenant to pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent. As there is no evidence that the Tenant made emergency repairs to the rental unit; that the Tenant has authority from the Residential Tenancy Branch to withhold rent; or otherwise has the legal right to withhold rent, I find that the Tenant was obligated to pay rent when it was due.

On the basis of the undisputed evidence, I find that the Tenant entered into a tenancy agreement that required him to pay monthly rent of \$600.00 by the first day of each month. As the Notice to End Tenancy did not end the tenancy until January 31, 2014, I find that the Tenant was obligated to pay monthly rent of \$600.00 for December of 2013 and \$600.00 for January of 2014. As the Tenant has already paid \$750.00 in rent on January 28, 2014, I find that the Tenant still owes \$450.00 in rent for this period.

As the Tenant has not yet vacated the rental unit and the Agent for the Tenant does not believe the Tenant will be able to vacate the rental unit prior to March 31, 2014, I find that the Tenant is also obligated to pay rent of \$1,200.00 for the two months that he remained, or intends to remain, in the rental unit. As the Tenant has already paid \$250.00 in rent on February 22, 2014, I find that the Tenant still owes \$950.00 in rent for this period.

In reaching this conclusion, I placed little weight on the Agent for the Tenant's testimony that the Landlord agreed that rent was not due for December of 2013. When one party alleges that a term of the tenancy agreement has been amended, the onus is on that party to prove that the parties agreed to the amendment. In the absence of evidence that corroborates the Agent for the Tenant's testimony that the Landlord agreed that rent was not due for December or that refutes the Landlord's testimony that he did not agree to that, I find that the Tenant has failed to establish that the parties agreed to this amendment. I therefore find that full rent was due for December of 2013.

In reaching this conclusion, I placed little weight on the Agent for the Tenant's testimony that the Landlord agreed that rent would be reduced to \$250.00 for any period of time

after December 31, 2013. In the absence of evidence that corroborates the Agent for the Tenant's testimony that the Landlord agreed to a rent reduction or that refutes the Landlord's testimony that he did not agree to a rent reduction, I find that the Tenant has failed to meet his burden of proving that the parties agreed to a rent reduction. I therefore find that full rent was due for any days the Tenant continued to occupy the rental unit.

In determining this matter, I have placed little weight on the fact that the Landlord cashed the \$750.00 cheque, which indicates the payment represented \$250.00 for December's rent, \$250.00 for January's rent, and \$250.00 for March's rent. When this cheque was tendered on January 28, 2014 the Tenant owed the Landlord \$1,200.00 in rent from December of 2013 and January of 2014. I therefore find that the Landlord had every right to apply this cheque to rent owing. I do not accept the Tenant's argument that the act of cashing that cheque shows the Landlord agreed to the rent reduction of \$250.00. Rather, I find that the Landlord was simply attempting to recover rent that was due.

Residential Policy Guidelines stipulate that a Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties. The Guidelines stipulate that the question of waiver usually arises when the landlord has accepted rent or money 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 owed the Landlord \$1,200.00 in rent when the rent cheque of \$750.00 was tendered, I find that no question of waiver arises, as the Landlord was entitled to that rent.

Residential Policy Guidelines further stipulate that there are two types of waiver: express waiver and implied waiver. Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises 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. Implied waiver can also arise 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 concur with this policy guideline.

Residential Policy Guidelines further stipulate if the landlord accepts the rent for the period after the effective date of the Notice, the intention of the parties will be in issue. Intent can be established by whether the landlord has issued a receipt that shows the money was received for use and occupation only and/or the landlord specifically informed the tenant that the money would be for use and occupation only. I concur with this policy guideline.

I find that the Landlord posted a document on the Tenant's door on February 22, 2014 in which he clearly informed the Tenant that the \$250.00 cheque that was tendered on February 22, 2014 is for "use and occupancy only" and that it does not reinstate the tenancy. I find that this document clearly informs the Tenant that the Landlord is not reinstating the tenancy by accepting the rent.

I find that the Landlord's application has merit and that the Landlord is entitled to recover the filing fee from the Tenant for the cost of this Application for Dispute Resolution.

Conclusion

The Landlord has established a monetary claim, in the amount of \$1,450.00, which is comprised of \$1,400.00 in unpaid rent and \$50.00 in compensation for the filing fee paid by the Landlord for this Application for Dispute Resolution. Pursuant to section 72(2) of the *Act*, I authorize the Landlord to retain the Tenant's security deposit of \$300.00, in partial satisfaction of the monetary claim.

Based on these determinations I grant the Landlord a monetary Order for the balance of \$1,150.00. In the event that the Tenant does not comply with this Order, it may be served on the Tenant, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

I grant the Landlord an Order of Possession. As the Tenant has been ordered to pay rent for March of 2014, I find it reasonable to make this Order of Possession effective at 1:00 p.m. on March 31, 2014. This Order may be served on the Tenant, filed with the Supreme Court of British Columbia, and enforced as an Order of that Court.

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: March 06, 2014

Residential Tenancy Branch

