



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPL, FF

Introduction

This hearing was convened by way of conference call concerning an application made by the landlord for an Order of Possession for landlord's use or property and to recover the filing fee from the tenant for the cost of the application.

The landlord and the tenant both attended and each gave affirmed testimony. The tenant also called one witness who also gave affirmed testimony.

During the course of the hearing, the tenant advised that the landlord had not provided the tenant with the evidence that the landlord provided to the Residential Tenancy Branch. The landlord stated that the Residential Tenancy Branch made photocopies and charged a fee of about \$2.50 and gave the landlord a package to serve on the tenant. The landlord believes that the evidence was included in that package and consists of the 2 page application, notice of hearing and the Decision from the hearing in June, 2014. In reviewing the file, I find that the landlord made the application at a Service BC office on July 16, 2014 which was sent by facsimile to the Residential Tenancy Branch that day. Those documents include the 2-page application, 2 copies of both pages of a 2 Month Notice to End Tenancy for Landlord's Use of Property, and a copy of a 4 page Decision of the director dated June 18, 2014. The file also contains a receipt for the filing fee, but not a receipt for photocopies.

The landlord also provided an additional page of evidence on August 15, 2014, which he agrees had not been provided to the tenant.

In the circumstances, I am not satisfied that the landlord has served all of the evidence on the tenant, but I am satisfied that the tenant has received the 2 page application, the notice of hearing and a copy of the June 18, 2014 Decision. All other evidence is excluded and not considered in this Decision.

Issue(s) to be Decided

Is the landlord entitled under the *Residential Tenancy Act* to an Order of Possession for landlord's use of property?

Background and Evidence

The landlord testified that this month-to-month tenancy began on June 27, 2012 and the tenant still resides in the rental unit. Rent in the amount of \$800.00 per month is payable on the 27th day of each month, in advance. The landlord testified that a written tenancy agreement was signed by the parties but a copy has not been provided for this hearing. He stated that the agreement provided for a security deposit in the amount of \$400.00 to be paid to the landlord, but the landlord only collected \$200.00. The tenant promised to pay the other half but still has not done so.

The landlord further testified that the tenants were served with a 2 Month Notice to End Tenancy for Landlord's Use of Property on April 1, 2014 by personally handing it to the tenant on that date. He testified that the notice is dated April 1, 2014 and contains an expected date of vacancy of July 1, 2014. The reason for issuing the notice states: "The rental unit will be occupied by the landlord or the landlord's spouse or a close family member (father, mother, or child) of the landlord or the landlord's spouse." The landlord testified that he and his family are tenants in a basement suite of another house and the landlord's small child cries and disturbs other occupants, and the landlord wants to move into the rental unit occupied by the tenant.

He further testified that the tenant asked the landlord for compensation for moving expenses, and the landlord complied by giving the tenant a cheque in the amount of \$800.00 on May 9, 2014 which the tenant cashed.

The landlord also testified that the parties had been to arbitration with the Residential Tenancy Branch on June 17, 2014 and a copy of the resulting Decision has been provided. The Decision is dated June 18, 2014 and states that the dispute involved an application by the tenant seeking an order cancelling the 2 Month Notice to End Tenancy for Landlord's Use of Property and for an order granting the tenant more time to make the application. The arbitrator found that the tenant had not explained sufficiently the reason(s) for failing to apply within the 15 days provided in the *Act*, and the tenant's application for an extension of the time was dismissed, as was the tenant's application for an order cancelling the notice. The Decision also states that the landlord did not make a request for an Order of Possession of the rental unit at the hearing, and was therefore not granted. The tenant's application was dismissed without leave to reapply. No other notices to end the tenancy were given by the landlord to the tenant.

The landlord testified that the tenant has still not moved out, and owes rent for the months of August and September, 2014.

The tenant testified that at the beginning of the tenancy the parties had discussed that the tenants could stay as long as they wanted.

Rent is due on the 27th of the month for the following month, and the tenant paid rent for July, 2014. The landlord accepted rent for the month of July, 2014 and the tenant believes that the landlord has reinstated the tenancy. He stated that no receipt for the payment was provided by the landlord.

The tenant further testified that he sought legal advice and was told that: the tenant is entitled to a fair and unbiased hearing; no evidence has been received from the landlord; and that the tenant should ask that the application be dismissed because the evidence was not provided to the tenant, there are too many missing pieces, and the landlord received rent in July after the Decision of June 18, 2014.

The tenant's witness testified that she also resides in the rental unit and has since the beginning of the tenancy. The rental unit is a basement suite and another unit above it is vacant and the landlord was showing it to perspective renters about a month ago, however the landlord had told the witness that the landlord wants to occupy the entire house.

In rebuttal, the landlord testified that he only showed the upper unit to his brother about a year ago when that unit became vacant; he did not show it to a perspective renter.

Analysis

Where a landlord applies for an Order of Possession, the onus is on the landlord to establish that the tenancy should end and that the landlord has good faith intention to use the rental unit for the purpose set out in the notice. Further, the tenant has raised the issue that the landlord collected rent after the issuance or effective date of the notice and did not indicate on any receipt or any other writing that the rent was being received for use and occupancy only and did not serve to reinstate the tenancy. I refer to Policy Guideline #11, Amendment and Withdrawal of Notices, which states, in part:

A landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy. With the consent of the party to whom it is given, but only with his or her consent, a Notice to End Tenancy may be withdrawn or abandoned prior to its effective date. 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 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.

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 evidence as to:

- whether the receipt shows the money was received for use and occupation only.
- whether the landlord specifically informed the tenant that the money would be for use and occupation only, and
- the conduct of the parties.

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. 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.

Also, as a general rule it may be stated that the giving of a second Notice to End Tenancy does not operate as a waiver of a Notice already given.

In order to be effective, a notice ending a tenancy must be clear, unambiguous and unconditional.

In this case, the parties agree that rent is payable on the 27th day of each month. The *Residential Tenancy Act* states that a landlord must serve the notice on the tenant the day before rent is payable under the tenancy agreement, and the notice takes effect 2 months after that so that the tenancy ends on the day before rent is due. The landlord in this case testified that the notice is dated April 1, 2014 and therefore could not be effective until 2 months after April 27, 2014, or June 27, 2014. The landlord testified that the effective date of vacancy contained in the notice is July 1, 2014 which is more

time than the landlord was required to provide to the tenant. The tenant testified that the landlord accepted rent for July, 2014 without issuing a receipt and the landlord did not dispute that testimony. No documentation was given to the tenant to ensure the tenant knew that the money was being received for use and occupancy only and did not serve to reinstate the tenancy.

For those reasons, I am not satisfied that the landlord has established an entitlement to an Order of Possession.

The tenant is obviously not entitled to the compensation given by the landlord and the landlord testified that rent for August and September have not yet been paid. The landlord is at liberty to serve another notice to end the tenancy, however the 2 Month Notice to End Tenancy for Landlord's Use of Property issued on April 1, 2014 will not suffice to obtain an Order of Possession and the landlord's application is hereby dismissed.

Conclusion

For the reasons set out above, the landlord's application for an Order of Possession and to recover the filing fee from the tenant is hereby dismissed.

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: September 17, 2014

Residential Tenancy Branch

