



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR

Introduction

This hearing dealt with an application by the tenant for an order setting aside a 10 Day Notice to End Tenancy for Non-Payment of Rent. Both parties appeared and had an opportunity to be heard.

Issue(s) to be Decided

Is the 10 Day Notice to End Tenancy for Non-Payment of Rent dated January 5, 2015, valid?

Background and Evidence

This month-to-month tenancy commenced September 1, 2011. The monthly rent of \$1150.00 is due on the first day of the month. The landlord received a security deposit of \$575.00.

On September 17, 2014, the landlord issued and subsequently served a 1 Month Notice to End Tenancy for Cause. At first the tenant took the position that she would move out of the rental unit at the end of October in compliance with the notice to end tenancy. She paid the landlord one half of the October rent and asked him to apply the security deposit to the balance.

The tenant subsequently decided to dispute the notice to end tenancy and filed an application for dispute resolution with the Residential Tenancy Branch. The hearing was set for November 25.

The tenant sent the application for dispute resolution and notice of hearing to the landlord by registered mail. For whatever reason on November 1 the landlord was not aware of the tenant's action or that a dispute resolution hearing had been scheduled. He went to the rental unit on November 1 to take possession of the rental unit and was very disappointed to find the tenant still there.

There was a scene. The tenant offered the landlord the November rent. He refused to accept it because he did not want the tenancy to continue.

The hearing went ahead on November 25. Neither the landlord nor the tenant recall the arbitrator explaining the purpose of a receipt marked "for use and occupancy only".

An oral decision was not given at the end of the hearing.

On December 1 the tenant called the landlord and offered the December rent. He said he did not want it because, if he won the case, he wanted the tenant out.

The tenant said she held onto the November rent until December 11 when she deposited it back into her account.

A written decision was rendered on December 15 and received by the parties many days after that.

The decision contained the following warning:

"The tenant is cautioned to honour her obligation to pay rent in accordance with the tenancy agreement and the landlord is cautioned that he cannot refuse rent."

On December 26 the tenant sent the landlord a text message asking for banking information so she could direct deposit the January rent. The landlord was not comfortable giving this information to the tenant.

The landlord's partner came to the rental unit on January 1, pursuant to a prior arrangement with the tenant, to pick up the rent and to conduct an inspection. The tenant gave her a cheque for the January rent, less the filing fee for the previous application which she had been awarded. The landlord asked for the November and December rent, plus repayment of the security deposit, but the tenant did not have the money. As of the date of this hearing the tenant still did not have the funds to pay the November and December rent.

On January 5, 2015, the landlord issued and served the tenant with a 10 Day Notice to End Tenancy for Non-Payment of Rent.

The tenant's position was that the landlord had refused to accept the November and December rent and she came to the conclusion that she needs a court to tell her she had to pay it.

The landlord testified that she refused to accept the November and December rent until the outcome of the arbitration hearing was known because he was afraid that accepting the rent would be considered as reinstating the tenancy.

Analysis

A landlord who accepts the rent effective date of a 1 Month Notice to End Tenancy for Cause will be found to have reinstated the tenancy unless he can convince an arbitrator that he made it very clear to the tenant that payment was being accepted for use and occupancy only and did not reinstate the tenancy. The simplest means of doing this is by giving the tenant a receipt for the payment that includes the phrase “accepted for use and occupancy only”.

The tenant is obliged to pay the rent unless she can establish that the landlord has explicitly or implicitly waived his right to the November and December rent.

As explained in *Residential Tenancy Policy Guideline 11: Amendment and Withdrawal of Notices*:

“Express waiver arises where there has been a voluntary, intentional relinquishment of a known right. Implied waiver arises when 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 that amount to estoppel.”

The evidence is that the landlord’s position was clear from September onwards. He wanted this tenancy to end and he did want to do anything that might inadvertently reinstate it. He was prepared to wait until he had the arbitrator’s decision before asking for the November or December rent. There was nothing in the landlord’s actions that suggest that in the event the 1 Month Notice to End Tenancy was set aside and the tenancy continued that he was giving up his right to rent for the months that the tenant lived in the rental unit. Once he found out the tenancy was going to continue he asked for the November and December rent within a reasonable period of time.

The 10 Day Notice to End Tenancy for Non-Payment of Rent dated was in the valid form and was properly served. There are arrears of rent owed for November and December and those arrears were not paid by the tenant within five days of receiving

the notice as required by the legislation. Accordingly, the tenant's application is dismissed.

Section 55(1) of the *Residential Tenancy Act* provides that if a tenant makes an application to set aside a landlord's notice to end a tenancy and the application is dismissed, the dispute resolution officer must grant an order of possession of the rental unit to the landlord if, at the time scheduled for the hearing, the landlord makes an oral request for an order of possession.

The landlord did make an oral request for an order of possession. The landlord is entitled to an order of possession effective two days after service on the tenant. If necessary, this order may be filed in the Supreme Court and enforced as an order of that Court.

If the landlord wishes to pursue any claim for arrears of rent and/or damages he must file his own application for dispute resolution asking for a monetary order and prove his claim at that hearing.

As the tenant did not pay a fee to file this application no order with respect to the filing fee is required.

Conclusion

The tenant's application is dismissed. The landlord is granted an order of possession effective two days after service.

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: January 30, 2015

Residential Tenancy Branch

