



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

OPR, MNR, MNSD, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an Order of Possession for unpaid rent, pursuant to section 55;
- a monetary order for unpaid rent, pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested, pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant, pursuant to section 72.

The tenant did not attend this hearing although it lasted approximately 20 minutes. The landlord attended the hearing and was given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

The landlord gave sworn testimony that his mother, "LS," personally served the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent, dated December 8, 2014 ("10 Day Notice"), on the same date. The landlord provided a signed proof of service with both his and LS's signatures on the form. In accordance with section 88 of the *Act*, I find that the tenant was served with the 10 Day Notice on December 8, 2014.

The landlord testified that he served the tenant with the Application for Dispute Resolution hearing package ("Application") on January 8, 2015, by way of registered mail. The landlord provided a Canada Post customer receipt and tracking number as proof of service, with his Application. The landlord stated that the tenant telephoned him to discuss the Application. In accordance with sections 89 and 90 of the *Act*, I find that the tenant was deemed served with the Application on January 13, 2015, five days after its registered mailing.

During the hearing, the landlord withdrew his application for a monetary order for unpaid rent for December 2014 and January 2015 and to retain the tenant's security deposit in satisfaction of the monetary order requested. Accordingly, the landlord's application for a monetary order for unpaid rent for December 2014 and January 2015 is withdrawn. Although the landlord intends to withdraw his application to retain the tenant's security deposit, I have allowed the landlord to

retain a portion of the security deposit in accordance with section 72 of the *Act*, as outlined in the conclusion section, below.

Issues to be Decided

Is the landlord entitled to an Order of Possession for unpaid rent?

Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

The landlord testified that this tenancy began on July 15, 2012. Monthly rent in the amount of \$1,050.00 is payable on the 1st day of each month. A security deposit of \$525.00 was paid by the tenant and the landlord continues to retain this deposit. The landlord provided a written tenancy agreement with his application. The tenancy agreement indicates that three tenants, SL, JL and the tenant named in this application, AL, occupied the premises. However, the landlord indicated that one of the tenants, SL, had already moved out. The landlord stated that the tenant named in this application, as well as JL, still remained in this rental unit. The tenancy agreement names this landlord as well as his mother, LS, as landlords for this rental unit.

The landlord issued the 10 Day Notice, indicating that rent in the amount of \$1,050.00 was due on December 1, 2014. The notice indicates an effective move-out date of December 20, 2014. The landlord confirmed that the tenant paid rent of \$1,900.00 on January 20, 2015 and \$250.00 on January 25, 2015, the day before this hearing. The landlord confirmed that this total payment of \$2,150.00 was for December 2014 and January 2015 rent. The landlord stated that although only \$2,100.00 was due for both December 2014 and January 2015 rent, the tenant paid an extra \$50.00 because she had made an agreement with the landlord to pay this additional amount for a previous late payment for November 2014 rent. The landlord stated that a receipt for the \$2,150.00 payment had not yet been sent to the tenant because the final outstanding balance was only paid the day before this hearing. The landlord indicated that a receipt for "use and occupancy only" was to be sent on the day of the hearing, by way of mail, to the tenant. The landlord provided a copy of this receipt, which is dated January 26, 2015, after the hearing, at my request. The receipt is signed by the landlord and LS, indicating that \$2,150.00 was received from the tenant for "use and occupancy only."

The landlord stated that his intentions regarding ending this tenancy were made clear to the tenant. The landlord indicated that he discussed his application with the tenant and informed her that he intended to pursue his application for an order of possession. The landlord also stated that a previous hearing before a different arbitrator was held on July 23, 2014, after which a settlement decision was recorded on August 1, 2014. The file number for this previous hearing is indicated on the front page of this decision. The landlord's previous application was for an order of possession for unpaid rent and a monetary order for unpaid rent. The decision indicates that the tenant had paid rent up to and including August 2014 but the tenant was provided receipts for "use and occupancy only." In that decision, the landlord had stated that

“rent was late all the time.” The parties agreed to settle the matter by the tenant providing 6 post-dated cheques for rent from September 2014 forward and that the tenant would continue paying rent in this method, unless and until the parties reached another agreement. The landlord indicated that the tenant’s post-dated cheques were unsuccessful and that the tenant subsequently paid him cash for rent in January 2015. The landlord indicated that the tenant was not abiding by her agreement or paying rent on time.

The landlord is also seeking to recover the filing fee of \$50.00 for this Application from the tenant.

Analysis

Residential Tenancy Policy Guideline 11 discusses the issue of waiver of a 10 Day Notice:

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.

The landlord provided undisputed evidence at this hearing, as the tenant did not appear. The tenant failed to pay the full rent due on December 1, 2014, within five days of receiving the 10

Day Notice. Although the tenant paid the full amount owing after the effective date of December 20, 2014, the landlord only accepted it for “use and occupancy only,” as stated on the receipt that he provided. The receipt was issued on the day of the hearing, since the tenant provided the full payment on the day before the hearing.

Although the landlord accepted the full rent payment after filing and serving his Application upon the tenant, I do not find this to be a waiver of the 10 Day Notice. The landlord gave undisputed sworn testimony that he spoke with the tenant after serving his application, that the tenant was aware of his Application, and he advised her of his intentions to pursue his Application for an order of possession. The landlord did not withdraw his Application at any time prior to this hearing, the landlord did not cancel the hearing, and the tenant had sufficient notice of the hearing. The tenant did not appear at this hearing to present her position. She did not provide any evidence for this hearing. The tenant did not allege any express or implied waiver of the 10 Day Notice. The landlord stated that after the previous hearing settlement in July 2014, the tenant did not abide by the terms of her settlement agreement and she was aware that the landlord had been previously seeking an order of possession because of her late rent payments.

For the above reasons, and given the conduct of the parties, I find that the landlord did not waive his rights to pursue the 10 Day Notice and he did not waive the 10 Day Notice, whether expressly or impliedly. I find that the landlord did not intend to reinstate this tenancy, despite accepting full rent payments from the tenant after the effective date stated on the 10 Day Notice.

The tenant has not made an application pursuant to section 46(4) of the *Act* within five days of being deemed to have received the 10 Day Notice. In accordance with section 46(5) of the *Act*, the failure of the tenant to either pay the full rent or make an application within five days led to the end of this tenancy on December 20, 2014, the effective date on the 10 Day Notice. In this case, this required the tenant and any other occupants on the premises to vacate the premises by December 20, 2014. As this has not occurred, I find that the landlord is entitled to a 2 day Order of Possession.

As the landlord was successful in his application, I find that he is entitled to recover the \$50.00 filing fee paid for the Application.

The landlord testified that he continues to hold the tenant's security deposit of \$525.00. Although the landlord attempted to withdraw his application to retain the tenant's security deposit, in accordance with the offsetting provisions of section 72 of the *Act*, I order the landlord to retain \$50.00 from the tenant's security deposit in full satisfaction of the monetary award. No interest is payable over this period. The landlord is required to deal with the remainder of the tenant's security deposit, in the amount of \$475.00, in accordance with section 38 of the *Act*.

Conclusion

I grant an Order of Possession to the landlord effective **two days after service of this Order** on the tenant. Should the tenant or any other occupants on the premises fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I order the landlord to retain \$50.00 from the tenant's security deposit in full satisfaction of the monetary award. The landlord is required to deal with the remainder of the tenant's security deposit, in the amount of \$475.00, in accordance with section 38 of the *Act*.

The landlord's application for a monetary order for unpaid rent for December 2014 and January 2015 is withdrawn.

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: February 06, 2015

Residential Tenancy Branch

