



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MT, CNR, FF

Introduction

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

- more time to make an application to cancel the landlord's 10 Day Notice to End Tenancy for Unpaid Rent, dated February 12, 2015 ("10 Day Notice"), pursuant to section 66;
- cancellation of the landlord's 10 Day Notice, pursuant to section 46; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

Both parties attended the hearing and were each given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

The landlord testified that she served the tenant with the 10 Day Notice on February 12, 2015, by way of email and registered mail. The tenant confirmed receipt on February 12, 2015, by way of email only. Although email is not an acceptable service method according to section 88 of the *Act*, the tenant admitted service and she filed her application in response to the 10 Day Notice. In accordance with section 71(2)(c) of the *Act*, I find that the tenant was sufficiently served with the landlord's 10 Day Notice on February 12, 2015.

The tenant testified that she served the landlord with the tenant's application for dispute resolution hearing package ("Application") on February 25, 2015, by way of registered mail. The landlord confirmed receipt of the tenant's Application. In accordance with sections 89 and 90 of the *Act*, I find that the landlord was duly served with the tenant's Application.

The landlord testified that she served the tenant with the landlord's written evidence package on March 9, 2015, by way of registered mail. The tenant confirmed receipt of

the landlord's written evidence package. In accordance with sections 89 and 90 of the *Act*, I find that the tenant was duly served with the landlord's written evidence package.

Preliminary Issue – More time to file application to cancel 10 Day Notice

The tenant applied for more time to make an application to cancel the landlord's 10 Day Notice. The tenant stated that she filed an "original application" prior to this current Application, on February 17, 2015, within 5 days of receiving the landlord's 10 Day Notice on February 12, 2015. The tenant stated that she was unable to serve the landlord with her original application and written evidence within 3 calendar days, as she thought that she had 3 business days to do so. The tenant stated that she called the Residential Tenancy Branch ("RTB") and was told that it was too late to serve her evidence to the landlord because it was past 3 calendar days, so the tenant cancelled her original application. The tenant provided reference and file numbers for the original application.

As per section 66 of the *Act*, I grant the tenant more time to make her application to cancel the 10 Day Notice. I find that the tenant's original application was within the 5 day deadline to dispute the 10 Day Notice, as per section 46(4) of the *Act* but due to a misunderstanding regarding service of the tenant's original application, it was cancelled. The tenant's current Application was filed six days after the original application, on February 23, 2015. Although the tenant applied past the effective date on the 10 Day Notice, this effective date is incorrect, as stated by the landlord. The effective date of January 31, 2015 is prior to the date of the 10 Day Notice itself, which is February 12, 2015. Therefore, I do not find that the tenant is barred by section 66(3) of the *Act*, from applying for more time to cancel the notice, given that the effective date on the 10 Day Notice is incorrect.

Issues to be Decided

Should the landlord's 10 Day Notice be cancelled?

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

Background and Evidence

The tenant testified that this month to month tenancy began on May 1, 2011. A security deposit of \$350.00 was paid by the tenant in May 2011 and the landlord continues to

retain this deposit. Neither party could confirm whether an additional security deposit of \$350.00 was paid later in the tenancy. The tenant and her male friend currently occupy the upper level of a house, which is two levels. The landlord testified that her five adult children are the owners of the rental unit.

Both parties agreed that the tenant initially occupied the lower level suite of the house with her sister from May 2011 until August 2012, paying rent of \$700.00 per month. Both parties agreed that the former occupants living in the upper level of the house vacated in August 2012 and the landlord allowed the tenant, her sister and male friend to occupy the entire house. The tenant indicated that she began occupying the entire house from September 2012 until July 2013, paying rent of \$1,400.00 per month. The tenant stated that she gave one month's notice to the landlord in July 2013 that her sister was vacating the rental unit. The tenant testified that she advised the landlord that her sister's share for the lower level suite was \$400.00 per month for rent and given that her sister had vacated, the tenant requested that the new rent be set at \$1,000.00 per month for the tenant and her male friend. The tenant indicated that the landlord accepted monthly rent payments of \$1,000.00 from August 2013 until present, while the tenant and her male friend have been occupying the upper level of the house, not the lower portion anymore. The tenant provided documentary evidence of bank deposits made to the landlord for this \$1,000.00 monthly amount. The landlord stated that she received rent of \$1,000.00 from August 2013 until present, but that she did not agree with the amount, as rent was supposed to be \$1,400.00 in this rental unit. The landlord stated that a new tenant, B, is currently occupying the lower level of the house and paying \$650.00 per month in rent.

Both parties agreed that the landlord first raised the issue regarding rent of \$1,400.00 at the end of September 2014. The landlord testified that she did not take any steps to recover \$1,400.00 in monthly rent from the tenant from August 2013 until she raised the issue with the tenant verbally in September 2014. The landlord stated that she was not seeking unpaid rent of \$400.00 per month from August 2013 to December 2014 from the tenant. The landlord agreed that she continued the tenancy at a monthly rent of \$1,000.00 and that she is not applying to evict the tenant at this time. The landlord indicated that she did not issue any 10 Day Notices for unpaid rent until February 12, 2015. The landlord indicated that she would serve the tenant with a 2 Month Notice for her children to occupy the rental unit, if the tenant fails to pay \$1,400.00 in monthly rent, going forward.

The landlord provided a copy of a tenancy agreement, which indicates that rent of \$1,400.00 is due per month. However, written beside that amount is \$1,350.00, which has been crossed out. The landlord stated that after speaking with the RTB, she

realized that she required a written tenancy agreement to confirm the rent amount that she was seeking. Prior to this tenancy agreement, only an oral agreement was made. The landlord stated that she unilaterally drafted and signed the tenancy agreement on November 30, 2014. Both parties agreed that the tenant did not sign this tenancy agreement. The tenant stated that she received a copy of this tenancy agreement by way of email on March 4, 2015. The landlord stated that she was willing to accept \$1,350.00 monthly rent from the tenant previously, but that the tenant did not agree to this amount so the landlord indicated \$1,400.00 for rent on the tenancy agreement.

The landlord issued the 10 Day Notice, indicating different rent amounts due on different dates. The landlord made a number of changes and alterations to the 10 Day Notice. On the 10 Day Notice, the landlord indicated rent of \$350.00 and \$700.00 were unpaid on January 1 and February 1, 2015. The landlord testified that \$350.00 for each of January and February 2015 was unpaid. The landlord testified that rent has always been \$1,400.00 in this rental unit from September 1, 2012 until present. The tenant testified that she does not owe any unpaid rent as per the 10 Day Notice. The tenant stated that the landlord is attempting to illegally increase her rent by \$400.00 each month. She stated that the rent is currently \$1,000.00 per month for the rental unit because the landlord agreed to this amount by accepting it for over 1.5 years.

Both parties agreed that they had discussions from November 2014 to January 2015 regarding the monthly rent. The tenant stated that she advised the landlord about the rent increase rules under the *Act* and the *Residential Tenancy Regulation*. The tenant indicated that in December 2014 she offered to pay an extra \$75.00 per month for rent to the landlord in order to settle the issue but that she did not receive a response from the landlord.

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

Analysis

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the tenant's claim and my findings around each are set out below.

As I have granted the tenant more time to cancel the 10 Day Notice, the burden shifts to the landlord to show, on a balance of probabilities, the grounds on which the 10 Day Notice is based.

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 tenancy agreement was unilaterally drafted and signed by the landlord only, without agreement from the tenant. Therefore, it is not an enforceable tenancy agreement. From the beginning of this tenancy, oral agreements were reached to confirm the rent

amount. The rent of \$700.00, when the tenant was using the lower level of the house, changed to \$1,400.00 when she began occupying the entire house. The rent then changed again to \$1,000.00 when the tenant's sister vacated the lower level of the house and the tenant only occupied a reduced portion of the house, the upper level. The parties made an oral agreement for monthly rent of \$1,000.00 to be paid for this tenancy. The tenant has paid \$1,000.00 rent per month for over 1.5 years from August 2013 until present and the landlord accepted this amount. The landlord only began questioning this rent amount in September 2014, over one year after accepting the same monthly rent of \$1,000.00. The landlord did not issue a legal notice of rent increase to raise the rent for this tenancy. Therefore, I find that the landlord waived her right to obtain \$1,400.00 per month in rent for this tenancy by accepting \$1,000.00 from the tenant for a lengthy period of time. Accordingly, I order that rent for this tenancy remains at \$1,000.00 for the remainder of this tenancy, unless and until it is legally changed in accordance with the *Act*.

For the reasons stated above, I find that the landlord's 10 Day Notice is invalid. Both parties agreed that the tenant has been paying \$1,000.00 per month for rent, to date. Therefore, no rent is currently outstanding and therefore, no amounts are owed for the 10 Day Notice. Therefore, the landlord has waived her right to enforce the 10 Day Notice, as she has continued to accept rent from the tenant after the corrected effective date on the 10 Day Notice, which is February 22, 2015. Accordingly, the landlord did not meet her onus of proof to show that the 10 Day Notice is valid.

I allow the tenant's application to cancel the landlord's 10 Day Notice, dated February 12, 2015. The landlord's 10 Day Notice is cancelled and of no force or effect. This tenancy will continue until it is ended in accordance with the *Act*.

As the tenant was successful in her Application, she is entitled to recover the \$50.00 filing fee from the landlord.

Conclusion

The tenant's application for more time to make an application to cancel the landlord's 10 Day Notice is allowed. The tenant's application to cancel the landlord's 10 Day Notice is allowed. The landlord's 10 Day Notice, dated February 12, 2015, is cancelled and of no force or effect. This tenancy continues until it is ended in accordance with the *Act*.

I order that rent for this tenancy remains at \$1,000.00 for the remainder of this tenancy, unless and until it is legally changed in accordance with the *Act*.

I order the tenant to deduct \$50.00 total from a future rent payment at the rental unit, in order to recover the filing fee from the landlord.

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 31, 2015

Residential Tenancy Branch

