



# Dispute Resolution Services

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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* ("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 tenants' 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 tenants, pursuant to section 72.

The two tenants did not attend this hearing, which lasted approximately 35 minutes. The landlord's agent, ES ("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 confirmed that he is the site manager for the landlord company named in this application and that he had authority to represent it as an agent at this hearing.

The landlord testified that the tenants were served with the landlord's 10 Day Notice to End Tenancy for Unpaid Rent, dated April 2, 2015 ("10 Day Notice"), on the same date, by way of posting to their rental unit door. In accordance with sections 88 and 90 of the *Act*, I find that both tenants were deemed served with the landlord's 10 Day Notice on April 5, 2015, three days after its posting.

The landlord testified that the tenants were each served with a separate copy of the landlord's Application for Dispute Resolution hearing package ("Application") on April 23, 2015, by way of registered mail. The landlord provided Canada Post receipts and tracking numbers as proof of service. In accordance with sections 89 and 90 of the *Act*, I find that both tenants were deemed served with the landlord's Application on April 28, 2015, five days after their registered mailings.

During the hearing, the landlord withdrew the landlord's application for a monetary order for unpaid rent and to retain the tenants' security deposit. Accordingly, these portions of the landlord's application are withdrawn.

### 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 tenants?

### Background and Evidence

The landlord testified that this tenancy began on June 1, 2012. Monthly rent in the current amount of \$2,127.90 is payable on the first day of each month. A security deposit of \$1,000.00 was paid by the tenants and the landlord continues to retain this deposit. The landlord provided a written tenancy agreement with its application. The landlord testified that the tenants continue to reside in the rental unit, as they last paid rent in the building around May 31 or June 1, 2015, and he saw one of the tenants after this time period.

The landlord testified that monthly rent under the tenancy agreement was initially \$2,000.00. The landlord indicated that rent was increased to \$2,076.00, pursuant to a notice of rent increase that was posted to the tenants' rental unit door on February 6, 2013, and effective on June 1, 2013. The landlord indicated that rent was increased to \$2,127.90, the current rent amount, pursuant to a notice of rent increase that was posted to the tenants' rental unit door on February 17, 2015, and effective on June 1, 2015. The landlord did not provide a copy of either notice for this hearing.

The landlord stated that another 10 Day Notice, dated February 2, 2015, was posted to the tenants' rental unit door on the same date. The landlord provided a copy of this notice with its Application. The notice indicates an effective move-out date of February 15, 2015. The notice states that \$1,883.00 was due on February 1, 2015. The landlord confirmed that the tenants paid \$2,200.00 on February 16, 2015. A receipt for "use and occupancy" only was issued for this rent payment, a copy of which the landlord provided with its Application.

The landlord issued the 10 Day Notice that is the subject of this Application, indicating that rent in the amount of \$1,785.00 was due on April 1, 2015. Although the amount of the rent was amended on the notice, the landlord confirmed that this change was made before the notice was served to the tenants. The notice indicates an effective move-out

date of April 15, 2015. The landlord confirmed that the tenants paid rent of \$1,800.00 on April 15, 2015 and a receipt was issued for "use and occupancy only." The landlord provided a copy of this receipt with its Application. The landlord stated that the tenants paid \$15.00 more than the outstanding balance owed for rent, which was credited to their rent account.

The landlord confirmed that the tenants paid rent on time for both May and June 2015. The landlord stated that the tenants paid \$2,100.00 on May 1, 2015, while their rent was \$2,076.00 at the time, resulting in an overpayment of \$24.00. The landlord indicated that the tenants paid \$2,200.00 on May 31 or June 1, 2015, for their new rent amount of \$2,127.90, resulting in an overpayment of \$72.10. The landlord stated that the tenants have \$111.10 total in rent credits, due to overpayments made since April 2015. The landlord indicated that the tenants do not owe any outstanding rent at this time, as they have paid until June 30, 2015. The landlord confirmed that no receipts were issued for the May and June 2015 rent payments, because they were paid on time. He stated that receipts are usually issued by the landlord if rent is paid late.

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

### 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 tenants did not appear. The tenants failed to pay the full rent due on April 1, 2015, within five days of receiving the 10 Day Notice. Although the tenants paid the full amount owing on April 15, 2015, the landlord only accepted it for “use and occupancy only,” as stated on the receipt provided.

The landlord stated that he spoke with one of the tenants before filing the Application and indicated that rent payments were repeatedly late. The landlord stated that he told one of the tenants to pick up the landlord’s Application package, which informed the tenants that the landlord was seeking an order of possession at this hearing. Subsequently, the tenants made both of the following rent payments on time for May and June 2015. I find the landlord’s conduct of accepting full rent payments for two months after filing and serving the Application, to be a waiver of the 10 Day Notice. The landlord did not issue any receipts for the May or June 2015 rent payments or indicate that they were being accepted for “use and occupancy only.” The landlord indicated that the tenants paid rent for May 2015 by way of a cheque that was left for the landlord and so no communication was made between the landlord and tenants at this time. He stated that when the tenants paid rent for June 2015 in person, he was not present and he was unaware of what transpired between the tenants and landlord on this date. The landlord failed to provide any evidence that the landlord specifically informed the tenants that their May and June 2015 rent payments were being accepted for “use and occupancy only.” The landlord testified that although he saw one of the tenants just a few days before this hearing, sometime after the May 31 or June 1, 2015 rent payment, he did not have a conversation with her at all. I find that the landlord did not communicate with the tenants about its intention to pursue an end to this tenancy.

The landlord did not withdraw its Application or cancel the hearing at any time prior to this hearing. I found that the tenants were deemed served with the landlord's Application and had sufficient notice of the hearing. The tenants did not appear at this hearing to present their position. The tenants did not allege any express or implied waiver of the 10 Day Notice. However, I find that the tenants relied on the landlord's conduct, amounting to waiver, of continuing to accept May and June 2015 rent payments without issuing any receipts or verbal notifications that the rent was being accepted for "use and occupancy only" or that an end to tenancy was still desired. I find that the tenants paid rent on time for May and June 2015, assuming that their tenancy would continue.

Further, the landlord issued the 10 Day Notice in February 2015 and the tenants paid rent on time for the next due date on March 1, 2015, as per the landlord's rent ledger provided with its Application. The landlord did not provide a receipt for this hearing, indicating that the rent was accepted for "use and occupancy only." The landlord did not file an Application until April 20, 2015, after the April 2015 rent payment was late. I find that this is another indication that the landlord's past conduct induced the tenants into thinking that 10 Day Notices would not be pursued to eviction, if the tenants paid rent on time after receiving a notice.

If the landlord's intention was to pursue an end to this tenancy despite accepting the tenants' rent payments for May and June 2015, it should have been made clear to the tenants prior to this hearing. This is particularly so, since the landlord saw one of the tenants just days before this hearing and failed to communicate this intention.

For the above reasons, and given the conduct of the parties, I find that the landlord waived its rights to pursue an Order of Possession based on the 10 Day Notice. I find that the landlord reinstated this tenancy by accepting full rent payments from the tenants after the effective date stated on the 10 Day Notice.

On a balance of probabilities and for the reasons stated above, I dismiss the landlord's application for an order of possession based on the landlord's 10 Day Notice, dated April 2, 2015, without leave to reapply. The landlord's 10 Day Notice, dated April 2, 2015, is cancelled and of no force or effect. This tenancy continues under the terms of the tenancy agreement, until it is ended in accordance with the *Act*.

As the landlord was unsuccessful in its Application, I find that it is not entitled to recover the \$50.00 filing fee paid for the Application.

Conclusion

The landlord's application for an order of possession based on the landlord's 10 Day Notice, dated April 2, 2015, is dismissed without leave to reapply. The landlord's 10 Day Notice, dated April 2, 2015, is cancelled and of no force or effect. This tenancy continues under the terms of the tenancy agreement, until it is ended in accordance with the *Act*.

The landlord's application to recover the filing fee for this Application is dismissed without leave to reapply.

The landlord's application for a monetary order for unpaid rent and to retain the tenants' security deposit 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: June 05, 2015

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Residential Tenancy Branch

