



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC

Introduction

This hearing dealt with an application by the landlord for an order of possession. Both parties participated in the conference call hearing. I found that the tenants had been properly served the landlords evidence and with the notice of the landlord's claim and the date and time of the hearing in accordance with Section 89 of the Act. The tenants confirmed receipt of said documents. Both parties gave affirmed evidence.

Issues to be Decided

Is the landlord entitled to an order of possession?

Background and Evidence

The landlord gave the following testimony:

The tenancy began on or about February 1, 2015. Rent in the amount of \$700.00 is payable in advance on the first day of each month. At the outset of the tenancy the landlord collected from the tenant a security deposit in the amount of \$350.00. The landlord stated that the male tenant was the party she rented the unit to. The landlord stated that the female party moved in several weeks after the male party took possession of the unit.

The landlord stated that although she was hesitant about this arrangement, she accepted it and accepted the female party as a tenant as well. The landlord stated that she signed a "shelter information form" to authorize that the female tenant would be moving in and that the monthly rent was to be paid directly to the landlord. The landlord stated that she received numerous verbal complaints about the female tenant as well as written complaints.

The landlord stated that other tenants in the building have filed applications seeking compensation for loss of quiet enjoyment due to the subject tenants' actions. The landlord stated that the local police have attended on numerous occasions for noise complaints, parties, and numerous people in the unit, yelling fighting and screaming. The landlord stated that the tenant has drilled holes in the walls and runs extension cords from her unit to common area outlets to steal electricity.

The landlord stated that she spoke to the tenant numerous times about when she was to move out and that she had not re-instated the tenancy at any time. The landlord stated that at no time did she agree to withdraw the notice or that she had waived her right to pursue an order of possession. The landlord stated that she was still entitled to be paid and the only reason subsequent rent was paid was due to the lengthy delay in getting a hearing date.

The tenants advocate gave the following submissions:

The tenants advocate submits that a tenant is not required to file an application to dispute a One Month Notice to End Tenancy for Cause. The advocate submits that even if the tenant did not dispute the notice, the landlord accepted rent and therefore reinstated the tenancy. The advocate submits that if the landlord did not provide a receipt the specifically states that the payment is for "use and occupancy only", the landlord has cancelled the notice and therefore the tenancy continues.

The tenant gave the following testimony:

The tenant stated that she suffers from many illnesses and that she has trouble remembering many details. The tenant stated that many of the people that have written complaints about her are now her friends. The tenant stated that she has made efforts to resolve the problems with the other tenants. The tenant stated that the landlord is exaggerating about the police involvement and that it's not an issue. The tenant stated that she adamantly disputes the landlords' claims.

Analysis

Both parties agree that the tenant received the One Month Notice to End Tenancy for Cause on April 30, 2015 with an effective date of May 31, 2015. The tenants advocate stated that there is no requirement for the tenant to dispute the notice and that an alternative argument is that the landlord has waived the right to pursue the notice by accepting rent. I disagree with the advocate on both of his arguments. Firstly, I address the advocates' position that a tenant need not file an application to dispute a notice. Section 47(4) and (5) clearly address the tenants options as follows

Section 47

(4) A tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.

(5) If a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (4), the tenant

(a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and

(b) must vacate the rental unit by that date.

Secondly, I address the advocates' position that the landlord waived their right to pursue the notice by accepting rent.

Residential Tenancy Policy Guideline 11 discusses the issue of waiver.

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.

Although the landlord accepted the rent payments after filing and serving her application upon the tenant, I do not find this to be a waiver of the One Month Notice. The landlord stated that she was surprised the tenant did not move out on the effective date as she had “waived” her right to dispute the notice. In addition, the landlord stated that since “welfare sent the cheques, I never gave a receipt”. It’s reasonable and logical to accept the landlord felt that it wasn’t necessary to provide a receipt that stated “for use and occupancy only” and that by serving the tenant a notice for dispute resolution after the effective date, the landlord was fully intending on pursuing the One Month Notice to End Tenancy for Cause.

The landlord gave sworn testimony that she spoke with the tenant after serving her application, and that she advised the tenant of her intentions to end this tenancy because of the tenants conduct. The landlord did not withdraw her 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 stated that she disputes these conversations ever occurred. I find the landlords testimony to be more credible, reliable and the one that I prefer.

The landlords “conduct” clearly showed that throughout the entire process she had not waived her right to pursue the Notice and an order of possession. The tenant was unclear, contradictory and gave sworn testimony she has a hard time remembering things. At one point in the hearing the tenant and her advocate stated that they weren’t sure which notice was the subject of this hearing. The tenants’ testimony cannot be relied upon.

In addition, the landlord provided sufficient evidence on a balance of probabilities; testimonial and documentation, to uphold the One Month Notice to End Tenancy for Cause on the basis that the tenant significantly interfered with or unreasonably disturbed another tenant, occupant or the landlord.

Based on the above facts I find that the landlord is entitled to an order of possession. The tenant must be served with the order of possession. Should the tenant fail to

comply with the order, the order may be filed in the Supreme Court of British Columbia and enforced as an order of that Court.

Both parties acknowledged that the rent would be paid on this date by the "Ministry". Due to the timing of this hearing, the time required in the administration of this decision, and that I do not find the tenant to be an immediate risk; the order of possession takes effect at 1:00 p.m. on August 31, 2015.

The landlord is also entitled to recovery of the \$50.00 filing fee. I order that the landlord retain the \$50.00 from the security deposit in full satisfaction of the claim

Conclusion

The landlord is granted an order of possession and to withhold \$50.00 from the security deposit.

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: July 29, 2015

Residential Tenancy Branch

