



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding M'Akola Housing Society
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPC, O, FF

Introduction

This hearing dealt with the landlord's Application for Dispute Resolution seeking an order of possession.

The hearing was conducted via teleconference and was attended by two agents for the landlord; the tenant; and her advocate.

At the outset of the hearing I noted to the landlord that they had applied to obtain an order of possession based on a 1 Month Notice to End Tenancy for Cause but that in the details of dispute section of their Application for Dispute Resolution the landlord had written that the "Landlord requests an Order of Possession based on the Fixed Term Tenancy Agreement ending July 31, 2015" [reproduced as written].

The landlord confirmed they are seeking the order of possession based on the fixed term tenancy agreement. As the details of dispute on the Application outlined this specifically I am satisfied the Application reflects the landlord's intentions in pursuing this Application.

During the hearing issues relating to events occurring after the end date of the fixed term tenancy were raised that required my consideration in this decision also required that both parties submit additional evidence after the hearing was concluded.

I provided both parties with a fax number to submit the additional evidence and ordered that they submit it no later than the end of business on the same date as the hearing. Specifically I ordered the tenant to submit the following documents:

1. A copy of a 10 Day Notice to End Tenancy for Unpaid Rent issued in September 2015;
2. A copy of a letter received from the landlord with the 10 Day Notice; and
3. Any receipts she had received from the landlord for the payment of any monies since August 1, 2015.

Further I ordered the landlord to submit the following documents:

1. A copy of a 10 Day Notice to End Tenancy for Unpaid Rent issued in September 2015;
2. A copy of a letter received provided to the tenant with the 10 Day Notice; and
3. Any receipts issued by the landlord for the payment of any monies since August 1, 2015 that had been stamped, upon issuance, "for use and occupancy only".

Both parties submitted these documents in accordance with my orders above. I note that the landlord did not provide any copies of receipts. I had advised both parties that should I find a need to reconvene the hearing once I had received these documents I would do so. However, I find reconvening the hearing would not contribute to the resolution of the matters before me.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to an order of possession as per the fixed term tenancy agreement and to recover the filing fee from the tenant for the cost of the Application for Dispute Resolution, pursuant to Sections 44, 55, 67, and 72 of the *Residential Tenancy Act (Act)*.

Background and Evidence

The landlord submitted into evidence a copy of a tenancy agreement signed by the parties on May 1, 2015 for a 3 month fixed term tenancy beginning on May 1, 2015 for a monthly rent of \$666.00 due on the 1st of each month. The agreement stipulated in Clause 3 that the tenant must vacate the rental unit at the end of the fixed term on July 31, 2015.

The landlord submitted that based on a number of factors, as outlined in an email from the landlord's Chief Operating Officer to one of the agents who attended the hearing, the landlord had decided not to renew the tenancy agreement with the tenant.

The tenant's advocate submitted that since July 31, 2015 the tenant has paid rent to the landlord for both the months of August and September 2015. The advocate stated the tenant had receipts to confirm these payments. The advocate also submitted that for the month of September 2015 the tenant was short \$47.00. The advocate stated that the landlord issued a 10 Day Notice to End Tenancy for Unpaid Rent and a letter warning the tenant that if she did not pay the rent within 5 days the tenancy would be deemed to have ended.

The landlord's agent confirmed receipt of the funds paid by the tenant and that they issued receipts. The agent submitted that their usual practice is to stamp the receipts, in circumstances such as this, with the statement for "use and occupancy only". During the hearing the landlord submitted that they could not confirm that the receipts issued in this particular case were stamped or find any such printed receipts on the tenant's file.

The evidence submitted after the hearing confirms the content of the letter dated September 10, 2015 confirming the issuance of the 10 Day Notices and that failure to pay within 5 days would end the tenancy. The tenants copies of receipts issued on September 1, 2015 and September 14, 2015 do not have any stamp or notation indicating for use and occupancy only.

Analysis

Section 44(1) of the *Act* states a tenancy ends only if one or more of the following applies:

- a) The tenant or landlord gives a notice to end the tenancy in accordance with one of the following:
 - i. Section 45 (tenant's notice);
 - ii. Section 46 (landlord's notice: non-payment of rent);
 - iii. Section 47 (landlord's notice: cause);
 - iv. Section 48 (landlord's notice: end of employment);
 - v. Section 49 (landlord's notice: landlord's use of property);
 - vi. Section 49.1 (landlord's notice: tenant ceases to qualify);
 - vii. Section 50 (tenant may end tenancy early);
- b) The tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;
- c) The landlord and tenant agree in writing to end the tenancy;
- d) The tenant vacates or abandons the rental unit;
- e) The tenancy agreement is frustrated; or
- f) The director orders the tenancy is ended.

From the undisputed evidence submitted by the landlord I find the tenancy agreement did require the tenant to vacate the rental unit effective July 31, 2015. As such and pursuant to Section 44(1)(b) I find the tenancy ended on July 31, 2015.

Residential Tenancy Policy Guideline 11 provides guidance in determining if a landlord has withdrawn or abandoned a notice to end tenancy. The guideline states a landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy. With the consent of the party to whom it is given, but only with his or her consent, a Notice to End Tenancy may be withdrawn or abandoned prior to its effective date. 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 guideline goes on to state 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 may 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.

While this guideline specifically deals with the issue of waiving or abandoning the right to end a tenancy after a notice to end tenancy has been issued I find it can be useful in the circumstances of the case before me.

Whether or not the tenancy continued or was reinstated the tenant continued to stay in the rental unit. If the tenancy was ended and the tenant remained the landlord would be entitled to a per diem charge for overholding. As such, I find it is not a question of whether or not the tenant owed the landlord money for rent or overholding but rather if the landlord provided any clear indication that they did not intend to pursue ending the tenancy based on the original tenancy agreement.

Despite the issuance of receipts that do not indicate for use and occupancy only and a 10 Day Notice to End Tenancy in September 2015 I find there was no evidence presented by either party that the landlord had, at any time, provided an unequivocal or decisive act that they would not be pursuing their Application for an order of possession to end the tenancy based on the fixed term tenancy. As such, I find the landlord has not reinstated the tenancy.

Conclusion

Based on the above, I find the landlord is entitled to an order of possession effective **two days after service on the tenant**. This order must be served on the tenant. If the tenant fails to comply with this order the landlord may file the order with the Supreme Court of British Columbia and be enforced as an order of that Court.

I find the landlord is entitled to monetary compensation pursuant to Section 67 and I grant a monetary order in the amount of **\$50.00** comprised of the fee paid by the landlord for this application.

This order must be served on the tenant. If the tenant fails to comply with this order the landlord may file the order in the Provincial Court (Small Claims) and be enforced as an order of that Court.

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: September 30, 2015

Residential Tenancy Branch

