



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPC, FF; CNC, FF

Introduction

This hearing dealt with the landlord's application against both tenants, pursuant to the *Residential Tenancy Act* ("Act") for:

- an Order of Possession for cause, pursuant to section 55; and
- authorization to recover the filing fee for this application from the tenants, pursuant to section 72.

This hearing also dealt with tenant MS' cross-application against the landlord, pursuant to the *Act* for:

- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause, dated October 20, 2015 ("1 Month Notice"), pursuant to section 47; and
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

The landlord and her advocate (collectively "landlord") and the two tenants, tenant MS ("tenant") and "tenant CL" (collectively "tenants") attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The landlord confirmed that she wanted her advocate to speak on her behalf at this hearing. This hearing lasted approximately 54 minutes in order to allow both parties to fully present their submissions.

Both parties confirmed receipt of the other party's application for dispute resolution hearing package. In accordance with sections 89 and 90 of the *Act*, I find that both parties were duly served with the other party's application.

The tenants confirmed receipt of the landlord's 1 Month Notice on October 20, 2015, by way of tenant CL's uncle who was living in the same rental property at the time. In accordance with section 88 of the *Act*, I find that both tenants were duly served with the landlord's 1 Month Notice.

Issues to be Decided

Should the landlord's 1 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession for cause?

Is either party entitled to recover the filing fee for their application?

Background and Evidence

Both parties agreed that this tenancy began on October 1, 2014 and was for a fixed term of one year, after which it transitioned to a month-to-month tenancy. Both parties agreed that a security deposit of \$1,250.00 was paid by the tenants and the landlord continues to retain this deposit. The tenants continue to reside in the rental unit.

Both parties agreed that only tenant CL signed a written tenancy agreement with the landlord ("signed tenancy agreement"). Both parties agreed that the landlord drafted another written tenancy agreement, at the request of the tenants, but the tenant did not sign this agreement as required ("unsigned tenancy agreement").

Both parties agreed that monthly rent in the amount of \$2,500.00 is payable on the first day of each month. The tenant testified that although the signed tenancy agreement indicated that rent was due on the 15th day of each month, that provision was only for the month of October 2014. The tenant testified that as of November 1, 2014, as per the unsigned tenancy agreement, rent was due on the first day of each month. The tenant stated in her own written evidence that she wished for me to make a declaration at this hearing, that the rental due date revert back to the 15th day of each month, as per the signed tenancy agreement.

The tenant seeks to cancel the landlord's 1 Month Notice. The landlord issued the 1 Month Notice, indicating that "*the tenant is repeatedly late paying rent.*" The notice indicates an effective move-out date of November 30, 2015.

Both parties agreed that the tenants paid rent late in January, February, March, July and October 2015. The landlord testified that the tenants also paid rent late in April, May and September 2015, while the tenants disagreed. Both parties agreed that the tenants' rent cheques were returned for insufficient funds in June, July and August 2015. The landlord provided bank documents to confirm this. Both parties agreed that the tenants were issued rent receipts for late payment of rent in January, February, March, July and October 2015. The landlord provided the rent receipts for this hearing.

Both parties agreed that the tenants paid rent on time in November and December 2015. The landlord stated that she provided a rent receipt in November 2015 to the tenants but she did not provide a copy for this hearing. The landlord confirmed that she has not yet provided a rent receipt to the tenants for December 2015. The landlord maintained that she accepted rent after the effective date of the 1 Month Notice because the Residential Tenancy Branch ("RTB") told her to do so. She said that she still intended to evict the tenants and that is why she appeared at this hearing. The tenants confirmed that they appeared at this hearing because they were aware that the landlord still wanted to evict them from this rental unit.

Analysis

According to subsection 47(4) of the *Act*, a tenant may dispute a 1 Month Notice by making an application for dispute resolution within ten days after the date the tenant receives the notice. The tenant received the 1 Month Notice on October 20, 2015 and filed an application on October 22, 2015. Therefore, the tenant is within the ten day time limit under the *Act*. The onus, therefore, shifts to the landlord to justify the basis of the 1 Month Notice.

Section 26 of the *Act* requires tenants to pay rent on the date indicated in the tenancy agreement. Both parties agreed that rent is due on the first day of each month. Residential Tenancy Policy Guideline 38 states that "three late payments are the minimum number sufficient to justify a notice..." The tenants acknowledged that they paid rent late more than three times during this tenancy. Accordingly, I find that the tenants were late paying rent more than three times during this tenancy in January, February, March, July and October 2015.

Although the tenants paid rent late a number of times and the landlord accepted this rent, this does not waive the landlord's right to issue a 1 Month Notice for repeated late payment of rent. The landlords issued the 1 Month Notice on October 20, 2015, after more than three late rent payments.

Accordingly, I find that the landlord's 1 Month Notice was issued for a valid reason. The next issue is whether the landlord waived her right to pursue the 1 Month Notice. Residential Tenancy Policy Guideline 11 discusses the issue of waiver of a 1 Month 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.

Although the landlord accepted a rent payment from the tenants in December 2015 after the effective date on the 1 Month Notice of November 30, 2015, I do not find this to be a waiver of the 1 Month Notice. This is despite the fact that the landlord did not issue rent receipts indicating "use and occupancy only." The tenant did not withdraw her application to cancel the 1 Month Notice, at any time prior to this hearing. Both parties submitted written evidence for this hearing regarding the 1 Month Notice. Both parties attended this hearing on the understanding that the landlord still intended to pursue the 1 Month Notice. This is recent evidence of both parties' intention to attend this hearing to determine whether this tenancy would end, pursuant to the landlord's 1 Month Notice. Both parties attended the hearing and made submissions regarding the 1 Month Notice. For the above reasons, and given the conduct of the parties, I find that the landlord did not waive her right to pursue the 1 Month Notice and did not waive the 1 Month Notice, whether expressly or impliedly. I find that the landlord did not intend to reinstate this tenancy, despite accepting a rent payment after the effective date stated on the 1 Month

Notice. Accordingly, the tenant's application to cancel the landlord's 1 Month Notice is dismissed without leave to reapply. As I have dismissed the tenant's application, the landlord is entitled to an order of possession against both tenants, as her application was made against both tenants, pursuant to section 55 of the *Act*.

I find that the landlord is entitled to an Order of Possession effective at 1:00 p.m. on January 15, 2016. I find that because the tenants have three small children and given the rental market during the winter season, they require additional time to vacate the rental unit. Further, the tenants paid rent for December 2015, so they are entitled to possession of the rental unit until at least December 31, 2015.

As the tenant was unsuccessful in her application, I find that she is not entitled to recover the \$50.00 filing fee from the landlord. As the landlord was successful in her application, I find that she is entitled to recover the \$50.00 filing fee from the tenants.

Conclusion

The tenant's entire application is dismissed without leave to reapply.

I grant an **Order of Possession to the landlord effective at 1:00 p.m. on January 15, 2016**. Should the tenants or anyone 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 deduct \$50.00 from the tenants' security deposit of \$1,250.00 in full satisfaction of the monetary award for the filing fee. The remainder of the security deposit in the amount of \$1,200.00 is to be dealt with at the end of this tenancy in accordance with section 38 of the *Act*.

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: December 22, 2015

Residential Tenancy Branch

