



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Stroshin Apartments
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNC, FF

Introduction

This hearing dealt with an application by the tenant for an order setting aside a notice to end his tenancy. Both parties participated in the conference call hearing.

Issue to be Decided

Should the notice to end tenancy be set aside?

Background and Evidence

The facts are not disputed. On or about November 26, 2015, the landlord served on the tenant a one month notice to end tenancy for cause (the "Notice") which had an effective date of December 31, 2015. The tenant paid rent in the month of January and at the end of January provided a rent payment for the month of February.

The tenant argued that because the landlord accepted the rent payments for January and February without qualification, he considers the tenancy to have been reinstated. The landlord testified that the last communication he had with the tenant with respect to the tenancy ending was a text message at the end of November in which he stated that "the notice to end tenancy still stands."

Analysis

The tenant has raised the question of waiver. Residential Tenancy Policy Guideline #11 provides as follows:

A Notice to End Tenancy can be waived (i.e. withdrawn or abandoned), and a new or continuing tenancy created, only by the express or implied consent of both parties.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 accepted rent without specifying either verbally or in writing that it was accepted only as occupational rent and not to reinstate the tenancy. The tenant believed that the tenancy had been reinstated as a result of his rent having been accepted without qualification. I find that the landlord's failure to clearly communicate to the tenant that the rent did not act to reinstate the tenancy amounted to an implied waiver. I therefore find that the Notice must be set aside as the landlord has reinstated the tenancy.

As the tenant has been successful in his application, I find he is entitled to recover the \$50.00 filing fee paid to bring the claim and I award him that sum. **The tenant may deduct \$50.00 from a future rental payment.**

Conclusion

The Notice is set aside and of no force or effect and as a result, the tenancy will continue. The tenant may deduct \$50.00 from a future rental payment in order to recover his filing fee.

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: January 29, 2016

Residential Tenancy Branch

