



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding WENDEB PROPERTIES INC
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, MNR , FF

Introduction

This hearing addressed the landlord's application pursuant to the *Residential Tenancy Act* (the "Act") for:

- an Order of Possession for unpaid rent, pursuant to section 55;
- a monetary order for unpaid rent and utilities, pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant, pursuant to section 72.

The tenant did not participate in the conference call hearing, which lasted approximately 17 minutes. The landlord attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

The landlord testified that on February 23, 2016 the landlord's agent forwarded the landlord's application for dispute resolution and supporting documents via registered mail to the tenant. The landlord provided a receipt and tracking number from Canada Post. Based on the testimony of the landlord and in accordance with sections 89 and 90 of the *Act*, I find that the tenant has been deemed served with the application and supporting documents on February 28, 2016, the fifth day after their registered mailing.

The landlord testified the landlord's 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, dated January 22, 2016, ("10 Day Notice") was placed in the tenants mail slot of the rental unit, on this same date. In accordance with sections 88 and 90 of the *Act*, I find that the tenant was deemed served with the landlord's 10 Day Notice on January 25, 2016, three days after it was placed in the mail slot.

Preliminary Issue – Amendment of Landlords' Application

The landlord confirmed that she wished to amend the landlords' Application to increase her monetary claim to include March and April 2016 unpaid rent of \$1,820.00 total. I find that the tenant should reasonably have known that the landlord would suffer this loss of income if he did not pay the rent or vacate the rental unit to allow it to be re-rented. Based on the undisputed evidence and in accordance with section 64(3)(c) of the *Act*, I amend the landlords' Application to include a monetary claim for March and April 2016 unpaid rent of \$1,820.00 total.

Issues to be Decided

Is the landlord entitled to an Order of Possession for unpaid rent?

Is the landlord entitled to a monetary award for unpaid rent and utilities?

Is the landlord entitled to recover the filing fee for this Application from the tenant?

Background and Evidence

The landlord testified that this tenancy began sometime between the years 2005 and 2007. The landlord explained that the tenancy began under a property management company that the landlord no longer uses. The landlord testified that this property management company has withheld the file related to this tenancy and consequently she does not have a copy of the tenancy agreement. The landlord testified the tenancy is on a month-to-month basis and rent in the amount of \$910.00 is payable on the first of each month. The landlord estimates the tenant remitted a security deposit at the start of the tenancy but again has no records to verify. The tenant continues to reside in the rental unit.

A 10 Day Notice for unpaid rent of \$2,850.00 due on January 1, 2016 was issued to the tenant on January 22, 2016. The notice indicates an effective move-out-date of February 5, 2016. The tenant provided payment in the amount of \$2,000.00 to the landlord's agent sometime in February 2016. The landlord testified her agent would have issued a receipt but was uncertain whether the receipt was issued for use and occupancy only.

The landlord seeks a monetary order for \$3,530.00 in unpaid rent and \$150.00 in late fees accumulated from February 2015 to April 2016. In total, the landlord is seeking \$3,680.00. The landlord is also seeking to recover the \$100.00 filing fee for this Application from the tenant.

Analysis

The landlord provided undisputed evidence at this hearing, as the tenant did not attend. The tenant failed to pay the full rent due on January 1, 2016 and did not pay the rent within five days of receiving the 10 Day Notice. The tenant made a payment in February 2016, however the payment was due by January 30, 2016, five days after the deemed receipt date of January 25, 2016.

The next issue is whether the landlord waived its right to pursue the 10 Day Notice. 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 rent after the effective date on the 10 Day Notice, I do not find this to be a waiver of the 10 Day Notice. The landlord did not withdraw its Application to enforce the 10 Day Notice, at any time prior to this hearing.

For the above reason, and given the conduct of the parties, I find that the landlord did not waive its rights to pursue the 10 Day Notice and did not waive the 10 Day Notice expressly or impliedly. I find that the landlord did not intend to reinstate this tenancy, despite accepting a rent payment after the effective date of the 10 Day Notice.

The tenant has not made an application pursuant to section 46(4) of the *Act* within five days of being deemed to have received the 10 Day Notice. In accordance with section 46(5) of the *Act*, the failure of the tenant to pay the full rent or file an application within five days led to the end of this tenancy on February 4, 2016, the corrected date on the 10 Day Notice. In this case, this required the tenant and anyone on the premises to vacate the premises by February 4, 2016. As this has not occurred, I find that the landlord is entitled to a two (2) Day Order of Possession, pursuant to section 55 of the *Act*. I find that the landlord's 10 Day Notice complies with section 52 of the *Act*.

Section 26 of the *Act* requires the tenant to pay rent on the date indicated in the tenancy agreement, which is the first day of each month. Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply.

I find that the landlord proved that the current rent for this unit is \$910.00. I find the landlord provided undisputed evidence that the tenant failed to pay full rent between February 2015 and April 2016. Section 7(1)(d) of the *Regulation* establishes that an administration fee no greater than \$25.00 may be charged for late payment of rent, however section 7(2)(e) establishes that a landlord must not charge the fee unless the tenancy agreement provides for that fee. Based on the absence of a written tenancy agreement, I find that the landlord is not entitled to the recovery of the late fees. Therefore, I find that the landlord is entitled to \$3,530.00 in unpaid rent.

As the landlord was successful in this Application, I find that the landlord is entitled to recover the \$100.00 filing fee paid for the Application, for a total award of \$3,630.00.

Conclusion

I grant an Order of Possession to the landlord effective **two (2) days after service on the tenant**. Should the tenant 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 issue a monetary order in the landlord's favour in the amount of \$3,630.00 against the tenant. The tenant must be served with this Order as soon as possible. Should the tenant fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and 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: April 15, 2016

Residential Tenancy Branch