



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNDC

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, pursuant to section 67;
- a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, pursuant to section 67;

The tenant and landlord participated in the conference call hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

The tenant confirmed receipt of the landlord's application for dispute resolution and hearing notice. In accordance with sections 89 and 90 of the Act, I find that the landlord was duly served with the tenant's application and hearing notice.

The parties disagreed on the method that was used to serve the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities ("10 Day Notice"). The landlord testified that the 10 Day Notice was hand delivered on March 8, 2016 whereas the tenant testified the 10 Day Notice was posted to the rental unit door. In the absence of corroborating evidence from the applicant, who bears the burden to prove service, I find the tenant received the 10 Day Notice on March 11, 2016, three days after it was posted to the door. In accordance with sections 88 and 90 of the Act, I find that the tenant was deemed served with the landlord's Notice.

Issue(s) 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?

Is the landlord entitled to a monetary award for money owed or compensation for damage or loss?

Background and Evidence

The landlord testified that she assumed this tenancy in March 2016, when she purchased the property from the former landlord.

The landlord was uncertain as to when the tenancy began as she had no record of a tenancy agreement. The tenant acknowledged there was no written tenancy agreement but recalled the tenancy began with the former landlord in November of 2013 on a month to month basis. The tenant testified rent in the amount of \$595.00 was payable on the first of each month, whereas the landlord testified rent in the amount of \$600.00 was payable the first of each month. The parties agreed a meeting took place in March of 2016 in which the landlord advised the tenant rent would be \$600.00 per month. The tenant testified that he remitted a \$250.00 security deposit at the start of his tenancy. The landlord testified she did not assume this deposit from the former landlord. The tenant continues to reside in the rental unit.

A 10 Day Notice for unpaid rent of \$600.00 due on March 1, 2016 was issued to the tenant. The notice indicates an effective move-out-date of March 19, 2016.

The landlord seeks a monetary order of \$1,200.00 for unpaid rent from March to April 2016. The tenant testified he did not pay any rent in March but rather provided three separate cash payments in April totaling \$500.00. The landlord confirms that the tenant paid only \$500.00 in rent for the above two months and is seeking a monetary order for the total of \$700.00. The landlord states she did not issue receipts but testified she told the tenant following receipt of the payments that he still had to vacate the rental unit.

The landlord testified she could not provide a monetary amount she was seeking for damages as she has not inspected the rental unit due to the tenant's occupancy.

Analysis

Section 46 of the Act provides that upon receipt of a notice to end tenancy for unpaid rent the tenant may, within 5 days, pay rent in full or dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. If the tenant does not pay rent in full or file an application, the tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the notice and must move out of the rental unit.

Although the tenant failed to pay the full rent due on March 1, 2016 and did not pay the rent within five days of receiving the 10 Day Notice the tenant did make three partial payments in April 2016. Because of this, it must be decided 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 some 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. The landlord testified that after receiving the partial payments she told the tenant he still had to

vacate the rental unit. This is recent evidence of the landlord's intention to pursue the 10 Day Notice and obtain an order of possession against the tenant.

For the above reasons, 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 partial rent payment after the effective date of the 10 Day Notice.

Based on the parties' testimony, I find that the tenant was served with an effective notice. The tenant clearly did not pay rent in full or file an application to dispute the 10 Day Notice. As the tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the notice, and must move out of the rental unit, I find that the landlord is entitled to an order of possession.

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.

In the absence of a tenancy agreement I must rely on the testimony of the parties to establish the rent amount. The landlord testified she met with the tenant and told him the rent would be \$600.00. I find this to be an arbitrary rent increase in contravention of the Act and further find based on the tenant's testimony that current rent for this unit is \$525.00. The parties do not dispute that the tenant failed to pay rent for March and full rent for April 2016. Therefore, I find that the landlord is entitled to \$1,050.00 in rent arrears less the April \$500.00 payment for a total of \$550.00.

Although the landlord applied for compensation for damages, I find the claim to damages premature as the tenant has not vacated the rental unit. For this reason I dismiss the landlord's application for damages with leave to reapply. Therefore, I find that the landlord is not entitled to any compensation other than outstanding rent in the amount of \$550.00.

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 \$550.00 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 29, 2016

Residential Tenancy Branch