



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Neighbourhood Housing Society
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPB, FF

Introduction

This hearing was convened by way of conference call concerning an application made by the landlord for an Order of Possession for breach of an agreement, and to recover the filing fee from the tenant for the cost of the application.

An agent for the landlord and the tenant attended the hearing, and the tenant was represented by a Legal Advocate.

The tenant provided evidentiary material to the Residential Tenancy Branch, however only a portion of that material was provided to the landlord. The portion received by the landlord is a copy of a Decision of the director dated April 12, 2016, and the copy provided to the Residential Tenancy Branch contains pages 1 and 3 of the Decision only, as well as other documentation which the tenant's advocate advised was sent in error, and the tenant does not rely on that evidence.

The Rules of Procedure require parties to exchange all evidence, and I am not certain which pages of the Decision of the director were provided to the landlord as evidence for this hearing. Therefore, I decline to consider any of the evidentiary material.

The landlord's agent gave affirmed testimony, but the tenant did not testify. The landlord's agent and the tenant's Legal Advocate were given the opportunity to give closing submissions.

Issue(s) to be Decided

- Is the landlord entitled under the *Residential Tenancy Act* to an Order of Possession for breach of a fixed term tenancy agreement?

Background and Evidence

The landlord's agent testified that this fixed-term tenancy began on January 1, 2016. Rent is subsidized and the tenant's portion is \$356.00 per month, and there are no rental arrears. At the outset of the tenancy the landlord collected a security deposit in the amount of \$474.00 which is still held in trust by the landlord, and no pet damage deposit was collected. The rental unit is a bachelor suite in a complex containing 61 units.

The landlord's agent testified that a hearing had been held wherein the landlord orally requested an Order of Possession. The tenancy agreement, a copy of which has not been provided, specifies that the tenancy ends on March 31, 2016 at which time the tenant must move out of the rental unit and is initialled in 2 boxes by the tenant. The tenant initialled those boxes and signed the tenancy agreement at the beginning of the tenancy on January 1, 2016. The landlord sent to the tenant a reminder on March 1, 2016 that the tenancy ends on March 31, 2016. The tenant has not moved out of the rental unit.

The landlord's agent told the Arbitrator at the April 12, 2016 hearing that rent for the month of April was accepted for use and occupancy only. The landlord was not provided with an Order of Possession, and applies for that now. Rent for May and June, 2016 have also been paid, and no receipt or written documentation was given to the tenant, and the landlord has not served a notice to end the tenancy.

Submissions of the Tenant's Legal Advocate:

The tenant's Legal Advocate submits that there is no evidence before me to establish that the tenant has to move. The onus is on the landlord to establish a fixed term by providing a copy of the tenancy agreement, and as a result of the landlord's failure to provide a copy of the tenancy agreement for this hearing, the *Residential Tenancy Act* deems that the tenancy continues on a month-to-month basis. Technically, by continuing to accept rent, the landlord has converted this tenancy into a month-to-month tenancy.

The landlord has no cause to evict the tenant, and has not issued a notice to end the tenancy. The tenant's Legal Advocate refers to Section 44 of the *Act* and submits that the tenancy reverts by its nature to a month-to-month tenancy, and by continuing to accept rent, the tenancy reverts just by common sense.

The tenant's Advocate also submits that the hearing on April 12, 2016 was an application by the tenant to cancel a notice to end the tenancy was dismissed because there was no notice to cancel.

Submissions of the Landlord's Agent:

The landlord's agent submits that the tenant signed the tenancy agreement which stated that at the end of March, 2016 the tenant had to move out of the rental unit and initialed those boxes at the beginning of the tenancy. The tenant was given a reminder in writing on March 1, 2016 that the tenancy expires March 31, 2016 and will not be extended.

Analysis

I explained to the parties the legal principle of res judicata which is a doctrine that prevents rehearing of claims and issues arising from the same cause of action between the same parties, after a final judgment was previously issued on the merits of the case. I indicated that I would be reviewing the previous Decision to ensure that I did not make a finding on a matter that had already been heard and decided upon.

I have reviewed the Decision of the director dated April 12, 2016. It is clear that the application before the Arbitrator at that time was an application by the tenant. The tenant did not attend the hearing, and the tenant's Advocate had no written authority to represent the tenant. It also states that the tenant's application was to cancel a notice to end the tenancy but no such notice was given, only a reminder by the landlord that the tenant had to vacate at the end of March. The tenant's application was dismissed.

The Decision also states that at the hearing the landlord orally requested an Order of Possession, which was denied. The Decision also sets out Section 55 (1) of the *Act*, and states that because the landlord had not issued a notice to end the tenancy, the landlord was not entitled to ask for an Order of Possession, but the landlord remains at liberty to file an application for an order pursuant to Section 55 (2) (c) of the *Act*, which states as follows:

55 (2) landlord may request an order of possession of a rental unit in any of the following circumstances by making an application for dispute resolution:

(c) the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit at the end of the fixed term;

The Decision of the director also makes certain findings. The Arbitrator accepted that the tenancy is a fixed term tenancy that expired March 31, 2016 and the tenant was required to vacate at that time. The Arbitrator also found that the tenancy has been extended to April 30, 2016 by virtue of the landlord's acceptance of rent for that month.

I find that there is nothing in the Decision of the director that precludes the landlord from making the application that is before me, being an application for an Order of Possession for breach of an agreement.

The tenant's Legal Advocate raised Section 44 of the *Residential Tenancy Act*, which states, in part:

How a tenancy ends

44 (1) A tenancy ends only if one or more of the following applies:

(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;

(3) If, on the date specified as the end of a fixed term tenancy agreement that does not require the tenant to vacate the rental unit on that date, the landlord and tenant have not entered into a new tenancy agreement, the landlord and tenant are deemed to have renewed the tenancy agreement as a month to month tenancy on the same terms.

(Sections 44(1) (b) and (3) apply to this dispute.)

The tenant's Legal Advocate submits that subsection (3) provides that the parties are deemed to have renewed the tenancy agreement as a month to month tenancy, however that is for situations where the tenancy agreement does not require the tenant to vacate the rental unit on a specific date.

The tenant's Legal Advocate submits that because I don't have a copy of the tenancy agreement, the landlord has failed to establish the date by which the tenancy ends and therefore it reverts to a month-to-month tenancy. I have heard the testimony of the landlord's agent, and I have no reason to believe that the testimony is not truthful. The finding of the Arbitrator at the April 12, 2016 hearing is also consistent with the landlord's testimony that the fixed term expired on March 31, 2016 at which time the tenant was required to vacate the rental unit.

The tenant's Legal Advocate also submits that by virtue of continuing to accept rent, the landlord has reinstated the tenancy, and that if I accept that, the tenancy reverts to a month-to-month tenancy.

The landlord clearly did not understand the concept of reinstating the tenancy, having testified that he told the Arbitrator at the April 12, 2016 hearing that he accepted the rent for April for use and occupancy only, and testified that he accepted rent beyond that date for use and occupancy only. However, the landlord did not make it clear to the tenant when the rent was paid that the rent money was accepted for use and occupancy only. The Arbitrator at the April 12, 2016 hearing made a finding that by accepting the rent for April without making it clear to the tenant that the money was accepted for use

and occupancy only, the landlord had in effect reinstated the tenancy which extended the tenancy until April 30, 2016.

I also refer to Residential Tenancy Policy Guideline #11 - Reinstatement of Tenancies, which states, in part:

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.

In this case, the landlord did not issue a notice to end the tenancy, so the payment of rent beyond the effective date of a notice is not an issue. The landlord collected rent beyond the expiry date of the fixed term, and a previous hearing resulted in a finding that the landlord had in effect extended the tenancy until the end of the month in which rent was paid. In the circumstances, I find that the conduct of the parties was such that the tenant was aware that the landlord had no intention of reinstating the tenancy or extending the fixed term, given that the landlord provided the tenant with a reminder on March 1, 2016 that the fixed term was expiring on March 31, 2016.

I find that the landlord has established the claim, and by virtue of accepting rent for the month of June, 2016, I find that the landlord is entitled to an Order of Possession effective June 30, 2016.

Since the landlord has been successful with the application, the landlord is also entitled to recovery of the \$100.00 filing fee, and I hereby grant a monetary order as against the tenant in that amount.

Conclusion

For the reasons set out above, I hereby grant an Order of Possession in favour of the landlord effective 1:00 p.m. on June 30, 2016.

I hereby grant a monetary order in favour of the landlord as against the tenant pursuant to Section 67 of the *Residential Tenancy Act* in the amount of \$100.00.

This order is final and binding and may be enforced.

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: June 23, 2016

Residential Tenancy Branch