



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding NORTH PARK MANOR SOCIETY
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes opt

Introduction

The tenant applies for an Order of Possession of the rental unit.

Both the tenant, as well as two representatives for the landlord attended the hearing. Both parties provided submissions, and both filed documents as evidence in advance of the hearing.

Issues to Be Decided

- Is the tenant entitled to an Order of Possession?

Background and Evidence

A prior hearing involving this tenancy occurred June 22, 2016. In his claim related to that former hearing, the tenant had applied for an order cancelling a One Month Notice to End Tenancy dated May 12, 2016. The effective end of tenancy was to be June 30, 2016. By June 30, 2016, the parties did not yet know the outcome of the hearing, as to whether the Notice was going to be cancelled with the tenancy continuing, or the Notice upheld and an Order of Possession issued to the landlord.

As confirmed by affidavit of the tenant in claim 16-3035 to the Supreme Court of British Columbia, since neither landlord nor tenant knew by June 30, 2016 whether the ending of the tenancy would be upheld or not, the tenant provided the landlord with a money order for July's rent on June 30. The landlord's operations manager still did not know the outcome on July 4 and called the Residential Tenancy Office, but they were unable to advise him as to outcome of the hearing. As the tenant remained in possession at this time, and as the landlord did not know when the decision would be obtained, or whether the tenant would seek a review of the eventual decision, the landlord deposited the rent for July. There was no receipt given by the landlord indicating that this rent money for July was accepted on a use and occupation basis only, or that the acceptance reinstated the tenancy.

On July 5, the landlord became aware that an Order of Possession had been granted effective June 30, 2016 at 1:00 pm. The landlord applied for, and obtained a Writ of Possession dated July 18, 2016 from the Supreme Court. On July 19, 2016 the tenant was successful in obtaining a temporary Stay of the Order of Possession as well as the

Writ of Possession. Prior to that Stay ending, the tenant filed the instant application for a tenant's Order of Possession.

The tenant testified at the hearing, that he has since paid rent for August, 2016, and was provided a receipt indicating the rent was accepted on a use and occupation basis.

The tenant submits that the absence of any confirmation that July's rent was accepted on a use and occupation basis means that the tenancy was reinstated, and he seeks an Order of Possession for the tenant. The landlord submits that he deposited July's rent on July 4 because he did not know if the tenancy was over or not, and did not know if an Review would be applied for by the tenant. In August, as it was clear that the tenant would not be vacating, the landlord accepted further rent, but now knowing the tenancy was ordered to end, specifically provided a receipt that indicated rent was accepted on a use and occupation basis.

Analysis

The tenant requests an Order of Possession, but what appears to be the actual intent of the application of the tenant is to receive a determination that the tenancy has been reinstated as a result of the landlord accepting July's rent without specifying that it was received on a use and occupation basis. In fact the tenant currently remains in possession.

Policy Guideline 11 provides some guidance over this issue. That guideline provides that a landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy, and that a Notice 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 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.

Guideline 11 goes on to note that 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 did not clearly provide an intention to accept July rent on a use and occupation basis. That could have been accomplished by the use of a receipt similar to the one prepared for the acceptance of the August rent. Nevertheless, other than this single omission, there is no evidence of an intention of the landlord to reinstate the tenancy, or to accept the July rent for any reason other than on a use and possession basis. On the contrary, the preceding and subsequent steps of the landlord all point to an intention to have the tenancy end, although not without an accompanying loss of rent. The landlord called the tenancy office repeatedly trying to learn of the outcome of the hearing. The service upon the tenant of the Order of Possession, the obtaining and service of the Writ of Possession, and the acceptance of August's rent on a use and possession basis all point to an intent that the Notice to End Tenancy was to be upheld and eventually enforced.

Based upon these facts and circumstances, I find that the acceptance of the July rent by the landlord extended the tenancy to July 31, and the acceptance of August's rent has extended it to August 31. Such extensions, however, have not reinstated the tenancy. The tenant's application is dismissed.

Conclusion

No Order of Possession to the tenant is issued. The tenant's application is dismissed.

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: August 22, 2016

Residential Tenancy Branch