



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW HEARING DECISION

Dispute Codes OPC OPB

Introduction

On June 9, 2016 the Landlord filed an application for Dispute Resolution to request Orders of Possession for cause and breach of an agreement based on an undisputed 1 Month Notice to end tenancy that had been issued April 26, 2016. The Landlord's application was heard via teleconference on July 18, 2016.

When the July 18, 2016 hearing commenced the Tenant did not appear at the scheduled time. The Landlord was in attendance at that hearing and a Decision was issued July 18, 2016 granting the Landlord an Order of Possession effective 2 days upon service based on the undisputed 1 Month Notice to end tenancy that was issued April 26, 2016.

On July 26, 2016 the Tenant filed an Application for Review Consideration in response to the July 18, 2016 Decision and Order. On August 5, 2016 an Arbitrator granted the Tenant a Review Hearing and suspended the July 18, 2016 Decision and Order pending the outcome of the Review Hearing.

The Review Hearing was scheduled to be heard before me on September 28, 2016 via teleconference. The Landlord and Tenant appeared and each person gave affirmed testimony. I explained how the review hearing would proceed and the expectations for conduct during the hearing, in accordance with the Rules of Procedure. Each party was provided an opportunity to ask questions about the process however, each declined and acknowledged that they understood how the conference would proceed.

The Tenant confirmed that she had received the Landlord's application for Dispute Resolution and evidence submissions when she picked up her mail on or around June 13, 2016. No issues were raised regarding receipt of the Landlord's evidence submissions. As such, I accepted the Landlord's relevant submissions as evidence for these proceedings.

The Tenant testified she did not serve the Landlord with copies of the documentary evidence she submitted to the Residential Tenancy Branch (RTB) in support of her Application for Review Consideration or with any other documentary evidence in response to the Landlord's application for Dispute Resolution.

Both parties were provided with the opportunity to present relevant oral evidence, to ask questions, and to make relevant submissions. Following is a summary of those submissions and includes only that which is relevant to the matters before me.

Issue(s) to be Decided

- 1) Should the July 18, 2016 Decision and Order be confirmed, varied, or set aside?

Background and Evidence

The parties testified they entered into a written month to month tenancy agreement which began on December 1, 2014 for the Tenant's occupancy of a subsidized rental unit. The Tenant's current subsidized rent amount of \$463.00 is payable on or before the first of each month. No security deposit was required to be paid. The rental unit was described as being a 3 bedroom single detached home with a front and back yard.

A copy of the written tenancy agreement was submitted into evidence by the Landlord which indicated the market value rent was \$850.00 per month and a pet deposit of \$425.00 was required to be paid by the Tenant. In addition, that written agreement stated, in part, as follows:

...

2. LENGTH OF TENANCY

This tenancy ends on: August 1, 2018 (subsidy cancellation date)

Length of tenancy:

This tenancy is:

X a) on a month-to-month basis

...

9. RENTAL SUBSIDY

...

c. That the benefit of Subsidy accrues to the Tenant, and in order to preserve the eligibility of the Tenant for the Subsidy, the Tenant will provide the Landlord with satisfactory evidence of the Tenant's income, as and when required by the Landlord and in the form required by the Landlord;

d. that in the event that the Subsidy changes, the Tenant is eligible for increased Subsidy, is eligible for a reduced Subsidy or the Tenant's Subsidy is eliminated, the Landlord will provide notice of such changes to the Tenant, and the Tenant will on the next installment of rents, pay a new Net Rent or the Market Rent as shall be required, by the Landlord...

[Reproduced as written]

On April 26, 2016 the Landlord issued the Tenant a 1 Month Notice to end tenancy which was served to the Tenant's P.O. Box via registered mail and regular mail. That

Notice was issued pursuant to Section 47(1) of the Act listing an effective date of May 31, 2016 for the following reasons:

- Tenant or a person permitted on the property by the tenant has:
 - Significantly interfered with or unreasonably disturbed another occupant or the landlord
- Tenant has engaged in illegal activity that has or is likely to
 - Jeopardize a lawful right or interest of another occupant or the landlord
- Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so

The Tenant testified she was not able to pick up her mail regularly so she did not receive the 1 Month Notice until approximately June 13, 2016 which is the same date she had received the Landlord's application for Dispute Resolution and notice of hearing documents. The Tenant asserted that she did not file to dispute the 1 Month Notice because she had received the Landlord's application the exact same time as the Notice so she planned on discussing the Notice at the Landlord's hearing.

The Landlord testified that their office is located in another city so they schedule inspections on the rental property whenever they are in town. The Landlord confirmed that they had no contact with the Tenant between the time of serving the 1 Month Notice via registered mail near the end of April 2016 and the scheduled hearing date of July 18, 2016. The Landlord stated they did not check the Canada Post tracking website to determine if the Tenant had signed for the registered mail.

The Landlord submitted oral and written submissions in support of the reasons for issuing the 1 Month Notice which included, in part: an April 22, 2016 newspaper article stating the Tenant and a male person were arrested; the Landlord has concerns for their property, the neighbours, and children after learning about that arrest; issues regarding the cleanliness of the front and back yard which were identified after an inspection of the rental property in May 2015; and the Tenant's failure to provide the Landlord with a letter from the Tenant's social worker or a notarized document proving the Tenant is receiving shelter money for at least one of the Tenant's two children to confirm a child is residing with the Tenant in support of the Tenant's subsidy application, which the Landlord asserted failure to provide those documents was a breach of a material term of the tenancy agreement.

The Landlord testified they had not issued the Tenant a notice to end tenancy back in 2015 or in early January 2016 because they were giving the Tenant time to comply with their requests to clean up the yard. She asserted they were also giving the Tenant time to obtain the requested information to prove the entitlement to subsidized rent.

The Tenant testified and confirmed she had been arrested and detained for one evening back in April 2016. She submitted she was arrested in a vehicle on a highway several miles outside of the city where she resided and not at the rental unit. The Tenant

confirmed she had been asked to clean up the yard and one area in the house; which she said she complied with the request and sent the Landlord pictures afterwards. The Tenant stated the first time she received a written request to clean up the yard was in April 2016, prior to her arrest. She admitted that she cleans up the yard and then over time things pile up again until she has the energy to clean it up again.

The Tenant asserted her two children continue to reside with her and that her daughter even came home for lunch on the date the Landlord did their last inspection. She asserted that at the time she entered into the tenancy agreement she had not received the custody order from the courts for her children. The Tenant argued she had made the Landlord aware of her court proceedings at that time and that she followed through with the court process and has since provided the Landlord a copy of her custody order. She asserted she is not paid shelter money for the children and that she is the only one in receipt of disability payments and shelter payments because she pays for the children's shelter herself.

The Landlord confirmed the Tenant's daughter had come home for lunch during her previous inspection. She also confirmed receipt of the custody order. The Landlord argued that their concern was raised when they saw that the Tenant was receiving individual shelter money and not an amount for a family; which led them to believe the children were not living with the Tenant.

The Landlord confirmed the first written warning that the Tenant was issued regarding failure to provide documents for the annual subsidy and which stated the Tenant may be issued with a notice to vacate was dated April 22, 2016 (the same date the newspaper article was published stating the Tenant had been arrested). The Landlord stated the two previous letters were more of reminders of what the Tenant was required to provide for her subsidy and to clean up the yard.

Analysis

Section 62 (2) of the *Act* stipulates that the director may make any finding of fact or law that is necessary or incidental to making a decision or an order under this *Act*.

After careful consideration of the foregoing; documentary and oral submissions; and on a balance of probabilities I find pursuant to section 62(2) of the *Act* as follows:

Upon review of the written tenancy agreement I find these parties entered into a written agreement for a month to month tenancy. That agreement provides for subsidized rent until August 1, 2018 on the condition that the Tenant provides the Landlord with satisfactory evidence of the Tenant's income, as and when required by the Landlord and in the form required by the Landlord.

Section 90(a) of the *Residential Tenancy Act* (the "Act") states that a document served by mail is **deemed** to have been received five days after it is mailed.

The Courts have determined that deeming of service is a rebuttable presumption. Therefore, because the Tenant has now argued that they did not receive the 1 Month Notice until June 13, 2016, I find that the presumption of service has been rebutted. I further accept the Tenant felt she was not required to file an application to dispute that Notice because the Landlord had already filed an application for Dispute Resolution prior to the Tenant receiving the 1 Month Notice.

By her own submissions, the Landlord confirmed they made no attempt to contact the Tenant after serving the Notice on April 23, 2016 or prior to the July 18, 2016 hearing date. Furthermore, the Landlord confirmed they made no effort to check the Canada Post tracking website to determine if the Tenant had signed for the registered mail. Therefore, at the time the Landlord filed their application for Dispute Resolution on June 9, 2016 the Landlord had no knowledge that the Tenant actually received the 1 Month Notice.

Based on the above, I conclude the Landlord filed their application for Dispute Resolution prematurely, as their application for Dispute Resolution filed June 09, 2016 was filed four days prior to the Tenant receiving that 1 Month Notice.

Residential Tenancy Branch Policy Guideline 11 provides that 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 rent 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. I concur with this policy and find it is relevant to matters currently before me.

As stated above, the Notice listed an effective date of May 31, 2016. There was no evidence before me that would indicate the Tenant failed to pay her rent for any period prior to or after the effective date of that Notice. Furthermore, there was no evidence before me that would indicate the Landlord issued the Tenant receipts for payments being received for "use and occupancy only", not rent, for payments received after the effective date of May 31, 2016. As such, in absence of evidence to prove the contrary, I find it is reasonable to conclude the Landlord continued to accept payments for rent

after the May 31, 2016 effective date of the 1 Month Notice. As such I conclude the 1 Month Notice issued April 23, 2016 was waived and it is no longer of any force or effect.

Section 82(3) of the *Act* stipulates that upon review of the director's decision and/or order, following the Review Hearing, the director may confirm, vary or set aside the original decision or order.

As I have found the Landlord's application for Dispute Resolution to have been filed prematurely and the 1 Month Notice issued April 23, 2016 to be waived, I hereby **set aside** the original July 18, 2016 Decision and Order, pursuant to section 82(3) of the *Act*. In addition, I dismiss the Landlord's application for Dispute Resolution filed June 9, 2016, without leave to reapply. Accordingly, the Order of Possession issued July 18, 2016 is cancelled and is of no force or effect.

In the event circumstances change and the Landlord had reason to serve the Tenant a new notice to end tenancy each party would have liberty to file an application for Dispute Resolution regarding such a notice.

Conclusion

The July 18, 2016 Decision and Order were **set aside**, and the Order of Possession issued July 18, 2016 was cancelled, pursuant to section 82(3) of the *Act*. In addition, the Landlord's application for Dispute Resolution was dismissed.

This decision is final, legally binding, and 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: September 30, 2016

Residential Tenancy Branch