



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      OPR, FF

### Introduction

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

- an order of possession for unpaid rent pursuant to section 55; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant and landlord attended the hearing and were each 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. In accordance with sections 89 and 90 of the *Act*, I find that the tenant was duly served with the application.

### Issue(s) to be Decided

Is the landlord entitled to an order of possession for unpaid rent?

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

### Background and Evidence

As per the testimony of the parties, the tenancy began on October 1, 2010 on a fixed term. Rent in the amount of \$776.00 is payable on the first of each month. The tenant remitted a security deposit in the amount of \$377.50 at the start of the tenancy. The tenant continues to reside in the rental unit.

A 10 Day Notice to End Tenancy for Unpaid Rent or Utilities ("10 Day Notice") was issued to the tenant on July 11, 2016 by way of posting to the rental unit door where the tenant resides. The notice indicates an effective move-out-date of July 21, 2016. In

accordance with sections 88 and 90 of the *Act*, I find that the tenant was served with the landlord's 10 Day Notice on July 14, 2016, three days after its posting.

Since the 10 Day Notice was issued to the tenant the landlord has received two rent payments. The landlord received payment of \$780.00 on July 27, 2016 and payment in the amount of \$776.00 on August 8, 2016. The landlord issued receipts for "use and occupancy only" for both payments.

The landlord is also seeking to recover the \$100.00 filing fee for this application from the tenant.

The tenant contended that typically he called the landlord when he had his rent and the landlord picked it up from his rental unit. The tenant acknowledged he did not call the landlord on July 1, 2016 or August 1, 2016 to notify the landlord that rent was available for pick up. The tenant acknowledged he often paid rent after the first of the month due to mail issues within the building. Specifically the tenant testified that he often receives his income late as a result of late mail.

### Analysis

Section 46 of the *Act* provides that upon receipt of a notice to end tenancy for unpaid rent the tenant may, within five 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 July 1, 2016 and did not pay the rent within five days of receiving the 10 Day Notice the tenant did make two payments following the 10 Day Notice. 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 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 his application to enforce the 10 Day Notice, at any time prior to this hearing. The landlord provided copies of the rental receipts issued to the tenant for use and occupancy only. 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 rent payment after the effective date of the 10 Day Notice.

Based on the parties' testimony and the 10 Day Notice before me, I find that the tenant was served with an effective notice. The tenant clearly did not pay rent or file an application to dispute the 10 Day Notice within five days. 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.

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.

In accordance with the offsetting provisions of section 72 of the *Act*, I allow the landlord to retain \$100.00 of the \$377.50 security deposit in full satisfaction of the monetary award. The parties are cautioned to follow the provisions of section 38 of the *Act* in regards to the remaining \$277.50 security deposit balance.

### Conclusion

I grant an order of possession to the landlord effective **two (2) days after service on the tenant**.

I order the landlord to retain \$100.00 of the security deposit and address the remaining security deposit balance in accordance with section 38 of the *Act*.

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: September 19, 2016

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Residential Tenancy Branch