



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR, MNDC, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* ("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 damages or loss pursuant to section 67; and
- recovery of filing fees for this application from the tenants pursuant to section 72.

The tenants did not attend this hearing, which lasted approximately 20 minutes. The landlord attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

The landlord testified that he served the 10 Day Notice to End Tenancy for Unpaid Rent or Utilities dated December 2, 2016 (the "10 Day Notice") on the tenants on that date by posting on the rental unit door. In accordance with sections 88 and 90 of the *Act*, I find that the tenants were deemed served with the landlord's 10 Day Notice on December 5, 2016, three days after posting.

The landlord testified that he served the landlord's application for dispute resolution dated December 13, 2016 on December 20, 2016 by registered mail. The landlord provided two Canada Post tracking numbers as evidence. In accordance with sections 89 and 90 of the *Act*, I find that the tenants were deemed served with the landlord's application package including evidence on December 25, 2016, five days after mailing.

At the outset of the hearing the landlord testified that the tenants have paid the rent arrear and he is withdrawing the portions of his application seeking a monetary order.

Issue(s) to be Decided

Is the landlord entitled to an Order of Possession?

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

Background and Evidence

The landlord provided undisputed evidence on the following facts. This tenancy began in August, 2016. The monthly rent is \$3,200.00 payable on the first of the month. The tenants paid a security deposit of \$1,600.00 at the commencement of the tenancy and the deposit is still held by the landlord.

The landlord testified that the tenants pay the monthly rent through e-Transfer. The tenants initiate a payment and a notification is emailed to the landlord. The landlord then chooses to accept the payment and the funds are received in the landlord's account. An email notification is automatically sent to the tenants to confirm that funds have been transferred and the landlord has the option of adding a message to the tenants when receiving the funds.

The landlord testified that after he had served the 10 Day Notice, the tenants made payment on December 5, 2016 for \$2,200.00 and on December 13, 2016 for \$1,000.00. The landlord said that when receiving the second payment on December 13, he informed the tenants by email that he had filed an application for dispute resolution earlier that day. The landlord testified that he received the rental payment for January in two installments; the first payment of \$2,700.00 on January 1, 2017 and a second payment of \$500.00 on January 2, 2017. The landlord testified that he did not send any message to the tenants in reply when accepting the January payments.

Analysis

The landlord testified that the tenants have paid all outstanding rent and there is no rental arrear as at January 18, 2017 the date of the hearing.

Residential Tenancy Policy Guideline 11 discusses the issue of waiver of a 10 Day Notice:

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.

The landlord provided undisputed evidence as the tenants did not attend. The tenants were deemed served with the 10 Day Notice on December 5, 2016. The tenants made payments for the rent owing, after the deemed service date on December 5, 2016 and December 13, 2016. The landlord testified that upon receipt of the December 13th payment he informed the tenants that he had filed an application for dispute resolution with the Residential Tenancy Branch that day. The landlord testified that he did not inform the tenants that payment was being accepted for use and occupancy only. The landlord accepted two additional payments in January for the January rent amount. I find that the landlord's conduct of acceptance of the payments after filing the application on December 13, 2016 to be a waiver of the 10 Day Notice.

The landlord did not withdraw his application or cancel the hearing at any time prior to this hearing. I found that the tenants were deemed served with the landlord's application and had sufficient notice of the hearing. The tenants did not appear at this

hearing to present their position. The tenants did not allege any express or implied waiver of the 10 Day Notice. However, I find that the tenants relied on the landlord's conduct, amounting to waiver, of continuing to accept rent payments for December 2016 and January 2017 without issuing any receipts or verbal notifications that the rent was being accepted for "use and occupancy only" or that an end to tenancy was still desired.

I find that the landlord had the opportunity to inform the tenants that any payments received would be accepted "for use and occupancy only". I accept the landlord's evidence that the e-Transfer system allows a recipient to refuse payment or send a message to the payor when accepting payment. I accept the landlord's undisputed testimony that he informed the tenants that an application for dispute resolution had already been filed when accepting the December 13, 2016 payment. However, I find that the combination of the landlord's conduct in accepting the December payment and accepting further payment in January without specifying that the payments were being accepted for use and occupancy only, and his words informing the tenants that an application had been filed but not specifying that he intended to proceed with the hearing created ambiguity. I find, on a balance of probabilities, that informing the tenants of the filing of the application without specifying whether the landlord intended to proceed with the hearing or if the application should now be ignored as payment had been accepted, creates ambiguity about the landlord's intentions. Therefore, I find on a balance of probabilities that this ambiguity in the landlord's conduct amounts to a waiver of the landlord's right to seek an Order of Possession.

I find that the landlord waived his rights to pursue an Order of Possession. I find that the landlord reinstated this tenancy by accepting full rent payments from the tenants for both December 2016 and January 2017, after the corrected effective date of the 10 Day Notice on December 10, 2016.

For the above reasons, I dismiss the landlord's application for an order of possession based on the landlord's 10 Day Notice, dated December 2, 2016, without leave to reapply.

As the landlord was unsuccessful in his application for an Order of Possession, the landlord is not entitled to recover the filing fees for this application.

Conclusion

The landlord withdraws the application for a monetary order.

The landlord's 10 Day Notice of December 2, 2016 is cancelled and of no force or effect. This tenancy continues until ended in accordance with 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: January 18, 2017

Residential Tenancy Branch