



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNR, OPR, FF

Introduction

This is an application brought by the Landlord requesting an Order of Possession based on a Notice to End Tenancy for nonpayment of rent, requesting a monetary order for outstanding rent, and requesting recovery of the \$100.00 filing fee.

A substantial amount of documentary evidence and written arguments has been submitted by the parties prior to the hearing. I have thoroughly reviewed all relevant submissions.

I also gave the parties the opportunity to give their evidence orally and the parties were given the opportunity to ask questions of the other parties.

The parties were affirmed.

Issue(s) to be Decided

At the beginning of the conference call, the landlord testified that at this point there is no rent outstanding and therefore the only issue I dealt with is whether to issue an Order of Possession and an Order for recovery of the filing fee.

Background and Evidence

This tenancy began on November 1, 2014, and the present monthly rent is \$1440.00, due on the first of each month.

The landlord testified that the tenant failed to pay the December 2016 rent, and therefore, on December 7, 2016, a 10 day Notice to End Tenancy was posted on the tenants door.

The landlord further testified that the tenant did not pay the outstanding December 2016 rent until December 16, 2016.

The landlord further testified that on December 19, 2016 she posted a receipt for the December 2016 rent, on the tenants door, stating that it was for use and occupancy only, for the month of December.

The landlord further testified that the tenant has subsequently also paid the January 2017 rent; however she also states that it was accepted for use and occupancy only as well.

The landlord is therefore requesting an Order of Possession be issued for January 31, 2017.

The tenant testified that she did fail to pay the rent at the beginning of December 2016, and she did receive a Notice to End Tenancy from the landlord, which she found posted on her door on December 9, 2016.

The tenant further testified that she subsequently paid the full outstanding rent, in cash, for December 2016 on December 15, 2016 not December 16, 2016, and at that time the landlord said nothing about accepting the rent for use and occupancy only.

The tenant further testified that at no time did she ever find a receipt for December 2016 rent posted on her door, and the first time she saw this receipt is when she received the landlords hearing package.

The tenant is therefore asking that, since the full rent was accepted for December 2016, this tenancy be allowed to continue.

Analysis

It is my finding that the landlord has not met the burden of proving that when she accepted the December 2016 rent from the tenant, she informed the tenant that it was for use and occupancy only, and therefore this raises the question of waiver.

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 landlord specifically informed the tenant that the money would be for
- use and occupancy only,
- whether the receipt shows the money was received for use and occupancy 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.

In this case there was no express waiver however it is my finding that by accepting the full rent for the month of December, which is well past the effective date of the notice, there is an implied waiver of the notice to end tenancy.

Although it is true that the receipt issued by the landlord does state it was for use and occupancy only, this receipt was not issued until well after the tenant had paid the rent, and there is no evidence to show that, at the time the landlord accepted the rent, she specifically informed the tenant that the money would be for use and occupancy only.

It is my decision therefore that I will not issue an Order of Possession based on the Notice to End Tenancy that was issued on December 7, 2016, as this tenancy has been reinstated.

Since I am dismissing the landlords request for an Order of Possession it is my decision that the landlord must bear the cost of the filing fee that she paid for this dispute resolution hearing.

Conclusion

This application is dismissed in full without leave to reapply.

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 19, 2017

Residential Tenancy Branch