



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding SUPERMEN PROPERTY MANAGEMENT INC
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPC

Introduction

This hearing dealt with the landlord's request for an Order of Possession for cause based upon a 1 Month Notice to End Tenancy for Cause dated December 20, 2016. The tenant did not appear at the hearing. The landlord was represented by the manager and the owner of the property. The manager testified that she personally served the tenant with the hearing documents at the rental unit on January 20, 2017 with the owner of the property as a witness. I was satisfied that the tenant was duly served with notification of this hearing and I continued to hear from the landlord without the tenant present.

Issue(s) to be Decided

Is the landlord entitled to an Order of Possession for cause?

Background and Evidence

The tenancy started on or about February 1, 2014 and the tenant is required to pay rent on the first day of every month. I heard that the tenant has a brain injury and that his behaviour has deteriorated in the last year or so. The landlord had been receiving a number of complaints from other tenants regarding disturbances coming from the tenant, his guests, and the rental unit. The manager personally served the tenant with a 1 Month Notice to End Tenancy for Cause on December 20, 2016 (the 1 Month Notice) with the owner as a witness. The 1 Month Notice has a stated effective date of "January 20, 2016". The tenant did not file to dispute the 1 Month Notice but two days later, on December 22, 2016, the owner met with the tenant and the tenant's worker. The owner and the tenant signed a document which was included in the evidence before me. The document states, in part:

“The owners have decided to give you one more opportunity to stay in [address of rental unit]. Providing that you can refrain yourself, from causing unnecessary and obtrusive behaviour.

...

This will be your last warning, if you cannot be respectful of your neighbours, and have peaceful dealing with management and owners, and not allow people to stay with you that are not to be in the building then you will need to vacate and find somewhere else to live.”

The landlord's agents submitted that approximately a week after this document was signed there was a major disturbance at the property involving the tenant. A major police presence was required to deal with the extremely intoxicated tenant who was involved in a fight on the property which left blood in the stairwell. The manager testified that on the day the police attended the property the landlord told the tenant he would have to vacate the rental unit and he was told this again when the landlord delivered the hearing package to the tenant. I heard that recently the tenant has had rude and abusive communication with the landlord's agent and left abusive phone messages for the landlord's agents. Further, the landlord has continued to receive complaints from other occupants of the building and other tenants are indicating they will be moving if the situation is not rectified.

The landlord was of the position that the tenant breached his agreement of December 22, 2016 to stop causing disturbances and continued to cause obstructive and abusive conduct so the landlord seeks to enforce the 1 Month Notice.

I heard that the tenant continues to occupy the rental unit and rent was sent to the landlord for the month of February 2017 directly from the Ministry. The landlord requested an Order of Possession effective as soon as possible.

Documentary evidence provided for my consideration included: a copy of the 1 Month Notice dated December 20, 2016; Proof of Service for the 1 Month Notice signed by the manager and the owner; and, the document signed by both parties on December 22, 2016

Analysis

The landlord seeks to enforce the 1 Month Notice to End Tenancy for Cause dated December 20, 2016 and obtain an Order of Possession. Section 55(2) of the Act

provides that a landlord may obtain an Order of Possession where a Notice to End Tenancy has been served upon the tenant and the tenant has not filed to dispute the Notice to End Tenancy within the time limit for doing so. The time limit for disputing a 1 Month Notice is 10 Days after the tenant has received the Notice.

In this case, I accept the unopposed evidence that the tenant was served with the subject 1 Month Notice on December 20, 2016 and the tenant did not file to dispute the 1 Month Notice. However, I find it appropriate to consider whether the 1 Month Notice remains enforceable in light of the document signed by both the tenant and the landlord on December 22, 2016.

Residential Tenancy Policy Guideline 11: *Amendment and Withdrawal of Notices* provides, in part, with my emphasis underlined:

With the consent of the party to whom it is given, but only with his or her consent, a Notice to End Tenancy may be withdrawn or abandoned prior to its effective date. 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.

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.

In order to be effective, a notice ending a tenancy must be clear, unambiguous and unconditional.

Upon consideration of the December 22, 2016 document signed by both parties, it would appear that the Notice to End Tenancy was expressly withdrawn, although it is arguable that the withdrawal was on a conditional basis. Accordingly, I find it reasonable to conclude that the Notice to End Tenancy became a conditional Notice to End Tenancy. As seen in policy guideline 11, to be effective, a Notice to End Tenancy

must be unconditional. To have a conditional Notice to End Tenancy or a conditional withdrawal prejudices the party receiving the Notice to End Tenancy as it is unclear as to when the tenancy ends or if it is ending. The requirement to have an unconditional Notice to End Tenancy would apply to both landlords and tenants as it would also be prejudicial to a landlord for a tenant to give a conditional Notice to End Tenancy. Therefore, I deny the landlord's request for an Order of Possession based upon the Notice to End Tenancy dated December 20, 2016 as it became a conditional Notice to End Tenancy on December 22, 2016 by consent.

If the tenant gave the landlord cause for ending the tenancy after December 22, 2016 I find the landlord's remedy is to serve the tenant with another Notice to End Tenancy. The landlord still has that right.

Conclusion

I have denied the landlord's request for an Order of Possession as the Notice to End Tenancy dated December 20, 2016 became conditional by way of a mutual agreement and a conditional Notice to End Tenancy is not enforceable. The landlord remains at liberty to issue another Notice to End Tenancy to the tenant as appropriate.

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: February 10, 2017

Residential Tenancy Branch