



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR

Introduction

This hearing was ordered pursuant to a decision issued by Adjudicator Doyon on January 11, 2017 in response to a landlord's Application for Dispute Resolution by Direct Request. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

The landlord served the tenants with notification of this hearing by registered mail sent to each of them on January 26, 2017 and received by the tenants on January 27, 2017. The delay in serving the tenants was attributable to the landlord not receiving the hearing documents mailed to her by the Residential Tenancy Branch. The tenants submitted that they did not have enough time to submit documentary evidence in support of their position given the short notice of this hearing. The tenants described the documentation as being a *2 Month Notice to End Tenancy for Landlord's Use of Property* and emails exchanged between the parties. In recognition that the tenants received notification of this hearing very shortly before the hearing date, I informed the parties that I would hear the tenant's oral testimony and, if necessary, I would consider remedies available for submitting the evidence. As the hearing progressed, it was undisputed that the tenants were in receipt of a 2 Month Notice to End Tenancy and the parties had exchanged emails after it was served. Accordingly, I found it unnecessary to order the tenant's to produce the 2 Month Notice for my review or the emails to which they referred.

Both parties confirmed that the tenants have since vacated the rental unit and the landlord has regained possession of the rental unit. Accordingly, an Order of Possession is no longer required and I do not provide one with this decision. Both parties confirmed that they understood the purpose of this hearing was to determine whether the landlord is entitled to rent for the month of January 2017.

Issue(s) to be Decided

Is the landlord entitled to rent for the month of January 2017?

Background and Evidence

The tenancy started on July 1, 2015 for a fixed term of one year that converted to a month to month tenancy upon the expiry of the fixed term. The tenants paid a security deposit of \$750.00 and a pet damage deposit of \$100.00. The tenants were required to pay rent of \$1,500.00 on the first day of every month. It is undisputed that the tenants did not pay rent for the month of January 2017. The tenants testified that they vacated the rental unit on January 31, 2017 and the landlord confirmed that she found the rental unit vacant, along with the keys for the rental unit, on February 1, 2017.

In the few months preceding the end of this tenancy, the landlord had issued multiple Notices to End Tenancy to the tenants, as described below.

- A 2 Month Notice to End Tenancy for Landlord's Use of Property was issued by the landlord on November 15, 2016 with an effective date of February 1, 2017. The landlord served the 2 Month Notice to the female tenant, in person. The tenants did not dispute the 2 Month Notice.
- A 1 Month Notice to End Tenancy for Cause was issued by the landlord on December 2, 2016 and personally served to the tenants' adult daughter who lives in the rental unit on December 3, 2016. The 1 Month Notice has an effective date of February 1, 2017. The tenants did not file to dispute the 1 Month Notice.
- A 10 Day Notice to End Tenancy for Unpaid Rent was issued by the landlord on December 2, 2016 (the December 10 Day Notice) and served upon the tenant's adult daughter at the same time the 1 Month Notice was served. The tenants paid the outstanding rent by way of two payments. It was undisputed that the tenants paid \$500.00 on December 8, 2016. The second installment of \$1,000.00 was received by the landlord on December 9, 2016; however the tenant believed the payment was made on December 8, 2016. I noted that the landlord had not pursued the end of the tenancy due to the December 10 Day Notice and the tenants did not file to dispute it. Both parties confirmed that with payment of the outstanding rent they did not consider the tenancy to be at an end due to unpaid rent for December 2016.

- A 10 Day Notice to End Tenancy for Unpaid Rent was issued by the landlord on January 3, 2017 (the January 10 Day Notice) and given to the tenants' minor son on January 3, 2017. This is the Notice to End Tenancy the landlord pursued in filing her Application for Dispute Resolution by Direct Request on January 10, 2017. Although the landlord failed to serve the 10 Day Notice to an adult occupant of the rental unit, the tenants acknowledged receiving it from their minor son later that day, on January 3, 2017. The tenants filed an Application for Dispute Resolution to dispute the Notice after the time limit for doing so (file number referred to on the cover page of this decision).

As to the landlord's entitlement to recover unpaid rent from the tenants, I heard the following arguments from the parties.

The landlord was of the position that the tenants are obligated to pay rent in accordance with the tenancy agreement as the landlord fulfilled her obligation to provide them with possession of the rental unit. Although the landlord served the tenants with a 2 Month Notice, the landlord was of the position that the 2 Month Notice became void when the tenants were served with the subsequent Notices to End Tenancy. The landlord submits that the more recent issued Notices to End Tenancy brought the tenancy to an end. Since the 2 Month Notice is void, the tenants are not entitled to tenant's compensation that is provided with a 2 Month Notice. The landlord pointed out that the Act does not require one Notice to End Tenancy to be withdrawn or removed before another Notice to End Tenancy may be served.

The tenants argued that they are entitled to withhold last month's rent because they were in receipt of a 2 Month Notice and January 2017 was their last month of tenancy. The tenants point out that after they received the 2 Month Notice they communicated with the landlord via email with respect to withholding rent for December 2016 and paying January 2017 rent; and, the landlord responded to their email informing them that she required them to pay rent for December 2016 and January 2017. The tenants testified that at no time did the landlord approach them about withdrawing or cancelling the 2 Month Notice.

Analysis

Upon consideration of everything before me, I provide the following findings and reasons.

It is undisputed that the tenants had possession of the rental unit throughout January 2017 and did not pay rent for January 2017. The tenants submitted that they are

entitled to withhold rent for January 2017 as compensation for receiving a 2 Month Notice to End Tenancy for Landlord's Use of Property. Accordingly, at issue in this case is whether the tenants are entitled to compensation under section 51(1) of the Act.

I have reproduced the relevant portions of section 51(1) of the Act below:

(1) A tenant who receives a notice to end a tenancy under section 49 [landlord's use of property] is entitled to receive from the landlord on or before the effective date of the landlord's notice an amount that is the equivalent of one month's rent payable under the tenancy agreement.

(1.1) A tenant referred to in subsection (1) may withhold the amount authorized from the last month's rent and, for the purposes of section 50 (2), that amount is deemed to have been paid to the landlord.

[My emphasis underlined]

It is undisputed that the tenants were served with a 2 Month Notice to End Tenancy for Landlord's Use of Property, which is a Notice to End Tenancy provided under section 49 of the Act. The tenants did not dispute the 2 Month Notice and their actions indicate that they accepted the tenancy would end pursuant to the 2 Month Notice as demonstrated by the email communication to the landlord. There is no evidence to suggest the parties mutually agreed to withdraw the 2 Month Notice.

The landlord argued that the issuance of subsequent Notices to End Tenancy rendered the 2 Month Notice void. I accept the landlord's position that the Act is silent with respect to "removing" a Notice to End Tenancy before another one can be issued; however, it is also important to note that the Act does not stipulate that a Notice to End Tenancy is cancelled, nullified, or otherwise considered void by issuance of a subsequent Notice to End Tenancy. Accordingly, I accept that multiple Notices to End Tenancy may be issued and each Notice bears benefits and consequences under the Act.

The Residential Tenancy Branch has publicized a policy guideline that deals with withdrawal of Notices to End Tenancy. Residential Tenancy Policy Guideline 11: *Amendment and Withdrawal of Notices* provides, in part:

A landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy. 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.

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.

Also, as a general rule it may be stated that the giving of a second Notice to End Tenancy does not operate as a waiver of a Notice already given.

In this case, I find there is no evidence to suggest the 2 Month Notice was withdrawn or waived by mutual agreement. In keeping with Residential Tenancy Branch Policy Guideline 11, I reject the landlord's position that the subsequent Notices to End Tenancy operated as a waiver or withdrawal of the 2 Month Notice already given.

Rather, the effect of the subsequent Notices to End Tenancy may have been to end the tenancy earlier than the effective date of the 2 Month Notice. However, the 1 Month Notice had the same effective date as the 2 Month Notice; the December 10 Day Notice appears to have been withdrawn by implied consent of both parties; and I find the landlord was not in a position to demand rent for January 2017. Thus, it would appear that the tenancy came to an end February 1, 2017 by way of the 2 Month Notice and the 1 Month Notice.

In light of the above, having received a 2 Month Notice under section 49 that remained in force, I find the tenants are entitled to compensation under section 51 of the Act and I find that they obtained the compensation payable under section 51(1) by withholding last month's rent, as permitted under section 51(1.1) of the Act. Therefore, I dismiss the landlord's request for a Monetary Order for unpaid rent for January 2017.

Conclusion

The landlord's request for a Monetary Order for unpaid rent for January 2017 is dismissed.

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 02, 2017

Residential Tenancy Branch