



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding LIVE GROUP OF CANADA INC.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes DRI, CNR, OLC, RP

Introduction

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

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- an order to the landlord to make repairs to the rental unit pursuant to section 33; and
- a determination regarding their dispute of an additional rent increase by the landlord pursuant to section 43.

Both parties attended the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The tenant MR primarily spoke for both co-tenants (the "tenant"). The corporate landlord was represented by its agent AM (the "landlord").

As both parties were in attendance I confirmed that there were no issues with service of the tenants' application for dispute resolution, the landlord's two 10 Day Notices, the tenants' amendment to their application for dispute resolution in response to each of the 10 Day Notice and the tenants' evidentiary materials. The landlord testified that they had not submitted any written evidence. The parties confirmed receipt of one another's materials. In accordance with sections 88 and 89 of the *Act*, I find that the parties were duly served with copies of the landlord's 10 Day Notices, the tenants' application and amendments and the tenants' evidence.

Issue(s) to be Decided

Should the landlord's 10 Day Notices be cancelled? If not is the landlord entitled to an Order of Possession?

Should the landlord be ordered to comply with the Act, regulations or tenancy agreement? Should the landlord's rent increase be upheld?

Should the landlord be ordered to make repairs to the rental unit?

Background and Evidence

The tenants began occupying the rental unit in October, 2010. There have been four separate tenancy agreements signed by the parties during this occupation. The monthly rent throughout the tenants' occupation has been \$1,295.00 payable on the first of each month. A security deposit of \$650.00 was paid in October, 2010 and is still held by the landlord.

The parties testified that a new tenancy agreement was signed by the parties creating a fixed term tenancy beginning on September 1, 2016 and ending on June 30, 2017. Neither party submitted a copy of this tenancy agreement into written evidence. The tenant testified that the landlord has not provided them copies of any of the tenancy agreements signed during their occupancy.

The landlord said that the September, 2016 tenancy agreement is a fixed term tenancy that provides that the tenants must vacate the rental unit at the end of the term. The landlord said that the tenants were offered an option of entering into a new tenancy agreement starting July 1, 2017 at a monthly rent of \$2,500.00. The tenants did not sign and enter into a new tenancy agreement.

The landlord claims that the tenancy agreements provide that a late fee of \$25.00 is payable on all rent payments made after the first of the month. The landlord said that tenants have been regularly late throughout the tenancy and the total late fees owing is \$925.00, late fees of \$25.00 for 37 months. The landlord said that they issued a 10 Day Notice dated June 23, 2017 for the unpaid rent fees accumulated during the tenancy.

The landlord issued a second 10 Day Notice dated August 1, 2017 stating that the tenant has failed to pay rent in the amount of \$2,270 that was due on August 1, 2017. The landlord said that the rent beginning July, 2017 ought to have been \$2,500.00. The

parties confirmed that the tenants paid \$1,295.00 for the rent for July, 2017. The landlord said that the amount indicated on the 10 Day Notice includes late fees of \$975.00 and the unpaid rent portion of \$1,205.00. When it was pointed out that the late fees and rental arrears do not add up to the amount indicated on the 10 Day Notice of \$2,270.00 the landlord said that the amount on the 10 Day Notice is an arithmetic error.

The parties confirmed that the tenants have paid \$1,295.00 for the months of July and August, 2017 and that amount has been accepted by the landlord. Neither party gave any evidence of receipts being issued indicating that rent payments were accepted for use and occupancy only.

The tenant testified that they have requested the landlord fix the oven in their rental unit. The tenant said that the repair request was originally made in October, 2015 and there has been no action taken.

Analysis

Section 46 of the *Act* provides that upon receipt of a notice to end tenancy for non-payment of rent the tenant may, within ten days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. I find that the tenants have filed their amendment to the application for dispute resolution in response to both 10 Day Notices within the allotted time.

When the tenant files an application to dispute the notice, the landlord bears the burden to prove the grounds for the 10 Day Notice. In the matter at hand I find that landlord has provided insufficient evidence in support of their position. The landlord failed to provide a written tenancy agreement into evidence. The tenants said that the landlord has failed to provide them with a copy of any of the tenancy agreements during their tenancy. In the absence of a written tenancy agreement I find that there is insufficient evidence to support the landlord's claim for late fees. I do not find the landlord's testimony that the tenants have been late with their monthly rent payment for the majority of the tenancy to be particularly persuasive. If the tenants were late in paying their rent it is reasonable to expect that the landlord would have put the tenants on notice or have made a claim sometime in the seven years prior to this hearing. I find that there is little evidence to support that there is a rental arrear of \$925.00 for this tenancy. Consequently, I allow the tenants' application and find that the 10 Day Notice of June 23, 2017 is of no force or effect.

I accept the parties' testimony that the tenants did not enter into a new tenancy agreement with a monthly rent of \$2,500.00. As the tenants did not agree to a new rent amount I find there is no obligation on the tenants to pay an amount that was unilaterally set by the landlord. Consequently, I find that there is no contractual basis in support of the landlord's 10 Day Notice of August 1, 2017 claiming a rental arrear of \$2,270.00. I allow the tenants' application and find that the 10 Day Notice of August 1, 2017 is of no force or effect.

In the absence of a tenancy agreement being submitted into written evidence, I find there is insufficient evidence that the tenancy agreement of September, 2016 ended on June 30, 2017 rather than continuing on as a periodic tenancy.

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 parties testified that the tenants have continued to pay rent in the amount of \$1,295.00 for the months of July and August, 2017. The landlord has accepted the monthly rent. The landlord did not provide any evidence that they informed the tenants that payments were being accepted for use and occupancy only. I find that the landlord's conduct of acceptance of the payments after issuing their 10 Day Notices on June 23, 2017 and August 1, 2017 to be a waiver of the 10 Day Notices.

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 find that the landlord's conduct in accepting the rent payments without specifying that the payments were being accepted for use and occupancy only created a belief in the tenants that the tenancy was extended under the terms of the earlier agreement. Section 44(3) of the Act provides that a landlord and tenant are deemed to have renewed the tenancy agreement as a periodic tenancy on the same terms if the parties have not entered into a new tenancy agreement at the end of a fixed term tenancy. I find that by their conduct, in accepting the rent payment made by the tenants, the landlord is deemed to have renewed the tenancy as a periodic tenancy.

I find that the landlord reinstated this tenancy by accepting full rent payments from the tenants for both July and August, 2017. I find that this tenancy will continue on a month-to-month basis under the terms of the September, 2016 with a monthly rent of \$1,295.00 until ended in accordance with the Act.

I accept the tenant's evidence that the landlord has failed to provide the tenants with a copy of the written tenancy agreement. Accordingly, I order that the landlord provide the tenants with a copy of the tenancy agreement in accordance with section 13(3) of the Act.

I accept the tenants' undisputed evidence that the oven in the rental unit is not working and requires repairs. I therefore issue an order that the landlord repair the oven of the rental unit.

Conclusion

The landlord's 10 Day Notices are cancelled and of no further force or effect. This tenancy will continue on a periodic basis with a monthly rent of \$1,295.00 until ended in accordance with the *Act*.

The landlord is ordered to comply with the requirements of the Act by providing the tenants with a copy of the tenancy agreement within 21 days of this decision.

The landlord is ordered to make repairs to the oven of the rental unit.

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: August 21, 2017

Residential Tenancy Branch