



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: OPR MNR MNSD MNDC FF

Introduction

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

- an Order of Possession for unpaid rent or utilities, pursuant to section 55;
- a monetary order for unpaid rent or utilities, pursuant to section 67;
- a monetary order for monetary loss or money owed pursuant to section 67;
- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38
- authorization to recover the filing fee for this application, pursuant to section 72

JW ('landlord') appeared and testified on behalf of the landlord in this hearing. Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

The tenants confirmed receipt of the landlord's application for dispute resolution hearing. In accordance with section 89 of the Act, I find that the tenants were duly served with the landlord's application. As all parties confirmed receipt of each other's evidentiary materials, I find that these were duly served in accordance with section 88 of the Act.

The tenants confirmed receipt of the 10 Day Notice on May 24, 2017, with a corrected effective date of June 6, 2017, which was posted on their door. In accordance with sections 88 and 90 of the Act, I find that the tenants were deemed served with the 10 Day Notice on May 27, 2017, three days after posting

Issue(s) to be Decided

Is the landlord entitled to an Order of Possession for unpaid rent or utilities?

Is the landlord entitled to monetary compensation for unpaid rent or utilities?

Is the landlord entitled to a monetary order for damage or money owed?

Is the landlord entitled to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary award requested?

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

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This tenancy began on May 1, 2014 as “a periodic tenancy commencing at 12:00 noon on May 1, 2014 and continuing on a year-to-year basis until the Landlord or Tenant terminates the tenancy”. Monthly rent is set at \$1,795.00. The landlord collected a security deposit of \$1,500.00, and still hold that deposit. The tenants still reside in the home. A copy of the 82 condition tenancy agreement was included in the landlord’s written evidence

The landlord issued the tenants a 10 Day Notice on May 24, 2017 for failing to pay \$1,795.00 in rent by May 3, 2017.

The landlord is seeking an Order of Possession, as well as a Monetary Order for \$10,655.00 as outlined in the table below and in the landlord’s Application:

Item	Amount
Unpaid Rent for April 2017	\$1,795.00
Unpaid Rent for June 2017	1,795.00
Penalty for Breaking Lease Agreement (3xrent per condition 40 of tenancy agreement)	5,385.00
Estimate for Start Up & Shown Down of Pool	1,680.00
Total Monetary Order Requested	\$10,655.00

The landlord testified that the tenants had made a rent payment in the amount of \$1,795.00 on June 19, 2017, reducing the monetary claim to \$8,860.00. The landlord did not indicate whether this payment was for “use and occupancy”, despite this payment being accepted after the effective date of the 10 Day Notice.

The landlord testified that the tenants breached the rental agreement by failing to pay rent for April 2017, as well as failing to abide by condition 39 of the tenancy agreement which reads “Tenant will pay to have a professional pool company come in for start up and shut down of the pool seasonally and will maintain the pool properly”. The landlord also testified that the tenant should be assessed a penalty equivalent to 3 month’s rent for their breach of the tenancy agreement as per condition 40 which reads “in the event the tenant can not continue with lease 3 months Notice or Three months rent penalty will be paid to the Landlord”.

The tenants disputed the landlord's testimony that they owed outstanding rent. The tenants testified that all rent payments have been made, and are up to date as supported by their evidence. The tenants provided receipts for payments in the amount of \$1,795.00 for May 1, 2017, June 19, 2017, and July 6, 2017. The tenants testified that April 2017 rent was paid as part of an agreement for work that was completed for the landlord. The tenants provided supporting evidence to show that two email transfers were made on April 21 and 22, 2017 in the amounts of \$3,000.00 and \$805.00 respectively. The tenants testified that these transfers were made after an email was sent on April 21, 2017 for a fence the tenants help build on the landlord's property requesting payment of \$5,600.00 less the \$1795.00 "Lease for April". The tenants provided a copy of this email in their evidence indicating that this was proof that the landlord had acknowledged that April rent payment deducted from the balance for work completed by the tenants.

The landlord acknowledged in the hearing that an agreement was made, but testified that the tenants had still owed \$1,795.00 for rent as the tenants did not complete the work as agreed to. The landlord testified that this email and payment does not constitute a contract or agreement for payment of rent.

The tenants dispute the landlord's application for a penalty equivalent to three month's rent, stating that this tenancy had not ended, nor have they breached the tenancy agreement. The tenants also dispute the landlord's monetary claim for the pool, stating that they had maintained the pool as required by the agreement.

Analysis

It was undisputed by both parties that the tenants had made rent payment on June 19, 2017, after the effective date of the 10 Day Notice. I find that the tenants had provided sufficient evidence to support that payments were made after the 10 Day Notice was issued to them. It was undisputed that the landlord had accepted payments on June 19, 2017 and July 6, 2017, and did not indicate to the tenants that these payments were for "use and occupancy" only.

Residential Tenancy Policy Guideline #11 discusses the Amendment and Withdrawal of Notices, specifically what happens when payment is accepted after the effective date of a Notice is given.

"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....

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

By accepting payments after the 10 Day Notice was issued to the tenants, particularly after the effective date of the Notice, and without indicating that these payments were for use and occupancy only, I find that the landlord had implied that that this tenancy was reinstated, and to continue as per the *Act* and tenancy agreement.

As noted above, the notice to end tenancy must be clear, unambiguous and unconditional. By accepting rent payments after the effective date of the Notice without informing the tenants that these payments were for use and occupancy only, the Notice became ambiguous whether this tenancy had ended on the effective date of June 6, 2017 or not. Accordingly, I find that the landlord had implied that the tenancy was reinstated, and I dismiss the landlord's application for an Order of Possession for Unpaid Rent on this basis. This tenancy is to continue as per the *Act*, regulation, and tenancy agreement.

The landlord filed a monetary claim for \$1,795.00 in unpaid rent for April 2017. The tenants provided evidence to support that the landlord had made a payment following an email request for payment by the tenants for work that was completed, with the equivalent of 1 month's rent deducted from that request. I find that the tenants had provided sufficient evidence to support that a monetary transaction had taken place that demonstrates, on a balance of probabilities, that payment was made and accepted by the landlord. As the landlord had not provided sufficient evidence to support that the tenants failed to satisfy their responsibilities in accordance with section 26(1) of the *Act* and as required by the tenancy agreement and regulation, I dismiss the landlord's monetary claim for unpaid rent.

The landlord also made a monetary claim for the tenant's failure to abide by conditions 39 and 40 of the tenancy agreement, which the tenants dispute. Condition 40 of the tenancy agreement pertains to a situation where if "the tenant cannot continue with lease 3 months Notice or Three months rent penalty will be paid to the Landlord". I find the landlord is seeking the equivalent of

three month's rent despite the fact that the tenants have not ended the tenancy with the landlord.

Furthermore, I find that the "three months rent penalty" set out in the residential tenancy agreement is clearly defined by the landlord as a "penalty" rather than a liquidated damage clause. Residential Tenancy Branch Policy Guideline #4 with respect to Liquidated Damages includes the following guidance with respect to the interpretation of such clauses:

A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:

- *A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.*
- *If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.*
- *If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.*

If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum...

The landlord drafted the agreement indicating the three month's rent as a "penalty" for breaking the lease. As noted above, if a clause constitutes a penalty, the result is that the clause becomes unenforceable. On this basis, and the fact that the landlord failed to establish how the tenants had breached this term of the agreement or the Act, the landlord's application for compensation in the amount of three month's rent is dismissed.

The landlord also applied for compensation for the tenant's failure to comply with condition 39 of the tenancy agreement regarding the maintenance of the pool. The tenants disputed this claim, stating that they had performed regular maintenance on the pool, in addition to educating themselves how to do so. The landlord submitted an estimate in the amount of \$1,680.00 for their claim, but did not provide any witness testimony, reports, or sufficient supporting evidence to demonstrate that the tenants failed to properly maintain the pool, or how the landlord had

suffered a loss equivalent to the value of this claim. On this basis, I dismiss this portion of the landlord's monetary claim.

As the landlord was not successful in their application, the landlord's application to recover the filing fee is dismissed. As the landlord was not granted any monetary orders, the landlord's application regarding the retention of the tenant's security deposit is dismissed.

Conclusion

I dismiss landlord's application for an Order of Possession. I find that the landlord's 1 Month Notice to be invalid, and this tenancy is to continue as per the *Act*, regulation, and tenancy agreement.

The remainder of the landlord's application 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: September 14, 2017

Residential Tenancy Branch