



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: OPR MNR FF CNC CNR

Introduction

This hearing was convened in response to cross-applications by the parties pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

The landlord requested:

- an Order of Possession for non-payment of rent pursuant to section 55;
- a monetary order for unpaid rent pursuant to section 67;
- authorization to recover the filing fee for this application, pursuant to section 72 .

The tenant requested:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46; and
- cancellation of the landlord's 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) pursuant to section 47

PJ (‘landlord’) appeared as agent on behalf of the landlord and had full authority to do so. 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.

Both parties confirmed receipt of each other's applications for dispute resolution hearing package (“Applications”). In accordance with section 89 of the *Act*, I find that both the landlord and tenant were duly served with each other's Applications. The landlord confirmed receipt of the tenant's evidence. In accordance with section 88 of the *Act*, I find the landlord duly served with the tenant's evidence. The landlord did not submit any evidence for this hearing.

The tenant acknowledged receipt of the landlord's 10 Day Notice dated July 8, 2017 with an effective date of July 18, 2017, the 1 Month Notice dated July 16, 2017 with an effective date of August 31, 2017, and the 10 Day Notice dated August 3, 2017 with a corrected effective date of August 16, 2017. In accordance with section 88 of the *Act*, I find the tenant duly served with all three notices.

The landlord withdrew his monetary application for unpaid rent as the tenant no longer owed outstanding rent as of the hearing date.

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 for unpaid rent?

Should the landlord's 1 Month Notice be cancelled? If not, is the landlord entitled to an Order of Possession?

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

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 month-to-month tenancy began on or around July of 2015 with monthly rent currently set at \$620.00. The landlord collected a security deposit of \$100.00, and still holds that deposit. The current landlord took over this tenancy in March of 2016. On July 16, 2017 the landlord gave notice to the tenant that the rent would be increased to \$640.00 as of September 1, 2017.

The landlord issued the tenant two 10 Day Notices for unpaid rent, one on July 8, 2017 for failing to pay \$420.00 in rent plus a \$50.00 late fee, and on August 3, 2017 for failing to pay \$620.00 in rent plus a \$50.00 late fee.

Since the two 10 Day Notices were issued to the tenant, the tenant had paid the rent in full for July and August 2017, which was confirmed by the landlord in the hearing. The following installments were made by the tenant: \$200.00 on June 28, 2017, \$200.00 on July 14, 2017, \$220.00 on July 23, 2017, \$200.00 on August 2, 2017, \$220.00 on August 20, 2017, and 200.00 on August 23, 2017. The landlord did not indicate whether these payments were for "use and occupancy only", despite payments being accepted after the effective date of the 10 Day Notices.

The tenant disputed the 10 Day Notices testifying that he had an oral agreement with the previous landlord that he could pay rent in partial instalments. The tenant also disputes the \$50.00 late charges stating that this was never a condition of this tenancy.

The landlord acknowledged during the hearing that the tenant was not given three months' notice as required by section 42(2) of the *Act* for the rent increase given on July 16, 2017. The landlord also acknowledged that the \$50.00 late fee was never formally communicated to the tenant in writing, but that the tenant had received communication regarding the fee by way of

text message. A copy of this message was included in the tenant's evidence which read "you are late again and a \$50 late charge will apply".

The landlord is also seeking an Order of Possession pursuant to a 1 Month Notice to End Tenancy given to the tenant on July 16, 2017. The landlord submitted the notice to end tenancy providing the following grounds:

1. The tenant is repeatedly late paying rent;
2. The tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord;
3. The tenant or a person permitted on the property by the tenant has seriously jeopardized the health or safety or lawful right of another occupant or the landlord; and
4. The tenant has engaged in illegal activity that has, or is likely to adversely affect the quiet enjoyment, security, safety, or well-being of another occupant.

The tenant disputes being repeatedly late in paying rent. The landlord testified that the tenant was late in paying rent for the months of July and August 2017. The landlord also testified that the tenant jeopardized the health and safety of all occupants, and the building, by smoking inside the building. The tenant disputes this, stating that he had quit smoking, and that there were other smokers in the building. The landlord testified that both himself and the manager had given verbal warnings to the tenant to stop smoking, but cannot verify that any written warnings have been given to the tenant.

The landlord indicated in the hearing that the tenant had not engaged in any illegal activity, and this reason was ticked off in error.

Analysis

It was undisputed by both parties that the tenant had made rent payments after the effective dates of the 10 Day Notices, and the tenant no longer owed rent for the months of July and August 2017. It was also undisputed that the landlord had accepted these payments, and did not indicate to the tenant 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 Notices were issued to the tenant, particularly after the effective dates of the Notices, 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 dates of the Notices without informing the tenant that these payments were for use and occupancy only, the Notices became ambiguous whether this tenancy had ended on the effective dates of the notices, or not. Accordingly, I find that the landlord had implied that the tenancy was reinstated on these occasions, and I allow the tenant's application to cancel the two 10 Day Notices issued to him on July 8, 2017 and August 3, 2017 respectively.

The tenant also applied to cancel the 1 Month Notice issued to him on July 16, 2017. Although the landlord provided oral testimony that the tenant had smoked inside the building, the landlord did not provide sufficient evidence to support this. The landlord did not provide any witness testimony or documentation for this hearing to support that the tenant had jeopardized the health or safety of the landlord or other occupant, or significantly interfered with the landlord or another occupant. The tenant disputed the landlord's testimony with his own, stating that he had never smoked inside the building, and that the smoke the landlord smelled could be attributed to others who smoked in the building.

The landlord also testified in the hearing that the tenant was repeatedly late in paying his rent. Residential Tenancy Policy Guideline #38 states that “a landlord may end a tenancy where the tenant is repeatedly late paying rent. Three late payments are the minimum number sufficient to justify a notice under these provisions.” In accordance with Residential Tenancy Policy Guideline #38, I find that the landlord failed to provide sufficient evidence to establish that the late payments meet the criteria for sufficient cause to end this tenancy under section 47(1)(b) of the *Act*.

I find the landlord has not met the burden of proof to justify that there is sufficient cause to end this tenancy on the grounds provided in the 1 Month Notice. Under these circumstances, I am allowing the tenant’s application to cancel the landlord’s 1 Month Notice.

As all three Notices given to the tenant were cancelled, this tenancy is to continue until ended in accordance with the *Act* and tenancy agreement.

As the landlord was not successful in their application, the landlord's application to recover the filing fee is dismissed.

The landlord indicated in the hearing that a rent increase was imposed on July 16, 2017. Although the tenant did not apply to dispute this rent increase I note that section 42 of the *Act* states the following about how a Notice of Rent Increase is to be given:

Timing and notice of rent increases

42 (1) A landlord must not impose a rent increase for at least 12 months after whichever of the following applies:

(a) if the tenant's rent has not previously been increased, the date on which the tenant's rent was first established under the tenancy agreement;

(b) if the tenant's rent has previously been increased, the effective date of the last rent increase made in accordance with this *Act*.

(2) A landlord must give a tenant notice of a rent increase at least 3 months before the effective date of the increase.

(3) A notice of a rent increase must be in the approved form.

(4) If a landlord's notice of a rent increase does not comply with subsections (1) and (2), the notice takes effect on the earliest date that does comply.

The landlord was advised during the hearing that all rent increases must be imposed in accordance with the *Act*.

Conclusion

The landlord indicated in the hearing that he was withdrawing his application for a monetary order for unpaid rent. The remaining portion of the landlord's application is dismissed.

I allow the tenant's application to cancel the 10 Day Notices dated July 8, 2017 and August 3, 2017. I also allow the tenant's application to cancel the 1 Month Notice dated July 16, 2017. This tenancy is to continue until ended in accordance with the *Act* and tenancy agreement.

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 26, 2017

Residential Tenancy Branch