



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding EQUITEX REALTY LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes CNR

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* ("Act") for cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 47.

Both parties were represented at the hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The corporate landlord was represented by its agent CB and property manager MH. CB (the "landlord") primarily spoke for the corporate landlord.

As both parties were present I attempted to confirm service. The tenant confirmed receipt of the 10 Day Notice dated November 7, 2017. The landlord confirmed receipt of the tenant's application dated November 14, 2017. I find that those documents were served in accordance with sections 88 and 89 of the Act.

The parties both disputed receiving the other's evidence. The landlord testified that they sent their evidentiary materials by registered mail to the tenant on January 12, 2018. The landlord provided a copy of the Canada Post tracking number as evidence of service. Registered mail is an accepted form of service pursuant to section 88 of the Act. In accordance with Residential Tenancy Policy Guideline 12, when a document is served by registered mail even if a party refused to pick up the mail, receipt is deemed to have occurred on the fifth day after mailing. Accordingly, I find that the landlord's evidence was deemed received on January 17, 2018, five days after mailing.

The tenant testified that she personally served the tenant's evidence package at the landlord's office on January 19, 2018. The tenant said she was not provided with a signature or receipt. The landlord testified that they have no records of receiving the

evidence. During the hearing the tenant emailed the evidence to the landlord and the landlord was provided an opportunity to review the materials. In accordance with Rule of Procedure 3.17, 3.19 and section 71(2)(c) of the Act, as the landlord consented to the inclusion of the tenant's evidence and I find that its consideration does not subvert the principles of procedural fairness and natural justice I found that the evidence was sufficiently served.

Issue(s) to be Decided

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

Background and Evidence

The parties agreed on the following facts. This tenancy began in June, 2014. The current monthly rent is \$1,110.00 payable by the first of each month. A late fee of \$25.00 applies to any rent paid after the due date.

The landlord testified that the tenant was late in paying the rent for the month of October, 2017. The tenant made payment of \$1,110.00 by cash on October 11, 2017. The landlord said that the tenant failed to pay any rent for the month of November and the 10 Day Notice was issued. The landlord said that as of the date of the hearing the rental arrears is \$1,134.00 the unpaid rent for November, 2017 and previously incurred late fees. The landlord said that they have no record of any payment being made by the tenant towards the November, 2017 rent. The landlord submitted into written evidence a copy of the tenant ledger dated January 8, 2018 showing the charges and payments on the tenant's account.

The tenant testified that she paid the November rent in the amount of \$1,100.00 by a money order dated October 25, 2017 which she hand delivered to the landlord's office. The tenant said that she has been in contact with an employee of the corporate landlord attempting to trace the payment and resolve the issue. The tenant submitted into written evidence a copy of the endorsed money order made out to the corporate landlord and a printout of her bank account showing the amount of \$1,110.00 deducted on October 25, 2017.

The tenant testified that she has made full payment of rent for all subsequent months and they have been accepted by the landlord. The tenant said that she has been

informed by her financial institution that the money order was cashed and it would take several months to reverse the transaction.

The landlord testified that they have no record of the money order being received at the business office or the funds being deposited into the tenant's account. The landlord said that the endorsement on the back of the money order does not correspond to a financial institution used by the landlord. The landlord said that the employee, with whom the tenant was corresponding, is no longer employed by the corporate landlord. The landlord questioned why the tenant did not communicate directly with the property manager MH or the agent CB when she was no longer receiving responses from the past employee. The landlord disputes the tenant's intention to resolve the issue in a timely manner and said that she has not provided requested information to investigate the payment.

Analysis

Both parties focused much of their testimonies and evidence on the issue of whether a money order was provided by the tenant to the landlord on October 25, 2017. The parties did not dispute the evidence that the tenant made full rent payment for the subsequent months of December, 2017 and January, 2018. No evidence was submitted that the payments were accepted solely for "use and occupancy".

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 landlord submitted into written evidence a copy of the tenant ledger showing that rent was received for the months of December, 2017 and January, 2018 in full. The landlord did not submit evidence that the payments were accepted for use and occupancy only. The parties gave evidence that the tenant was in communication with the landlord's employee attempting to resolve the issue of the November, 2017 payment. I find that the landlord's conduct of acceptance of the payments after the issuance of the 10 Day Notice on November 7, 2017 to be a waiver of the 10 Day Notice.

I find that the landlord had the opportunity to inform the tenant that any payments received would be accepted "for use and occupancy only". I find that the landlord has not provided evidence that the tenant was informed that payments made were being accepted without reinstating the tenancy. I find that the combination of the landlord's conduct in accepting the rent payment for December 2017 and January 2018 in conjunction with the ongoing communication with the landlord's employee to resolve the November, 2017 payment issue created ambiguity about the landlord's intentions. Therefore, I find on a balance of probabilities that this ambiguity in the landlord's conduct amounts to a waiver of the landlord's right to seek an Order of Possession.

I find that the landlord waived his rights to pursue an Order of Possession. I find that the landlord reinstated this tenancy by accepting full rent payments from the tenant for

both December 2017 and January 2018, after the effective date of the 10 Day Notice without specifying that the payments were accepted for use and occupancy only.

For the above reasons, I allow the tenant's application to cancel the landlord's 10 Day Notice, dated November 7, 2017. The 10 Day Notice is of no further force or effect.

Conclusion

The tenant's application is allowed. The landlord's 10 Day Notice of November 7, 2017 is of no further force or effect.

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 2, 2018

Residential Tenancy Branch