



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNRL, FFL

Introduction

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

- an Order of Possession for unpaid rent pursuant to section 55;
- a monetary order for unpaid rent pursuant to section 67; and
- recovery of filing fees for this application from the tenants pursuant to section 72.

Both parties appeared at this hearing and were given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The tenant JWC (the "tenant") primarily gave testimony for both co-tenants.

As both parties were present service was confirmed. The tenant could not recall the specific date but confirmed that they were served with the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the "10 Day Notice"), application for dispute resolution and evidence. The tenant confirmed they had not submitted any evidence. Based on the undisputed evidence I find that the tenants were served with the landlord's materials in accordance with sections 88 and 89 of the *Act*.

Issue(s) to be Decided

Is the landlord entitled to an Order of Possession?

Is the landlord entitled to a monetary award as claimed?

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 and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here. The principal aspects of the landlord's claims and my findings around each are set out below.

The parties agreed on the following facts. This tenancy began in October, 2016. The monthly rent is \$1,250.00 payable on the first of the month. A security deposit of \$625.00 was paid at the start of the tenancy and is still held by the landlord.

Neither party submitted a written tenancy agreement into evidence. The landlord testified that they drafted a tenancy agreement and provided it to the tenants but it was never signed and returned. The tenants testified that the landlords did not provide them with a tenancy agreement until late November, 2016 and it provided little details as to what services were included with the monthly rent. Both parties agree that the rent of \$1,250.00 included internet and cable services.

The parties agree that the tenants did not pay the full rent for February and March, 2018. The parties testified that the tenants paid the amounts of \$1,110.00 and \$1,138.00 for those months.

The tenants submit that they were entitled to make a deduction from the monthly rent payment as they were forced to purchase their own internet services when the landlords failed to provide functioning service as required under the tenancy agreement.

The parties testified that the tenants made subsequent rent payments to the landlord, less an amount the tenants attributed to the internet services. The parties said that payment was made electronically with the landlord accepting the tenant's payment and not issuing a receipt or any indication that the payments are accepted only for use and occupancy.

The landlord is seeking a monetary award of \$352.00 which they say includes the unpaid rent portions for February and March as well as the filing fees. While the landlord testified that the tenants have underpaid the rent for April and May they did not make an application at the hearing to amend the amount of their monetary claim.

Analysis

In accordance with subsection 46(4) of the *Act*, a tenant must either pay the overdue rent or file an application for dispute resolution within five days of receiving a valid 10 Day Notice.

Pursuant to section 26(1) of the *Act*, a tenant must pay rent when it is due under the tenancy agreement whether or not the landlord complies with the *Act*, regulations or tenancy agreement, unless the tenant has a right under the *Act* to deduct all or a portion of the rent. While the tenant submits that they are entitled to deduct a portion of the rent as they have contracted for their own cable and internet services rather than utilize the service provided by the landlord, I find that the tenant was not authorized to make this deduction. The *Act* does not provide that the tenant may unilaterally make deductions from the monthly rent even if the landlord has not provided all of the services listed under the tenancy agreement.

I find the evidence provided by the parties about the quality, cost and history of the internet services in the rental building to be generally irrelevant to the matter at hand. I find that there was a valid tenancy agreement between the parties. I find the absence of a written tenancy

agreement to be poor practice by the landlord. The Act requires that the landlords are obligated to prepare a written tenancy agreement at the commencement of a tenancy. I do not find the landlord's testimony that there is a written tenancy agreement which has not been returned to them by the tenants to be reasonable or convincing. Regardless of the absence of a written tenancy agreement, I find that the parties understood their respective obligations and rights and entered into a tenancy agreement in October, 2016. I accept the evidence of the parties that the tenancy was functioning for several months until recent events. I accept the evidence of the parties that they knew their respective responsibilities as landlord and tenant.

I accept the undisputed evidence of the parties that the monthly rent for this tenancy is \$1,250.00. I accept the evidence of the parties that the tenants failed to pay the full rent amount for February, 2018 and a 10 Day Notice was issued. I accept the undisputed evidence of the parties that the tenants did not pay the rental arrears nor did they file an application to dispute the 10 Day Notice within the 5 days of service granted under section 46(4) of the Act.

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 gave undisputed evidence that the tenants have made payment towards the rent for April and May, 2018. The landlord testified that the payments were made by electronic transfer and explained that the landlord has the option of refusing to accept the tenant's payment or issuing a message to the tenants when accepting the payments. The landlord testified that they have not issued any receipts to the tenants or indicated that the rent payments were being accepted for "use and occupancy only".

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 accept the landlord's evidence that the electronic payment system allows a recipient to refuse payment or send a message to the payor when accepting payment. I find that the landlord's conduct in accepting the tenant's payments for April and May, without specifying that the payments were being accepted for use and occupancy only, created ambiguity. 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 their right to pursue an Order of Possession. I find that the landlord reinstated this tenancy by accepting the rent payments from the tenants for March, April and May, 2018, after the effective date of the 10 Day Notice without specifying that the payments were accepted solely for use and occupancy.

For the above reasons, I dismiss the landlord's application for an order of possession based on the landlord's 10 Day Notice, dated February 7, 2018, without leave to reapply.

I accept the undisputed evidence provided by the parties that the tenants did not pay the full rent owed for February and March, 2018. Pursuant to section 26 of the *Act* the tenant is obligated to pay the rent when it is due regardless of whether the landlord has violated the *Act*, regulations or tenancy agreement. Accordingly, I find that the tenants were not entitled to deduct any portion of the rent payment without an agreement with the landlord or an order allowing them to make such a deduction. I accept the undisputed evidence that the arrears for the months of February and March, 2018 is \$252.00. Therefore, I issue a monetary award in the landlord's favour in the amount.

As the landlord's application was not wholly successful I decline to issue an order that the landlord may recover the filing fee for this application from the tenants.

Conclusion

I issue a monetary order in the landlord's favour against the tenants for \$252.00. The tenants must be served with this Order as soon as possible. Should the tenants fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

The balance of the landlord's application is dismissed without leave to reapply.

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: May 16, 2018

Residential Tenancy Branch