



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding D&S DUPERRON PROPERTY HOLDINGS LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPM, FFL

Introduction

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

- an Order of Possession for a Mutual Agreement to End Tenancy, pursuant to section 55 of the *Act*; and
- recovery of the filing fee from the tenant pursuant to section 72 of the *Act*.

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. Landlord's agent D.D. spoke on behalf of the landlord and is herein referred to as "the landlord".

As both parties were in attendance, service of documents was confirmed. The parties confirmed that the landlord's Notice of Dispute Resolution Proceeding package was served to the tenant in person by the building manager on April 24, 2018. The tenant acknowledged that he had been given a copy of the Mutual Agreement to End a Tenancy document, which was submitted into evidence by the landlord. In accordance with section 89 of the *Act*, I find that the respondent was duly served with the application.

Issue(s) to be Decided

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 the documentary evidence and the testimony of both parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of this matter and my findings are set out below.

A written tenancy agreement, signed by all parties on August 12, 2016, was submitted into evidence. Both parties agreed to the following facts provided in the written tenancy agreement. This month to month tenancy began on August 4, 2016, with rent of \$900.00 payable on or before the first day of each month. A security deposit of \$450.00 was paid by the tenant on August 12, 2016, and a pet deposit of \$450.00 was paid by the tenant on December 16, 2016. Both deposits continue to be held by the landlord.

Both parties agreed that the tenant's rent has increased over the years by the allowable rent increases to \$920.00 per month, plus \$10.00 per month for parking.

Both parties agreed that the tenant has often been late paying rent or falls behind in his rent payments. The tenant testified that the landlord has treated him fairly and allowed him to get caught up when he falls behind. The landlord had previously issued a 10 Day Notice to End Tenancy for Unpaid Rent to the tenant but the tenant agreed to get caught up with his rent and so the landlord never acted on the notice.

On March 9, 2018, the landlord and the tenant signed their first Mutual Agreement to End a Tenancy, in which both parties agreed to end the tenancy effective March 31, 2018. However, on March 23, 2018, the tenant paid the landlord \$1,000.00 to cover: the balance of rent owing from March 2018; a late fee charge; and, the full month of rent for April 2018. A second Mutual Agreement to End Tenancy was signed on that day, March 23, 2018, containing an end date for the tenancy effective April 30, 2018. Therefore, the first Mutual Agreement to End a Tenancy signed on March 9, 2018, was no longer in effect.

According to rent receipts referenced by the landlord, on April 20, 2018, the tenant paid the landlord rent money in the amount of \$940.00 to cover rent for the upcoming month of May 2018. Neither the landlord nor the tenant could confirm why the amount paid was \$940.00 instead of the required amount of \$930.00, but the landlord suggested it could have been an extra \$10.00 paid for parking for the tenant's girlfriend. The landlord was referencing receipts on file, however she advised that the building manager handled these types of transactions. The landlord confirmed that the rent receipt provided by the building manager to the tenant for the month of May 2018 did not include any notation explaining that it was for "use and occupancy only".

The landlord testified that the building manager was given direction to advise the tenant that if he moved out early, he would get a refund. The tenant confirmed that he had been told this by the building manager.

The tenant testified that he felt forced to sign the first Mutual Agreement to End a Tenancy and that he did not really understand what he was signing when he signed the second Mutual Agreement to End a Tenancy. The tenant clarified that he did not mean he felt physically forced or that he signed the agreements under duress, but rather that he did not feel like he had other options.

The landlord stated that the tenant should have known by the time he signed the second Mutual Agreement to End a Tenancy that it meant that he had to move out as agreed, because it was the second time he signed this type of agreement.

As evidence of the landlord's intent to carry through with ending the tenancy per the second Mutual Agreement to End a Tenancy, the landlord testified that the unit was being shown for re-renting and the tenant was served with the Notice of Dispute Resolution Proceeding package for this hearing. The landlord further confirmed that a new tenant had been secured to move into the rental unit beginning June 2018.

The tenant stated that his understanding was that the landlord was willing to work with him and continue the tenancy if he was able to keep his rent caught up to date and paid on time. He was aware that the rental unit had been shown for re-renting on one occasion, which he found confusing since he thought the landlord was going to continue working with him. He advised that on April 8, 2018, he had a conversation with the building manager who advised him that he should be prepared to move if he does not have the money for rent.

The tenant stated that he liked living at the rental property, that he liked all the people there and got along well with the building manager and did not want to move. He said he had been trying to find other rental accommodations but the market was very difficult and he had not found another rental unit. The tenant stated that he had expressed to the building manager that the landlord would need to get bailiffs as he could not foresee being in a position to move out by the end of May 2018.

Analysis

Section 44 of the *Act* states that a tenancy ends if the landlord and tenant agree in writing to end the tenancy.

Section 55(2) of the *Act* states that a landlord may request an order of possession for a rental unit when the landlord and tenant have agreed in writing that the tenancy is ended.

In this case, both parties provided undisputed testimony that a second Mutual Agreement to End a Tenancy, completed using an approved Residential Tenancy Branch form, was signed by both the landlord and the tenant on April 30, 2018, as submitted into evidence by the landlord.

The landlord has expressed no desire to continue the tenancy due to the tenant's issues with late payment of rent. The landlord argues that the tenant was aware that the consequences of signing the second Mutual Agreement to End a Tenancy meant that he would have to move out, and that he had been provided with many opportunities to address his repeated issues of late payment of rent.

The tenant has expressed that he has no desire to end the tenancy. The basis of the tenant's dispute is that he signed the agreement with the understanding that the landlord would be willing to continue the tenancy if he kept his rent paid up on time, and that he has had no success in finding other rental accommodations due to the challenging rental market conditions. His request in this hearing was to have the tenancy reinstated or at the very least to be provided with an extension of time in the current tenancy until he could secure new accommodations in the next couple of months.

Residential Tenancy Policy Guideline 11. Amendment and Withdrawal of Notices provides guidance in consideration of disputes in which a determination must be made on whether an end to a tenancy has been waived, and therefore the tenancy has been reinstated.

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.

[My emphasis added]

In this case, the landlord accepted rent “for the period after the effective date of the Notice”, calling into question “the intention of the parties”.

The building manager did not attend the hearing and therefore the landlord was unable to provide testimony regarding why the receipt for May 2018 was not marked with “for use and occupancy only”. However, the tenant confirmed that he was advised the May 2018 rent money he paid would be returned, at a prorated amount, if he were to move out prior to the end of the month.

Further to this, the landlord issued a previous 10 Day Notice to End Tenancy for Unpaid Rent and then did not act on it as the tenant caught up on rent, followed by a request for the tenant to sign a first Mutual Agreement to End a Tenancy on March 9, 2018, and then again did not act on it as the tenant again caught up on rent. These actions could be construed as the landlord showing “an intention to waive” their rights to end the tenancy when the second Mutual Agreement to End a Tenancy was signed, if the tenant were to keep caught up on rent.

These actions by the landlord, in addition to accepting rent payment for May 2018 without the qualification that it was for “use and occupancy” weigh as evidence in

support of the tenant's understanding of the situation, that the tenancy could continue if the tenant paid rent on time.

However, the landlord has explained the context for their actions. The landlord ensured it had been communicated to the tenant that their intention was to follow through with the agreement to end the tenancy. The tenant was told that the May 2018 rent money would be returned to him prorated if he moved out before the end of the month, that he should prepare himself to move out, and that the rental unit was being shown for the purposes of being re-rented.

It was acknowledged by the tenant in his own words, that the landlord has treated him "fairly", and has shown a willingness to work with him by giving him repeated opportunities to get caught up on his rent when he has fallen behind.

I find it more probable that the intention of the landlord's actions in not acting on the previously issued 10 Day Notice to End Tenancy was to provide the tenant with a final opportunity to comply with the terms of the tenancy agreement regarding payment of rent, given that this was a tenant with whom they appear to have had a good relationship with accept for issues around late payment of rent. It would be reasonable to interpret that the landlord's decision not to act upon the first Mutual Agreement to End a Tenancy demonstrated an attempt to accommodate and extend leniency for the tenant in the face of his tenancy ending, rather than "a clear, unequivocal and decisive act" to waive their right to end the tenancy, which would be contrary to the terms they agreed to in signing the second Mutual Agreement to End a Tenancy form.

I find it less probable to accept the tenant's interpretation of the landlord's lenient and flexible actions to be an indication of the landlord's desire to continue a tenancy, which has required them to expend considerable efforts to obtain rent money because of the tenant's repeated failure to comply with the basic requirement of the tenancy agreement to pay rent when due.

In summary, I find there is sufficient evidence to demonstrate that the parties entered into a Mutual Agreement to End a Tenancy, with an effective date to end the tenancy on April 30, 2018, and that there is insufficient evidence presented to prove an implied waiver of the landlord's right to end the tenancy, resulting in a continuation or reinstatement of the tenancy.

I accept that the effective date for ending the tenancy as noted on the Mutual Agreement to End a Tenancy has now passed, and the tenant does not intend to vacate the rental unit.

Section 55(3) of the *Act* provides that an order of possession may be granted to a landlord before or after the date when a tenant is required to vacate a rental unit, and that the order takes effect on the date specified in the order.

As the effective date for ending the tenancy has now passed, I grant the landlord an Order of Possession to be served on the tenant. If the tenant does not vacate the rental unit within the 2 days required, the landlord may enforce this Order in the Supreme Court of British Columbia.

As the landlord was successful in their application, they may, pursuant to section 72 of the *Act*, recover the \$100.00 filing fee from the tenant. In place of a monetary award, the landlord may withhold \$100.00 from tenant's security deposit.

Conclusion

I grant an Order of Possession to the landlord effective **two days** after service of this Order on the tenant. Should the tenant or anyone on the premises fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

The landlord may withhold \$100.00 from tenant's security deposit in satisfaction of the return of the filing fee.

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: June 4, 2018

Residential Tenancy Branch