



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW HEARING DECISION

Dispute Codes

OPRM-DR, FFL

Introduction

This hearing was scheduled pursuant to the *Residential Tenancy Act* (the “Act”) in response to a successful application filed by the tenant for review of a decision dated July 30, 2018. In the original decision issued by way of a Direct Request Proceeding, the landlord was granted an order of possession and a monetary order in the amount of \$849.00. The original decision and orders were subsequently suspended by way of a review consideration decision dated August 15, 2018 pending the outcome of this review hearing.

This hearing addressed the landlord’s application pursuant to section 55 of the *Act* for an order of possession for unpaid rent, section 67 of the *Act* for a monetary order for unpaid rent and section 72 of the *Act* for the recovery of the filing fee.

The tenant, the tenant’s advocate and the landlord’s agent (the “landlord”) attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. The landlord confirmed she was an agent of the landlord’s company named in this application, and had authority to speak on its behalf.

At the outset of the hearing, each party confirmed that they had received the other party’s evidence. As neither party raised any issues regarding service of the application or the evidence, I find that both parties were duly served with these documents in accordance with sections 88 and 89 of the *Act*.

Issue(s) to be Decided

Is the landlord entitled to an order of possession for unpaid rent?

Is the landlord entitled to monetary compensation for unpaid rent?

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

Background and Evidence

As per the submitted tenancy agreement and testimony of the parties, the tenancy began on May 1, 2007 on a month-to-month basis. Rent in the amount of \$749.00 is payable on the first

of each month. The tenant remitted a security deposit in the amount of \$409.50 at the start of the tenancy, which the landlord still retains in trust. The tenant continues to reside in the rental unit.

A 10 Day Notice to End Tenancy for Unpaid Rent or Utilities ("10 Day Notice") was issued to the tenant on July 6, 2018 by way of posting to the rental unit door where the tenant resides. The 10 Day Notice indicates outstanding July 2018 rent in the amount of \$749.00 and an effective move-out-date of July 19, 2018. The tenant confirmed receipt of the 10 Day Notice on July 6, 2018.

At the time of the landlord's application, the landlord sought a monetary order of \$749.00 for unpaid rent for July 2018. The landlord testified that since filing the application, the tenant has paid July 2018 rent. Specifically, the landlord testified that the tenant paid July rent in the amount of \$749.00 by way of e-transfer on July 25, 2018, and in return the tenant was issued a receipt for use and occupancy only.

The landlord acknowledged receipt of a \$749.00 payment on August 1, 2018, but contends that this payment constitutes over holding compensation, not rent. The landlord testified that upon receipt of the August payment, the landlord forwarded a letter to the tenant identifying the payment as over holding compensation.

The landlord is also seeking to recover the \$100.00 filing fee for this application from the tenant.

In reply, the tenant testified that the landlord refused the e-transfer on July 25, 2018 but later accepted it on July 30, 2018. The tenant also testified that the payment made on August 1, 2018 was rent. It is the tenant's position that because she has been issued a 10 Day Notice every month for the last 11 months, and she has always managed to work out a payment with the landlord, she did not expect the landlord to pursue this particular 10 Day Notice. The tenant testified that after receiving the 10 Day Notice dated July 6, 2018, she spoke with and emailed the landlord explaining her situation and at no time did the landlord tell her they were pursuing the 10 Day Notice.

Analysis

Section 46 of the *Act* provides that upon receipt of a notice to end tenancy for unpaid rent or utilities the tenant may, within five days, pay the overdue rent or dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. If the tenant does not pay the overdue rent or file an application, the tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the notice and must move out of the rental unit.

Although the tenant failed to pay the rent due on July 1, 2018 and did not pay the rent within five days of receiving the 10 Day Notice the tenant did make later payments in July and August

2018. Because of this, it must be decided whether the landlord waived its right to pursue the 10 Day Notice. Residential Tenancy Policy Guideline 11 discusses the issue of waiver:

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.

Although the landlord accepted rent after the effective date on the 10 Day Notice, I do not find this to be a waiver of the 10 Day Notice. The landlord did not withdraw its application to enforce the 10 Day Notice, at any time prior to the direct request process or this hearing. The landlord testified that after receiving the July payment a receipt for use and occupancy only was issued and after the August payment a letter for over holding compensation was issued. Based on this undisputed testimony of the landlord, I find this is recent evidence of the landlord's intention to pursue the 10 Day Notice and obtain an order of possession against the tenant.

For the above reasons, and given the conduct of the parties, I find that the landlord did not waive its rights to pursue the 10 Day Notice and did not waive the 10 Day Notice expressly or impliedly. I find that the landlord did not intend to reinstate this tenancy, despite accepting rent payments after the effective date of the 10 Day Notice.

Based on the parties' testimony and the notice before me, I find that the tenant was served with an effective notice. As the tenant did not pay the overdue rent or file an application to dispute the notice within five days, the tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the notice, and must move out of the unit. As this has not occurred, I find that the landlord is entitled to a two (2) day order of possession, pursuant to section 55 of the *Act* and therefore confirm the original order of possession dated July 30, 2018.

Section 26 of the *Act* requires the tenant to pay rent on the date indicated in the tenancy agreement, which is the first day of each month. Although the tenant may have arranged late payments in previous months, it becomes clear that in July 2018, the landlord was no longer prepared to accept late payments and exercised their right to end the tenancy with a 10 Day Notice. Because the landlord has already accepted the July payment in the amount of \$749.00, and the landlord was successful in this application, I vary the monetary order dated July 30, 2018 to \$100.00.

Conclusion

The original order of possession dated July 30, 2018 is confirmed.

The original monetary order dated July 30, 2018 is varied to \$100.00.

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 13, 2018

Residential Tenancy Branch