



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

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 ("Mutual Agreement") 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 B.B. 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 upon the tenant. No issues of service were raised. 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.

The parties entered into a tenancy agreement beginning March 1, 1993. Monthly rent is \$634.00 payable on the first of the month. At the beginning of the tenancy, the tenant provided a security deposit of \$225.00 which is held by the landlord.

A copy of the tenancy agreement was submitted by the landlord.

The parties testified that a Two Month Notice for Landlord's Use ("Two Month Notice") was personally served upon the tenant on April 24, 2018 with an effective vacancy date of the end of June 2018.

A copy of the Two Month Notice was not submitted.

The landlord testified the Two Month Notice was issued for renovations pursuant to section 49(b) which states:

A landlord may end a tenancy in respect of a rental unit if the landlord has all the necessary permits and approvals required by law, and intends in good faith, to do any of the following:

(b) renovate or repair the rental unit in a manner that requires the rental unit to be vacant

The landlord stated his intention was to renovate the unit and offer it for rent at more than twice the current rent.

The tenant testified she offered to pay the landlord increased rent of \$900.00 but the landlord rejected the offer.

The landlord testified the tenant did not pay rent for the month of June 2018 pursuant to section 51 of the *Act* which requires the landlord in applicable situations to provide compensation to the tenant in an amount equivalent to one month's rent.

On July 6, 2018, as the tenant was still occupying the unit, the landlord testified he agreed to extend the vacancy date from June 30 to July 31, 2018 conditional upon the tenant signing the Mutual Agreement agreeing to vacate three weeks later, on July 31, 2018.

Both parties signed the Mutual Agreement on July 6, 2018 with an effective vacancy date of July 31, 2018.

A copy of the signed Mutual Agreement in an approved Residential Tenancy Branch form was submitted in evidence.

The tenant testified she is a First Nations woman in her 80's and in poor health. She stated she has lived in the unit for twenty-five years. She detailed her efforts, which were limited because of her health issues, to find another place to live. These efforts included applications to First Nations housing groups. However, she testified she has not found an alternate place to live that is within her means.

As a result, the tenant testified she did not move out on June 30, 2018, the effective date of the Two Month Notice. She paid rent for July 2018. The tenant acknowledged she received one month's rent as compensation (the month of June 2018) pursuant to section 51 of the *Act*.

The tenant testified that someone came to her door on July 6, 2018 and said, "I have something for you to sign." The person presented the Mutual Agreement and the tenant signed it without discussion.

The tenant asserted she did not understand the nature of the Mutual Agreement. She stated she felt forced to sign the agreement, although she did not allege any physical force. However, she stated she believed she had no choice but to sign the document.

The tenant testified she wanted to stay in the unit and never willingly agreed to move out. She said, "It is not very nice of the landlord to want me to move out." The tenant continues to occupy the unit.

The landlord denied the tenant's version of events surrounding the signing of the Mutual Agreement. He testified to many conversations with the tenant about her moving out. The landlord addressed the tenant by her first name during the hearing and purported to remind her of their many discussions about her moving out. The tenant did not acknowledge such discussions.

The landlord testified he has received rent from the tenant for every month since the issuance of the Two Month Notice, except, as stated earlier, for the month of June 2018, although he did not provide the receipts. He stated the receipts were marked, "for use and occupancy only" after the issuance of the Two Month Notice.

The tenant submitted no documentary evidence and provided no testimony concerning payment of rent except to say she was not in arrears.

The landlord filed no documents with respect to his claim other than the tenancy agreement and the Mutual Agreement.

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 Mutual Agreement in an approved Residential Tenancy Branch form was signed by both the landlord and the tenant on July 6, 2018.

The landlord has expressed no desire to continue the tenancy and has requested an immediate order of possession to start renovations as soon as possible. The landlord argues that the tenant was aware of the significance of signing the Mutual Agreement. He claims multiple discussions with the tenant affirming her obligation to vacate the unit, first at the end of June 2018, and then at the end of July 2018.

A Notice to End Tenancy can be considered withdrawn or abandoned if the landlord accepts rent after the effective date of the Notice. In such a case, the tenancy is reinstated.

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. The Guideline states [underlining added]:

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 stated he accepted rent after the effective date of the Two Month Notice, that is, for July 2018, and again after July 6, 2018 when the Mutual Agreement was signed, that is, for the months of August and September 2018. As this application only concerns an order of possession pursuant to the Mutual Agreement, the rent for August and September 2018 only will be considered.

Further to the Guideline, the landlord's intent can be determined by considering three factors.

The first is stated in the Guideline, "*whether the receipt shows the money was received for use and occupation only.*" The landlord stated that the receipts were marked "for use and occupancy only" but did not provide a copy of the receipts or any evidence in support of this assertion.

The second factor is, "*whether the landlord specifically informed the tenant that the money would be for use and occupation only*". The landlord provided no evidence that he informed the tenant that the rent payments would be for "use and occupation only".

The third factor is "*the conduct of the parties.*"

I have considered the landlord's testimony. He has accepted rent without providing evidence that the acceptance was based upon use and occupancy only. Without additional evidence, I find the landlord's conduct is in keeping with the existence of an ongoing tenancy relationship with the tenant.

As well, the conduct of the tenant is in keeping with an ongoing tenancy. She continues to live in the unit and has never had any intention of leaving. She testified she has surgery planned soon and is planning to recover in her unit. Her conduct is in keeping with an understanding that the tenancy is continuing for the foreseeable future.

After considering the factors in the Guideline, the totality of the evidence and the testimony of the parties, I find that the landlord's actions amount to an implied waiver of the landlord's right to end the tenancy pursuant to the Mutual Agreement.

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 July 31,

2018. I also find that there is sufficient evidence presented to prove on a balance of probabilities an implied waiver of the landlord's right to end the tenancy under the Mutual Agreement. I therefore find the tenancy continues until it is ended in accordance with the *Act*.

I therefore dismiss the landlord's claims, including the request for reimbursement of the filing fee, without leave to reapply.

Conclusion

The applicant's claims are 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: October 3, 2018

Residential Tenancy Branch