



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding AQUILINI PROPERTIES LP
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR MNRL FFL

Introduction

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

- an Order of Possession pursuant to section 55;
- a monetary order for unpaid rent pursuant to section 67; and
- authorization to recover the filing fee from the tenant pursuant to section 72.

The tenant did not attend this hearing which lasted approximately 15 minutes. The corporate landlord was represented by its agent (the "landlord") who appeared and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

The landlord testified that a 10 Day Notice to End Tenancy for Unpaid Rent was issued on September 10, 2018 and served by posting on the rental unit door on that date. Based on the undisputed evidence I find that the 10 Day Notice was deemed served on September 13, 2018, 3 days after posting in accordance with sections 88 and 90 of the *Act*.

The landlord testified that their application for dispute resolution and evidence were served on the tenant by registered mail sent on October 4, 2018. The landlord provided a Canada Post tracking number as evidence of service. Based on the undisputed evidence I find that the tenant was deemed served with the hearing package in accordance with sections 88, 89 and 90 of the *Act* on October 9, 2018.

At the outset of the hearing the landlord testified that the tenant has made full payment of the arrears sometime in October and withdrew the monetary portion of their claim.

Issue(s) to be Decided

Is the landlord entitled to an order of possession?

Is the landlord entitled to recover their filing fee from the tenant?

Background and Evidence

The landlord gave undisputed evidence regarding the following facts. This periodic tenancy began several years ago. The current monthly rent is \$635.00 payable by the first of each month. The landlord submits that the tenant failed to pay the full amount of the monthly rent and there was an arrear of \$432.00 when the 10 Day Notice was issued.

The landlord testified that the tenant made full payment of the arrear sometime in October, 2018 after the 5 day period provided under section 46(5) of the Act. The landlord testified that they did not issue a receipt to the tenant indicating that the payment was being accepted for use and occupancy only and did not reinstate the tenancy.

Analysis

The landlord testified that the tenants have paid all outstanding rent and there is no rental arrear as at November 15, 2018 the date of the hearing.

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 provided undisputed evidence as the tenant did not attend. The tenant was deemed served with the 10 Day Notice on September 13, 2018. The tenant made full payment of the rental arrear sometime in October, 2018. The landlord testified that they did not issue a receipt indicating that the payment was being accepted for use and occupancy only. The landlord did not provide evidence that the tenant was informed that the payment did not reinstate the tenancy. I find that the landlord's conduct of acceptance of the payment after filing their application on October 4, 2018 to be a waiver of the 10 Day Notice.

The landlord did not withdraw his application or cancel the hearing at any time prior to this hearing. I found that the tenant was deemed served with the landlord's application and had sufficient notice of the hearing. The tenant did not appear at this hearing to present their position. The tenant did not allege any express or implied waiver of the 10 Day Notice. However, I find that the tenant relied on the landlord's conduct, amounting to waiver, of accepting payment of the arrear and continuing to accept rent payment for October, and November, 2018 without issuing any receipts or notification that the rent was being accepted for "use and occupancy only" or that an end to tenancy was still desired.

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 accept the landlord's

evidence that the tenant paid by cheque and the landlord had the option of not cashing the cheques, returning the cheques or issuing a receipt to the tenant indicating payment is accepted for “use and occupancy” only. The landlord did not do so. I find that the landlord’s conduct in accepting the payment of the rental arrear and the subsequent rent payments without specifying that the payments did not reinstate the tenancy to have created ambiguity about their 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 their right to pursue an Order of Possession. I find that the landlord reinstated this tenancy by accepting full payment of the arrear and the rent payment from the tenants for October, 2018 and November, 2018, after the corrected effective date of the 10 Day Notice on September 23, 2018.

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

As the landlord was unsuccessful in his application for an Order of Possession, the landlord is not entitled to recover the filing fees for this application

Conclusion

The landlord withdraws the application for a monetary order.

The landlord’s 10 Day Notice of September 10, 2018 is cancelled and of no force or effect. This tenancy continues until ended in accordance with the *Act*.

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: November 15, 2018

Residential Tenancy Branch