



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## **REVIEW HEARING DECISION**

Dispute Codes      OPRM-DR, 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
- authorization to recover the filing fee for this application, pursuant to section 72.

The landlord's two agents, landlord GW ("landlord") and "landlord LT," and the tenant and his two agents, tenant's agent PW ("tenant's agent") and "tenant's agent GC," 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 stated that he was the property manager and landlord LT was the bookkeeper, both employed by the landlord company named in this application, and that both had permission to speak on its behalf. The tenant confirmed that his two agents had permission to speak on his behalf. This hearing lasted approximately 48 minutes.

### Preliminary Issue - Previous Hearings and Service of Documents

This hearing was originally scheduled as a direct request proceeding, which is a non-participatory hearing ("original hearing"). A decision, dated October 25, 2018, ("original decision"), was issued by an Adjudicator for the direct request proceeding. The original decision was based on the landlord's paper application only, with no submissions made by the tenant. The original decision granted the landlord a two-day order of possession ("original order of possession") and a \$530.00 monetary order ("original monetary order") for October 2018 rent of \$430.00 and the \$100.00 application filing fee, against the tenant.

The tenant applied for a review of the direct request decision, alleging fraud. A new review hearing was granted by a different Arbitrator, pursuant to a review consideration decision, dated November 1, 2018 (“review decision”). As per the review decision, the tenant was required to serve the landlord with a copy of the review decision, the notice of review hearing and the accompanying evidence.

The landlord confirmed receipt of the above review documents from the tenant. In accordance with sections 89 and 90 of the *Act*, I find that the landlord was duly served with the required review documents from the tenant.

#### Preliminary Issue - Service of Landlord’s Original Application and 10 Day Notice

The tenant’s agent confirmed receipt of the landlord’s original application. In accordance with sections 89 and 90 of the *Act*, I find that the tenant was duly served with the landlord’s original application.

The tenant’s agent confirmed that the tenant personally received the landlord’s 10 Day Notice to End Tenancy for Unpaid Rent or Utilities, dated October 3, 2018 (“10 Day Notice”). The effective move-out date on the notice is October 16, 2018. In accordance with sections 88 and 90 of the *Act*, I find that the tenant was duly served with the landlord’s 10 Day Notice on October 3, 2018.

At the outset of the hearing, the landlord confirmed that the tenant had paid the balance of the outstanding October 2018 rent of \$430.00 and he was no longer seeking a monetary order of unpaid rent against the tenant.

#### Issues to be Decided

Should the landlord’s 10 Day Notice be cancelled? If not, 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 testimony of both parties and the documentary evidence, not all details of the submissions and arguments are reproduced here. The principal aspects of the landlord’s claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on July 1, 2014. Monthly rent in the amount of \$830.00 is payable on the first day of each month. A security deposit of \$380.00 and a key deposit of \$10.00 were paid by the tenant and the landlord continues to retain both deposits. A written tenancy agreement was signed by both parties. The tenant continues to reside in the rental unit,

The landlord seeks an order of possession based on the late payment of October 2018 rent and to recover the \$100.00 application filing fee. The landlord indicated that a 10 Day Notice was issued to the tenant for failure to pay rent of \$830.00, due on October 1, 2018. The landlord testified that the tenant failed to pay October 2018 rent on time. He confirmed that the tenant paid \$400.00 on October 3, 2018 and \$430.00 on October 26, 2018. He said that a rent receipt was issued for "use and occupancy only" on October 17, 2018 for the October 3, 2018 rent payment of \$400.00 because the Residential Tenancy Branch ("RTB") asked for it as part of the landlord's original application. The tenant confirmed receipt of this rent receipt. The landlord claimed that a rent receipt was issued on October 26, 2018 for the \$430.00 payment for "use and occupancy only" made on the same date and left in the tenant's mailbox, which the tenant denied receiving. Landlord LT confirmed seeing the landlord place the receipt in the tenant's mailbox.

The tenant disputes the landlord's 10 Day Notice. The tenant's agent claimed that the tenant has a serious brain injury, which is apparent to those around him. The landlord denied knowledge of this. The tenant's agent testified that the tenant paid partial rent of \$400.00 on October 3, 2018 and made a verbal agreement with the landlord to pay the remaining balance of \$430.00 by October 26, 2018 and he would be able to continue his tenancy and not be evicted as per the 10 Day Notice. The tenant's agent stated that the tenant relied on this agreement with the landlord, did not dispute the 10 Day Notice for this reason, and the tenant did not have assistance despite his brain injury during this time.

The tenant's agent pointed to the rent receipt for the partial payment being given two weeks later on October 17, 2018, rather than right after the October 3, 2018 payment with a handwritten "use and occupancy only" on it. He said that if the landlord's intention was to follow through with the eviction rather than the agreement, this receipt should have been issued within a timely manner. He claimed that the tenant received a debit receipt for the \$400.00 on October 3, 2018 with nothing else written on it such as "use and occupancy only." He maintained that the tenant did not receive the October 26, 2018 receipt indicating "use and occupancy only" from the landlord. He said that the

tenant only received a debit receipt for \$430.00 on October 26, 2018 with nothing else written on it. The tenant's agent submitted that the tenant paid November and December 2018 rent on time to the landlord, which the landlord did not dispute.

### Analysis

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 tenant failed to pay the full rent due on October 1, 2018, within five days of receiving the 10 Day Notice on October 3, 2018. The tenant only made a partial payment of \$400.00 on October 3, 2018 and paid the remainder on October 26, 2018.

I find that the landlord's conduct of accepting full rent by October 26, 2018 and for two months after filing their original application on October 17, 2018, to be a waiver of the 10 Day Notice. I find that the tenant had an agreement with the landlord to pay full rent by October 26, 2018. The landlord delayed for two weeks in issuing the first rent receipt to the tenant for "use and occupancy only" for the October 3, 2018 payment, and only did so in order to satisfy the requirements for their original application to the RTB. The tenant also paid November and December 2018 rent on time and it was accepted by the landlord.

The landlord did not withdraw its application or cancel the hearing at any time prior to this hearing. However, I find that the tenant relied on the landlord's conduct, amounting to waiver, of continuing to accept October, November and December 2018 rent payments. I find that the tenant paid rent on time for November and December 2018, assuming that his tenancy would continue. The landlord also failed to provide any receipts for "use and occupancy only" in their application evidence for this hearing for the October 26, 2018, November 2018 and December 2018 rent payments.

For the above reasons, and given the conduct of the parties, I find that the landlord waived its rights to pursue an Order of Possession based on the 10 Day Notice. I find that the landlord reinstated this tenancy by accepting full rent payments from the tenant after the effective date of October 16, 2018.

On a balance of probabilities and for the reasons stated above, the landlord's 10 Day Notice, dated October 3, 2018, is cancelled and of no force or effect. This tenancy continues under the terms of the tenancy agreement, until it is ended in accordance with the *Act*.

As the landlord was unsuccessful in this application, I find that it is not entitled to recover the \$100.00 filing fee from the tenant.

Section 82(3) of the *Act* states:

*Following the review, the director may confirm, vary or set aside the original decision or order.*

Accordingly, I set aside the original decision and original order of possession, both dated October 25, 2018. The order of possession is hereby cancelled and of no force or effect.

Since the landlord received the outstanding \$430.00 in rent for October 2018 and was unsuccessful in recovering the \$100.00 filing fee in this application, the landlord's original monetary order of \$530.00 is set aside and cancelled of no force or effect.

### Conclusion

The original decision, original order of possession and original monetary order, all dated October 25, 2018, are set aside by way of this decision. They are hereby cancelled and of no force or effect.

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: December 13, 2018

---

Residential Tenancy Branch