



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPM, MNDCL-S, MNRL-S, FFL

Introduction

This hearing dealt with an application by the landlord pursuant to *Residential Tenancy Act* (the Act) seeking the following:

- an Order of Possession on the basis of a mutual agreement to end tenancy, pursuant to sections 44 and 55 of the Act;
- a monetary order for unpaid rent, and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67 of the Act;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38 of the Act; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72 of the Act.

The tenant and the landlord's agent ("AG") appeared at the hearing. All parties present were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The landlord's agent AG testified that he served the Landlord's Application for Dispute Resolution hearing package ("dispute resolution hearing package"), along with his evidence, to the tenant by way of registered mail. The tenant confirmed receipt of the landlord's dispute resolution hearing package and the landlord's evidence. Therefore, I find that the tenant has been served with the landlord's notice of dispute resolution package, and accompanying evidence, in accordance with section 89 of the Act.

The tenant testified that he served his evidence package to the landlord, and AG confirmed receipt of the evidence.

Preliminary Issue – Amending the Landlord’s Application

At the onset of the hearing, the landlord’s agent AG stated that he wished to amend his application seeking a monetary order. AG stated that he wished to pursue a monetary order only in respect of unpaid rent, in the amount of \$3,000.00. AG provided that he is seeking rent owed in the amount of \$1,500.00 each month for the months of January 2019 and February 2019, totaling \$3,000.00. Accordingly, I amend the landlord’s application pursuant to section 64(3)(c).

Issues(s) to be Decided

Is the landlord entitled to end this tenancy on the basis of the mutual agreement to end tenancy form and to obtain an Order of Possession? Is the landlord entitled to a monetary order for unpaid rent? 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 all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and /or arguments are reproduced here. The principal aspects of the landlord’s application, along with the respective testimony and submissions presented by the parties and my findings are set out below.

The parties agreed that the tenancy began on January 01, 2015. The monthly rent was determined to be due on the first day of each month. The monthly rent was set at \$1,500.00. The parties agreed that the tenant provided a security deposit in the amount of \$750.00 which continues to be held by the landlord.

The parties signed a subsequent fixed-term tenancy agreement which provided an end of tenancy date of June 30, 2018. The parties agreed that the rent was increased by way of mutual agreement to \$1,650.00, effective January 01, 2019. The landlord provided as evidence a copy of a written tenancy agreement signed by both parties, which confirms the details provided orally by the parties.

The subject rental unit is a townhouse. The tenancy agreement is such that the tenant rents the entire townhouse as the rental unit.

The landlord’s agent AG testified that the most recent tenancy agreement signed by the parties was a fixed-term agreement which provided that the tenancy would end on June 30, 2018. AG stated that the parties exchanged email correspondence (copies of which were provided as evidence by the tenant) in early March 2018. AG conveyed to the tenant that the landlord (AG’s

father) did not intend to continue having the townhouse used as a rental unit, and that the landlord wanted to assume use of the townhouse for his own purpose.

AG testified that the parties met on May 03, 2018 and determined that since the landlord intended to use the subject rental unit (the townhouse) for his own use, that the tenancy should end. The parties then entered into a mutual agreement to end tenancy, and signed a "mutual agreement to end a tenancy" form, dated May 03, 2018. However, the parties then immediately agreed to amend the date on which the tenancy would end by providing an amended date of December 31, 2018.

AG provided a written submission and testimony to acknowledge that the tenant's wife spoke directly with AG's father (the landlord) in July 2018, at which time the landlord expressed that the tenant may continue his tenancy beyond the December 31, 2018 date indicated on the mutual agreement to end tenancy.

AG stated that he was on vacation at the time, and that upon his return, he resumed his role as agent and spoke with the tenant to agree that the tenancy would continue beyond the December 31, 2018 date. AG testified that in early January 2019, the parties agreed that a new tenancy agreement would be signed. AG provided that he drafted a new tenancy agreement, which was a fixed-term tenancy agreement for the period of January 01, 2019 to December 31, 2019, and provided that at the end of the fixed-term, the tenant would vacate the rental unit.

AG testified that he signed the tenancy agreement and met the tenant on January 06, 2019 to have the tenant sign the agreement. AG stated that the tenant did not sign the agreement, as he did not agree with the clause requiring the tenant to vacate the rental unit at the end of the fixed-term. AG testified that he subsequently retracted his offer of presenting the new tenancy agreement to extend the tenancy and notified the tenant that he would enforce the terms of the mutual agreement to end tenancy, dated May 03, 2018, and would pursue an Order of Possession on that basis.

The tenant testified to confirm AG's testimony that the parties agreed to sign a mutual agreement to end the tenancy on December 31, 2018, based on the initial intention conveyed by the landlord that he wished to use the rental unit for his own purpose.

The tenant stated that in July 2018, his wife spoke directly with the landlord and that the landlord conveyed that he no longer intended to use the property for his own purpose. The tenant testified that on the same occasion, the landlord agreed that the tenancy could continue, such that it would extend beyond the December 31, 2018 date provided on the mutual agreement to end tenancy form, thereby, in effect, nullifying the mutual agreement to end tenancy.

The tenant testified that when AG returned from his vacation, he communicated with AG in September 2018 to confirm that the tenancy would continue and that the mutual agreement to

end tenancy would no longer be in effect. The tenant testified that as a result of his wife's direct communication with the landlord, and based on the confirmation he received from AG, he ceased his efforts to procure new accommodation, as his belief was that the landlord and AG confirmed that the tenancy would continue since the landlord no longer intended to use the rental unit for his own purpose.

The tenant provided as evidence a copy of an email message from AG, dated January 03, 2019, in which AG confirms that the landlord spoke with the tenant's wife, whereby an agreement was reached to continue the tenancy. AG then, in that email, conveyed that he would draft a new tenancy agreement to confirm the agreement made verbally by the landlord in July 2018.

The tenant stated that during this time, his understanding was that he would enter into a new fixed-term tenancy agreement under the same terms, and written in the same format as, as the previous agreements signed by the parties. The tenant provided that on January 06, 2019, he met with AG and was presented a written tenancy agreement that was different in format than the previous agreements, and that it contained more pages. The tenant testified that his intention was not to refuse the tenancy agreement, but that he wanted to review all six pages of the agreement.

The tenant testified that he was able to make photocopies of some of the pages, but that AG took the written tenancy agreement with him. After reviewing the terms of the agreement, the tenant testified that he contacted AG to convey that he would agree to the terms of the agreement and sign the new tenancy agreement. The tenant stated that without cause or explanation, AG retracted his offer to have the tenant sign the new tenancy agreement and conveyed that he would seek an Order of Possession based on the mutual agreement to end tenancy form, which the tenant was led to believe had been nullified as early as July 2018, subsequent to the agreement reached with the landlord.

The tenant testified that he provided a cheque, in the amount of \$1,650.00, for payment of rent owed for the month of January 2019, but that AG refused to accept the cheque or process it to obtain the funds, as AG refused to acknowledge that the cheque constituted payment of rent. Rather, the tenant testified, AG demanded that the tenant provide an alternate cheque which included a memo written by the tenant to depict that the cheque would be for use and occupancy only. AG agreed with this portion of the tenant's testimony.

The tenant testified that he is prepared to provide payment of rent owed for February 2019 if AG would accept the payment as rent for that month. The tenant testified that he was unable to come to an agreement with AG regarding whether AG would agree to accept rent for February 2019, which is why no payment was provided for February 2019.

Analysis

In a matter in which the landlord seeks an Order of Possession, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the reasons for request of the Order of Possession are based. Therefore, in the matter before me, the burden of proof rests with the landlord.

When one party provides testimony of the events in one way, and the other party provides an equally probable but different explanation of the events, the party making the claim (and bearing the burden of proof) has not met the burden on a balance of probabilities and the claim fails.

Both parties have provided documentary evidence, along with their respective testimony and submissions. However, the question of what occurred is not an easy determination to make when weighing verbal testimony and submissions before me, particularly as the burden of proof to justify ending the tenancy is on the landlord.

However, the test that I must apply in this matter is a balance of probabilities, which is to say, that it is more likely than not that, based on the evidence and testimony, that events occurred in a certain way as opposed to another.

Although the landlord's evidence and submissions were considered on merit, in weighing the evidence and testimony from both parties, I find that the landlord had the burden of providing *definitive evidence and testimony* to demonstrate that it was open to him to enforce the terms of the mutual agreement to end tenancy and that he did not reinstate the tenancy. I find that the landlord failed to meet that burden.

In the matter before me, I find that, on a balance of probabilities, the landlord has failed to provide sufficient evidence that he did not waive his right or intention to end the tenancy pursuant to the mutual agreement to end the tenancy, which was endorsed by the parties on May 03, 2018.

Upon consideration of the evidence before me, I will outline the following relevant Sections of the Act that are applicable to this situation. I will provide the following findings and reasons when rendering this decision.

Section 44(1)(c) of the Act provides that a tenancy can end if the landlord and tenant agree in writing to end the tenancy—in effect, a mutual agreement to end the tenancy.

Section 55(1)(d) of the Act provides that a landlord may request an Order of Possession of a rental unit if the landlord and tenant have agreed in writing that the tenancy is ended. The landlord has presented as evidence a copy of a mutual agreement to end a tenancy, which states that on May 03, 2018, the parties agreed that the tenancy would end on December 31, 2018.

Residential Tenancy Policy Guideline 11 (Policy Guideline 11) provides the following with respect to the principle of waiver:

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.

In determining whether it remains open to the landlord to request an Order of Possession on the basis of the mutual agreement, I must consider the actions of the parties—specifically, the actions of the landlord and AG—subsequent to signing the mutual agreement form, dated May 03, 2018, and further, must consider whether those actions demonstrate that the landlord's intention was to extend the tenancy beyond December 31, 2018, such that he waived his intention to end the tenancy pursuant to the mutual agreement.

In conjunction with the foregoing, I must also consider whether, as outlined by Policy Guideline 11, the tenant has been induced by the conduct of the landlord to act upon the belief that there has been a waiver—in this case, that the landlord waived his intention to end the tenancy on December 31, 2018 pursuant to the mutual agreement—and changed his position (with respect to ceasing his effort to find new accommodation based on his belief that the landlord, as early as July 2018, agreed to continue the tenancy) to his detriment.

The parties provided evidence and testimony to establish that the landlord's initial intention was to cease offering the townhouse as a rental unit, and that he would use the townhouse for his own purpose. This initial intention formed the basis of the parties agreeing to sign a mutual agreement to end tenancy form which provided a December 31, 2018 end of tenancy date.

In July 2018, the tenant's wife had discussions with the landlord with respect to continuing the tenancy. During this time, the landlord suggested to the tenants that his intention was no longer to occupy the townhouse himself, and that the tenants could continue their tenancy beyond the date indicated on the mutual agreement.

In September 2018, the tenant communicated with AG and it was at that time that the tenant ceased to plan for an end of tenancy date of December 31, 2018, since the landlord's agent and tenant agreed that the tenancy would continue beyond the date indicated on the mutual agreement to end tenancy form.

The tenant submitted as evidence an email dated January 03, 2019, in which AG writes to the tenant to confirm that the tenant's wife spoke directly with the landlord during the preceding summer (which corresponds to the tenant's testimony that they entered a verbal understanding with the landlord in July 2018 to extend the tenancy) to come to an agreement about extending the tenancy beyond the effective date of the mutual agreement. In effect, AG acknowledges the testimony provided by the tenant, whereby the tenant asserts that an agreement was reached with the landlord directly in July 2018 to cancel the Mutual Agreement and allow the tenancy to continue beyond December 31, 2018.

In the January 03, 2019 email, AG goes on to say that he will draft a new tenancy agreement to give effect to the agreement reached by the tenant and the landlord during the preceding summer. The tenant agreed to AG's instructions and understood that a new tenancy agreement would be signed.

The parties subsequently met to sign a new agreement on January 06, 2019, but the tenant requested clarification with respect to the terms around the ending of the one-year fixed term agreement. After understanding the terms set forth by the landlord, the tenant emailed the AG on January 07, 2019 to accept the terms and sign the agreement. However, AG rescinded the offer of the new agreement on January 09, 2019.

I find that the cumulative actions of the landlord and AG, since July 2018 onward, depict a pattern of communication to the tenant whereby they expressly state that they wish to extend the tenancy beyond the December 31, 2018 end of tenancy date on the mutual agreement to end tenancy form. AG further reinforces the communication provided to the tenant since July 2018 onward by confirming, in January 2019, after the December 31, 2018 date had passed, that he wished to extend the tenancy and sign a new tenancy agreement.

Based on the foregoing, I find that the landlord and AG, both expressly and tacitly, conveyed to the tenant that they chose to waive their interest in enforcing the provisions of the mutual agreement to end tenancy, by agreeing, as early as July 2018, to extend the tenancy with the tenants and then subsequently maintaining and reinforcing that intention up to January 06, 2019, by presenting a new tenancy agreement, signed by AG, that would extend the tenancy for another term for the period of January 01, 2019 to December 31, 2019.

In effect, pursuant to the principle of waiver outlined in Policy Guideline 11, the landlord and AG waived their intention to uphold the mutual agreement to end tenancy dated May 03, 2018, and waived their subsequent ability to enforce the provisions of the mutual agreement. By way of their voluntary decision to extend the tenancy, the landlord and AG reinstated the tenancy and subsequently intentionally relinquished their ability to later reinforce the provisions of the mutual agreement to end tenancy after the December 31, 2018 date had passed, and after the tenant acted on the belief that the landlord and AG had set aside the agreement that the tenancy would end pursuant to the mutual agreement.

Therefore, I find that the landlord and AG have reinstated the tenancy, and it does not remain open to the landlord to pursue an Order of Possession on the basis of the mutual agreement to end tenancy, dated May 03, 2018.

I further find that the following principle, as outlined in Policy Guideline 11 applies to the tenant:

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.**

[my emphasis added]

The tenant provided testimony, which was also supported by AG's written submission, that the tenant ceased his efforts to find new accommodations, based on the understanding that the landlord and AG had agreed to extend the tenancy beyond December 31, 2018 and that he would not have to vacate the rental unit. In effect, the tenant relied on the communication provided by the landlord and AG to determine his living arrangement, and for AG to now enforce the mutual agreement places the tenant at a disadvantage.

Based on the foregoing, I dismiss the landlord's application for an Order of Possession.

I find that the tenancy will remain in effect and has reverted to the month-to-month basis that the tenancy initially reverted to after the most recent fixed-term tenancy ended on June 30, 2018. I find that the tenancy will continue in this manner until such time that the tenancy ends pursuant to the Act or the parties agree to amend the terms of the tenancy or enter into a new tenancy agreement.

The tenant had provided payment to the landlord, in the form of a cheque in the amount of \$1,650.00, for payment of rent owed for January 2019, which the landlord chose not to accept or process as rent for the month of January 2019.

The tenant testified, in response to the landlord's request to recover unpaid rent, that he had already provided payment of rent for the month of January 2019 and is prepared to provide the rent owed for February 2019, but that the landlord refuses to accept it. As it has been determined that the tenancy will remain in effect, I permit the tenant a period of five days after receipt of this decision to provide payment of the balance of unpaid rent owed for January 2019 and February 2019, and that payment within these timelines will not constitute a late payment of rent.

The landlord has requested a monetary order in the amount of \$3,000.00, which AG testified is the balance of unpaid rent owed for the months of January 2019 and February 2019. As rent for January 2019 and February 2019 remains unpaid, I grant the landlord a monetary order in the

amount of \$3,000.00, which the landlord may choose to serve to the tenant if the tenant does not pay the rent owed for January 2019 and February 2019 in adherence with the timelines set out above.

Conclusion

As the landlord was not successful in the entirety of his application, I find that the landlord is not entitled to recover the cost of the filing fee.

I dismiss the landlord's application for an Order of Possession, based on the mutual agreement to end tenancy, dated May 03, 2018, without leave to reapply. The tenancy will continue on a month-to-month basis until such time that the tenancy ends pursuant to the Act.

I issue a monetary order in the landlord's favour in the amount of \$3,000.00 against the tenant for the balance of unpaid rent due for the months of January 2019 and February 2019. The tenant must be served with this Order if the tenant does not pay the rent owed for the months of January 2019 and February 2019 in adherence with the timelines provided in this decision. Should the tenant fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

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: February 15, 2019

Residential Tenancy Branch