



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **FFL OPR-DR**

This first hearing in this matter took place on April 9, 2019. A Review Consideration Decision dated March 15, 2019 directed a new hearing.

Introduction

This hearing dealt with an application by the landlord under the *Residential Tenancy Act* (the *Act*) for the following:

- An order for possession under a 10-Day Notice to End Tenancy for Unpaid Rent (Ten-Day Notice) pursuant to sections 46 and 55;
- A monetary order for unpaid rent and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement pursuant to section 67 of the *Act*;
- Authorization to recover the filing fee for this application pursuant to section 72.

The landlord's agent ("the landlord") appeared at the hearing and was given the opportunity to make submissions as well as present affirmed testimony and written evidence.

The tenants did not attend the hearing. I kept the teleconference line open from the scheduled time for the hearing for an additional thirty minutes to allow the tenants the opportunity to call. The teleconference system indicated only the landlord and I had called into the hearing. I confirmed the correct call-in number and participant code for the tenants were provided.

The landlord provided affirmed testimony that the landlord served the tenants with the original Notice of Hearing and evidence as well as the Notice of Hearing and evidence

for today's hearing by registered mail sent on June 3, 2019 and deemed received by the tenants under section 90 of the *Act* five days later, that is, on June 8, 2019

The landlord provided the Canada Post Tracking Number in support of service to which I refer on the cover page. The landlord provided documentary and oral evidence that the documents were sent to the tenants at their address of residence. Pursuant to sections 89 and 90, I find the landlord served the tenants with the documents on June 8, 2019.

Amendment to Claim

The landlord requested an amendment to the landlord's application to increase the monetary order requested to **\$4,350.00** to include additional outstanding rent for the months of May, June and July 2019 and to account for payments made by the tenants which were accepted by the landlord. The landlord's application, submitted on March 27, 2019, pre-dated the due date for rent for April, May, June and July 2019 and as such the landlord's claim does not reflect outstanding rent for these months. The landlord also requested an amendment to the landlord's application to grant authorization to apply the security deposit of **\$725.00** to the landlord's monetary award pursuant to section 72.

The landlord clarified the landlord's monetary claim for outstanding rent, reimbursement of the filing fee, and application of the security deposit to the award as follows:

ITEM	AMOUNT
Rent March 2019	\$1,450.00
Received March 22, 2019	(\$1,450.00)
Rent April 2019	\$1,450.00
Received April 8, 2019	(\$1,450.00)
Rent May 2019	\$1,450.00
Rent June 2019	\$1,450.00
Rent July 2019	\$1,450.00
Outstanding rent	\$4,350.00

ITEM	AMOUNT
Outstanding rent (set out above)	\$3,725.00.
Reimbursement of the filing fee	\$100.00
(Less security deposit)	(\$725.00)
Total Monetary Award Requested	\$3,100.00

Section 4.2 of the Rules of Procedure provide that a landlord's monetary claim may be amended at the hearing in circumstances that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made.

I find the tenants could reasonably anticipate the landlord's claim would be amended to include outstanding rent for the months of April, May, June and July 2019, to consider payments on outstanding rent made by the tenants, and to allow for the application of the security deposit to the monetary award. The amendments would not be prejudicial to the respondents.

Pursuant to my authority under section 64(3)(c) of the *Act*, I amended the landlord's application to increase the landlord's overall claim for outstanding rent to consider rent due April, May, June and July 2019, payments made by the tenants and to seek authorization to apply the security deposit to the monetary award.

The total monetary order requested by the landlord is amended to **\$3,100.00**.

Preliminary Issue: Service of the Ten-Day Notice

The Review Consideration Decision stated as follows:

I note the original Arbitrator found that the Tenant E.E. was "conclusively presumed under sections 46(5) and 53(2) of the Act to have accepted that the tenancy ended on the corrected effective date of the 10 Day Notice, March 19, 2019." The original Arbitrator came to this conclusion based on the evidence before her that the tenant was deemed to have received the landlord's 10 Day

Notice to End Tenancy for Unpaid Rent on March 9, 2019 and failed to file an application to dispute the notice.

However, the tenant disputes the deeming provisions of section 90 of the Act. The tenant argues that they were not living at the rental unit since the end of February 2019 and therefore they did not receive the landlord's 10 Day Notice in writing, which in turn resulted in their failure to file an application to dispute the 10 Day Notice.

I note that in the landlord's Direct Request application the landlord failed to submit into evidence a Canada Post tracking report or the completed registered mail receipt showing the address of service used by the landlord to send the tenant the 10 Day Notice.

I refer to Residential Tenancy Policy Guideline #12. Service Provisions which explains the requirement for proof of service by registered mail, in part, as follows:

*Proof of service by Registered Mail should include the original Canada Post Registered Mail receipt containing the date of service, **the address of service**, and that the address of service was the person's residence at the time of service, or the landlord's place of conducting business as a landlord at the time of service as **well as a copy of the printed tracking report.***

[My emphasis added]

I find that the landlord provided incomplete documentary evidence for proof of service to the original Arbitrator, as required by Policy Guideline #12, and when considered with the tenant's submissions in this Application for Review Consideration, I find that this raises sufficient questions as to whether the landlord sent the 10 Day Notice to the correct address, and whether the tenants may have grounds to rebut the section 90 deeming provisions based on their allegations that they were not residing at the rental unit for the period of time when the 10 Day Notice was served.

Background and Evidence

The landlord provided testimony and complete documentary evidence for proof of service of the Ten-Day Notice upon the tenants in the following documents and testimony submitted as evidence at this hearing:

- Proof of Service of Notice to End Tenancy, witnessed, dated and signed, stating that the landlord served the tenants with the Ten-Day Notice by registered mail sent to them at the tenants' residence at the time of service (address provided) on March 3, 2019, thereby effecting service five days later on March 9, 2019, pursuant to sections 88 and 90 of the Act;
- Copy of dated *Canada Post Registered Mail* receipt with Tracking Number appearing on the first page of the decision;
- Testimony of landlord that the tenants continue to reside at the address of service, that they acknowledged receipt of the Ten-Day Notice in writing to the landlord, and that the parties had correspondence regarding the expected departure of the tenants, copies of the correspondence being submitted as evidence.

Conclusion

The landlord submitted substantial documentary and verbal evidence which is uncontradicted. I find the landlords have met the burden of proof on a balance of probabilities that the landlord served the tenants with the Ten-Day Notice as claimed. I accept the landlord's evidence as credible, reliable and unrefuted.

I find the landlord has established that the landlord properly served the tenants with the Ten-Day Notice on March 9, 2019 and again on June 8, 2019 for this hearing (service referenced above).

I therefore find the tenants are conclusively presumed under sections 46(5) and 53(2) of the Act to have accepted that the tenancy ended on the corrected effective date of the Ten-Day Notice on, March 19, 2019.

Issue(s) to be Decided

Is the landlord entitled to the following?

- An order for possession under a 10-Day Notice to End Tenancy for Unpaid Rent (Ten-Day Notice) pursuant to sections 46 and 55;
- A monetary order for unpaid rent and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement pursuant to section 67 of the *Act*;
- Authorization to apply the security deposit to the monetary award pursuant to section 72;
- Authorization to recover the filing fee for this application pursuant to section 72.

Background and Evidence

The tenants began renting a unit from the landlord on November 15, 2018 for monthly rent of \$1,450.00 due on the first day of each month. The landlord submitted a copy of the tenancy agreement. At the beginning of the tenancy, the tenants provided a security deposit of \$725.00 which the landlord holds.

The landlord submitted a copy of the Ten-Day Notice dated March 3, 2019, for \$1,450.00 in unpaid rent. The Ten-Day Notice provides that the tenants had five days from the date of service to pay the rent in full or apply for Dispute Resolution or the tenancy would end on the stated effective vacancy date of March 18, 2019 (corrected to March 19, 2019).

I reviewed the issue of service of the Ten-Day Notice. As stated above, I have found that the landlord served the Ten-Day Notice on the tenants on March 9, 2019 and again on June 8, 2019.

The landlord testified the tenants did not pay the outstanding rent within five days of service.

The landlord testified that the rent from March to July 2019 and amounts paid by the tenant leave a balance owing of **\$4,350.00** for outstanding rent. This amount is calculated as follows:

ITEM	AMOUNT
Rent March 2019	\$1,450.00

Received March 22, 2019	(\$1,450.00)
Rent April 2019	\$1,450.00
Received April 8, 2019	(\$1,450.00)
Rent May 2019	\$1,450.00
Rent June 2019	\$1,450.00
Rent July 2019	\$1,450.00
Outstanding rent	\$4,350.00

The landlord submitted a copy of the receipts for the above two payments dated March 22, 2019 and April 8, 2019. The landlord also submitted a Monetary Worksheet.

The receipts do not state that the payments are accepted for “use and occupancy only”. The landlord testified that the landlord’s express intention was to accept the payments for “use and occupancy only”. However, the landlord explained the absence of the phrase on the receipts because of his lack of knowledge of the use of the term. The landlord testified that he was unaware of the practice of writing “use and occupancy only” on receipts when tenants made payment on rent outside the 5-day period after service of the Ten-Day Notice, the landlord sought to mitigate losses, and the landlord intended efforts to obtain an order of possession.

The landlord testified that it was always the landlord’s intention to proceed to obtain an order of possession; the landlord did not intend to reinstate the tenancy or cancel the Ten-Day Notice when the tenants made the payments. The landlord did not accept the amounts paid by the tenants in return for cancelling the Ten-Day Notice or for continuing the tenancy. The landlord testified he made this clear to the tenants when he accepted the payments; he also submitted that his actions in proceeding without delay to obtain an order of possession are consistent with the acceptance of the payments for use and occupancy only.

The landlord testified the tenant has made no payments for the previous three months and the amount of rent outstanding is **\$4,350.00**. The landlord requested authorization to apply the security deposit to the monetary award and to obtain reimbursement of the filing fee for a monetary order requested of **\$3,100.00**.

Analysis

I find the form and content of the Ten-Day Notice complies with section 52 of the *Act*.

I find the tenants were served with the Ten-Day Notice in accordance with sections 88 and 90 of the *Act* on March 9, 2019. I find the tenants did not dispute the Ten-Day Notice or pay the rent in full within five days.

Payments by tenants

The landlord accepted payment by the tenants on March 22 and April 8, 2019 in the amount of \$1,450.00 on each occasion. This occurred after the Notice was given and after the effective date. The landlord issued receipts, copies of which were submitted as evidence. The receipts do not state the amounts were accepted for “use and occupancy only”. I therefore must consider whether there was an express or implied waiver of the Ten-Day Notice and a reinstatement of the tenancy.

This issue is considered in *Residential Tenancy Act Guideline 11- Amendment and Withdrawal of Notices* which states in part as follows [emphasis 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 testified that his intention was to accept the payments as mitigation of his losses and proceed with eviction. The landlord explained that this was his first time encountering such a situation and he was not familiar with the phrase “use and occupancy only”. He testified he did not make any promises to the tenants that he would stop eviction proceedings.

In support of his assertion that he neither expressly or impliedly relinquished his right to possession, the landlord submitted a copy of an email dated March 14, 2019 from the landlord to the tenant, stating, “This is just a reminder to vacate our property by March 18, 2019 and to submit your rent payment until that day as outlined in the eviction notice.” The landlord also testified he brought an application for a Direct Request on March 27, 2019, five days after the tenants made the first payment.

I accept the evidence of the landlord that the receipts for payments made by the tenants inadvertently omit the phrase “for use and occupancy only”. I find the landlord did not expressly or impliedly relinquish the right to possession of the unit. I find the landlord’s testimony is supported by the fact that shortly after the landlord received the rent payment on March 22, 2019, the landlord brought a Direct Request application for an order of possession. I find the landlord’s diligent and concerted efforts to obtain possession of the unit to be factors in support of my finding that the issuance of the receipts without the phrase “use and occupancy only” did not cancel the Ten-Day Notice, relinquish the landlord’s rights or reinstate the tenancy. I find the failure of the tenants to attend the hearing and to explain any different interpretation to be a strong factor in support of the landlord’s version of events, which I find are reasonable and believable as well as uncontradicted. I find there is no evidence that the tenants relied upon the acceptance of the payments to assume the tenancy would continue; I accept

the landlord's evidence that the tenants have not paid rent for the previous three months. I find there is no evidence that the tenants were induced by the landlord's acceptance of the payments or that they acted as though the tenancy was resumed.

In summary, I find the tenants did not pay the overdue rent or dispute the Ten-Day Notice within the five-day period following service. I find the landlord's acceptance of rent payments is not a waiver or cancellation of the Ten-Day Notice.

Therefore, pursuant to section 46(5), the tenants are conclusively presumed to have accepted the tenancy ends on the effective date of the notice requiring the tenant to vacate the rental unit by that date.

As the tenants continue to occupy the unit, I find the landlord is entitled to an order of possession under section 46, effective two days after service.

I therefore grant the landlord an order of possession effective two days after service.

Based on the uncontradicted evidence of the landlord, I grant the landlord a monetary award pursuant to section 67 for outstanding rent as requested.

Further to section 72, I award the landlord authority to apply the security deposit to the monetary award.

As the landlord was successful in this application, I award the landlord the amount of \$100.00 for reimbursement of the filing fee.

In summary, I grant the landlord a monetary order **\$3,100.00** calculated as follows:

ITEM	AMOUNT
Outstanding rent	\$3,725.00.
Reimbursement of the filing fee	\$100.00
(Less security deposit)	(\$725.00)
Total Monetary Order	\$3,100.00

Conclusion

I grant the landlord a monetary order in the amount of **\$3,100.00**. This order must be served on the tenants. If the tenants fail to comply with this order, the landlord may file the order in the Provincial Court (Small Claims) to be enforced as an order of that Court.

I grant the landlord an order of possession **effective two (2) days** after service on the tenant. This order must be served on the tenant. If the tenant fails to comply with this order, the landlord may file the order with the Supreme Court of British Columbia to be 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: July 3, 2019

Residential Tenancy Branch