



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 634245 B.C. Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, MNR, FF, MNDC, RP, CNR, CNR

Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* (the *Act*). The landlord applied for:

- an order of possession for unpaid rent pursuant to section 55;
- a monetary order for unpaid rent pursuant to section 67;
- authorization to recover its filing fee for this application from the tenant pursuant to section 72.

The tenant applied for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) pursuant to section 46;
- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- an order to the landlord to make repairs to the rental unit pursuant to section 32.

Both parties attended the hearing via conference call. At the outset, both parties confirmed that the tenant had incorrectly named the landlord, the named landlord, N.C. was in fact an agent of the landlord, a numbered company as confirmed in the signed tenancy agreement. Both parties consented to the tenant's application renaming the landlord as the numbered company.

Both parties confirmed the tenant served the landlord with the notice of hearing package and the submitted documentary evidence on August 6, 2019. Both parties confirmed the tenant served the 1st amendment to the application for dispute to include a request to cancel a 10 Day Notice dated August 7, 2019 in person on August 8, 2019. Both parties confirmed the tenant served the 2nd amendment to the application for dispute to

include a request to cancel a 10 Day Notice dated September 3, 2019 in person on September 4, 2019 in person. Both parties confirmed the tenant served the 3rd amendment to the application for dispute to include a request to cancel a 10 Day Notice dated October 3, 2019 in person on October 4, 2019 in person.

Both parties confirmed the landlord served the tenant with the notice of hearing package and the submitted documentary evidence via Canada Post Registered Mail on August 28, 2019.

Neither party raised any service issues. The landlord stated that he wished to still proceed on all three 10 Day Notice(s) to end the tenancy.

I accept the undisputed evidence of both parties and find that both parties have been sufficiently served and are deemed served as per section 90 of the Act.

Preliminary Issue(s)

The tenant's initial application was clarified. Extensive discussions over a 21 minute period failed to have the tenant identify the details for her request for repairs and a monetary claim of \$7,325.00. The tenant's application refers to an attachment which the tenant stated was not provided. As such, this portion of the tenant's claim is dismissed with leave to reapply. Leave to reapply is not an extension of any applicable limitation period.

The hearing shall proceed with the landlord's request for an order of possession and a monetary claim for unpaid rent and recovery of the filing fee; and the tenant's request to cancel a 10 Day Notice(s) (X3).

At 11:42 am, the tenant was disconnected while the support worker was speaking. The hearing was suspended for 4 minutes to wait for the tenant to reconnect. No further calls in to the conference call hearing was made by the tenant. The hearing resumed in the absence of the tenant. The hearing was concluded at 11:57am with no re-connection by the tenant or her assistant.

Issue(s) to be Decided

Is the landlord entitled to an order of possession for unpaid rent?

Is the landlord entitled to a monetary order for unpaid rent and recovery of the filing fee?

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 both the tenant's claim and the landlord's cross claim and my findings around each are set out below.

This tenancy began on November 1, 2018 on a fixed term tenancy ending on April 1, 2019 and then thereafter on a month-to-month basis as per the submitted copy of the signed tenancy agreement dated October 31, 2018. The monthly rent is \$650.00 payable on the 1st day of each month. A security deposit of \$325.00 was paid on October 15, 2018.

The landlord seeks an order of possession and monetary order for unpaid rent of \$225.00 and recovery of the \$100.00 filing fee.

The landlord provided undisputed testimony that the tenant was served with the 10 Day Notice dated August 7, 2019 in person with a witness on August 7, 2019. The 10 Day Notice for Unpaid Rent states that the tenant failed to pay rent of \$225.00 that was due on August 1, 2019. The stated effective end of tenancy date was listed as August 16, 2019. The landlord stated that rent was paid on September 27, 2019 of two payment of \$650.00 each. The landlord stated that no notice that the payments were being accepted for use and occupancy were given to the tenant.

The landlord provided undisputed testimony that a 10 Day Notice dated September 3, 2019 was served in person to the tenant on September 3, 2019. The 10 Day Notice for Unpaid Rent states that the tenant failed to pay rent of \$900.00 that was due on September 1, 2019. As noted above, the landlord accepted rent payment on September 27, 2019 of two payment(s) of \$650.00 each on the same day. The landlord stated that no notice that the payments were being accepted for use and occupancy were given to the tenant, but argued that a subsequent 10 Day Notice was issued for Unpaid Rent.

The landlord was unable to provide any details of the 10 Day Notice dated October 3, 2019.

Analysis

Pursuant to section 46 of the Act, a landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end tenancy effective on a date that is not earlier than ten days after the date the tenant receives the notice.

The landlord provided undisputed testimony that the 10 Day Notice dated August 7, 2019 was served upon the tenant in person with a witness on September 3, 2019.

Residential Tenancy Branch, Policy Guideline #11, Amendment and Withdrawal of Notices states in part,

The Residential Tenancy Act and the Manufactured Home Park Tenancy Act (the Legislation) set out the requirements¹ for giving a Notice to End Tenancy. The Legislation² allows an arbitrator, on application, to amend a Notice to End Tenancy where the person receiving the notice knew, or should have known, the information that was omitted from the notice, and it is reasonable in the circumstances.

In determining if a person "should have known" particular facts, an arbitrator will consider whether a reasonable person would have known these facts in the same circumstances. In determining whether it is "reasonable in the circumstances" an arbitrator will look at all of the facts and consider, in particular, if one party would be unfairly prejudiced by amending the notice.

A landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy. With the consent of the party to whom it is given, but only with his or her consent, a Notice to End Tenancy may be withdrawn or abandoned prior to its effective date. 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.

Also, as a general rule it may be stated that the giving of a second Notice to End Tenancy does not operate as a waiver of a Notice already given.

In order to be effective, a notice ending a tenancy must be clear, unambiguous and unconditional. A Notice to End Tenancy given by the landlord must also be in the form approved by the Director of the Residential Tenancy Office.

In this case, the landlord accepted payment of rent for both August and September 2019 on September 27, 2019 of \$1,300.00 in two payments of \$650.00 on the same day. The landlord provided undisputed testimony that at no time was notice given to the tenant upon receipt of these payments that rent would be accepted for “use and occupancy only” and as such, I find that the landlord has reinstated the tenancy as this was done beyond the effective end of tenancy date of each notice. On this basis, the 10 Day Notice(s) dated August 7, 2019 and September 3, 2019 are set aside and cancelled.

On the 10 Day Notice dated October 2, 2019 disputed by the tenant, the landlord was unable to provide any details of this notice. A review of the 10 Day Notice submitted by the tenant shows that it was dated October 2, 2019 and stated that the tenant failed to pay rent of \$275.00 that was due on October 1, 2019 and provides for an effective end of tenancy date of October 11, 2019. In the absence of any submissions from the landlord on this notice, I find that the tenant has been successful in her application to cancel it. The 10 Day Notice dated October 2, 2019 is set aside and cancelled.

Conclusion

The landlord’s application is dismissed. The tenant’s application to cancel the 10 Day Notice(s) (X3) is granted. The tenancy shall continue.

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 23, 2019

Residential Tenancy Branch