



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPR, MNR

Introduction

This application was adjourned from the direct request process to a participatory hearing that dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the Act) for:

- an order of possession for unpaid rent pursuant to section 55;
- a monetary order for unpaid rent pursuant to section 67.

The landlord's agent, M.A. attended the hearing on behalf of the landlord via conference call. The tenant did not attend or submit any documentary evidence. The landlord's agent, the landlord stated that the tenant was served with the notice of hearing package via Canada Post Registered Mail on October 12, 2019. The landlord stated that the submitted documentary evidence was served to the tenant via Canada Post Registered Mail, but was unable to provide any details on the date or any proof of service.

I accept the undisputed testimony of the landlord and find that the tenant was properly served with the notice of hearing package via Canada Post Registered Mail on October 12, 2019. I also find that the tenant was served with the submitted documentary evidence via Canada Post Registered Mail. Although the tenant failed to attend or submit any documentary evidence, I find that the tenant is deemed sufficiently served as per section 90 of the Act.

At the outset, the landlord stated that she no longer seeks a monetary claim as all rental arrears were paid by the tenant on October 30, 2019 for \$1,700.00. The landlord also stated that the tenant had also paid for November 2019 rent. As such, no further action is required for the monetary claim.

Issue(s) to be Decided

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

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 applicant's claim and my findings are set out below.

This tenancy began on July 25, 2018 and the monthly rent was \$850.00 as per the submitted copy of the signed tenancy agreement dated July 23, 2018.

The landlord claims that the tenant was served with the 10 Day Notice for Unpaid Rent dated August 12, 2019 by posting it to the rental unit door on August 12, 2019. The 10 Day Notice states that the tenant failed to pay rent of \$850.00 and a \$25.00 late fee that was due on August 1, 2019 and provides for an effective end of tenancy date of August 25, 2019.

The landlord stated that although all rental arrears have been paid, the landlord still seeks an end to the tenancy and an order of possession.

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.

I accept the undisputed evidence of the landlord and find that the tenant was served with the 10 Day Notice dated August 12, 2019 by posting it to the rental unit door on August 12, 2019.

However, the landlord stated that on October 30, 2019 all rental arrears totalling, \$1,700.00 was paid. The landlord also stated that November 2019 rent was also paid thereafter.

Policy Guideline #11, Amendment and Withdrawal of Notices
Use and Occupancy Only

Notice to End Tenancy

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 this case, the landlord provided undisputed testimony that rent was accepted on October 30, 2019 for the outstanding \$1,700.00 which was beyond the effective end of tenancy date of August 25, 2019. The landlord provided no evidence that notice was given to the tenant that the monies would be accepted for "use and occupancy only" and would not reinstate the tenancy. A review of the evidence submitted for the direct request process and the participatory hearing failed to reveal any notice's of the

landlord's intent to accept the rent for "use and occupancy only". On this basis, I find that the landlord's request for an order of possession is denied.

Conclusion

The landlord's application for an order of possession is dismissed.

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 07, 2019

Residential Tenancy Branch