



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding NORTH KMLOOPS BUILDING
SOCIETY and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPRM-DR

Introduction

This hearing dealt with the Landlord's adjourned Direct Request Application filed under the Residential Tenancy Act, (the "Act"), for an order of possession, and a monetary order for unpaid rent. The matter was set for a conference call.

The Landlord attended the hearing. As the Tenant did not attend the hearing, service of the Notice of Dispute Resolution Hearing documentation was considered. The Residential Tenancy Branch Rules of Procedure states that the respondent must be served with a copy of the Notice of Hearing documents. The Landlord testified that the Notice of Hearing documents were posted to the Tenant's door, on January 30, 2020.

Special rules for certain documents

89 (1) An application for dispute resolution or a decision of the director to proceed with a review under Division 2 of Part 5, when required to be given to one party by another, must be given in one of the following ways:

- (a) by leaving a copy with the person;
- (b) if the person is a landlord, by leaving a copy with an agent of the landlord;
- (c) by sending a copy by registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
- (d) if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant;

(e) as ordered by the director under section 71 (1) [*director's orders: delivery and service of documents*].

(2) An application by a landlord under section 55 [*order of possession for the landlord*], 56 [*application for order ending tenancy early*] or 56.1 [*order of possession: tenancy frustrated*] must be given to the tenant in one of the following ways:

- (a) by leaving a copy with the tenant;
- (b) by sending a copy by registered mail to the address at which the tenant resides;
- (c) by leaving a copy at the tenant's residence with an adult who apparently resides with the tenant;
- (d) by attaching a copy to a door or other conspicuous place at the address at which the tenant resides;
- (e) as ordered by the director under section 71 (1) [*director's orders: delivery and service of documents*].

Pursuant to section 89(1) of the *Act*, I find that the service requirement was not met in regard to the Landlord's monetary claim, and therefore dismiss the Landlord's monetary claim with leave to reapply.

I find that the Tenant had been duly served with the Notice of Hearing documents in accordance with the *Act* in regard to the Landlord's request for an order of possession and the return of the filing fee. I find that the service to the door meets the requirements set out in section 89(2) and is sufficient for me to proceed on these matters.

The Landlord was affirmed to be truthful in their testimony. The Landlord was provided with the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue to be Decided

- Is the Landlord entitled to an order of possession?

Background and Evidence

The Landlord testified that the tenancy began on August 1, 2017, as a month to month tenancy. The tenancy agreement shows that rent in the amount of \$677.00 is to be paid by the first day of each month and that the Tenant had paid a \$335.00 security deposit at the outset of this tenancy. The Landlord submitted a copy of the tenancy agreement into documentary evidence.

The Landlord testified that they served the Tenant with the Notice to End Tenancy by personally serving it to the Tenant on December 28, 2019, with an effective date of January 7, 2020. The Notice informed the Tenant of the right to dispute the Notice or pay the outstanding rent within five days after receiving it. The Notice also informed the Tenants that if an application to dispute the Notice or payment of the outstanding rent in full is not made within five days, the Tenants are presumed to have accepted the Notice and must move out of the rental unit on the date set out on page one of the Notice. The Landlord submitted a copy of the Notice into documentary evidence.

The Landlord testified that the Tenant has not paid the full outstanding rent, as indicated on the Notice, within five days as required, and that they are requesting an Order of Possession to enforce this Notice.

The Landlord testified that the Tenant had paid the full rent for January, February and March 2020.

Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows:

I accept the Landlord's undisputed testimony that they issued the Notice to End Tenancy on December 28, 2019. Section 46 of the Act requires that upon receipt of a Notice to End Tenancy for Non-payment of Rent, a tenant must, within five days, either pay the amount of the arrears indicated on the Notice or dispute the notice by filing an Application for Dispute Resolution with the Residential Tenancy Branch. If the tenant does not do either of these things, the tenant is conclusively presumed to have accepted that the tenancy ended on the effective date of the Notice under section 46(5).

Landlord's notice: non-payment of rent

46 (1) A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.

(5) If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant

(a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and

(b) must vacate the rental unit to which the notice relates by that date.

I accept the undisputed testimony of the Landlord that the Tenant has not paid the outstanding rent for December 2019 or disputed the Notice within five days of receiving the Notice. Therefore, I find that the Tenant has not paid the rent or disputed the Notice within the legislated timeline and are conclusively presumed to have accepted the tenancy ended on the effective date of the Notice.

However, I also accept the Landlord's testimony that they accepted full rent payments from the Tenant for January, February and March 2020.

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.”

I have reviewed the evidence submitted by the Landlord, and I find that there is no evidence before to show that the Landlord had informed the Tenant that the rent payments were accepted by the Landlord solely for “use and occupancy.”

As the landlord has not provided evidence that the Tenant was informed that payments made were being accepted without reinstating the tenancy, I find that the Landlord’s conduct in accepting the rent payment for January, February and March 2020, without issuing receipt indicating “for use and occupancy only,” created ambiguity about the Landlord’s intentions regarding this tenancy. Therefore, I find on a balance of probabilities that this ambiguity in the Landlord’s conduct amounts to a waiver of the Landlord’s right to seek an Order of Possession.

Therefore, as the Landlord has waived their rights to pursue an Order of Possession for the Notice issued on December 28, 2019. I find that the Landlord reinstated this tenancy by accepting full rent payments from the tenant for January, February and March 2020, after the effective date of the 10 Day Notice without specifying that the payments were accepted for use and occupancy only. Consequently, I dismiss the Landlord application for an order of possession.

Conclusion

The Landlord's application for an order of possession is dismissed, without leave to reapply.

The Landlord's application for a monetary order for unpaid rent is dismissed, with leave to reapply.

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: March 27, 2020

Residential Tenancy Branch