



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPT

Introduction

This hearing convened as a result of a Tenant's Application for Dispute Resolution, filed on February 20, 2020, wherein she sought an Order of Possession of the rental unit.

The hearing of the Tenant's Application was scheduled for teleconference at 9:30 a.m. on March 17, 2020. Only the Tenant called into the hearing. She gave affirmed testimony and was provided the opportunity to present her evidence orally and in written and documentary form, and to make submissions to me.

The Landlords did not call into this hearing, although I left the teleconference hearing connection open until 10:04 a.m. Additionally, I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the Tenant and I were the only ones who had called into this teleconference.

As the Landlords did not call in, I considered service of the Tenant's hearing package. The Tenant testified that she served the Landlords on February 29, 2020 by posting the Notice of Hearing, Application and Supporting Evidence to the door of the address provided by the Landlord on the Residential Tenancy Agreement as the Landlords' Address for Service. The Tenant also provided a signed Proof of Service confirming that this service was witnessed by a third party.

Pursuant to the above, and section 90 of the *Residential Tenancy Act*, documents served this way are deemed served three days later; accordingly, I find the Landlords were duly served as of March 3, 2020 and I proceeded with the hearing in their absence.

I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Rules of Procedure*. However, not all details of the Tenant's submissions and or arguments are reproduced here; further, only the evidence specifically referenced by the Tenant and relevant to the issues and findings in this matter are described in this Decision.

Issue to be Decided

Is the Tenant entitled to an Order of Possession?

Background and Evidence

The Tenant confirmed she is no longer in the rental unit having been removed by a B.C. Supreme Court Bailiff on March 6, 2020.

The Landlords obtained an Order of Possession on December 23, 2019. A copy of the file number is included on the unpublished cover page of this my Decision. The Tenant denies being served the 1 Month Notice to End Tenancy and as such applied for Review Consideration of the Decision pursuant to section 79 of the *Residential Tenancy Act*. Her request was denied, and the Order of Possession was confirmed.

The Landlords obtained a Writ of Possession in the B.C. Supreme Court on February 6, 2020.

The Tenant testified that she paid the January 2020 rent on December 22, 2019, the day before the original hearing before the Residential Tenancy Branch. The Tenant provided confirming of this payment having been received by the Landlord.

The Tenant then paid her February 2020 rent. Again, the Tenant provided confirmation of this payment having been received by the Landlords. The Tenant provided documentary evidence to support this claim.

The Tenant submitted that by accepting the rent while she was still in occupation of the rental unit the Landlords reinstated her tenancy such that she should be entitled to an Order of Possession.

Analysis

The Tenant seeks an Order of Possession pursuant to section 54 of the *Residential Tenancy Act*.

The Tenant disputes being served the 1 Month Notice to End Tenancy which ultimately resulted in the end of her tenancy. She acknowledged that her tenancy was ended by the December 23, 2019 Decision, which was confirmed by the Review Consideration Decision of February 6, 2020. She further acknowledged that I do not have jurisdiction to reconsider the original Decision or Review Consideration Decision and that her remedy is to seek Judicial Review of those Decisions in the B.C. Supreme Court.

The Tenant argues that by accepting her January 2020 rent on December 22, 2019 and her February 2020 rent, after the effective date of the Notice, and while she was still in occupation of the rental unit, the Landlords created a new tenancy such that she should be entitled to an Order of Possession.

Residential Tenancy Branch Policy Guideline 11 provides in part as follows:

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.

In the case before me the Tenant paid her rent by way of electronic transfer. There was no evidence before me to confirm whether or not this was the regular means of rent payment.

When a landlord receives a cash or cheque payment for rent after the effective date of a notice to end tenancy and issues a written receipt, it may be more readily apparent as to the landlord's intentions with respect to the receipt of the payments as a landlord who does not wish to reinstate a tenancy will write "for use and occupancy only" on a rent receipt.

This is not as straightforward when payment is made by electronic transfer. Depending on the landlords' banking preferences, funds sent to a landlord may be automatically deposited into the landlords' bank account upon receipt of an electronic transfer, or further steps may be required: such as the landlord may need to answer a security question created by the tenant and direct the funds to a particular account. Further, upon receipt of such electronic transfers a landlord may, or may not, have the opportunity to send a message to the sender (in this case the tenant).

In the case before me I was provided documentary evidence which confirmed the funds sent by the Tenant for her January 2020 and February 2020 rent payments were "accepted" by the Landlords. The use of the word "accepted" is as noted on the information provided to the Tenant from her bank; this word does not denote the Landlords' acceptance of these funds as rent payment, or conclusively determine that the Landlords have reinstated the tenancy.

As *Policy Guideline 11* provides, the conduct of the parties is relevant. In this case, the Landlords obtained an Order of Possession on December 23, 2019. Following this, the Landlords obtained a Writ of Possession in the B.C. Supreme Court on February 6, 2020. On March 6, 2020, a Court Bailiff, acting on the Landlords' instructions, physically removed the Tenant and her belongings from the rental unit.

The Tenant provided in evidence communication she had with the Landlords' representatives; this communication confirms the Landlords sought to regain possession of the rental units. While the Landlords offered the Tenant a financial

incentive to move, namely \$500.00 towards her moving costs, at no time did the Landlords indicate they wished to continue this tenancy.

I find, on the basis of the evidence before me, that the Tenant has failed to prove the Landlords expressly, or impliedly, consented to withdraw the Notice to End Tenancy or otherwise create a new tenancy.

Conclusion

The Tenant'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: March 18, 2020

Residential Tenancy Branch