



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL, OPC, FFL

Introduction

This hearing was convened by way of conference call. The Landlord filed an Application for Dispute Resolution on April 22, 2020 (the “Application”). The Landlord applied as follows:

- For an Order of Possession based on a One Month Notice to End Tenancy for Cause dated November 30, 2019 (the “Notice”);
- To recover unpaid rent; and
- For reimbursement for the filing fee.

The Landlord appeared at the hearing with H.K. to assist given a language barrier. The Tenant appeared at the hearing for the Tenants. I explained the hearing process to the parties. The parties provided affirmed testimony.

H.K. confirmed the Landlord is no longer seeking reimbursement for the filing fee. I consider this request to be withdrawn.

The Landlord submitted evidence prior to the hearing. The Tenants did not. I addressed service of the hearing package and Landlord’s evidence. The Tenant confirmed receipt of these and did not raise any issues with service.

The parties were given an opportunity to present relevant evidence and make relevant submissions. I have considered the documentary evidence and oral testimony of the parties. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

1. Is the Landlord entitled to an Order of Possession based on the Notice?
2. Is the Landlord entitled to recover unpaid rent?

Background and Evidence

A written tenancy agreement was submitted as evidence and the parties agreed it is the written agreement they entered into. The tenancy started July 01, 2019 and is for a fixed term ending June 30, 2020. Rent according to the written agreement is \$1,400.00 per month due on the first day of each month. The Tenants paid a \$700.00 security deposit.

The parties agreed rent is not actually \$1,400.00 per month.

The Tenant testified as follows in relation to the rent amount. Rent was actually \$1,850.00 from the start of the tenancy. Rent was changed from \$1,400.00 to \$1,650.00 because the Tenants rented an additional room. Rent was then changed to \$1,850.00 because the Tenant rented a portion of the garage for storage for his business. He paid the \$1,650.00 and \$200.00 separately to the Landlord. Two months ago, he emptied the garage and notified the Landlord of this, so rent went back to \$1,650.00 per month.

The Landlord testified that rent has always been \$1,850.00. The Landlord denied the Tenant has emptied the garage. H.K., on behalf of the Landlord, agreed the Tenant paid the \$200.00 for the garage separately from the \$1,650.00 and agreed the Tenant used a portion of the garage for storage for his business. H.K. advised that the Tenant did not tell the Landlord he had emptied the garage.

The Notice was submitted. As stated, it is dated November 30, 2019 with an effective date of December 31, 2019. The grounds for the Notice are that the Tenants are repeatedly late paying rent, have significantly interfered with or unreasonably disturbed another occupant or the Landlord and seriously jeopardized the health or safety or lawful right of another occupant or the Landlord.

H.K. testified that the Landlord served the Notice on the Tenant in person on November 30, 2019.

The Tenant agreed the Landlord served the Notice on him in person on November 30, 2019. However, the Tenant testified that the Landlord and her husband attended the rental unit one week later and took the Notice back.

The Landlord agreed she and her husband attended the rental unit one week after serving the Notice and took it back. H.K. testified that the Landlord took the Notice back because she was afraid of the Tenant and the Tenant said the Tenants would find another place to live. H.K. testified that the Landlord felt afraid to enforce the Notice because the Tenant has a temper. I asked what changed in April, when the Application was filed, and H.K. testified that the Tenant continued to cause issues and stopped paying rent. H.K. testified that the Landlord felt threatened by the Tenant.

H.K. testified that the Tenants paid rent for January, February and March by cheque. H.K. testified that, every time the Landlord accepted rent, she asked the Tenant if the Tenants were looking for another place to live and the Tenant said he was still looking for another place to live.

The Tenant testified that the Tenants did not dispute the Notice because they thought the Landlord had forgotten the whole thing. The Tenant testified that the Tenants continued to pay rent as normal each month and it was like nothing had happened. The Tenant acknowledged telling the Landlord the Tenants would look for another place to live but denied doing so each time rent was paid. The Tenant testified that the Landlord would say there was no rush and not to worry about finding another place to live when the issue was raised. The Tenant denied he did anything to cause the Landlord fear or to feel threatened.

The Landlord sought to recover unpaid rent for April, May and June of 2020. The Landlord took the position that rent was \$1,850.00 per month for these months. The Landlord took the position that the Tenants did not have authority under the *Act* to withhold rent for these months.

The Tenant agreed the Tenants have not paid rent for April, May or June. The Tenant took the position that rent was \$1,650.00 per month for these months. The Tenant did not take the position that the Tenants had authority under the *Act* to withhold rent. The Tenant testified that the Tenants could not pay rent because of the current pandemic.

Analysis

Pursuant to rule 6.6 of the Rules of Procedure (the “Rules”), it is the Landlord as applicant who has the onus to prove the claim. The standard of proof is on a balance of probabilities meaning it is more likely than not the facts occurred as claimed.

When one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Order of Possession

The Notice was issued pursuant to section 47 of the *Residential Tenancy Act* (the “Act”). The Tenants had 10 days from receipt of the Notice to dispute it pursuant to section 47(4) of the *Act*.

There is no issue that the Tenants received the Notice November 30, 2019 as the parties agreed on this. The Tenants did not dispute the Notice. Usually, the Tenants would be conclusively presumed to have accepted that the tenancy ended December 31, 2019, the effective date of the Notice, pursuant to section 47(5) of the *Act*.

However, the Tenant appeared at the hearing and testified that the Landlord took the Notice back one week after serving it, the Tenants continued to pay rent as usual and the Tenants thought the Notice had been forgotten and was no longer an issue.

Policy Guideline 11 deals with withdrawing and waiving notices to end tenancy and states in part:

C. WITHDRAWAL OF NOTICE TO END TENANCY

A landlord or tenant cannot unilaterally withdraw a notice to end tenancy.

A notice to end tenancy may be withdrawn prior to its effective date only with the consent of the landlord or tenant to whom it is given.

A notice to end tenancy can be waived only with the express or implied consent of the landlord or tenant (see section D below).

It is recommended that withdrawal of a notice to end tenancy be documented in writing and signed by both the landlord and the tenant.

D. WAIVER OF NOTICE AND NEW OR CONTINUED TENANCY

Express waiver happens when a landlord and tenant explicitly agree to waive a right or claim. With express waiver, the intent of the parties is clear and unequivocal. For example, the landlord and tenant agree in writing that the notice is waived and the tenancy will be continued.

Implied waiver happens when a landlord and tenant agree to continue a tenancy, but without a clear and unequivocal expression of intent. Instead, the waiver is implied through the actions or behaviour of the landlord or tenant.

For example, if a landlord gives a notice to end tenancy, a landlord may accept rent from the tenant for the period up to the effective date of the notice to end tenancy without waiving the notice. However, if the landlord continues accepting rent for the period after the effective date but fails to issue rent receipts indicating the rent is for “use and occupancy only,” it could be implied that the landlord and tenant intend for the tenancy to continue.

Intent may also be established by evidence as to:

- whether the landlord specifically informed the tenant that the money would be for use and occupancy only;
- whether the landlord has withdrawn their application for dispute resolution to enforce the notice to end tenancy or has cancelled the dispute resolution hearing; and
- the conduct of the parties.

I accept that the Landlord and her husband attended the rental unit one week after serving the Notice and took the Notice back as the parties agreed this occurred. The Tenant indicated at the hearing that he understood the Notice was no longer an issue after this occurred. I find this to be a reasonable conclusion. There would be no reason for the Landlord to take the Notice back if the Landlord intended on enforcing the Notice. I am not satisfied the Landlord made it clear to the Tenants that she intended on enforcing the Notice despite taking it back. The conclusion that the Landlord took the Notice back and did not intend on enforcing it is supported by the fact that the Landlord accepted rent for January, February and March and did not seek to enforce the Notice in January, February or March despite the Tenants not vacating the rental unit December 31, 2019 as required by the Notice.

I find that either the parties agreed to cancel the Notice, or the Landlord waived her right to enforce the Notice by taking the Notice back, accepting rent for January, February and March and failing to take steps to enforce the Notice for almost four months after the effective date of the Notice. I do not accept that the Landlord was entitled to seek to enforce the Notice at the end of April in the circumstances.

I do not accept that the Tenant did anything to make the Landlord fear him or feel threatened by him. The Tenant denied doing so. In the absence of further evidence to support the Landlord's testimony on this point, I am not satisfied the Tenant did so.

I do not accept that the Tenant told the Landlord each time he paid rent that the Tenants were looking for another place to live. The Tenant denied this occurred. In the absence of further evidence to support the Landlord's testimony on this point, I am not satisfied it did occur.

In the circumstances, I find either the parties agreed to cancel the Notice, or the Landlord waived her right to enforce the Notice. The Landlord was not entitled to seek an Order of Possession based on the Notice pursuant to section 55 of the *Act* in April. Therefore, I decline to issue the Landlord an Order of Possession based on the Notice pursuant to section 55 of the *Act*. The request for an Order of Possession based on the Notice is dismissed without leave to re-apply.

Unpaid Rent

Section 7 of the *Act* states that, if a tenant does not comply with the *Act*, regulations or their tenancy agreement, the non-complying tenant must compensate the landlord for loss that results.

Section 26(1) of the *Act* requires a tenant to pay rent in accordance with their tenancy agreement unless they have a right to withhold rent under the *Act*.

The parties disagreed about the rent amount for April, May and June. The Tenant testified rent was \$1,650.00 for these months. The Landlord testified rent was \$1,850.00 for these months.

Neither party submitted documentary evidence outlining their agreement about use of the garage, the extra \$200.00 being paid by the Tenant or the rent amount for April, May and June. This is the Landlord's Application and the Landlord has the onus to prove the rent amount for April, May and June. Given the disagreement between the

parties, and the lack of evidence to support the Landlord's position, I can only be satisfied that rent was \$1,650.00 for April, May and June.

There is no issue that rent was due on the first day of each month as the parties agreed on this.

There is no issue that the Tenants failed to pay rent for April, May and June as the parties agreed on this.

The Tenant did not submit that the Tenants had authority under the *Act* to withhold rent for April, May or June. I acknowledge and accept that the Tenants have not been able to pay rent due to the current pandemic. However, the current pandemic and Ministerial Order M089 issued March 30, 2020 did not change the requirements regarding paying rent and therefore the Tenants were required to pay rent pursuant to section 26(1) of the *Act*.

The Landlord is entitled to recover \$4,950.00 in unpaid rent for April, May and June of 2020 and is issued a Monetary Order for this amount pursuant to section 67 of the *Act*.

Conclusion

The request for an Order of Possession based on the Notice is dismissed without leave to re-apply.

The Landlord is entitled to recover \$4,950.00 in unpaid rent for April, May and June of 2020 and is issued a Monetary Order for this amount. This Order must be served on the Tenants and, if the Tenants do not comply with the Order, it may be filed in the Provincial Court (Small Claims) and 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 *Act*.

Dated: June 08, 2020

Residential Tenancy Branch