



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPL

Introduction

This hearing dealt with the landlord's application pursuant to section 55 of the *Residential Tenancy Act* (the *Act*) for an Order of Possession.

Both parties attended the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

As both parties were present service was confirmed. The parties each confirmed receipt of the respective materials and based on the testimonies I find each party duly served in accordance with sections 88 and 89 of the *Act*.

Issue(s) to be Decided

Is the landlord entitled to an Order of Possession?

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 arguments are reproduced here. The principal aspects of the claim and my findings around each are set out below.

This periodic tenancy began in November 2019. The monthly rent is \$500.00 payable on the first of each month. The landlord issued a 2 Month Notice to End Tenancy for Landlord's Use dated January 10, 2020 with an effective date of March 31, 2020 (the "2 Month Notice"). The reason provided on the 2 Month Notice for the tenancy to end is that the rental unit will be occupied by the landlord or a close family member.

The tenant did not dispute the 2 Month Notice. The tenant did not move out on the effective date and continued to pay monthly rent for April, May and June, 2020. The landlord did not issue any receipts indicating that rent was being accepted for use and occupancy only but continued to communicate with the tenant and inform them that the tenancy has not been reinstated.

The tenant submits that they believe the tenancy has been reinstated and that the landlord's 2 Month Notice has now been cancelled. The tenant submitted into evidence correspondence dated June 1, 2020 wherein the tenant requests to continue residing in the rental unit. The landlord responded to that request by correspondence dated June 2, 2020 stating that they "understand that finding another place is going to be challenging and I am willing to be somewhat flexible about when you move out but you do need to find another place to live".

Analysis

Section 49(9) of the Act provides that a tenant who receives a 2 Month Notice and does not dispute the notice within 15 days of service is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice and must vacate the rental unit on that date.

In the present case the tenant confirmed receipt of the 2 Month Notice on or about January 10, 2020 and did not file an application to dispute the notice within the 15 days of that date, granted under section 49(8) of the Act. Accordingly, I find that the tenant is conclusively presumed under section 49(9) of the Act to have accepted that the tenancy ends on the effective date of the 2 Month Notice, March 31, 2020.

Residential Tenancy Policy Guideline 11 discusses the issue of waiver of a notice to End Tenancy:

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.

Based on the totality of the submissions of the parties I do not find that there is sufficient evidence that the conduct of the landlord amounts to an implied waiver of the Notice to End Tenancy and reinstatement of the tenancy. The tenant submits that the landlord's acceptance of rent payment for the months subsequent to the effective end of tenancy date amounts to an implied waiver of the 2 Month Notice. While the parties agree that payment was accepted and the landlord did not issue written receipts for those payments indicating that they were accepted for use and occupancy only, I accept that there was clear communication between the parties about the landlord's intention to proceed with enforcing the 2 Month Notice.

The written correspondence between the parties at the start of June, 2020 clearly indicates that the tenant was aware of the landlord's intention and was making a proposal to reinstate the tenancy. If there had been a waiver of the 2 Month Notice, such an effort to curry favour with the landlord would not have been necessary or reasonable. It is evident that the tenant was aware that the landlord intended to enforce the 2 Month Notice to End Tenancy. The landlord's correspondence in reply to the tenant is unequivocal in stating that the tenant needed to find another place to live.

Both parties testified that there was ongoing communication between them and I find the landlord's interpretation that they did not seek an Order of Possession earlier due to their awareness of the difficulties the tenant may encounter in seeking alternate accommodations to be reasonable and plausible. I do not find sufficient evidence to support the tenant's interpretation that there was a waiver of the notice to end tenancy. Not only is there no evidence of an express waiver, the evidence that was submitted supports the position that the parties were aware of the landlord's ongoing intention to enforce the notice at some point.

I accept the evidence of the landlord that they chose not to enforce the 2 Month Notice earlier due to the ongoing Covid19 pandemic and accompanying state of emergency in the province. I find that this delay does not amount to a waiver of the landlord's rights for an Order of Possession. A landlord's failure to seek an Order of Possession earlier in consideration of the tenant is not sufficient to conclude that they have waived their rights.

Accordingly, I find that there has been no waiver of the notice to end tenancy.

I find that the landlord's 2 Month Notice conforms with the form and content requirements of the Act as it provides the correct rental address, the effective date and the reason for the tenancy to end.

The 2 Month Notice is dated January 10, 2020 and was issued prior to the *Ministerial Order M089* issued March 30, 2020 pursuant to the State of Emergency declared on March 18, 2020. Therefore, in accordance with section 3(2) of the Ministerial order and pursuant to section 55 of the *Act*, I find that the landlord is entitled to an Order of Possession. As the effective date of the notice has passed I issue an Order enforceable 2 days after service.

Conclusion

I grant an Order of Possession to the landlord effective **2 days after service on the tenant(s)**. Should the tenant(s) or any occupant on the premises fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

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: June 29, 2020

Residential Tenancy Branch