



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPL FFL

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- an Order of Possession pursuant to section 55;
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

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.

The parties were made aware of Residential Tenancy Rule of Procedure 6.11 prohibiting recording dispute resolution hearings and the parties each testified that they were not making any recordings.

As both parties were present service was confirmed. The parties each testified that they received the respective materials and based on their 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?

Is the landlord entitled to recover the filing fee from the tenant?

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.

The parties agree on the following facts. This periodic tenancy began on January 1, 2011. The monthly rent is \$1,000.00 payable on the first of each month. The landlord holds a security deposit of \$500.00 for this tenancy.

The landlord issued a 2 Month Notice to End Tenancy for Landlord's Use dated January 3, 2020 with an end of tenancy date of May 1, 2020. The tenant confirms receipt of the 2 Month Notice and that they did not dispute notice.

The Covid pandemic surged in the province in early 2020 and the *Ministerial Order M089* was issued March 30, 2020 pursuant to the State of Emergency declared on March 18, 2020. As the 2 Month Notice was issued prior to the effective date of the Order and they were at liberty to seek an order of possession, the landlord chose not to do so given the circumstances.

The parties agree that the landlord has been clear that they require vacant possession of the rental unit and has repeatedly told the tenant that payment of the monthly rent does not reinstate the tenancy. The landlord submitted into evidence some correspondence between the parties during 2020 and a message dated March 28, 2021 indicating that the landlord still sought vacant possession of the rental unit.

The landlord filed their present application for dispute resolution on January 3, 2022.

Analysis

Section 49(9) of the Act provides that a tenant who has received a Notice to End Tenancy for Landlord's Use does not make an application to dispute the notice, the tenant is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice and must vacate the rental unit by that date.

Section 49(2)(a)(ii) provides that the effective date of the notice must be the day before the date in the month when rent is payable under the tenancy agreement. Section 53 provides that an incorrect effective date is automatically changed to the date that complies with the notice period.

In the present circumstances the parties agree that the tenant did not dispute the Notice which has an effective date of May 1, 2020. The parties gave evidence that rent is payable on the first of each month. Therefore, pursuant to section 53 I find the effective date of the notice is automatically changed to May 31, 2020, the day before the date in the month when rent is payable.

I accept the undisputed evidence of the tenant that they were served with the 2 Month Notice on or about January 3, 2020 and did not dispute the notice. 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 corrected effective date of the 2 Month Notice, May 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 landlord submits that they delayed enforcing the Notice due to the ongoing Covid pandemic but consistently communicated to the tenant that any payment was being accepted for use and occupancy only and did not reinstate the tenancy.

The tenant agrees with the landlord's evidence and testified that they were aware of the need to vacate the rental unit and that there has been ongoing communication between the parties where the landlord informed them the 2 Month Notice was still effective.

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.

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. While the landlord's delay in enforcing the notice was lengthy, 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.

Therefore, in accordance with 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.

As the landlord was successful in their application they may recover their filing fee from the tenant. In accordance with sections 38 and the offsetting provisions of 72 of the *Act*, I allow the landlord to retain \$100.00 of the tenant's security deposit of \$500.00 in satisfaction of the monetary award issued in the landlord's favour.

Conclusion

I grant an Order of Possession to the landlord effective **2 days after service on the tenants**. Should the tenant 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.

The security deposit for this tenancy is reduced by \$100.00 to \$400.00.

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: April 8, 2022

Residential Tenancy Branch