



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **OPR-DR**

Introduction

The parties were informed at the start of the hearing that recording of the dispute resolution is prohibited under the Rule 6.11 of the Residential Tenancy Branch Rules of Procedure ("Rules") and that if any recording was made without my authorization, the offending party would be referred to the RTB Compliance Enforcement Unit for the purpose of an investigation and potential fine under the Act.

Each party was administered an oath to tell the truth and they both confirmed that they were not recording the hearing.

On April 4, 2022, an Adjudicator appointed pursuant to the *Manufactured Home Park Tenancy Act* (the Act) adjourned the landlord's application for dispute resolution to a participatory hearing. She did so on the basis of an ex parte hearing using the Residential Tenancy Branch's direct request process. The adjudicator adjourned the direct request for the following reasons:

"A notice to end tenancy can be waived only with the express or implied consent of the landlord or tenant... 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."

I note that the 10 Day Notice is dated September 7, 2021; however, the landlord did not file for dispute resolution requesting an Order of Possession until March 15, 2022, over six months later.

In an ex-parte Direct Request, I find I am not able to determine whether the tenant was aware of the landlord's intention to proceed with the end of tenancy, despite the delay in taking action. I find that a participatory hearing is necessary to address this issue.

I have been delegated authority under the Act to consider the landlord's application for an Order of Possession for unpaid rent pursuant to sections 39 and 48.

Both the tenant and the landlord attended the hearing. As both parties were present, service of documents was confirmed. The tenant acknowledged service of the Notice of Dispute Resolution Proceedings and stated she had no concerns with timely service of documents.

Preliminary Issue – tenant's evidence not served upon the landlord

The landlord did not receive the tenant's evidence and the tenant testified that she never sent any evidence to the landlord. Rule 3.15 of the Residential Tenancy Branch Rules of procedure provide that the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing. I determined that it would cause unreasonable prejudice to the landlord if I were to accept evidence that the landlord did not have in his possession and in accordance with Rule 3.17, I declined to accept the tenant's documentary evidence.

Issue(s) to be Decided

Should the landlord's notice to end tenancy for unpaid rent be upheld or cancelled?

Background and Evidence

The landlord submitted the following relevant evidentiary material:

- A copy of a manufactured home park tenancy agreement which was signed by the landlord and the tenant on May 7, 2018, indicating a monthly rent of \$500.00, due on the first day of each month for a tenancy commencing on May 7, 2018
- A copy of a 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) dated September 7, 2021, for \$500.00 in unpaid rent. The 10 Day Notice provides that the tenant had five days from the date of service to pay the rent in full or apply for Dispute Resolution or the tenancy would end on the stated effective vacancy date of September 24, 2021
- A copy of a witnessed Proof of Service Notice to End Tenancy form which indicates that the 10 Day Notice was posted to the tenant's door on September 7, 2021

- A Direct Request Worksheet showing the rent owing and paid during the relevant portion of this tenancy

The landlord testified that he previously obtained an Order of Possession against this tenant for unpaid rent on June 24, 2019 and had obtained a Writ of Possession. The file number for the previous Order of Possession is recorded on the cover page of this decision. The landlord testified that he cancelled the Writ with the bailiff when the tenant paid him the outstanding arrears in rent. The landlord testified that the tenancy was re-instated by mutual agreement of the tenant and himself.

The tenant paid rent for July and August but did not pay the \$500.00 rent on September 1, 2021. The landlord served the tenant with a 10 Day Notice to End Tenancy for Unpaid Rent/Utilities by posting it to the tenant's door on September 7, 2021. The landlord called a witness, SP who provided affirmed testimony that he witnessed the landlord serving the notice to end tenancy by posting to the tenant's door.

The landlord testified that subsequent to serving the notice to end tenancy upon the tenant, the tenant did not pay the September arrears of \$500.00, nor did she pay any rent thereafter. The landlord testified that he has not been offered any rent by the tenant since the payment last for August's rent.

The reason the landlord did not seek an Order of Possession immediately after he served the notice to end tenancy upon the tenant was because this was the timeframe that he allowed himself to seek the Order of Possession. The landlord had other priorities, including making money from his other 60 tenants.

The tenant gave the following testimony. She acknowledges receipt of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent/Utilities on September 9, 2021. The tenant testified that she had a conversation with the landlord's secretary and told her she already paid the rent and figured that was the end of it. The tenant didn't file an application to dispute the notice to end tenancy because she thought it would just go away. She never gave it another thought since speaking to the landlord's secretary.

The tenant testified that she has documentary proof of a bank transfer slip to prove she paid September's rent on August 2, 2021 however I am unable to refer to that piece of evidence due to it being excluded for not being served upon the landlord. The tenant testified that she never sought receipts from the landlord for cash payments of rent, or that the landlord was "horrible" about providing receipts, saying that "it's unconventional around here".

Analysis

The adjudicator ordered the landlord's direct request proceedings to be reconvened for a participatory hearing to determine whether the tenant was aware of the landlord's intention to proceed with the end of tenancy, despite the delay in taking action.

I find that the landlord did not collect any rent from the tenant between serving her with the notice to end tenancy and the time the landlord applied for an Order of Possession by direct request. As such, I do not find the landlord gave to the tenant any impression of a waiver of his right to seek the Order of Possession. Further, I do not find that the landlord's choice to delay seeking the Order of Possession to be detrimental to the landlord's right to seek one. The delay has benefited the tenant who has continued to occupy the manufactured park site throughout the time the landlord delayed making the application. Consequently, I find there is no implied waiver of the landlord's right to pursue the notice to end tenancy through his actions or behavior.

The tenant acknowledged receipt of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent/Utilities on September 9, 2021, two days after the date the landlord testified he posted it to the tenant's door. I accept the notice to end tenancy was served on September 9, 2021 pursuant to sections 88 and 90 of the Act.

Sections 39(4) and (5) of the Act states:

- (4) Within 5 days after receiving a notice under this section, the tenant may
 - (a) pay the overdue rent, in which case the notice has no effect, or
 - (b) dispute the notice by making an application for dispute resolution.
- (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 manufactured home site to which the notice relates by that date.

Based on the landlord's testimony and the Notice before me, I find that the tenant was served with an effective Notice and did not file an application to dispute it within the 5 days as required by section 39(4). The tenant **must file** her application to dispute the landlord's notice to end tenancy if the tenant seeks to prove it is invalid. The tenant cannot simply wait for the landlord's application seeking the Order of Possession to present her defence. The time limit (5 days) has already passed. As stated in the

notice to end tenancy, *“If you do not apply within the required time limit, you are presumed to accept that the tenancy is ending and must move out of the rental unit by the effective date of this notice”*.

Pursuant to section 39(5), the tenant is conclusively presumed to have accepted the tenancy ended on the (corrected) effective date of the Notice. Pursuant to section 46(1), the effective date of the notice is corrected to September 19, 2021, ten days after September 9th, the date the notice to end tenancy was served. As the tenant has not moved out of the site by the (corrected) effective date, the landlord is entitled to an Order of Possession effective two (2) days after service upon the tenant.

Conclusion

I grant an Order of Possession to the landlord effective **2 days after service on the tenant**. Should the tenants or anyone on the premises fail to comply with this Order, this Order may be filed and enforced in 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 *Manufactured Home Park Tenancy Act*.

Dated: May 05, 2022

Residential Tenancy Branch