



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

LL: OPL

TT: CNR OLC DRI

Introduction

This hearing dealt with applications from both the landlord and tenants pursuant to the *Residential Tenancy Act* (the “*Act*”).

The landlord applied for:

- an Order of Possession pursuant to section 55;

The tenant applied for:

- cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent (the “10 Day Notice”) pursuant to section 46;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- a determination regarding their dispute of an additional rent increase by the landlord pursuant to section 43;

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 landlord has an individual assisting them in making submissions.

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*.

At the outset of the hearing the tenant clarified that their intention with filing their application was to dispute all of the Notices to End Tenancy they had been served. The landlord testified that they understood the tenant was seeking to cancel all notices and continue to reside in the rental unit indefinitely. Pursuant to section 64(3)(c) of the *Act* and Rule 4.2 of the Rules of Procedure as the intention of the parties was clear and unambiguous, and there is no breach of the principles of natural justice or procedural fairness I allow the tenant to amend their application to include a dispute of the landlord's 2 Month Notice of January 20, 2022.

Issue(s) to be Decided

Is either party entitled to the relief sought?

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 in February 2017. Monthly rent is \$950.00 payable on the first of each month.

The tenant submits that the landlord issued text messages to them to increase the monthly rent on or about July 14, 2021. The tenant submitted screenshots of the communication where the parties write:

Landlord:	Your rent this month will be \$1.010,00 Not 950 anymore
Tenant:	No I called landlord tenancy they informed that the freeze was still in effect until July
Landlord:	I don't care

The landlord testified that they subsequently came to understand that these text messages were a breach of section 42(3) of the *Act* and of no force or effect. The

landlord said at the hearing that they understood the monthly rent is \$950.00 and the tenant has not paid any greater amount throughout the tenancy.

The landlord issued a 2 Month Notice to End Tenancy for Landlord's Use dated January 20, 2022. The landlord testified that their adult child and their spouse were the family members who intended to occupy the rental unit. The landlord provided no documentary materials in support of their stated intention and gave no details of the plan such as where the child and spouse are currently residing, the reasons for the intended relocation or why the rental unit was chosen.

The landlord issued a 10 Day Notice to End Tenancy for Unpaid Rent dated March 4, 2022 indicating a rental arrear of \$950.00 payable on March 1, 2022. The landlord testified that the tenant paid the full amount of the arrear on or about March 29, 2022. The tenant confirmed they were served with the notice on March 4, 2022 and filed an application to dispute the notice on March 30, 2022.

The parties agree that the rent has been paid in full up to the date of the hearing, July 19, 2022. The landlord testified that they have accepted the rent payments by the tenant and have not issued any receipts nor indicated to the tenant in other ways that the rent was accepted for use and occupancy only.

Analysis

Section 41 of the Act states that a landlord must not increase rent except in accordance with that Part of the legislation. Sections 42 and 43 provide details on the timing, notice and amount of rent increase possible.

It is plainly obvious that the correspondence from the landlord does not conform to the requirements of the Act and are of no force or effect as a notice of rent increase. The landlord testified that they understand that they have not increased the rent and have made no further attempts at increasing the rent beyond what is legislated. As I find there has been no rent increase nor ongoing breach on the part of the landlord I find it unnecessary to issue an order and dismiss this portion of the tenants' application.

Section 49(8) provides that a tenant may make an application for dispute resolution of a Notice to End Tenancy for Landlord's Use within 15 days of service.

Section 46(4) provides that a tenant may make an application to dispute a Notice to End Tenancy for Unpaid Rent within 5 days of service.

In the present case the tenant confirmed that they were served with the 2 Month Notice on January 20, 2022 and the 10 Day Notice on March 4, 2022. The tenant first filed an application for dispute resolution on March 30, 2022, well outside of the statutory time limits.

Subsections 49(9) and 46(5) each provide that a tenant who fails to make an application within the timelines is conclusively presumed to have accepted the tenancy ends on the effective date of the notice.

However, I note the undisputed evidence of the parties that the landlord has demanded and accepted full rent payment from the tenant throughout the course of this tenancy even after the effective dates of the notices.

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

In the present circumstances I find sufficient evidence to support that there has been an implied waiver of both notices.

The parties confirm that the tenants have made full payments of rent for every month since the 2 Month Notice was served on January 20, 2022 which were accepted by the landlord. The rent paid includes full payments for the months of March, April, May, June and July since the 10 Day Notice was issued on March 4, 2020. The undisputed evidence of the landlord is that they accepted these payments and did not issue any written receipt nor other documentation indicating that the payments were accepted for use and occupancy only and did not reinstate the tenancy.

Based on the undisputed testimony and submissions of both parties it is clear that there has been ongoing communication between them. It would be reasonable to expect that there would be some communication or notation that the monthly rent payments were only accepted for “use and occupancy” and the landlords were not waiving their right to seek an Order if this were their intention. The evidence is that the landlord made no indication of their intent until filing their present application on July 12, 2022 after months of accepting rent payments.

I find, on a balance of probabilities that the ambiguity in the landlords’ conduct amounts to a waiver of the landlords’ right to seek an Order of Possession.

I find that the landlords waived their right to pursue an Order of Possession. I find that the landlords reinstated this tenancy by accepting full rent payments from the tenants for each of the months after the effective date of the 2 Month and 10 Day Notices without specifying that the payments were accepted for use and occupancy only.

Consequently, while the tenants were outside of the statutory timeline in filing their application to dispute the notices, I find that the notices had been waived through the conduct of the landlord and the landlord is not entitled to an Order of Possession.

Conclusion

Both the 10 Day Notice of March 4, 2022 and the 2 Month Notice of January 20, 2022 are cancelled and of no force or effect. This tenancy continues until ended in accordance with the Act.

The balance of the applications is dismissed without leave to reapply.

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: July 19, 2022

Residential Tenancy Branch