



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Marine Vista Realty
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **OPC, FFL**

Introduction

The words tenant and landlord in this decision have the same meaning as in the *Residential Tenancy Act*, (the "Act") and the singular of these words includes the plural.

This hearing dealt with an application filed by the landlord pursuant the *Residential Tenancy Act* (the "Act") for:

- An order of possession for cause pursuant to sections 47 and 55; and
- Authorization to recover the filing fee from the other party pursuant to section 72.

The tenants attended the hearing and the landlord was represented by property manager, CC. As both parties were present, service of documents was confirmed. The tenants acknowledged service of the landlord's Notice of Dispute Resolution Proceedings and had no issues with timely service of documents.

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.

Preliminary Issue

The landlord named an occupant as a third tenant in his application for dispute resolution. As this occupant did not sign the tenancy agreement and since occupants do not have any rights or obligations under a tenancy agreement, I dismissed the

application against the named occupant at the commencement of the tenancy. The occupant's name does not appear on the cover page of this decision.

Issue(s) to be Decided

Has the tenancy been reinstated by implied waiver?

Can the landlord recover the filing fee?

Background and Evidence

At the commencement of the hearing, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony pursuant to rule 7.4. In accordance with rules 3.6, I exercised my authority to determine the relevance, necessity and appropriateness of each party's evidence.

While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

The landlord provided a copy of the tenancy agreement. The tenancy began on November 1, 2020, with rent set at \$2,400.00 per month. Listed on the tenancy agreement are the two named tenants and a third occupant is named on page 1 of an addendum to the tenancy agreement.

The landlord testified that there is a fourth person who started occupying the rental unit with the tenants. On July 6, 2022, the landlord served the tenants with a 1 Month Notice to End Tenancy for Cause by registered mail. The tracking number is recorded on the cover page of this decision. In the notice, the reason for ending the tenancy is because the tenant assigned or sublet the rental unit without the landlord's written consent.

The landlord acknowledged that the tenants paid their rent via post dated cheques, usually 6 or 12 cheques at a time. No receipts are issued to the tenants for rent. The landlord acknowledges serving the tenants with a notice of rent increase on October 3rd.

The tenants gave the following testimony. RJ acknowledges Canada Post left a notice in the mailbox indicating there was registered mail to be picked up in mid-July but he got busy and didn't retrieve it. He did not know it was a notice to end tenancy from the

landlord and didn't realize the importance of registered mailing. By the time he decided to pick up the registered mail, the expiry date had already passed.

The tenants argue that the landlord never mentioned to them that he was seeking to end the tenancy. There was a discussion between them whereby the landlord was going to increase their rent beyond what was allowable under the Act, however the tenants wouldn't agree to it. Never did the landlord advise the tenants that a notice to end tenancy was sent to them via registered mail.

On October 3rd, the landlord served the tenants with a notice of rent increase, effective January 1, 2023. The tenants had always paid the rent on time without issue. They take care of the property and find no reason for the landlord to end the tenancy except to get more money.

The occupant named on the tenancy agreement is the tenant's brother-in-law and the "extra" person is the tenant's sister. The landlord has known for a long time that the sister was living in the unit and the 4 people living in the 3 bed/3 bath house is easily accommodated. There is no requirement under the tenancy agreement that the landlord can charge additional rent for another occupant, according to the tenant. The tenants occupy the rental unit; are not subletting the rental unit; and the tenancy has not been assigned to anybody.

Analysis

The notice to end tenancy is deemed served upon the tenants on July 11, 2022, five days after it was sent to them via registered mail in accordance with sections 88 and 90 of the Act.

Section 47(4) of the Act requires that a tenant must make an application to dispute the notice within 10 days after receiving the notice. If the tenant does not make the application, the tenant is conclusively presumed to have accepted the tenancy ends on the effective date of the notice and must vacate the rental unit. I find that the conclusive presumption provision applies in this case and the tenancy ended on August 31, 2022 pursuant to section 47(4).

Despite this, the actions of the parties after the notice was served implies that the tenancy was going to continue.

Residential Tenancy Branch Policy Guideline PG-11 [Amendment and Withdrawal of a notice to end tenancy] states at part D:

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.

The landlord did not dispute the tenant’s testimony that after sending the notice to end tenancy via registered mail, he continued to accept rent. The landlord testified that he did not provide any receipts to the tenant for their payments, effectively failing to advise the tenants that payments were for the use and occupancy of the rental unit while the hearing of this dispute was pending.

Most tellingly, even after the landlord had served the tenants with the Notice of Dispute Resolution Proceedings for this hearing, the landlord served a notice of rent increase effective January, 2023 – well after the hearing of this dispute. I find the conduct of the landlord implies that the tenancy is continuing into January.

For the reasons set out above, I find that the landlord implied to the tenants that the tenancy is continuing. Consequently, the landlord’s application seeking an Order of Possession is dismissed.

As the landlord’s application was not successful, the landlord is not entitled to recover the \$100.00 filing fee for the cost of this application.

Conclusion

The application 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: December 13, 2022

Residential Tenancy Branch