



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes

OPR, MNR, & FF

Introduction

This hearing was to deal with an application by the landlord seeking an Order of Possession and a monetary claim related to non-payment of rent by the tenant. Although the tenant was served with notice of this hearing registered mail he did not attend the hearing. I proceeded with the hearing in the tenant's absence.

Issues(s) to be Decided

Is the landlord entitled to an Order of Possession due to non-payment of rent?

Has the landlord waived the right to enforce the 10 day Notice to End Tenancy served on May 14, 2009?

Background and Evidence

This tenancy began on September 1, 2008 for the monthly rent of \$1,200.00 and a security deposit of \$600.00 paid on August 15, 2008.

On May 14, 2009 the landlord served the tenant with a 10 day Notice to End Tenancy due to Unpaid Rent by registered mail. The notice is deemed to have been received on the fifth day after it was mailed. The tenant had five days after receiving the notice to either dispute the notice by filling an application for dispute resolution or by paying the amount owed in five days. The tenant did not exercise either of these rights.

On June 16, 2009 the landlord accepted the sum of \$1,200.00 from the tenant and she stated in the hearing that she told the tenant that he had until July 31, 2009 to vacate the rental unit. The landlord stated that she told the tenant he had until July 31, 2009 to vacate because this was when the rental unit transferred over to a new owner.

The landlord stated that after the tenant failed to pay any further rent she then served a new 10 day Notice to End Tenancy due to Unpaid Rent. During the hearing the landlord could not recall when the new notice was issued but indicated that she could provide that information. The landlord sent a copy of the notice and a copy of the registered mail receipt after the hearing.

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This documentary evidence shows that the new 10 day Notice to End Tenancy was dated July 3, 2009 and sent to the tenant by registered mail in the same day. The notice indicated that the tenant owed \$2,400.00 as of July 1, 2009. This represents two months of outstanding rent.

The landlord seeks an Order of Possession and a monetary claim due to the tenant's breach of the tenancy agreement.

Analysis

I find that the landlord's application must fail on the basis that the landlord waived her right to enforce the 10 day Notice to End Tenancy due to Unpaid Rent issued on May 14, 2009.

I have considered policy guideline number 11, in the *Residential Tenancy Policy Guideline Manual*, which states in part:

A landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy. With the consent of the party to whom it is given, but only with his or her consent, a Notice to End Tenancy may be withdrawn or abandoned prior to its effective date. 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

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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.

I find that when the landlord accepted money on June 16, 2009 and told the tenant that he had to vacate by July 31, 2009, the landlord continued the tenancy and invalidated the 10 day Notice to End Tenancy dated May 14, 2009. I make this finding on the basis that the landlord explicitly told the tenant he could continue to occupy the rental unit even though the tenancy had expired due to the tenant's breach. In order to be effective, a notice ending a tenancy must be clear, unambiguous and unconditional. By telling the tenant that he could remain until July 31, 2009 the landlord waived her right to enforce the notice to end tenancy.

It should be noted that when the landlord made this statement she understood that the tenancy could only continue to July 31, 2009 because the rental unit has been sold and she no longer has possession of the property after this date. However, this is not relevant to the principal of waiver or estoppel as at the time she made the statement she reinstated the tenancy. Whether the tenancy ended on July 31, 2009 depends upon other factors which are not before me.

The landlord has issued a new 10 day Notice to End Tenancy due to Unpaid Rent; however, this notice is not part of this application. The landlord is at liberty to file a new application based on the notice served on July 3, 2009.

Conclusion

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*.

I dismiss the landlord's application. I have determined that the landlord waived the right to enforce the 10 Day Notice to End Tenancy dated May 14, 2009 which was the notice the landlord was attempting to enforce in this application.

I note that the landlord has served a new notice which has ended the tenancy as of July 17, 2009 if the tenant has not exercised his rights under section 46(4) of the *Act*. The tenant should have vacated by the effective date of this notice and failure to do so could



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result in the tenant being liable for any loss or damages experienced by the landlord due to a breach of the *Act*.

Dated: July 27, 2009.

Dispute Resolution Officer