Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding The Pacific Investment Corporation Limited
and [tenant name suppressed to protect privacy]
DECISION

Codes: OPC, FF

Introduction:

This was an application by the landlord for an Order for Possession pursuant to a Notice to End the Tenancy for Cause dated May 30, 2014 with an effective date of June 30, 2014. Both parties attended and were represented by counsel.

Issues:

- Is the landlord entitled to an Order for Possession?
- Has the tenancy been reinstated?

Background and Evidence:

The tenancy began on January 15, 2008 with rent in the amount of $ 790.00 due in advance on the first day of each month. The tenant paid a security deposit of $ 350.00 on January 15, 2008. The landlord's agent KS testified that the tenant was served with the Notice to End the Tenancy on May 30, 2014 by an employee of the landlord's posting it to her door on that day. I therefore find it was served by June 2, 2014

The tenant disputed the Notice to End the Tenancy and her application was dismissed on July 28, 2014 in file number 822491. The tenant filed a petition requesting a judicial review of the July 28, 2014 decision on August 18, 2014. The landlord has opposed that petition on September 12, 2014. Both the landlord and tenant's counsel admitted that the Notice to End the Tenancy is valid and that any challenge to it is *res judicata.*

The landlord has now applied for an Order for Possession pursuant to section 55(1) of the Residential Tenancy Act. This application was initiated on September 25, 2014. Section 55(1) of the Act provides as follows:

Order of possession for the landlord

55 (1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant an order of possession of the rental unit to the landlord if, at the time scheduled for the hearing,

(a) the landlord makes an oral request for an order of possession, and

(b) the director dismisses the tenant's application or upholds the landlord's notice.

KS agent for the landlord testified that he caused the Notice to End the Tenancy dated May 30, 2014 to be issued and served. He attended and opposed the tenant's application to cancel the Notice on July 28, 2014. He admitted that the tenant continued to pay and that the landlord continued to accept the tenant's rent payments without qualification for July, August, September, October and November 2014. He admitted that the landlord had not issued receipts or any other written notice qualified by the words that the payments were only accepted for "use and occupation." KS testified that he was aware of the landlord's Notice of Rent Increase dated April 17, 2014 and assumed it was delivered in April 2014. He did not know whether the tenant paid the increased amount but he expected that she would for as long as she remained in the unit. He also testified that he instructed his resident manager MD to advise the tenant that all rent was accepted for use and occupation however he was not aware whether such communication was ever made.

KS testified that he received the Decision of July 28, 2104 dismissing the tenant's application to cancel the Notice on August 11, 2014. KS testified that he received a copy of the tenant's petition to judicially review the July 28, 2014 decision on August 18, 2014. KS testified that he sent a letter to the tenant on August 18, 204 stating amongst other items that *"we need to confirm a date for you to vacate"* the unit. He testified that he did not want to forcibly evict the tenant. That letter was not submitted in evidence but I accept KS's unchallenged version of it. KS testified that he communicated with the tenant through her counsel by email on September 7, 2014 asking when the tenant could agree on a date to vacate the unit as the termination notice was still in effect and in particular he testified that he stated *"we need to arrange for enforcement"* of the Notice to End the Tenancy. KS's version of that email was also not challenged by the tenant. I accept it. KS testified that the landlord replied to the tenant's petition for judicial review on September 12, 2014 and brought this application on September 25, 2014. KS testified that it was always the landlord's intention to enforce the Notice to End the Tenancy.

CC the tenant testified that she had conflicts with the landlord's manager MD soon after his employment began and believes the Notice to End the Tenancy resulted from that conflict. CC testified that she disputed the Notice to End the Tenancy. She said, *"no one ever said anything"* and she thought as they took her rent she could continue to stay. In mid July she received a photocopy of the April Notice of Rent increase slid under her door and that in her mind also indicated that she could continue to reside at the unit. After her application was dismissed on July 28, 2014, CC testified that she continued to pay rent and was never advised orally or in writing that her rent was accepted for "use and occupation only."

CC testified that she began *"investigating"* a new apartment in August. She found a potential new home but was rejected by the prospective landlord around August 12, 2014 after a reference call was made to MD agent for the landlord. The tenant tendered a copy of a text message dated August 12, 2104 that she sent to her boyfriend apparently restating what she recalled the prospective landlord told her:

> "After great thought and evaluating our discussions and the information you have provided I feel you would not be a good fit. First you were leaving because the property group you're with now had offered you a job but the cat was a clincher and they wouldn't allow you to stay on. After a third visit you tell me you're actually being evicted. You're (sic) stories as to why you are leaving seem to keep changing. The fact that your landlord doesn't know you are leaving and that you are willing to leave without notice is very concerning to me. Even if you are having a problem with the landlord you should be able to contact the parent company and let them know. I realize these issues could be due to circumstances beyond your control but how they are being handled concerns me and how you would handle issues that could come up with me as your manager in the future. I wish you luck in your search for a new home."

CC testified because of the reference from her landlord's employee saying they didn't know she was leaving, she believed she was staying in her current tenancy. The tenant admitted in cross-examination that she understood by the landlord's letter of August 18, 2014 that the landlord intended to enforce the Notice to End the Tenancy.

The tenant, who earns 30% of her income from babysitting work in the building she now resides in, tendered a note she received in October from another occupant requesting her to work as a babysitter. She testified that in reliance upon the landlord's reinstatement of the tenancy she accepted this work commencing in November 2014.

Counsel for the landlord submits that pursuant to section 55(1) of the Act I am bound to issue an Order for Possession as soon as possible. The landlord submits that Residential Tenancy Policy Guideline 11 "Amendment and Withdrawal of Notices" governs the law on reinstatement of the tenancy or waiver. The relevant portion of Policy Guideline 11 is reprinted below:

> 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:
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> -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.

The landlord's counsel submits that the conduct of both parties must be examined to determine if there has been an implied or express waiver. The landlord submits that its intention as demonstrated by its conduct has always been clear and consistent: to uphold the Notice to End the Tenancy. The landlord submits that the tenant's conduct is consistent with knowing this was the landlord's intention as demonstrated by: her application to cancel the Notice, her petition for a judicial review when her application was defeated and her admission that she understood from the landlord's August 18, 2014 letter that the landlord intended to uphold the Notice and wanted her to vacate. The landlord submits that no positive indication was given to the tenant by the landlord that her tenancy was being reinstated. The landlord requested an Order for Possession.

The tenant's counsel relies upon a Residential Tenancy Fact sheet (which is actually no longer available.) Other fact sheets are located on the RTB web site under the following headings:

> Tools and Resources
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> Use these publications to help understand your rights and responsibilities as a landlord or tenant. The information in these resources is based on the *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act* and is intended to provide guidance. If ever there's a discrepancy between information from a supplementary resource and what the legislation says, the legislation will always take precedence as the legal authority.
>
> Information Sheets
>
> Be informed about everything involved in a tenancy – get a quick summary of information vital for landlords and tenants.

The fact sheet relied upon by the tenant differs greatly from Policy Guideline 11 in that it states:

> Where the landlord has served the tenant with a One-Month Notice to End Tenancy, and then accepts a rent payment for the month after the tenancy was to end, the tenancy will automatically be reinstated unless the landlord specifically tells the tenant that the tenancy is not reinstated and the tenant will have to vacate the premises at a future date.

The tenant's counsel also cited numerous decisions of the Residential Tenancy Branch as precedents. I find that most of them dealt with 10-Day Notices for Nonpayment of rent or were not about situations where a Notice has already been upheld after a decision dismissing a tenant's application to cancel a Notice. Regardless I find that I am not bound by any of these decisions nor are they persuasive to me in determining the matter before me.

The tenant submits that by accepting her rent after June 30, 2014 the effective date of the Notice to End without qualification, the tenancy is *automatically reinstated.*

Alternatively the tenant submits that the enforcement of the Notice was waived by the landlord's conduct. The tenant submits that the landlord's conduct must be examined objectively to determine if a reasonable person would conclude that the landlord waived its rights. The conduct that the tenant submits was tantamount to an implied waiver was: the acceptance of unqualified rent from July through November 2014, the redelivery of the rent increase in mid July 2014, and the manager MD's reference call to a prospective landlord on or about August 12, 2014 stating *"we didn't know she was leaving."*

Counsel for tenant submits that I must draw an adverse inference from the landlord not calling MD as a witness. However I am not sure that a negative inference would assist the tenant in that she also seeks to rely on his evidence albeit through the hearsay text message of August 12. Also the landlord has not submitted any evidence of MD or relied upon any of his acts in this matter.

The tenant submitted that she relied upon the landlord's waiver to her detriment by accepting new babysitting work commencing in November. All in all the tenant submits the landlord is now estopped from seeking an Order for Possession by its conduct, which amounts to an implied or express waiver effectively reinstating the tenancy.

Analysis:

At the outset I find that I am not bound by the "Fact Sheet" referred to by the tenant's counsel. That document is not law, nor a restatement of the law. It is merely a "quick summary." I do not think what it states is correct. Counsel for the tenant was not able to point to any legal reason why I am bound by such a document, which by its nature is only intended to provide some basic facts. I therefore reject the tenant's submission that the mere acceptance of rent unqualified after the expiry period of the Notice to End the Tenancy "automatically reinstates" the tenancy.

Section 91 of the Residential Tenancy Act states as follows:

Common law applies

91 Except as modified or varied under this Act, the common law respecting landlords and tenants applies in British Columbia.

I find that the common law of express and implied waiver is what is relevant to this matter. That law is restated in the Residential Tenancy Policy Guideline 11, abovementioned. What is to be determined is whether an express or implied waiver occurred. The unqualified acceptance of rent is only one factor to consider. It is the intention of the parties that must also be scrutinized.

I find that the events alleged by the tenant to have reinstated the tenancy must be considered by themselves and in the totality of the course of conduct of the parties. The redelivery of the Notice of Rent Increase, the acceptance of rent unqualified and the "reference" from MD to the tenant's prospective tenant all must be considered in addition to the tenant's conduct in relation to these events.

Timing is very important in this matter. The redelivery of the Notice of Rent Increase occurred in mid July 2014, before the hearing to dispute the Notice to End the Tenancy on July 28, 2014. The landlord opposed the tenant's application on July 28, 2014. The tenant's application was dismissed and the Notice to End the Tenancy was upheld on July 28, 2014. Had the landlord made a verbal request for an order of possession at that hearing, pursuant to s. 55 of the *Act* the arbitrator would have been bound to grant it. The tenant did not give evidence of when she received a copy of that decision. However the landlord's agent KS testified that he received it on August 11, 2014 and the tenant applied for judicial review on August 18, 2014. I therefore assume the tenant also received the decision close to August 11, 2014.

The landlord's agent KS testified that he delivered a letter to the tenant on August 18, 2014 and email to her counsel on September 7, 2014 all requesting that the tenant confirm a date to move out. The landlord has opposed the tenant's petition for judicial review. KS testified that the landlord continued to accept rent from the tenant, because they did not want to forcibly remove her as she was still occupying the unit. I believe that is supported by KS's polite but firm letters to the tenant and her counsel, requesting a date to vacate rather than demanding that the tenant vacate.

The redelivery of the Notice of Rent Increase dated April 17, 2014 in mid July is not determinative by itself and must be considered in the context of the events. As the landlord had continued to accept rental payments from the tenant it made sense that the landlord expected her to pay the increase, which was already served on her in April before the Notice to End the Tenancy had been issued, particularly if the Notice being challenged on July 28th was cancelled and the tenancy therefore continued on. Furthermore the landlord attended and opposed the tenant's application to cancel the Notice to End on July 28, 2014, communicated with the tenant shortly after receiving the decision that the landlord intended to uphold the notice and opposed the judicial review. The landlord applied for an order for Possession on September 25, 2014. I therefore find that the landlord's intention to evict the tenant was consistent from the time of issuance of the Notice on May 30th 2014 and thereafter. I do not find that Notice of Rent Increase by itself or in the contest of the conduct of the parties can be considered an implied waiver. Nor do I find that it was an express waiver requiring *voluntary, intentional relinquishment of a known right.*

The law of implied waiver also requires scrutiny of the tenant's conduct to determine whether she believed the landlord had waived its right to end the tenancy and whether she relied upon any alleged waiver to her detriment.

Policy Guideline 11 states:

> 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.

I find that the tenant was not "investigating" but actually looking for an apartment in August 2014 evidenced by her admission found in her text message. That text message was prefaced with a message to the tenant's boyfriend lamenting that the landlord's manager MD ruined her chance to obtain a new apartment. The message stated:

> "M. lost us an apartment."

The tenant testified she felt obliged to leave her unit up the point that her rent was accepted in July. She also testified that because she received a Notice of Rent Increase in mid July, she believed the landlord wasn't going to evict her. The tenant further testified that after she learned of the "reference" call around August 12, 2014 indicating that the landlord didn't know that she was leaving; this confirmed her belief that she could stay.

The tenant's testimony is problematic. It does not make any sense. If she really believed her tenancy was to be continued after the acceptance of the July and August rent and after the delivery of a Notice of rent Increase in mid July, why would she have filed a petition for Judicial Review of the decision of July 28, 2014 on August 18, 2014? More telling, why would she be looking for a new apartment in August? I find that the only logical inference was, that *she believed she was going to be evicted*. This is confirmed by her text message dated August 12, 2014 that the tenant submitted as evidence:

> "After a third visit **you tell me you're actually being evicted**. … I wish you luck in your search for a new home." (My emphasis added)

She confirmed this, when she admitted under cross-examination that she understood from the landlord's letter of August 18, 2014, that the landlord wanted to end her tenancy. I therefore reject her evidence that she thought she could stay when she learned around August 12, 2014 *"the landlord didn't know she was leaving."*
I reject her counsel's submissions that the text message, which stated that the landlord "didn't know that she was leaving", was tantamount to an express or implied waiver by itself. I find that it was more likely a statement indicating that she had not notified the landlord of *when* she was leaving. The rest of the text message dated August 12, 2014 confirms this:

> "The fact that your landlord **doesn't know you are leaving** and that **you are willing to leave without notice** is very concerning to me." (my emphasis added)

Notice of exactly when the tenant intended to vacate was something that she was obliged to do if she didn't want to be responsible for loss of revenue, and was what the landlord requested in the subsequent letter of August 18, 2014 and email of September 7, 2014. For all of the aforementioned reasons I find the tenant knew in July, August and most certainly by August 12, August 18, 2014, and September 7, 2014 that her landlord continued to intend to evict her. I therefore find that the acceptance of unqualified rent by the landlord for September, October and November absent any conduct which might be construed as contrary to its intention of ending the tenancy, does not constitute a waiver express or implied pursuant to the law as restated in Policy Guideline 11. It may also be inferred from the conduct of the parties that all monies paid by the tenant were offered by her and accepted by the landlord as "for use an occupation only." I find that the landlord further demonstrated its intention to end the tenancy as evidenced by the landlord's email dated September 7, 2014 to her counsel requesting a date for the tenant to move, the landlord opposing the tenant's judicial review on September 12, 2014 and the landlord filing this application seeking an order for possession on September 25, 2014.

I find there is no or insufficient evidence from the tenant that any alleged waiver induced her or that she relied upon any waiver thereby changing her position to her detriment. The tenant admitted that she always derived income from babysitting for other occupants in her building. I therefore find that the tenant's acceptance of future babysitting work in October for November more likely evidenced denial rather than her reliance upon any alleged waiver of the landlord. In any event she derived a benefit and not a detriment from the acceptance of that work. Apart from looking for a new apartment in August 2014, the tenant's position was unchanged throughout her tenancy. As I have already found, the tenant's search for a new apartment was more likely indicative that the tenant knew her tenancy was at an end rather than it was being reinstated.

Therefore I find that the tenant has not proven on the balance of probabilities that the landlord's conduct singularly or combined can be considered to be an express or implied waiver as contemplated by the Residential Policy Guideline 11 aforementioned.

Accordingly I find that the tenancy has not been reinstated. The tenant's application to cancel the Notice was dismissed on July 28, 2014. The parties admitted the Notice to End the Tenancy to be valid. The landlord has requested an Order for Possession. Accordingly I must grant an Order for Possession but make it effective no earlier than November 30, 2014.

I do not have jurisdiction to order a stay of execution. However, I caution the landlord to consider waiting until the judicial review of the July 28, 2014 decision is disposed of before executing the Order for Possession.

Conclusion:

I have granted the landlord an Order for Possession effective November 30, 2014. This order may be filed in the Supreme Court and enforced as an Order of that Court. I order that the landlord recover the filing fee of $ 50.00. This order may be filed in the Small Claims Court and enforced as an order of that Court. This Decision and Order must be served on the tenant.

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: November 12, 2014

Residential Tenancy Branch