



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding HOLLYBURN ESTATES LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPR, OPN, MNR, MNDC, MNSD, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* ("Act") for:

- an Order of Possession for unpaid rent and based on the tenant's notice to end tenancy, pursuant to section 55;
- a monetary order for unpaid rent and for money owed or compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("Regulation") or tenancy agreement, pursuant to section 67;
- authorization to retain a portion of the tenants' security deposit in partial satisfaction of the monetary order requested, pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant, pursuant to section 72.

The tenant did not attend this hearing, which lasted approximately 23 minutes. The landlord's agent, DDC ("landlord") attended the hearing and was given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The landlord confirmed that she is the building manager for the landlord company named in this application and that she had authority to represent it as an agent at this hearing. A property manager for the landlord company was observing the hearing but did not provide any testimony during the hearing.

The landlord testified that the tenant was served with the landlord's Application for Dispute Resolution hearing package ("Application") on October 28, 2015, by way of registered mail. The landlord provided a Canada Post receipt and tracking number as proof of service. The landlord confirmed that the tenant picked up and signed for the package on October 30, 2015. In accordance with sections 89 and 90 of the *Act*, I find that the tenant was deemed served with the landlord's Application on November 2, 2015, five days after its registered mailing.

The landlord testified that the tenant was served with the landlord's 10 Day Notice to End Tenancy for Unpaid Rent, dated October 7, 2015 ("10 Day Notice"), on the same date, by way of posting to her rental unit door. The landlord provided a signed, witnessed proof of service to confirm same. In accordance with sections 88 and 90 of the *Act*, I find that the tenant was deemed served with the landlord's 10 Day Notice on October 10, 2015, three days after its posting.

Issues to be Decided

Is the landlord entitled to an Order of Possession for unpaid rent?

Is the landlord entitled to a monetary award for unpaid rent and for money owed or compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement?

Is the landlord entitled to recover the filing fee for this Application from the tenant?

Background and Evidence

The landlord testified that this tenancy began on May 4, 2012. Monthly rent in the current amount of \$1,009.00 is payable on the first day of each month. The landlord provided a notice of rent increase, dated January 27, 2015, indicating that the rent was being increased from the original tenancy agreement amount of \$985.00 to the current amount of \$1,009.00, an increase of \$24.00, effective on May 1, 2015. The landlord provided a copy of the notice for this hearing. The landlord confirmed that this notice was served to the tenant on January 27, 2015, by way of posting to her rental unit door. The landlord provided a signed, witnessed proof of service to confirm same. In accordance with sections 88 and 90 of the *Act*, I find that the tenant was deemed served with then notice of rent increase on January 30, 2015, three days after its posting.

The landlord confirmed that a security deposit of \$492.50 was paid by the tenant and the landlord continues to retain this deposit. The landlord provided a copy of the written tenancy agreement with its application. The landlord testified that the tenant continues to reside in the rental unit, as rent for December 2015 was paid by the tenant.

The landlord issued the 10 Day Notice indicating that rent in the amount of \$129.00 was due on October 1, 2015. The notice indicates an effective move-out date of October 17,

2015. The landlord confirmed that the tenant failed to pay the additional rent increase amount of \$24.00 for each of May, July, August, September and October 2015 and \$9.00 for June 2015.

The landlord confirmed that the tenant paid rent on time and in full for November and December 2015 and no rent receipts were issued to the tenant. The landlord noted that no communication was made with the tenant to advise her that the landlord was accepting her rent for "use and occupancy only." The landlord confirmed that she wished for the tenant to pay the outstanding rent, late fees and parking charges due and then the landlord would not have to enforce an order of possession against the tenant. However, the landlord confirmed that the tenant was aware of the landlord's intention to enforce the 10 Day Notice because she received the notice and was aware of this hearing to obtain an order of possession against her.

The landlord seeks a monetary order of \$204.00 plus the \$50.00 filing fee for this Application. The landlord seeks \$129.00 for unpaid rent from May to October 2015. The landlord also seeks \$25.00 for a late payment fee for October 2015 rent and \$50.00 total for parking charges from February to March 2015. The landlord provided a copy of a separate agreement, dated February 20, 2015, signed by the tenant for parking charges of \$25.00 per month.

Analysis

Order of Possession

Residential Tenancy Policy Guideline 11 discusses the issue of waiver of a 10 Day Notice:

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 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 provided undisputed evidence at this hearing, as the tenant did not appear. The tenant failed to pay the outstanding rent due on October 1, 2015, within five days of receiving the 10 Day Notice.

After the tenant was deemed to have received the 10 Day Notice on October 10, 2015, she made two rent payments on time for November and December 2015. I find that the landlord's conduct of accepting full rent payments for two months after filing the Application on October 26, 2015, to be a waiver of the 10 Day Notice. The landlord did not issue any receipts for the rent payments or indicate that they were being accepted for "use and occupancy only." The landlord failed to provide any evidence that the landlord specifically informed the tenant that the November and December 2015 rent payments were being accepted for "use and occupancy only." I find that the landlord did not communicate with the tenant about its intention to pursue an end to this tenancy.

The landlord did not withdraw its Application or cancel the hearing at any time prior to this hearing. I found that the tenant was deemed served with the landlord's Application and had sufficient notice of the hearing. The tenant did not appear at this hearing to present her position. The tenant did not allege any express or implied waiver of the 10 Day Notice. However, I find that the tenant relied on the landlord's conduct, amounting to waiver, of continuing to accept November and December 2015 rent payments without issuing any receipts or verbal notifications that the rent was being accepted for "use and

occupancy only” or that an end to tenancy was still desired. I find that the tenant paid rent on time for November and December 2015, assuming that her tenancy would continue.

For the above reasons, and given the conduct of the parties, I find that the landlord waived its rights to pursue an Order of Possession based on the 10 Day Notice. I find that the landlord reinstated this tenancy by accepting full rent payments from the tenant after the corrected effective date of October 20, 2015.

On a balance of probabilities and for the reasons stated above, I dismiss the landlord’s application for an order of possession based on the landlord’s 10 Day Notice, dated October 7, 2015, without leave to reapply. The landlord’s 10 Day Notice, dated October 7, 2015, is cancelled and of no force or effect. This tenancy continues under the terms of the tenancy agreement, until it is ended in accordance with the *Act*.

Monetary Order

Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, *Regulation* or tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from a tenant’s non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

The landlord provided undisputed evidence that the tenant failed to pay rent of \$129.00 from May to October 2015. I find that the landlord issued a valid notice of rent increase within the allowable amount under the *Regulation* and that the tenant was deemed served with the notice within the allowable three-month notice period under the *Act*. I find that the rent for this unit is \$1,009.00 per month and that the tenant acknowledged this when she paid the full rent due in November and December 2015.

The landlord provided undisputed evidence that the tenant failed to pay a late fee of \$25.00 for October 2015. As per section 7(1)(d) and 7(2) of the *Residential Tenancy Regulation*, I find that the landlord is entitled to \$25.00 in late fees as the tenant was late paying rent, the fees are indicated in the tenancy agreement which the tenant signed, and the maximum charge for these late fees are \$25.00 per month.

The landlord provided undisputed evidence that the tenant failed to pay parking charges of \$50.00 total from February to March 2015. The landlord provided a parking agreement signed by the tenant for charges of \$25.00 per month. Therefore, I find that the landlord is entitled to \$50.00 in parking charges for the above period.

The landlord continues to hold the tenant's security deposit of \$492.50. The landlord applied to retain \$204.00 from the security deposit. However, as this tenancy is continuing, I decline to offset the landlord's monetary award against this deposit. The entire security deposit is to be dealt with at the end of this tenancy in accordance with section 38 of the *Act*.

As the landlord was partially unsuccessful in its Application, I find that it is not entitled to recover the \$50.00 filing fee paid for the Application.

Conclusion

The landlord's Application for an order of possession based on the landlord's 10 Day Notice, dated October 7, 2015, is dismissed without leave to reapply. The landlord's 10 Day Notice, dated October 7, 2015, is cancelled and of no force or effect. This tenancy continues under the terms of the tenancy agreement, until it is ended in accordance with the *Act*.

I issue a monetary order in the landlord's favour in the amount of \$204.00 against the tenant as follows:

Item	Amount
Unpaid February 2015 Parking Charges	\$25.00
Unpaid March 2015 Parking Charges	25.00
Unpaid May 2015 Rent	24.00
Unpaid June 2015 Rent	9.00
Unpaid July 2015 Rent	24.00
Unpaid August 2015 Rent	24.00
Unpaid September 2015 Rent	24.00
Unpaid October 2015 Rent	24.00
Unpaid October 2015 Late Fee	25.00
Total Monetary Award	\$204.00

The landlord is provided with a monetary order in the amount of \$204.00 in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

The landlord's application to recover the \$50.00 filing fee and to retain a portion of the tenant's security deposit, 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 22, 2015

Residential Tenancy Branch

