Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CORNERSTONE PROPERTIES LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes OPC, FF

Introduction

The landlord applies for an order of possession pursuant to a one month Notice to End Tenancy (the "Notice") served in June 2015 and for recover of the filing fee for this application.

The attending tenant Mr. K.R. argues that though the Notice ended the tenancy, it has been reinstated by the landlord's acceptance of rent, issuance of a rent increase and by a warning letter about use of the premises, all happening after the effective date of the Notice.

Both parties attended the hearing, the landlord by its lawful agents, and were given the opportunity to be heard, to present sworn testimony and other evidence, to make submissions, to call witnesses and to question the other. Only documentary evidence that had been traded between the parties was admitted as evidence during the hearing.

The tenant Mr. S.P. did not attend the hearing though his co-tenant Mr. K.R. confirmed he was aware of it. There was no issue raised regarding service on Mr. S.P..

Preliminary Issue

As a preliminary matter, it appears that the tenants had previously applied to cancel or challenge the one month Notice. In a decision dated August 28th, 2015 (under the file number recorded on the cover page of this decision), following a hearing the same day, Arbitrator K.M. determined that the tenants had not made their application to dispute the Notice within the statutory ten day period to do so following receipt of it and she declined to extend that time period. She upheld the Notice and determined that the tenancy would end in accordance with the Notice (which stated an effective ending date of July 20th, 2015).

The tenant Mr. K.R. has applied for judicial review of that decision pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. The landlord has been served with the petition. No hearing date has been set. The tenants have not obtained an order staying this proceeding or staying the effect of Arbitrator K.M.' decision.

It was my determination at this hearing that in the absence of an order of the court staying the proceedings, I am bound to deal with this application despite the fact that a judicial review application has been made from the decision of Arbitrator K.M..

Issue(s) to be Decided

Does the relevant evidence presented during the hearing show on a balance of probabilities that the tenancy has been reinstated or a new tenancy has been created after the original tenancy was ended by the one month Notice?

Background and Evidence

The rental unit is a one bedroom apartment in a 21 unit apartment building. The tenancy started in 2006. The most current monthly rent as of September 2015 was $813.00, due on the first of each month, in advance. The landlord holds a $325.00 security deposit.

The Notice in this matter was served in June 2015. The tenants failed in challenging it in the earlier proceeding and as a result, by operation of s. 47 of the *Residential Tenancy Act* (the "*RTA*") the tenancy ended. The Notice stated an effective date for the tenancy to end on July 20th, 2015. However, and as noted at hearing, that date was too soon. The "one month" reference in the statutory Notice is somewhat misleading in that regard. Under s. 47 there must be one clear rental period before the Notice can become effective. Since rent was due on the first of each month, a one month Notice to End Tenancy received any time in June could only have been effective to end the tenancy on the last day of the following rental period, namely July 31st.

It is of little consequence, because s. 53 of the *RTA* provides that a Notice containing an effective date that is too early, automatically corrects itself to the earliest lawful date.

This tenancy ended by operation of s. 47 of the *RTA* on July 31st, 2015.

After receipt of the August 28th decision the landlord provided the tenants with a letter indicating that they had scheduled the tenants' move out date for September 30th and wanted to make arrangements to complete a "move-out form" with the tenants.

The tenants did not vacate the premises on September 30th. The landlord's representative Ms. A.R. testifies that the landlord attended for a move-out inspection on September 30th and realized only then that the tenants were not leaving.

The landlord brought this application for an order of possession on October 2nd.

The tenant Mr. K.R. testifies that the landlord issued a Notice of Rent Increase to him regarding this rental unit. A copy of that document was not submitted. It is unclear when the Notice of Rent Increase was given but I surmise that it was received around November 1st.

Mr. K.R. says that rent was paid and accepted for the month of October and so the tenancy was reinstated. He says that the rent was customarily paid automatically directly to the landlord from the provincial Ministry of Social Services on the tenants' behalf and that the landlord deposited or accepted the bank credit for the rent that the Ministry sent for October.

Mr. K.R. did not receive an actual receipt for the rent payment. Rather, he received a letter from the landlord on or about October 9th acknowledging the payment and stating that it was accepted for "use and occupancy only."

Mr. K.R. says that on November 25th he received a letter from the landlord requiring him to remove a boat from a shoreline on the property. He says this letter also affirms the tenancy.

Ms. A.R. for the landlord testifies that the Notice of Rent Increase was a general one, sent to all applicable rental units and was sent to these tenants by mistake. There was no intent to indicate that the landlord still considered the applicants to be its tenants.

She confirms the landlord's letter that the money received from the Ministry for October was for use and occupation only and not as rent.

Analysis

Residential Tenancy Policy Guideline 11 "Amendment and Withdrawal of Notices" relates the general principles considered when a tenant has paid rent after receipt of a Notice to End Tenancy,

> 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.

In this case the tenancy had ended by operation of the Notice before any of the acts asserted by the tenants had occurred. The question then is not whether the Notice was "amended or withdrawn." The issue must be looked at as whether the tenants, by tendering money as rent after the tenancy had ended, created a new tenancy with the landlord. Collaterally, have the landlord's actions alleged by the tenants somehow created a new tenancy? In my view the essential issue is the same: what was the intention of the parties?

The landlord's September 11th letter to the tenant indicates that the landlord expected the tenants to vacate by September 30th.

On October 2nd, two days after the landlord determined that the tenants were not moving out, the landlord applied for an order of possession.

Likely in late September, the Ministry of Social Service on behalf of the tenants credited the landlord's bank account with the equivalent of what would have been the rent due for October 1st.

I find that the bank credit sent to the landlord by the Ministry was likely money described as "rent." It is likely that the transaction was automatic at the Ministry's end and would continue to be so until the Ministry was given different instructions by its clients, the tenants.

At the time the money was sent by the Ministry there was no tenancy. It had ended as a result of the Notice. Therefore, there was no “rent” due. The money from the Ministry was being forwarded pursuant to a tenancy agreement that no longer existed.

There is no evidence to suggest that the tenants’ intention in having the Ministry send the money was to create a new tenancy or revive the old one. If the tenants had such an intention, there is no evidence that they conveyed that intention to the landlord.

The money was likely deposited to the landlord’s bank account automatically. “Automatic” and “bank credit” were words used by the tenant at the hearing.On receipt of the money the landlord gave the tenants written acknowledgement of receipt but claimed the money to be for “use and occupation” and not as rent.

In terms of the essentials of a contract, namely: “the parties, the property and the price,” where a person says to another, “Here is $813.00 for rent for this apartment for the month of October” and the other simply takes the money without comment, a binding agreement may well have been made. The recipient cannot comeback later and say the money was for something other than rent.

In this case however, the landlord’s intention appears to have been clear and unwavering since the Notice was first issued. It opposed the tenants’ application to cancel the Notice. After receipt of the August 28th arbitration decision it wrote to the tenants that it expected them to vacate the premises by September 30th. Immediately after it was determined that the tenants were not leaving, it made this application for an order of possession.

I am unable to conclude that the tenants’ intention in permitting the Ministry to forward money for October rent to the landlord was to create a new tenancy. The mere fact of the payment cannot be conclusive. If it were, then a vacating tenant who neglected to cancel a rent payment arrangement through the Ministry would find his or herself still a tenant, despite intention.

I am unable to conclude that the landlord’s action in permitting, or perhaps not stopping the money being credited to its bank account was evidence of its intention to create a new tenancy with the tenants. Neither do the landlord’s actions demonstrate an intention to waive its right to possession of the premises as a result of the termination of the tenancy.

In regard to the Notice of Rent Increase issued by the landlord, I accept Ms. A.R.'s evidence that it was sent in error, as part of a general notice to all tenants susceptible to the annual automatic rent increases permitted under the *RTA.*

However, sending the tenants the Notice of Rent Increase can be seen as an act inconsistent with the termination of the tenancy.

In this case, the Notice of Rent Increase was given after the tenancy had ended. It was not the intention of the landlord to create or reinstate a tenancy. In the circumstances of this case would not have been reasonable for the tenants to conclude other than that it did not apply to them.

In regard to the letter of November 25th to the tenants regarding the relocation of a boat, in my view such a letter could properly be sent to an overholding tenant as well as to a lawful tenant. It did not serve to change the relationship between the parties.

Conclusion

The tenancy has ended. It has not been reinstated nor has a new tenancy been created. The landlord is entitled to an order of possession.

The landlord is entitled to recover the $50.00 filing fee for this application. I authorize it to reduce the security deposit it holds by $50.00, in full satisfaction of the fee.

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 04, 2015

Residential Tenancy Branch