



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **CNR, OLC, RR, MNDCT, OT**

Introduction

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

- cancellation of a 10 Day Notice to End Tenancy for Unpaid Rent (the "10 Day Notice") pursuant to section 46;
- an order requiring the landlord to comply with the *Act*, regulation or tenancy agreement pursuant to section 62;
- an order to allow the tenant to reduce rent for repairs, services or facilities agreed upon but not provided, pursuant to section 65;
- a monetary order for compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- other relief.

Both parties attended the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

The tenant mentioned at the outset of the hearing they had suffered injuries prior to the hearing but stated that they were capable of representing themselves and did not request an adjournment of the proceedings. I asked multiple times if the tenant required assistance or would like to request an adjournment for the purposes of obtaining legal advice or retaining an advocate and the tenant confirmed on each occasion that they were prepared to proceed with the hearing representing themselves.

The parties were made aware of Residential Tenancy Rule of Procedure 6.11 prohibiting recording dispute resolution hearings and the parties each testified that they were not making any recordings.

As both parties were present service was confirmed. The landlord confirmed receipt of the tenant's application and materials. Based on the undisputed evidence I find the landlord duly served in accordance with sections 88 and 89 of the Act.

The landlord testified that they served the tenant with their evidence by registered mail sent on May 3, 2022. The landlord submitted a valid Canada Post tracking receipt as evidence of service. The tenant testified that they did not pick up the registered mail as they are unable to reside at their address for service. Based on the testimonies I find the tenant deemed served with the landlord's evidence on May 8, 2022, five days after mailing in accordance with sections 88, 89 and 90 of the Act. Pursuant to Residential Tenancy Policy Guideline 12 the failure of a party to pick up materials served by registered mail does not override the deeming provisions of the Act.

Issue(s) to be Decided

Should the 10 Day Notice be cancelled? If not is the landlord entitled to an Order of Possession?

Is the tenant entitled to any of the other relief sought?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the claim and my findings around each are set out below.

The parties agree on the following facts. This tenancy began on March 1, 2020. The monthly rent for this periodic tenancy is \$1,318.00 payable on the first of each month. The rental unit is a suite in a multi-unit rental building. The tenant was issued a 10 Day Notice dated March 2, 2022 showing an arrear of \$1,318.00 payable on March 1, 2022. The tenant filed their application for dispute resolution on March 4, 2022 and made full payment of the arrear in two installments on March 7 and 8, 2022. The landlord issued receipts for each of those payments and copies of the receipts were submitted into evidence.

The tenant gave lengthy testimony about their complaints about this tenancy including the condition of the rental unit, the landlord's conduct and failure to perform repairs or accept rent payments in a timely manner, the inability to use common areas and the negative physical and mental effects this tenancy has had on the tenant. The tenant submitted into documentary evidence multiple hand written pages of submissions, correspondence with the landlord and others and journals of their complaints and interactions.

The landlord disputes the tenant's accusations and claims in their entirety.

Analysis

Subsection 46(1) of the *Act* provides that a landlord may end a tenancy if rent is unpaid on any day after it is due by providing a notice that complies with the form content requirements of section 52. In the present case the landlord issued the 10 Day Notice dated March 2, 2022 claiming unpaid rent of \$1,318.00 that was due on March 1, 2022.

Subsection 46(4) provides that a tenant may apply to dispute the notice or pay the overdue rent within 5 days of receipt of the notice. The evidence before me is that the tenant filed their application to dispute the notice on March 4, 2022, within the 5 days provided under the statute, and made full payment of the arrear by March 8, 2022.

Residential Tenancy Policy Guideline 11 discusses the issue of waiver of a notice to End Tenancy:

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.

I find that there is sufficient evidence that the conduct of the landlord amounts to an implied waiver of the Notice to End Tenancy and reinstatement of the tenancy. The parties confirmed that the tenant has made full payment of the rent since the 10 Day Notice was issued. I find that the written receipts issued by the landlord for these payments does not indicate that the payments are solely accepted for the purposes of use and occupancy and a reasonable interpretation is that they cancel the 10 Day Notice. I further find the evidence of the parties that the tenant has made subsequent rent payments to the landlord would be reasonably interpreted as a reinstatement of the periodic tenancy.

Accordingly, I find that the 10 Day Notice of March 2, 2022 has been cancelled through the landlord's acceptance of the payments without clarifying that they were only accepted for use and occupancy and did not serve to reinstate the tenancy. This tenancy continues until ended in accordance with the *Act*.

While the parties made reference to other notices that have been issued by the landlord and they gave evidence that the rent that was payable on June 1, 2022 has not been paid, I find these issues are not part of the application filed with the Branch and I make no finding on these other issues.

The onus to establish their claim on a balance of probabilities lies with the applicant as delineated in Rule of Procedure 6.6.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. This section, in conjunction with section 65 allows me to make an order for a reduction in the rent for a tenancy.

Based on the totality of the evidence before me I find the tenant has failed to meet their evidentiary onus. The tenant's submissions consists of subjective complaints, impassioned testimony and multiple pages of handwritten documents prepared by the tenant. I find little objective third-party materials that support the tenant's various complaints and grievances.

The tenant made reference to the state of the rental property but submitted no photographs or third-party inspection reports. The tenant made reference to complaints filed with the police but has failed to provide any incident reports or evidence of criminal charges being laid. I find that the tenant's testimony and documentary evidence do not cumulatively amount to sufficient evidence to meet their burden on a balance of probabilities.

While I sympathize with the tenant's subjective experiences, I find insufficient objective evidence that their fears, trepidation and discomfort arise from a breach on the part of the landlord.

I find that the tenant has not established this portion of their application demonstrating any breach on the part of the landlord that would give rise to either a monetary award or an order of compliance. Consequently, I dismiss this portion of the application.

Conclusion

The portion of the application seeking cancellation of the 10 Day Notice is granted. This tenancy continues until ended in accordance with the Act.

The balance of the tenant's 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: June 16, 2022

Residential Tenancy Branch