



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing

DECISION

Dispute Codes: FFL OPC

Introduction

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

- an Order of Possession for cause, pursuant to section 55; and
- authorization to recover the filing fee for this application, pursuant to section 72.

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

Pursuant to Rule 6.11 of the RTB Rules of Procedure, the Residential Tenancy Branch's teleconference system automatically records audio for all dispute resolution hearings. In accordance with Rule 6.11, persons are still prohibited from recording dispute resolution hearings themselves; this includes any audio, photographic, video or digital recording. Both parties confirmed that they understood.

The tenant confirmed receipt of the landlord's application for dispute resolution hearing. In accordance with section 89 of the *Act*, I find that the tenant duly served with the landlord's application. All parties confirmed receipt of each other's evidentiary materials, and that they were ready to proceed.

The tenant confirmed receipt of the 1 Month Notice dated November 29, 2022, which was personally served on the tenant on the same date. In accordance with section 88 of the *Act*, I find the tenant duly served with the landlord's 1 Month Notice on November 29, 2022.

Issues

Is the landlord entitled to an Order of Possession for Cause?

Is the landlord entitled to recover the filing fee for their application?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

Both parties originally entered into a fixed-term tenancy commencing November 21, 2022, and which was to end on February 1, 2024. Monthly rent is set at \$1,575.00, payable on the first of the month. The landlord holds a security deposit of \$787.50 for this tenancy. The landlord confirmed in the hearing that the tenant is still residing at the rental unit, and they have been receiving monthly rent from the tenant.

The landlord served the tenant with a 1 Month Notice dated November 29, 2022, providing the following grounds:

1. The tenant or a person permitted on the property by the tenant has seriously jeopardized the health or safety or lawful right of another occupant or the landlord.

The landlord testified that they had served the tenant with the 1 Month Notice as the tenant is smoking on the property. The landlord submitted photos of the tenant smoking on the property, which the landlord argued was in contravention of the tenancy agreement.

The tenant testified that the landlord was aware that they smoke, and had given them to smoke in certain areas of the property. The tenant states that since moving in, the landlord has served them with multiple documents, which has caused much confusion. The tenant submitted copies of these documents in evidence, with included the original tenancy agreement, and amended agreements as well as addendums. The tenant testified that despite being told that they could smoke on the porch, the landlord served the tenant with a 1 Month Notice to End Tenancy for smoking on November 29, 2022

The tenant testified that on December 5, 2022, they were provided with a new addendum that allowed the tenant to smoke on the property as long as it was out by the shed. The tenant states that they were very worried, confused, and scared.

The tenant submitted a copy of the amended tenancy agreement, with shows that the fixed term tenancy was changed to April 1, 2023. The amended tenancy agreement is initialed by two parties. The tenant also submitted a copy of the addendum to the residential rental agreement signed on December 5, 2022 by a party with the initials HV

next to “LANDLORD”. The landlord’s daughter testified in the hearing that the initials belonged to a family member, their mother. The addendum contained a new term which reads:

- “1) Tenants are on a “quit smoking program”. Smoking will only be permitted along the backside of the property yard near the shed house. Tenants must
- a. Dispose cigarette buds in garbage”.

AP, the tenant’s housing worker, attended the hearing, and testified that they were present when the landlord had shown the tenant the home for rent. AP testified that they had witnessed the landlord asking the tenant if they smoked, and when the tenant admitted that they did, the landlord gave permission for the tenant to smoke on the uncovered patio as long as the tenant ensured that the door and windows were closed.

Analysis

Section 47 of the *Act* provides that upon receipt of a notice to end tenancy for cause the tenant may, within ten days, dispute the notice by filing an application for dispute resolution with the Residential Tenancy Branch. In this case, the tenant did not file an application to dispute the 1 Month Notice within 10 days of November 29, 2002.

Normally the tenant’s failure to dispute the 1 Month Notice within the 10 days means that the tenant is conclusively presumed under section 47(5) of the *Act* to have accepted that the tenancy ended on the effective date of the 1 Month Notice.

In this case, I find that the actions of the landlord had caused considerable confusion for the tenant as to whether the landlord had withdrawn the 1 Month Notice on December 5, 2022, 6 days after the 1 Month Notice was served. Not only did the landlord accept rent after the corrected, effective date of the 1 Month Notice, January 31, 2023, without communicating that the rent was for use and occupancy only, the evidence shows that the tenant was provided with an amended tenancy agreement and addendum. The addendum is signed by a family member of the landlord, and dated December 5, 2022, and now includes a provision for the tenant to smoke on the property under certain conditions.

Residential Tenancy Policy Guideline #11 discusses the Amendment and Withdrawal of Notices.

“D. WAIVER OF NOTICE AND NEW OR CONTINUED TENANCY

Express waiver happens when a landlord and tenant explicitly agree to waive a right or claim. With express waiver, the intent of the parties is clear and unequivocal. For

example, the landlord and tenant agree in writing that the notice is waived and the tenancy will be continued.

Implied waiver happens when a landlord and tenant agree to continue a tenancy, but without a clear and unequivocal expression of intent. Instead, the waiver is implied through the actions or behaviour of the landlord or tenant.

For example, if a landlord gives a notice to end tenancy, a landlord may accept rent from the tenant for the period up to the effective date of the notice to end tenancy without waiving the notice. However, if the landlord continues accepting rent for the period after the effective date but fails to issue rent receipts indicating the rent is for “use and occupancy only,” it could be implied that the landlord and tenant intend for the tenancy to continue.

Intent may also be established by evidence as to:

- whether the landlord specifically informed the tenant that the money would be for use and occupancy only;*
- whether the landlord has withdrawn their application for dispute resolution to enforce the notice to end tenancy or has cancelled the dispute resolution hearing; and*
- the conduct of the parties.”*

In this case, I find that the actions of the landlord and their family members have implied that they have decided to continue with the tenancy by offering the tenant a signed addendum on December 5, 2022 with a new provision that the tenant may smoke in a designated area, and under certain conditions.

I further note that the landlord also continued to accept rent payments from the tenant after the effective date of the 1 Month Notice, but never communicated to the tenant that this payment was “for use and occupancy only”. By accepting payment after the effective date of the Notice, and without indicating that this payment was for use and occupancy only, I find that the landlord faces the issue of whether they had implied that the 1 Month Notice was withdrawn, and that the tenancy had in fact been reinstated earlier.

In order to be effective, a notice ending a tenancy must be clear, unambiguous and unconditional. I find that the above actions and conduct of the landlord constitute an implied waiver, and that it would have been reasonable on part of the tenant to believe that on December 5, 2022 that the landlord wanted to continue with the tenancy and was withdrawing the 1 Month Notice to End Tenancy that was served 6 days earlier. I find this belief to be supported by the fact that the tenant never did dispute the 1 Month Notice or move out despite being served with the 1 Month Notice.

As noted above, the notice to end tenancy must be clear, unambiguous and unconditional. By providing the tenant with the revised addendum on December 5, 2022, the Notice became ambiguous as to whether the landlord wanted to continue with the tenancy or not. I find that on December 5, 2022, the landlord had implied that the tenancy was reinstated with their actions, and therefore the 1 Month Notice was no longer in force or effect.

I find this waiver is further supported by the fact that the landlord continued to accept rent after the effective date had passed, and never noted that the payments were “for use and occupancy only”. I therefore dismiss the landlord’s application for an Order of Possession without leave to reapply. This tenancy is to continue until ended in accordance with the *Act*.

The filing fee is a discretionary award issued by an Arbitrator usually after a hearing is held and the applicant is successful on the merits of the application. As landlord was not successful, the landlord must bear the cost of this filing fee.

Conclusion

The landlord’s entire 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: April 24, 2023

Residential Tenancy Branch