



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      OPR, OPB, MNR, MNSD, FF

### Introduction

This hearing dealt with the landlords' application for an Order of Possession for unpaid rent and breach of an agreement with the landlord; a Monetary Order for unpaid rent; and, authorization to retain the security deposit. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

I determined that the tenants had vacated the rental unit prior to filing this Application for Dispute Resolution thus the landlord does not require an Order of Possession and I amend the application to exclude that request. The remainder of this decision deals with the landlords' claim for unpaid rent and disposition of the security deposit.

### Issue(s) to be Decided

1. Have the landlords established an entitlement to recover unpaid rent in the amount claimed?
2. Are the landlords authorized to retain all or part of the security deposit?

### Background and Evidence

A one-year fixed term tenancy commenced April 16, 2010 and the tenants paid a security deposit of \$750.00 and a fob deposit of \$100.00. The written tenancy agreement provides that the tenants shall pay rent of \$1,500.00 on the 1<sup>st</sup> day of every month.

In April 2011 the parties executed a document entitled "ADDENDUM" to extend the tenancy for another 12 month fixed term. In April 2012 the parties executed a document entitled "ADDENDUM Extension of Rental Agreement" to extend the tenancy for

another fixed term of 12 months and increase the monthly rent to \$1,564.50. The above documents have been referred to as the “extension” documents in this decision.

It was undisputed that the tenants paid rent of \$1,564.50 from May 2012 through March 2013. On February 14, 2013 the landlord received a written notice from the tenants of their intention to end the tenancy March 31, 2013. In response, the landlord communicated to the tenants that the landlords did not accept the tenants’ notice to end the tenancy early and would not end the tenancy until April 30, 2013. The tenants vacated the rental unit in March 2013 and did not pay rent for April 2013. The landlords are seeking loss of rent in the amount of \$1564.50 for the month of April 2013.

The landlord acknowledged that the landlord did not commence advertising efforts to re-rent the unit as the landlord intended to sell the unit after the fixed term tenancy ended. Further, the tenants were interfering with showings of the unit. The unit was sold in May 2013. The landlord was of the position it was unlikely that a replacement tenant would be found for a term of only one month.

The tenant submitted that the landlord had tried ending the tenancy on two previous occasions and the tenant was of the position the landlord wanted the tenancy ended. The tenant denied interference with the landlord’s attempts to show the unit. Rather, the tenant explained that he had requested proper notice of entry be given to the tenants. The frequent showings and improper notice was the reason the tenant ended the tenancy. This was cited as the reason for ending the tenancy in the tenants’ notice to end tenancy.

The landlord acknowledged that the tenant had requested notices of entry and the landlord submitted that they were sent to the tenants via email. If the tenant did not respond to the email the landlord would not enter the unit. As a result, the listing for sale was cancelled until after the tenant gave notice to end the tenancy. Even when the unit was largely vacated near the end of March 2013 the tenant was refusing entry. The tenant asserted that emailed requests for entry were insufficient.

### Analysis

Upon consideration of everything provided to me, I provide the following findings and reasons with respect to the landlords’ entitlement to recover unpaid and/or loss of rent from the tenants.

### **Monthly rent payable**

The first issue to determine is the amount of monthly rent payable by the tenants. The landlords are seeking an amount that is greater than the amount reflected in the tenancy agreement and I heard that a Notice of Rent Increase had not been served upon the tenants.

Part 2, section 14 of the Act provides for changes to a tenancy agreement. This section provides that a tenancy agreement may be amended to add, remove or change a term if both the landlord and tenant agree to the amendment. However, section 14(3) specifically states that rent increases must be made in accordance with Part 3 of the Act. Therefore, while I accept that the expiry date of the fixed term was amended from time to time by way of mutual agreement, as evidenced by the signed “extension” documents, the “extension” documents are not a means to increase the rent.

Part 3 of the Act provides that any rent increase must be made by way of a Notice of Rent Increase, in the approved form, served at least three (3) months in advance of the date the rent increase is to take effect. Since the landlord did not serve a Notice of Rent Increase upon the tenants I find the rent was not legally increased and the rent remained at \$1,500.00 per month.

Section 43 of the Act provides that if a landlord collects a rent increase that does not comply with Part 3 of the Act, the tenant may deduct the overpayment from rent or otherwise recover the overpayment from the landlord. Accordingly, I find the tenants are entitled to recover \$709.50 [\$64.50 x 11 months] from the landlords and I shall reduce any award to the landlords for unpaid and/or loss of rent by this amount.

### **April 2013 rent**

Where a tenant has an unexpired fixed term tenancy and the tenant ends the tenancy, the tenant may be held responsible for loss of rent for the remaining term of the tenancy agreement. Where a tenant gives a landlord notice of their intent to end the fixed term early a landlord should put the tenant on notice that the landlord does not accept the early end of the tenancy and/or will hold the tenant responsible for loss of rent. The purpose of giving such notice to the tenant is so that the tenant is fully aware of the consequences of their decision to continue with the early end of tenancy. In this case, I am satisfied the landlord communicated this to the tenants yet the tenants chose to proceed with their decision to end the tenancy early.

The tenant made submissions that it was the landlord's actions of permitting frequent and improper entries into the unit which caused the tenants to give notice to end the tenancy early. Where a tenant is of the position the landlord has violated a material term of the tenancy agreement, such as the right to quiet enjoyment, the tenant's obligation is to put the landlord on written notice to correct the breach and if the landlord does not correct the breach then the tenant may end the tenancy early. In this case, I find insufficient evidence the tenants gave the landlord written notice of a breach of a material term prior to giving their notice to end the tenancy.

Finally, I reject the tenant's position that the landlord tried to end the tenancy on two previous occasions. Upon review of the tenant's evidence, namely two emails from the landlord, I find the landlord was informing the tenants that the unit was for sale and that if a sale were made the owners would likely propose ending the tenancy early with compensation payable to the tenants. The purpose of this communication was to solicit a response from the tenants to see if the tenants would be receptive to such a proposal. I find these communications do not amount to attempts to end the tenancy as suggested by the tenant.

In light of the above, I find the landlords have established that the tenants breached the tenancy agreement and the Act by ending the tenancy before the expiry of the fixed term.

I accept the landlord's position that finding a replacement tenant for one month was extremely unlikely. I accept the landlord's submissions that requests to show the unit during the month of March 2013 were met with resistance by the tenants, as evidence by the numerous communications sent to the tenants by the landlord. Therefore, in these circumstances I find the landlord took reasonable action in attempt to mitigate losses.

In light of the above, I grant the landlords' request to recover loss of rent for the month of April 2013 from the tenants. As explained previously in this decision, the landlords were entitled to receive rent of \$1,500.00 per month from the tenants and I offset this award by the overpayment of \$709.50 made in the preceding 11 months. Therefore, the landlords are awarded a net amount of \$790.50 for unpaid and/or loss of rent.

### **Monetary Order**

Given the partial success of the landlords in this Application I award the landlords one-half of the filing fee or \$25.00.

I authorize the landlord to retain \$815.50 [\$790.50 + 25.00] of the tenants' security deposit and fob deposit in satisfaction of the amounts awarded to the landlord with this decision.

The landlord is ordered to return the balance of the deposits to the tenants without further delay. The amount payable to the tenants is \$34.50 calculated as follows:

April 2013 rent	\$ 1,500.00
Rent overpayment (May 2012 – March 2013)	(709.50)
Filing fee (one-half)	25.00
Less: security deposit and fob deposit	<u>(850.00)</u>
Monetary Order for tenants	\$ 34.50

Provided to the tenants with their copy of this decision is a Monetary Order in the amount of \$34.50 serve and enforce as necessary.

### Conclusion

The landlords have been authorized to retain \$815.50 from the tenants' deposits to recover unpaid and/or loss of rent. The landlords must return the balance of \$34.50 to the tenants' without further delay. The tenants have been provided a Monetary order in the amount of \$34.50 to ensure payment is made.

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: August 14, 2013

---

Residential Tenancy Branch

