



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes            OPR, MNR, MNDC, FF

### Introduction

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

- an order of possession for unpaid rent 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; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

The landlords' application was originally initiated as a direct request proceeding, which is a non-participatory hearing. In an interim decision issued on November 21, 2016, an adjudicator determined that the matter was not appropriate for a non-participatory hearing and ordered that a participatory hearing take place. The interim decision directed the landlord to serve the tenants with a copy of the interim decision and a Notice of Reconvened Hearing (the "Hearing Package").

The tenants, the tenants' advocate (collectively "the tenant") and the landlords attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

The tenants confirmed receipt of the Hearing Package by way of registered mail. In accordance with section 89 of the *Act*, I find that the tenants were duly served with the Hearing Package.

Each party confirmed that they had received the other party's evidence. Neither party raised any issues regarding service of the evidence.

### Issue(s) to be Decided

Are the landlords entitled to an order of possession for unpaid rent?

Are the landlords entitled to a monetary order for unpaid rent and for money owed or compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement?

Are the landlords entitled to recover the filing fee for this application from the tenants?

Background and Evidence

Prior to this tenancy, the tenants were owners of the rental unit, which contained an unauthorized lower suite. As owners, the tenants resided upstairs and collected \$500.00 rent each month from the downstairs tenant as per their long-standing oral agreement.

On April 29, 2016 the tenants sold their home to the landlords. The tenants remained as occupants and entered into a written tenancy agreement with the landlords. The tenancy agreement discloses that the tenancy started on May 1, 2016 and was for a fixed term of six months ending on November 30, 2016, after which time the tenancy may continue on a month-to-month basis. The parties provided conflicting testimony on the term of the tenancy. The landlords contended that the tenancy was a fixed term scheduled to end on November 30, 2016. The tenants maintained that the agreement was for a six month fixed term scheduled to end October 31, 2016. The tenants claimed the effective date of November 30, 2016 on the tenancy agreement was a typographical error and should have read October 31, 2016.

The monthly rent was set at \$3,000.00 per month, due on the first of each month. The tenancy agreement stipulated that rent includes the unauthorized suite. The tenants paid a \$1,500.00 security deposit. During the tenancy, the tenants continued to collect rent from the downstairs tenant and remitted it as part of the \$3,000.00 monthly rent.

The tenants vacated the rental unit on October 30, 2016 and provided their forwarding address to the landlords this same date. Upon attending the rental unit on October 30, 2016, the landlords discovered the tenant of the unauthorized suite had not vacated.

The landlords served a 10 Day Notice to End Tenancy for Unpaid Rent ("10 Day Notice") by registered mail to the tenants' forwarding address. The tenants confirmed receipt of the 10 Day Notice. The landlords contend this 10 Day Notice was issued to the tenants because the tenant of the unauthorized suite remained and they did not receive rent for November 1, 2016.

The tenant of the unauthorized suite remains and has not been served a notice to end tenancy to date.

The landlords seek an order of possession and a monetary order in the amount of \$9,070.48. The monetary amount includes a \$70.48 utility charge, \$3,000.00 for November rent, \$3,000.00 for December rent and \$3,000.00 for January rent. The landlords also seek to recover the \$100.00 filing fee from the tenants.

## Analysis

### Fixed Term

The onus is on the landlords to prove their claim. In this situation, I find the landlords have failed to establish the fixed term tenancy was scheduled to end on November 30, 2016. Although the fixed term is listed on the tenancy agreement to end November 30, 2016, the fixed term is stipulated as a six month term commencing May 1, 2016. In calculating six months from May 1, 2016 the corrected effective date should be October 31, 2016. I find the lack of clarity in the tenancy agreement is interpreted to the benefit of the party that did not draft the agreement, in this case the tenants. The sales agreement which is signed by both parties, specifies the "seller will enter rental agreement for 6 months as per conditions." Based on the above, I find the parties entered into an agreement in which the sellers would become tenants for a fixed term of six months, from May 1, 2016 to October 31, 2016.

### Landlord

Pursuant to section 1 of the *Act*, the definition of landlord includes a successor in title to an owner of a rental unit. This means that once a property is sold, the buyer becomes the new landlord and the tenancy continues under the same terms. The buyer and the tenant do not need to sign a new tenancy agreement in order for the obligations and rights of a landlord to transfer to the buyer.

In this circumstance, a tenancy for the unauthorized suite was established prior to the sale of the property. In this case, I heard undisputed sworn testimony from the tenant and the tenant in the lower suite that there had been an oral agreement between the tenants when they owned this property and the lower suite tenant for some 27 years. The subsequent residential tenancy agreement between the purchasers of the property, the landlords, and the tenants in no way set aside the existing oral agreement between the owner of this property and the lower suite tenant. In coming to this determination, I have taken into consideration that the lower suite tenant did not pay monthly rent directly to the owner of this property, after the tenants sold the home to the landlords. However, I do not find that this changed relationship alters the reality that an oral residential tenancy agreement existed between the owner of this property and the tenant in the lower rental suite for some 27 years. Rather, I find that the buyers assumed this oral tenancy agreement when they purchased the property. For these reasons, I find that the landlord is the legal landlord of the tenant of the unauthorized suite.

### Order of Possession

Section 5 of the *Act*, establishes that landlords may not avoid or contract out of the *Act* and any attempt is of no effect. Although the tenancy agreement stipulates rent includes the unauthorized suite, I find this clause has no effect as rent could not have included the unauthorized suite because of the existing tenancy. The tenants paid rent for occupancy of their rental unit to the end of their tenancy in October and had no outstanding rent at that time. They

vacated the rental unit as per the terms of their understanding of their fixed term tenancy agreement and the landlords clearly accepted possession of the upper portion of the suite shortly after the tenants' surrendered possession of that portion of the rental property that they had a legal right to occupy. Consequently the 10 Day Notice for unpaid rent is of no effect.

Even if I am incorrect on my determination regarding the 10 Day Notice, non-payment of rent for the upper suite has no bearing on the exercise of the landlords' rights against the lower suite tenant. The lower suite tenant has a pre-existing tenancy enabling him to legally remain in this rental unit until such time as his tenancy is ended in accordance with the *Act*. Therefore, I find that the landlords are not entitled to an order of possession against the tenants and dismiss this portion of the landlords' claim.

#### Monetary Order

In relation to the utility charge, the evidence does not establish the tenants are responsible for utilities. Therefore I dismiss this portion of the landlords' monetary claim.

As the tenants had vacated the rental unit on October 30, 2016 and in accordance with their fixed term tenancy agreement, I find they are not responsible for payment of November, December and January rent.

#### Filing Fee

As the landlords were not successful in this application, I find that the landlords are not entitled to recover the \$100.00 filing fee paid for the application.

#### Conclusion

The landlords' entire application is dismissed.

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: January 20, 2017

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Residential Tenancy Branch