



## Order under Section 57 Residential Tenancies Act, 2006

**Citation:** BURKE v DUSZYNSKI, 2024 ONLTB 22779

**Date:** 2024-03-26

**File Number:** LTB-T-053834-22

**In the matter of:** 15, 1850 BEAVERBROOK  
LONDON ON N6H5X7

**Between:** DENISE BURKE

Tenant

**And**

MATTHEW DUSZYNSKI  
STEPHANIE DUSZYNSKI

Landlords

DENISE BURKE (the 'Tenant') applied for an order determining that MATTHEW DUSZYNSKI and STEPHANIE DUSZYNSKI (the 'Landlords') gave a notice of termination in bad faith.

This application was heard by videoconference on September 21, 2023.

The Landlords' Legal Representative, D. Price, the Landlords, Mathew Duszynski (MD) and Stephanie Duszynski (SD), the Tenant's Legal Representative, T. Moberley, and the Tenant attended the hearing.

The following witnesses testified at the hearing:

Peter Seney (PS) – Purchaser's Real Estate Agent – on behalf of Landlords

Shanin Tabeshfard (ST) – Landlords' Real Estate Agent – on behalf of Landlords

### Determinations:

1. As explained below, the Tenant proved the allegations contained in the application on a balance of probabilities. Therefore, I find that the Landlords shall pay to the Tenant \$11,285.84.
2. Subsection 57(1)(b) of the *Residential Tenancies Act, 2006* (the 'Act') requires the Tenant to prove each of the following on a balance of probabilities:
  - The Landlords gave the Tenant a notice of termination under section 49 of the Act;
  - The Tenant vacated the rental unit as a result of the notice of termination;
  - No person referred to in subsection 49(1) or 49(2) of the Act occupied the rental unit within a reasonable time after the Tenant vacated; and
  - The Landlords served the N12 notice of termination in bad faith.
3. Subsection 49(1) of the Act states:

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A Landlord of a residential complex that contains no more than three residential units who has entered into an agreement of purchase and sale of the residential complex may, on behalf of the purchaser, give the tenant of a unit in the residential complex a notice terminating the tenancy, if the purchaser in good faith requires possession of the residential complex or the unit for the purpose of residential occupation by,

- (a) the purchaser;
  - (b) the purchaser's spouse;
  - (c) a child or parent of the purchaser or the purchaser's spouse; or
  - (d) a person who provides or will provide care services to the purchaser, the purchaser's spouse, or a child or parent of the purchaser or the purchaser's spouse, if the person receiving the care services resides or will reside in the building, related group of buildings, mobile home park or land lease community in which the rental unit is located.
4. There was no dispute that the Landlords gave the Tenant a Notice to End your Tenancy (N12 Notice) pursuant to subsection 49(1) of the Act on October 19, 2021 which provided a termination date of December 31, 2021 and advised the Tenant that a Purchase and Sale Agreement for the rental unit was signed and the purchaser intends to move into the unit.
  5. After receiving notice from the Landlords that they intend to sell the unit, the Tenant began searching for a new place. She stated that she started to look for similar rentals in the area but that the rents were greater and there was not a lot of choice. The Tenant also considered buying a home. She stated that after viewing close to thirty homes, she made an offer to purchase a home in Belmont, a nearby town. The Tenant stated that the home was vacant and she was able to get a thirty day closing. There was no dispute that the Tenant then provided the Landlords with a Tenant's Notice to End the Tenancy (N9 Notice) with a termination date of November 30, 2021.
  6. Although the Tenant ended up providing a N9 Notice, I find that this was only prompted because of the N12 Notice served by the Landlords. Consequently, I was satisfied that the Tenant vacated the rental unit as a result of the N12 Notice.
  7. The purchaser did not move into the rental unit after the Tenant vacated the unit. There was no dispute that the purchaser leased the premises about forty days after the Tenant vacated for a higher rental amount.

Whether N12 Notice given in bad faith

8. The Tenant's Legal Representative submits that the Landlords gave the N12 Notice in bad faith as they were negligent or wilfully blind to rely solely on the advice/statements of their Real Estate Agent with respect to the purchaser's intention for the unit. The Tenant's Legal Representative submits that the Landlords failed in their obligations under the Act.

9. The Landlords' Legal Representative submitted that the Landlords merely relied upon information relayed to them from their Real Estate Agent with over fifteen years of experience and the co-operating broker Agent with over thirty years of experience. The Landlords' Legal Representative submits that the Landlords did not act in bad faith.
10. MD stated that their Real Estate Agent indicated to him that the purchaser and his wife would be moving into the unit. He relied upon and submitted a copy of the "Schedule A" of their signed Purchase and Sale Agreement (PSA) which states the following:

"The Seller agrees, upon completion, vacant possession of the property shall be given to the Buyer."
11. MD also stated that the MLS listing showed the property as a rental and that is why the above clause was included in the PSA.
12. The Landlords' Real Estate Agent, ST, testified that he was told that the purchaser's son was accepted to Western University and would be occupying the unit and he relayed to the Landlords that the purchaser's wanted own use. ST testified that he does not deal with leasing or the serving of N12 Notices. ST also testified that he was informed that purchasers did not occupy the unit as their son was accepted into the University of Toronto. ST further testified that the "Schedule A" of the PSA was prepared by the purchaser's agent.
13. The purchaser's Real Estate Agent, PS, was permitted to testify and the Tenant's Legal Representative's objections were noted, in particularly that this testimony will mostly be hearsay evidence. PS testified that the listing agent stated that there was a tenant in the property but there were no discussions what the arrangement was. TS testified that the purchaser's intention was that they wanted to buy a property near Western University in case their son ended up going there.
14. Under cross examination, TS confirmed that the purchaser's were not one hundred percent on their son occupying the property as he would only occupy if attending Western University. TS also confirmed that the clause in "Schedule A" of the PSA is there because his client wanted it. TS further confirmed that his client did not sign an affidavit of their intention with the property as he did not know that was necessary.
15. The evidence before me, hearsay or not, was clear that the purchaser's never intended to occupy the rental unit. They were buying a property for their son, who would only occupy the unit if he were accepted into the nearby university.
16. The Landlords relied on assertions from their Real Estate Agent and a clause in the "Schedule A" of the PSA with respect to the purchaser's intention for the rental unit. Given that it was the Landlords, who served the N12 Notice on the Tenant pursuant to subsection 49(1) of the Act, I am satisfied they are responsible to ensure that the requirements of subsection were present.
17. Based on the evidence before me, I find that the Landlords lacked due diligence in confirming the purchaser's intention for the unit prior to serving the N12 Notice on the

Tenant. The Landlords simply relied on information from their Real Estate Agent who did not have direct information from the purchaser and is not licensed to provide Legal Services in Ontario. ST confirmed in his testimony that he does not have dealings with leasing or service of N12 Notices. I was satisfied that if the Landlords did not understand their rights and obligations under the Act, they ought to have consulted with a Legal Service provider prior to serving the N12 Notice on their Tenant.

18. I was also satisfied that the clause in “Schedule A” of their PSA does not confirm that the purchaser’s will be occupying the rental unit. It simply stated that they require vacant possession and more likely than not this was just a standard clause in a PSA. There was no reason given by the purchaser for requiring “vacant possession.” The Landlords could have and ought to have insisted on a clause that clearly stated the purchaser’s intention for the property was to occupy for a period of at least one year given that the Landlords planned to serve a N12 Notice pursuant to subsection 49(1) of the Act on the Tenant.
19. Given the above, I find that the Landlords served the N12 Notice in bad faith. They did not have confirmation or direct knowledge from the purchaser that they would occupy the rental unit for a period of at least one year.

### Remedies

20. In her application, the Tenant requested the following remedies:

- a) an abatement of rent for the increased monthly payments the Tenant incurred in her new home;
- b) difference in her rent for the period of one year;
- c) moving and storage expenses;
- d) general compensation for the increased monthly payments, tax implications, loss of investment earning potential, and loss of employment;
- e) the Landlords to pay a fine to the LTB.

21. Subsection 57(3) of the Act provides the following remedies for this type of application and states:

The orders referred to in subsection (1) are the following:

1. An order that the Landlord pay a specified sum to the former tenant for all or any portion of any increased rent that the former tenant has incurred or will incur for a one-year period after vacating the rental unit.

1.1 An order that the Landlord pay a specified sum to the former tenant as general compensation in an amount not exceeding the equivalent of 12 months of the last rent charged to the former tenant. An order under this paragraph may be made regardless of whether the former tenant has incurred any actual expenses or whether an order is made under paragraph 2.

1.2 An order that the Landlord pay a specified sum to the former tenant for reasonable out-of-pocket moving, storage and other like expenses that the former tenant has incurred or will incur.

2. An order for an abatement of rent.

3. An order that the Landlord pay to the Board an administrative fine not exceeding the greater of \$10,000 and the monetary jurisdiction of the Small Claims Court.

4. Any other order that the Board considers appropriate.

22. A rent abatement is a contractual remedy. Its purpose is to compensate a tenant for the difference in value between what a tenant was paying for and what they were receiving during a tenancy. The amount the Tenant requested as an abatement relates solely to her increased monthly expenses post tenancy. Therefore, I do not find that an abatement of rent is appropriate in these circumstances. There was no evidence before me that the Tenant was not paying for what she was receiving during the tenancy.

23. The Tenant requested her increased monthly expenses incurred for the period of one year. The Tenant purchased a property and is now making a monthly mortgage payment greater than the amount she paid as rent for the unit. She requested the difference between the rent paid at the rental unit and her monthly mortgage payment.

24. I am not satisfied that the Tenant's monthly mortgage payment is applicable under this remedy. Subsection 57(3) of the Act refers to "all or any portion of any increased rent." Rent is defined in the Act in part as:

"includes the amount of any consideration paid or given or required to be paid or given by or on behalf of a tenant to a Landlord or the Landlord's agent for the right to occupy a rental unit and for any services and facilities and any privilege, accommodation or thing that the Landlord provides for the tenant in respect of the occupancy of the rental unit, whether or not a separate charge is made for services and facilities or for the privilege, accommodation or thing..."

25. A mortgage payment does not meet the definition of rent. The language in subsection 57(3) of the Act refers to "rent." If the legislature had contemplated any increase in monthly expenses, it would have not stated the defined term of "rent."

26. The Tenant stated that she incurred expenses for moving of \$1,612.84. The Tenant stated that she paid the following: \$1,305.15 to "Prime Movers," \$222.50 to "Just Junk," \$80.69 to "Storage Mart," and \$4.50 to "Try Recycling." The Landlords' Legal Representative disputed these amounts as no invoices were submitted.

27. Based on the evidence before me, I was satisfied that the Tenant incurred \$1,612.84 for expenses related to her moving costs. Although no invoices were submitted, I was satisfied that the Tenant's evidence was credible and I find these amounts to be reasonable given the Tenant was moving after residing in a two bedroom rental unit for four and a half years.

28. Therefore, I find that the Landlords must pay the Tenant \$1,612.84 for the reasonable out-of-pocket moving, storage and other like expenses that the Tenant has incurred as a result of having to move out of the rental unit.
29. The Tenant requested general damages of \$20,420.00 for having to move out of the rental unit. She stated that she lost income for two days totalling \$1,120.00 having to look for another place. She stated that she also had to pay additional taxes of \$6,000.00 resulting from withdrawing an amount from her RRSP to purchase her home and lost the investment potential for that amount being \$2,500.00 per year. The Tenant also stated that her monthly expenses increased by \$900.00 per month as she was paying rent of \$1,450.00 and now pays \$2,350.00 just for housing. The Tenant requested \$10,800.00 representing a year's worth of her increased monthly expenses.
30. The Landlords' Legal Representative submitted that there is a difference between a mortgage payment and a rental payment which should be considered when looking at increased expenses and damages.
31. Based on the evidence before me, I was satisfied that the Tenant lost wages, additional tax implication and loss of investment potential (one year) was a result of having to move out of the rental unit. There was no dispute that the Tenant lost two days of work as a result of having to find another place to live. The Tenant stated she purchased a property after not being able to find a suitable rental given the market at the time. I was satisfied that in order to make this purchase the Tenant had to withdraw from her RRSP early which led to tax implications and loss of investment potential.
32. I was not satisfied that the Tenant's increased monthly expenses were a direct result of having to move out of the rental unit. The amount of the Tenant's mortgage payment is tied to the property purchased. It would be reasonable to expect that her monthly payments for housing would increase given that she is now a property owner. As well, the Tenant's monthly mortgage payment goes to the equity (and interest owed) in the property which the Tenant will benefit from financially in the future.
33. Therefore, I find that the Landlords must pay the Tenant \$9,620.00 (\$1,120.00 + \$6,000.00 + \$2,500.00) for general compensation.
34. The Tenant requested that the Landlords pay a fine to the LTB. Guideline 16 of the *Landlords and Tenant Board Interpretation Guidelines* (the 'Guidelines') states under purpose, that an administrative fine is a remedy to be used by the LTB to encourage compliance with the Act, and to deter landlords from engaging in similar activity in the future. This remedy is not normally imposed unless a landlord has shown a blatant disregard for the Act and other remedies will not provide adequate deterrence and compliance.
35. Based on the evidence before me, I was not satisfied that the Landlords have blatantly disregarded the Act. As per my finding above, the Landlords were negligent in confirming the purchaser's intent for the rental unit. Further, I am satisfied that the other remedies requested by the Tenant will provide adequate deterrence and ensure compliance by the Landlords in the future.

36. The Tenant is also entitled to \$53.00 for the costs of filing the application.

**It is ordered that:**

1. The total amount the Landlords shall pay the Tenant is \$11,285.84. This amount represents:
  - \$1,612.84 for the reasonable moving, storage and other like expenses that the Tenant has incurred as a result of having to move out of the rental unit;
  - \$9,620.00 for general damages; and
  - \$53.00 for the cost of filing the application.
2. The Landlords shall pay the Tenant the full amount owing by April 6, 2024.
3. If the Landlords do not pay the Tenant the full amount owing by April 6, 2024, the Landlords will owe interest. This will be simple interest calculated from April 7, 2024 at 7.00% annually on the balance outstanding.
4. The Tenant has the right, at any time, to collect the full amount owing or any balance outstanding under this order.

**March 26, 2024**

**Date Issued**

15 Grosvenor Street, Ground Floor  
Toronto ON M7A 2G6

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Lisa Del Vecchio

Member, Landlord and Tenant Board

If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.