

A landlord and a tenant orally agreed to a commercial tenancy for a term of six months beginning on July 1. Rent was to be paid by the first day of each month, and the tenant paid the first month's rent at the time of the agreement.

When the tenant arrived at the leased premises on July 1, he learned that the previous tenant had not vacated the premises at the end of her lease term on May 31 and did not intend to vacate. The tenant then successfully sued the previous tenant for possession. The tenant did not inform the landlord of the eviction action until after the tenant received possession.

The tenant then sued the landlord, claiming damages for that portion of the lease period during which the tenant was not in possession.

If the court finds for the landlord, what will be the most likely explanation?

- A. By suing the previous tenant for possession, the tenant elected that remedy in lieu of a suit against the landlord.
- B. The landlord had delivered the legal right of possession to the tenant.
- C. The tenant failed to timely vacate as required to sue for constructive eviction.
- D. The tenant had not notified the landlord before bringing the eviction action.

Explanation:

Landlord's duty to deliver possession

	Requirements	Remedies for breach
English rule (majority)	Deliver <i>actual</i> possession to tenant—ie, remove third party who wrongfully possesses property	Withhold rent to acquire possession Seek damages for period not in possession
American rule (minority)	Deliver <i>legal</i> possession to tenant—ie, ensure that no third party has right to possess property	Terminate lease

A **landlord** must generally **deliver *actual* possession** of leased premises to the tenant at the start of the lease term—ie, by **removing any third party** who wrongfully possesses the property (eg, a holdover tenant). If the landlord fails to do so, the tenant can recover damages from the landlord for the time when the tenant was not in possession. However, a **minority of jurisdictions** only require a landlord to **deliver *legal* possession**—ie, by ensuring that **no third party** has a **right to possess** the property when the lease term begins.

Here, the landlord leased property to the tenant for six months beginning on July 1. When the tenant arrived at the leased premises on July 1, he learned that the previous tenant had not vacated the premises (ie, the landlord failed to deliver *actual* possession). And since the previous tenant's lease ended on May 31, she was a holdover tenant who had no right to possess the property on July 1. Therefore, the most likely reason for a finding in the landlord's favor is that this court follows the minority rule and the landlord had delivered *legal* possession to the tenant.

(Choices A & D) A tenant does not waive any claim against the landlord by (1) suing a third party (eg, the previous tenant) for possession of the premises or (2) failing to notify the landlord before evicting the third party. As a result, the court will not find for the landlord on either basis.

(Choice C) To sue a landlord for constructive eviction—a landlord's substantial interference with a tenant's permissible use and enjoyment of the property—the tenant must notify the landlord and then vacate the premises within a reasonable time. But a failure to vacate does not prevent a tenant from suing based on the landlord's failure to deliver possession, so the court likely would not find in the landlord's favor on this basis.

Educational objective:

Although a landlord must generally deliver *actual* possession of the leased premises to the tenant at the beginning of the lease term, a minority of jurisdictions only require the landlord to deliver *legal* possession.

References

Restatement (Second) of Prop.: Landlord & Tenant § 6.2 (Am. Law Inst. 1977) (landlord's duty to deliver possession).

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