Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MGEY INVESTCO 604.1 INC and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNRL MNDCL FFL

Introduction

This hearing was convened as a result of the landlord's Application for Dispute Resolution (application) seeking remedy under the *Residential Tenancy Act* (the Act). The landlord applied for a monetary order in the amount of $5,725.00 for unpaid rent, for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, and to recover the cost of the filing fee.

The principal of the landlord company, MY (landlord), counsel for the landlord, and the tenant appeared at the teleconference hearing and gave affirmed testimony. During the hearing the parties were given the opportunity to provide their evidence orally. A summary of the evidence is provided below and includes only that which is relevant to the hearing.

Neither party raised any concerns regarding the service of documentary evidence. The parties confirmed that they received and reviewed the documentary evidence from the other party prior to the hearing. Words utilizing the singular shall also include the plural and vice versa where the context requires.

The hearing began on September 3, 2020 and was adjourned. An Interim Decision dated September 3, 2020 was issued, which should be read in conjunction with this decision. On October 15, 2020, the parties reconvened and after an additional 58 minutes, the hearing concluded.

Preliminary and Procedural Matter

The parties confirmed their email addresses at the outset of the hearing and stated that they understood that the decision would be emailed to them.

Issue to be Decided

- Is the landlord entitled to a monetary order under the Act, and if so, in what amount?
- If yes, is the landlord entitled to the recovery of the cost of the filing fee under the Act?

Background and Evidence

A copy of the tenancy agreement was submitted in evidence. A fixed-term tenancy began on June 1, 2017 and was scheduled to revert to a month to month tenancy after June 30, 2018. The tenant vacated the rental unit early on March 1, 2018. The monthly rent was $1,875.00 per month and was due on the first day of each month. The security deposit and pet damage deposit have already been dealt with in a previous decision so will not be addressed further in this decision.

The landlord's monetary claim is comprised of the following:

ITEM DESCRIPTION	AMOUNT CLAIMED
1. 2.5 months of unpaid rent/loss of rent (March 2018 of $1,875.00/April 2018 of $1,875.00/And half of May 2018 of $937.50)	$4,687.50
2. Liquidated damages	$937.50
TOTAL	**$5,725.00**

Regarding item 1, counsel for the landlord submits that the tenant failed to end the tenancy in accordance with the Act. Counsel submits that the tenant did not provide written notice to the landlord of a breach of a material term. Counsel also submits that the landlord mitigated their loss by securing a new tenant effective May 15, 2018.

The principal testified that in January 2018, the tenant complained about water rot and mould and that the landlord immediately scheduled an appointment for the building handyman (handyman) to get to the bottom of the tenant's complaints. The principal stated that the handyman conducted an inspection on January 24, 2018 and spent between 30 minutes and 1 hour inspecting the rental unit. The principal stated that inspection resulted in the tenant's claims of water rot and mould being unfounded and that the rental unit was not full of mould as claimed. On January 25, 2018, an email

indicating such was sent to the tenant, according to the principal. The principal stated that on January 31, 2018, the tenant stated that they would be ending their tenancy early and the tenant stated that they did not believe the results of the inspection as the reason they were moving. The principal stated that the tenant asked the principal if the tenant hired a mould inspector, would the landlord pay for it.

The landlord stated that LT, who does all the leasing, started to show the unit as of February 1, 2018 and that 20 parties viewed the rental unit between February 1, 2018 and May 2018. The tenant vacated the rental unit at the end of February 2018, and the parties agreed that the rental unit keys were returned to the landlord on March 1, 2018. The principal testified that they were “pretty sure the rental unit was advertised for $1,990.00” and was “100% sure that the rental unit was not advertised for more than $1,990.00”.

Counsel submitted that the Act does not allow a tenant to end a fixed-term tenancy early by given written notice and reinforced that the tenant failed to provide notice of a material breach, which includes providing the landlord a reasonable time to address a material breach. The principal stated that the tenant sent an email dated January 29, 2018 stating that they were vacating the rental unit at the end of February 2018 for health reasons and advised the landlord that the tenant would be seeking compensation. A new tenant was not secured until May 15, 2018.

Regarding item 2, the landlord is seeking $937.50 for liquidated damages. The tenant confirmed during the hearing that the tenant initialed the fixed-term tenancy portion of the tenancy agreement and the section which states that liquidated damages would be “$937.50 + tax”, the latter section which reads as follows:

> Liquidated Damages-- If the tenant(s) ends the fixed term tenancy, or is in breach of the Residency Tenancy Act or a material term of this agreement that causes the landlord to end the tenancy before the end of the term as set out above, or any subsequent fixed term, the tenant(s) will pay to the landlord the sum of $937.50 + tax liquidated damages and not as a penalty.

The tenant claims the handyman was not an inspector and that the inspection was only 4 minutes long. The tenant confirmed that they did receive the report from the handyman. The tenant referenced a January 25, 2018 email, but failed to submit a copy of that email for my consideration. The tenant claimed that the landlord verbally advised the tenant that they could break the fixed-term tenancy, which the principal vehemently denied.

The tenant stated that they did their due diligence and that 5 to 7 window frames were rotted inside and outside, which was unacceptable and that since moving out of the rental unit, the tenant feels much better.

The principal stated that the tenant was given no assurance that loss of rent and unpaid rent would be waived and that the liquidated damages would be waived. The principal reinforced that the tenant was never given permission to breach the fixed-term tenancy.

Analysis

Based on the testimony of the parties provided during the hearing, the documentary evidence and on the balance of probabilities, I find the following.

Test for damages or loss

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the *Act.* Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did what was reasonable to minimize the damage or loss.

In this instance, the burden of proof is on the landlord to prove the existence of the damage/loss and that it stemmed directly from a violation of the Act, regulation, or tenancy agreement on the part of the tenant. Once that has been established, the landlord must then provide evidence that can verify the value of the loss or damage. Finally, it must be proven that the landlord did what was reasonable to minimize the damage or losses that were incurred.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Item 1 – Firstly, as the tenancy was a fixed term tenancy, and I find there is insufficient evidence before me that the parties reached a mutual agreement in writing to end the

fixed-term tenancy earlier than June 30, 2018, which is the date in which the tenancy would automatically revert to a month to month tenancy, I find that section 45(2) of the Act applies and states:

> **Tenant's notice**
>
> **45**(2) **A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that**
>
> (a)**is not earlier than one month after the date the landlord receives the notice**,
>
> (b)**is not earlier than the date specified in the tenancy agreement as the end of the tenancy**, and
>
> (c)**is the day before the day in the month,** or in the other period on which the tenancy is based, **that rent is payable under the tenancy agreement**.
>
> [Emphasis added]

Given the above, I find that the tenant had no right under the Act to provide a written notice earlier than one month after June 30, 2018. Accordingly, I find that the landlord has met the burden of proof for rent owed for March 2018 in the amount of **$1,875.00.**

Regarding April 2018 rent and half of May 2018 rent being claimed by the landlord, section 7 of the Act, applies and states:

> **Liability for not complying with this Act or a tenancy agreement**
>
> **7(2) A landlord** or tenant **who claims compensation for damage or loss that results from the other's non-compliance with this Act**, the regulations or their tenancy agreement **must do whatever is reasonable to minimize the damage or loss.**
>
> [Emphasis added]

In addition, Residential Tenancy Branch Policy Guideline 5 – Duty to Minimize Loss applies and states the following:

> ***Loss of Rental Income***
>
> When a tenant ends a tenancy before the end date of the tenancy agreement or in contravention of the RTA or MHPTA, the landlord has a duty to minimize loss of rental income. This means a landlord must try to:

1. re-rent the rental unit at a rent that is reasonable for the unit or site; and
2. re-rent the unit as soon as possible.

For example, if on September 30, a tenant gives notice to a landlord they are ending a fixed term tenancy agreement early due to unforeseen circumstances (such as taking a new job out of town) and will be vacating the rental unit on October 31, it would be reasonable to expect the landlord to try and rent the rental unit for the month of November. **Reasonable effort may include advertising the rental unit for rent at a rent that the market will bear.**

If the landlord waited until April to try and rent the rental unit out because that is when seasonal demand for rental housing peaks and higher rent or better terms can be secured, a claim for lost rent for the period of November to April may be reduced or denied.

[Emphasis added]

I find the landlord has failed to meet part four of the test for damages or loss and has breached section 7 of the Act. Therefore, I dismiss the landlord's request for loss of rent for the period of April and half of May 2020, inclusive, due to insufficient evidence, without leave to reapply. I have reached this finding by considering that the landlord advertised the rental unit for $1,990.00, which was $115.00 more per month than the original tenancy rent of $1,875.00, and at no time did the landlord place the rental unit at the original amount of rent. In other words, I find the landlord attempted to advertise the rental unit for an amount higher than what the market will bear as the landlord was unable to re-rent for 2.5 months, which supports my finding. Given the above, the only amount I grant for item 1 is **$1,875.00** for March 2018 rent and the remainder is dismissed without leave.

Item 2 – Based on the evidence before me, I find the landlord provided sufficient evidence to support that the tenant did not end the tenancy in accordance with the Act. Section 45(2) of the Act applies, which is listed above. Based on section 45(2) of the Act and the evidence before me, I find the tenant breached section 45(2) by failing to wait until the fixed term tenancy ended before giving notice. I also find the tenant failed to write to the landlord to advise of a material breach and give the landlord sufficient time to address a material breach. Therefore, I find the tenant is liable for the full amount of the liquidated damages in accordance with the tenancy agreement, considering the tenant confirmed they initialled that portion of the tenancy agreement related to liquidated damages. Consequently, I award the landlord **$937.50** for this item as claimed.

As the landlord's application had some merit, I grant the landlord the recovery of the cost of the filing fee in the amount of **$100.00** pursuant to section 72 of the Act**.**

I find that the landlord has established a total monetary claim in the amount of **$2,912.50** pursuant to section 67 comprised of $1,875.00 for item 1, $937.50 for items 2, plus $100.00 for the filing fee. The landlord is granted a monetary order pursuant to section 67 of the Act for the balance owing by the tenant to the landlord in the amount of **$2,912.50.**

Conclusion

The landlord's claim is partially successful.

The landlord has established a total monetary claim in the amount of $2,912.50 and has been granted a monetary order in the same amount. Should the landlord require enforcement of the monetary order, the monetary order must be served on the tenant and may be filed in the Provincial Court (Small Claims) and enforced as an order of that court. The tenant may be held liable for the costs associated with enforcing the monetary order.

This decision will be emailed to both parties.

The monetary order will be emailed to the landlord only for service on the tenant.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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: November 5, 2020

Residential Tenancy Branch