Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

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

DECISION

Dispute Codes MNRL-S, MNDCL-S, FFL

Introduction

The Landlord filed an Application for Dispute Resolution on August 3, 2022 seeking an order to recover the money for unpaid rent and other money owing, and recovery of the Application filing fee. The matter proceeded by way of a hearing pursuant to s. 74(2) of the *Residential Tenancy Act* (the "*Act*") on April 27, 2023. In the conference call hearing I explained the process and provided each party the opportunity to ask questions.

Both parties attended the telephone conference call hearing, and I provided each the opportunity to present oral testimony and make submissions during the hearing. At the outset, both parties confirmed they received the prepared evidence of the other. On this basis, the hearing proceeded as scheduled.

Issues to be Decided

Is the Landlord entitled to compensation for the rent amounts and/or other money owed, pursuant to s. 67 of the *Act*?

Is the Landlord entitled to recover the filing fee for this Application pursuant to s. 72 of the *Act*?

Background and Evidence

The Landlord provided a copy of the tenancy agreement and both parties agreed on the terms therein in the hearing. The parties signed the agreement on March 21, 2022 for the tenancy starting on April 15, 2022, with the fixed term ending on April 30, 2023. The monthly rent

amount was $2,875. The Tenant paid a security deposit amount of $1,437.50 and a pet damage deposit amount of $1,437.50.

The agreement contains the provision addressing an early end of the tenancy:

> If the tenant(s) ends the fixed term tenancy, or is in breach of the Residential 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 $1,437,50 + tax liquidated damages and not as a penalty.

In a written statement, the Tenant stated their reasons for ending the tenancy early were: pests, with the Landlord's effort at correcting the problem being "insufficient" both in terms of addressing the immediate issue; and lack of maintenance of the rental unit property exterior that caused the problem. The Tenant also cited the Landlord's "lack of safe, timely action when main window pane for apartment was smashed and left unboarded or covered for weeks on end." The Tenant included photos of this in their evidence for this hearing.

They notified the Landlord of their end to the tenancy via email on June 25, 2022, to end on July 30, 2022. They stated they would pay July 2022 rent in full. In this notice to the Landlord, they also cited the smaller size of the rental unit, as opposed to what it was advertised as by the Landlord, with the Tenant being in another province when they signed the tenancy agreement. The Tenant also cited a lack of contact for issues, being "passed back and forth between parties whom all seem to deflect the situation and avoid responsibility."

The Landlord responded to the Tenant's notice on the same day, stating they had "re-listed [the] unit for August 1, 2022." They mentioned this was an early termination of the lease, leaving the Tenant liable for "any and all unpaid rent prior to April 30, 2022 [*sic*], and damages as noted in the amount of $1,437.50.

The Tenant and the Landlord met at the end of July to inspect the rental unit. The Tenant had provided their forwarding address to the Landlord at that time, and again on July 29, 2022. The Landlord noted they were finalizing with prospective tenants to move into the rental unit; however, on that same day the Landlord advised the potential tenants did not rent. The Landlord pledged to continue their efforts at marketing the rental unit.

The Landlord provided the following evidence to show their efforts at re-renting the rental unit as soon as possible:

- July 21 the Tenant notified the Landlord that there were only 2 showings, the re-rent ad on Craigslist was not posted until the start of July, and the sign on the rental unit property read “no vacancy” until very recently
- the Tenant notified the Landlord about this again on July 29, asking for the return of their deposits
- a list of the agent showings schedule, showing 15 separate showings from July 15 through to October 21

The Landlord re-rented the rental unit with new tenants on November 1, 2022. This was for a rent amount of $3,000 per month. A copy this subsequent agreement is in the Landlord’s evidence.

As on their Monetary Order Worksheet prepared for this hearing, the Landlord seeks the following amounts that total $10,062.50:

- monthly rent for August, September and October 2022: $8,625
- liquidated damages as per the agreement: $1,427.50

In their written statement, the Tenant presented their reasons why they feel they should not have to pay further rent, after their move-out in mid-July:

- the Landlord raised the monthly rent by $200 – this was “not trying to advertise properly to cover any loss of rent, however [the Landlord was] attempting to make a further profit”
- no urgency in advertising the rental unit, with the sign on the property showing “no vacancy” for “almost the complete month of July”, in summertime when this sign “would have attracted potential renters”
- the Tenant informed the Landlord “well in advance of August 1st”, this is “over 2 months of notice”.

The Tenant in summary believes they should have the deposits returned to them, and not pay anything “towards any months the unit was left vacant after [the Tenant’s] final month of July 2022.”

In the hearing, the Tenant reiterated the points made in this written submission. This is because “the renter did not do everything in their power to re-rent the unit.” According to the Tenant, the Landlord is not in a position to “complain” about the unit being unrented when they were seeking higher rent for that same unit. The signs posted outside a rental unit building in the area are a “big deal” in this area.

In response, the Landlord stated they have never rented out based on signage at a rental unit property. They drew attention to the document listing 15 separate showings, amounting to "2, 3, 4 per month", involving actually showing the rental unit. The Landlord also presented that a rise in rent is comparable to what a typical unit of that size rents for in that area, as shown in the agreement sent for an amount of $3,075 for a neighbouring rental unit.

Analysis

The *Act* s. 45 covers how a tenant may end a fixed-term tenancy. It provides that a date shall not be earlier than one month after the receives such notice, and not earlier than the end-of-tenancy date in the agreement.

I find as fact that the tenancy here was of a fixed-term in duration. Here, the Landlord received a notice from the Tenant; however, the Tenant sought to end the tenancy earlier than the end-of-tenancy date in the agreement. Legally speaking, the Tenant is obligated to fulfill the tenancy agreement through to the end of its term.

A principle governing any claim for compensation, as set out in s. 7(b) of the *Act*:

> 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.

In this matter, I find each of these principles apply. While the Tenant breached the *Act* s. 45(2)(b), I find the Landlord in this scenario was also obligated to minimize the damage or loss. I accept the Tenant's points on two aspects, that of the signage not being in line with seeking out new tenants forthwith by all available means, and the rent amount the Landlord sought. Additionally, I find there was a lesser number of showings per month relative to having the unit rented out as soon as possible.

I find there was no evidence of a rent equivalent by the Landlord in order to have the rental unit secured with new tenants as soon as possible. This would equate to having their loss accounted for at the end of this tenancy in an amount equal to what they had in place with this Tenant. Though the Landlord claimed this same amount, essentially as replacement income, they substantially raised the rent by $200 as shown in the Tenant's evidence. There is nothing legally precluding the Landlord from retaining new tenants at a higher rent; however, in the interest of renting the unit out as soon as possible, thereby minimizing loss, I find the Landlord in this way caused a higher amount of loss to the Tenant.

I also find the rent amount worked against the Landlord in the number of showings they had during this time in total. That really is a matter between the Landlord and their agent; therefore, I find the Tenant is not liable in this regard.

With these findings, I grant the Landlord 1.5 months of rent, with the finding that beyond a term of six weeks after the ending of this tenancy, there was no good reason why they would not be able to have the unit rented out. This amount is $4,312.50.

The Residential Tenancy Branch has a set of *Residential Tenancy Policy Guidelines*. These are in place to provide a statement of the policy intent of the *Act*. *Policy Guideline 4: Liquidated Damages* provides: "The amount [of damages payable] agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result will be unenforceable."

Though the Landlord provided in the tenancy agreement that the amount of $1,437.50 was "not as a penalty" and "an agreed pre-estimate of the landlord's costs of re-renting the Rental Unit", the onus was on the Landlord in this hearing to prove that amount. A breakdown of this amount, occurring as it does as the exact amount of the security deposit, was not in the Landlord's submissions.

I find a framework for the clause is not in place. The clause appears arbitrary and is not a genuine pre-estimate of loss. That is to say, the costs of each of advertising, interviewing, administration and re-renting are not established. The Landlord has not proven these costs amount to $1,437.50.

In sum, I find the liquidated damages clause is invalid in that it is punitive in nature. In line with the four points set out above, I find the true value of a loss involving re-renting the unit is not established, and this arbitrary amount is not an effort at mitigating the monetary loss.

For these reasons, I make no award for this liquidated damages amount.

In sum, I find the Landlord experienced a monetary loss as a result of the Tenant's breach. I have applied the overarching principle of mitigation to the Landlord's claim. I find the Landlord is entitled to the amount of $4,312.50.

Because they were moderately successful in their claim, I grant the Landlord reimbursement of $50 of the Application filing fee. The sum total of the award to the Landlord is $4,362.50.

The *Act* section 72(2) gives an arbitrator the authority to make a deduction from any deposit held by the landlord. The Landlord has established a claim of $4,362.50. After setting off the security deposit amount of $1,437.50, and the pet damage deposit amount of $1,437.50, there is a balance of $1,487.50. I am authorizing the Landlord to keep the security deposit and pet damage deposit amounts and award the balance of $1,487.50.

Conclusion

Pursuant to s. 67 and 72 of the Act, I grant the Landlord a Monetary Order in the amount of $1,487.50. I provide the Landlord with this Order, and they must serve this Order to the Tenant as soon as possible. Should the Tenant fail to comply with this Order, the Landlord may file this Order with the Small Claims Division of the Provincial Court where it will be enforced as an Order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under s. 9.1(1) of the *Act*.

Dated: May 15, 2023

Residential Tenancy Branch