



HOUSING BOARD OF REVIEW

City of Burlington

149 Church Street Room 11
Burlington, Vermont 05401
(802) 865-7122

HOUSING BOARD OF REVIEW

CITY OF BURLINGTON

NOTICE OF DECISION

Enclosed is a copy of the "Findings of Fact, Conclusions of Law and Order" of the Burlington Housing Board of Review.

Please note that a person aggrieved by a decision of the Housing Board of Review is entitled to appeal to the Chittenden Superior Court. (See Housing Code Section 18-59 and Vermont Statutes Annotated, Title 24, Section 5006.) The court rules may require that such an appeal be commenced within thirty (30) days of the Board's Order.

Unless an appeal is taken, the Board's Order should be complied with before expiration of the thirty (30) day period.

DATED 1/7/20

CITY OF BURLINGTON
HOUSING BOARD OF REVIEW

Josh O'Hara
Board Chair

cc: Jillian Goldman (for all tenants)
Mark Porter

**CITY OF BURLINGTON, VERMONT
HOUSING BOARD OF REVIEW**

**In re: Request for Hearing of JILLIAN)
GOLDMAN, MEGAN LEAVY and)
DENNIS MULVENA Regarding) Security Deposit Appeal
Withholding of Security Deposit by)
MARK PORTER for Rental Unit at)
31 Hyde Street, #7)**

DECISION AND ORDER

The above-named hearing came before the Housing Board of Review on December 16, 2019. Board Chair Josh O'Hara presided. Board Members Patrick Kearney, Patrick Murphy, Olivia Pena and Betsy McGavisk were also present. Petitioner Jillian Goldman was present and testified. Respondent Mark Porter was also present and testified.

Upon consideration of the evidence and the applicable law, the Board makes the following Findings of Fact, Conclusions of Law, and Order:

Findings of Fact

1. Respondent Mark Porter is the owner of a rental unit, 31 Hyde Street, #7, in the City of Burlington which is the subject of these proceedings.
2. Petitioners Jillian Goldman, Megan Leavy and Dennis Mulvena moved into the rental unit with a written lease which ran from June 1, 2018 to May 28, 2019. Petitioners were jointly and severally liable under the lease. Monthly rent was \$1800.00.
3. Petitioners paid a security deposit of \$1800.00 to respondent. The deposit was paid in one check by Jillian Goldman. Petitioners were to receive back their security deposit at the end of the lease minus any amounts withheld for damages.
4. Petitioners vacated the apartment on October 2, 2019, the date on which all their belongings were removed from the apartment and respondent had possession of it.

5. On October 7, 2019, respondent's property manager sent Megan Leavy an email related to the security deposit.¹ The property manager provided a narrative of the deductions being taken and attached the security deposit transmittal form to the email; the property manager also informed Ms. Leavy that respondent was the person cutting a check and she would check to see when that would be done. Megan Leavy forwarded the email to Jillian Goldman.

6. On October 15, 2019, respondent mailed the itemized list of deductions from the deposit to Megan Leavy at her last-known address (the address of the rental unit). Mark Porter testified he did not have forwarding addresses for petitioners. The property manager requested forwarding addresses in an email to Megan Leavy on October 2, 2019; in her response email on October 7, Ms. Leavy wrote, "Is there a chance that I could pick up my check deposit in Burlington instead of you forwarding it?" Ms. Leavy did not provide any forwarding addresses in her email. Jillian Goldman testified that even if she did not provide a forwarding address to respondent, she changed her address with the U.S. postal service so that any mail sent to her would be forwarded to her new address.

7. Respondent's statement itemized deductions totaling \$1630.46; petitioners disputed some of the deductions. Interest in the amount of \$7.22 was credited to the deposit. Respondent returned \$176.76 of the deposit to Megan Leavy with the statement. Jillian Goldman argued that respondent did not provide proper notice to her; Ms. Goldman argued that only Megan Leavy received the itemized statement and the statement was sent to the address of the rental unit. In addition, Ms. Goldman argued that the entire amount of the deposit returned was sent to Ms. Leavy rather than divided among all 3 tenants.

¹ Megan Leavy and the property manager exchanged several emails related to moving out and the deposit over a few days.

8. Respondent deducted \$116.13 for 2 days of rent in October, 2019. Jillian Goldman argued that had she known they were going to be charged for rent she would have made sure everything was out of the apartment on October 1, 2019.

9. Respondent deducted \$159.18 from the deposit to repair 2 broken screens. Petitioners accepted responsibility for the cost to repair one of them. Jillian Goldman testified that she removed a screen from a window and placed it outside for a few days until a maintenance person retrieved it. When the screen was retrieved it was twisted and bent.

10. Petitioners disputed the deduction of \$121.57 to replace 5 blinds. Petitioners had 2 cats that played with the blinds so they removed them. Respondent deducted the cost to replace the blinds from the deposit.

11. Respondent deducted \$1,200.00 from the deposit for the extermination of bedbugs in petitioners' apartment in September and October, 2018. The property manager sent a copy of the invoice for the work to petitioners by email on November 9, 2018. According to an invoice from Millers Pest Control, four bedbugs were found in a downstairs bedroom, and six bedbugs were found in another bedroom. No other bedbugs were found in the rest of the apartment or in the two adjoining apartments. Respondent's instructions to the property manager were that petitioners were responsible for paying the bill since bed bugs were only found in their apartment. Petitioners and Jillian Goldman's father disputed that they were responsible for paying the cost of extermination in emails to the property manager on November 10 and 11. Petitioners and Mr. Goldman argued that it was the landlord's responsibility to make sure a rental unit is habitable, including free of bed bugs. Mr. Goldman also argued that the provision in the lease making it the tenants' responsibility to pay the costs to exterminate bed bugs is an attempt to circumvent the law which is prohibited under state law. In addition, Jillian Goldman

testified that the exterminator told Ms. Leavy that the bed bugs were found in the electrical outlet between their unit and the adjacent one, suggesting that the infestation was from the other unit. Ms. Goldman's testimony is not reflected in the exterminator's invoice, and neither Ms. Leavy nor the exterminator testified. The Board therefore does not find the testimony that the bedbugs originated from an outlet credible. There is no dispute that petitioners kept the apartment in clean condition; in addition, petitioners did not bring used furniture into the apartment or travel anywhere that had bed bugs.

12. Petitioners did not dispute the final water bill of \$33.58 which was deducted from the security deposit.

Conclusions of Law

13. The City of Burlington's security deposit ordinance, Minimum Housing Code Sec. 18-120, took effect April 10, 1986 and governs any rental arrangements for dwelling units in the City of Burlington entered into or renewed after that date.

14. The State of Vermont's Landlord and Tenant Act, now codified at 9 V.S.A. Sec. 4451-68, applies to rental agreements for residential property entered into, extended or renewed on or after July 1, 1986. Its terms are to "be implied in all rental agreements" to which it is applicable. 9 V.S.A. Sec. 4453.

15. Under the city ordinance, as well as state law (the terms of which must be implied in the parties' rental agreement), "[a] landlord shall return the deposit to a tenant within fourteen (14) days from the date on which the landlord discovers that the tenant" has vacated the apartment. Minimum Housing Code sec. 18-120(c) (emphasis supplied); accord 9 V.S.A. sec. 4461(c) (using the same language). City ordinance also provides that the written statement must inform the tenant of the opportunity to request a hearing before the Burlington Housing Board of

Review within 30 days of receipt of the landlord's written statement. Minimum Housing Code Sec. 18-120(c). The statement and any payment must be hand-delivered or sent by mail.

Minimum Housing Code Sec. 18-120(c). If a landlord fails to return the deposit with a statement within 14 days, the landlord forfeits the right to withhold any portion of the security deposit.

See, Minimum Housing Code Sec. 18-120(c) and 9 V.S.A. Sec. 4461(e).

16. Petitioner Jillian Goldman argued that respondent did not provide notice to her of the deductions from the deposit so that he forfeited the right to withhold of any portion of it. Ms. Goldman cited to the Vermont Supreme Court case, *In re Soon Kwon*, 2011 VT 26, 189 Vt. 598, 19 A.3d 139, which required strict conformance with the notice requirements. Ms. Goldman argues that since she, personally, did not receive notice of the withholding of the deposit, respondent forfeited it. The Board disagrees. The plain language of the ordinance does not require a landlord to provide each individual tenant notice of the withholding of the deposit. See *State v. Berard*, 2019 VT 65, ¶ 12, — Vt. —, — A.3d — (holding that to discern the legislative intent behind a statute, one must examine its plain language). Both the ordinance and 9 V.S.A. sec. 4461(c) require a landlord to return the security deposit and a withholding notice to “a tenant.” The use of the indefinite article here means neither the ordinance nor the statute specify which tenant must receive the security deposit and withholding notice. The City Council was clearly aware of the possibility of multiple tenants in one unit (the sentence before this refers to “the tenant(s)”), yet it did not choose language that would impose on a landlord the responsibility to return the deposit and provide notice to “each tenant,” “all tenants,” or even “the tenants.” In the absence of a clear requirement to provide individual notice to each tenant, the Board cannot create one. Petitioners were jointly and severally liable under the lease so that notice to petitioner Megan Leavy constituted proper notice to them.

17. Based on the evidence, the Board concludes that it was proper to make deductions from the deposit for unpaid rent, the repair of 2 broken screens and the replacement of 5 blinds. Petitioners did not return possession of the apartment back to respondent until October 2 so it was reasonable to deduct 2 days of rent for October. The damage to both screens was attributable to petitioners: petitioners did not dispute the cost to repair one of the screens and the other screen was taken out of the window and left in a place where it could be damaged. The damage to the blinds was attributable to petitioners, but the Board concludes the deduction was not reasonable. The blinds themselves cost \$41.57 at Lowe's. Respondent then charged 2 hours for labor at \$40/hour. There was no evidence to suggest that new hardware needed to be installed for the blinds so the installation should not have taken much time. The labor charge also included travel time to Lowe's to get the blinds. However, the receipt submitted by respondent indicates other items (unrelated to petitioners' apartment) were purchased at the time so the trip to Lowe's was not specific to buying the blinds. The Board concludes a reasonable deduction for the blinds (materials and labor) is \$60.78.

18. With respect to the deduction to exterminate bed bugs in the apartment in November 2018, petitioners argued that they were not responsible for extermination: they never had bed bugs before moving into the apartment and respondent was responsible for providing them with a clean and safe environment in which to live. Respondent argued the tenants were responsible for the cost since their apartment was the only apartment that had bed bugs evidencing that the bed bugs were attributable to them, and they should be responsible for the cost of extermination.

19. Section 18-120(a)(1) of the Minimum Housing Code allows landlords to retain a security deposit "as security against damage beyond normal wear and tear to the premises which is attributable to the tenant..." Normal wear and tear under the ordinance is defined as "the

deterioration which occurs, based upon the reasonable use for which the dwelling unit or rooming unit is intended, without negligence, carelessness, accident or abuse of the premises or supplied equipment or appliances by the occupant or members of his household or their invitees or guests.” Minimum Housing Code, Sec. 18-2.

20. In 2016, the Vermont Supreme Court interpreted the concept of “normal wear and tear” within the context of a commercial lease, but when it did so, it used the term “normal wear and tear” as it is applied to residential leases. In that case, the Court explained that the contours of the “ordinary wear and tear” principle require examination of the reasonableness of the lessee’s use of the property with respect to the damage, and the context of the use and type of property. *Mongeon Bay Properties, LLC v. Malletts Bay Homeowner’s Association*, 202 Vt. 434 (2016). The Court’s analysis also requires inquiry into whether the lessee took reasonable steps to prevent damage.

21. The test established by the Supreme Court first requires the Board to examine whether the petitioners made reasonable use of this residential apartment. The evidence established that they did. Neither the respondent nor the petitioner know how ten bedbugs came to inhabit petitioner’s apartment. As the respondent conceded, petitioner and her roommates kept the apartment clean and, for all he knew, the bedbugs could have ridden into an apartment on the clothes of a maintenance worker. It is equally likely that the tenants or their guests unknowingly transported the bedbugs into the apartment after visiting an infested place. Bedbugs can be found nearly anywhere: luxury resorts, modest hotels, airplanes, public transportation, and dorm rooms. Centers for Disease Control and Prevention, “*Bed Bug FAQs*,” available at <https://www.cdc.gov/parasites/bedbugs/faqs.html> (last visited Dec. 27, 2019). They can be found in public spaces, like courtrooms, schools, theaters, and office buildings. Megan

M. Harrison, Note, *Don't Let the Bed Bugs Bill: Landlord Liability for Bed Bug Infestations in Georgia*, 34 Ga. St. U. L. Rev. 479, 480 n.6 (2018). They are “experts” at hiding, and they travel to a new home in an unsuspecting human’s clothing or belongings. Samuel R. Gilbert, Note, *Don't Let Them Bite: Defining the Responsibilities of Landlords and Tenants in a Bedbug Infestation*, 80 Geo. Wash. L. Rev. 243, 247-49 (2011). As one court put it when declining to assign fault to tenants despite being the likely vectors of an infestation, “[i]t appears that any individual venturing out into the world today, particularly an individual that travels, risks bringing bedbugs back home. *Bender v. Green*, 874 N.Y.S.2d 786, 792 (N.Y. Civ. Ct. 2009).

22. The existence of 10 bedbugs in the apartment does not establish the tenants made unreasonable use of it. The tenants could have stayed at a hotel, taken a ride on a bus, worked in an office, or visited a school and taken bedbugs back to the apartment with them. The evidence did not show that they undertook any activities that would have exposed them to an unreasonable risk of bedbug-infestation considering the residential use of the unit. They did not open a home daycare, start rehabbing used furniture, or rent a room out through Air BnB. Further, the petitioners promptly notified the respondent of the bedbugs, which limited the infestation to 10 bedbugs only in the petitioners’ apartment.

23. Therefore, the Board concludes the bed bugs were part of normal wear and tear, and thus, it was not reasonable to deduct the cost of extermination from the security deposit.

Order

Accordingly, it is hereby ORDERED:


24. Petitioners Jillian Goldman, Megan Leavy and Dennis Mulvena are entitled to recover from respondent Mark Porter the following amounts:

a) \$1260.79 of the principal amount of the security deposit improperly withheld after October 16, 2019; and

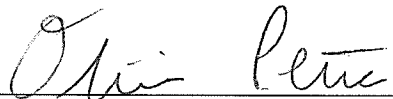
b) Additional interest of \$0.008 per day from October 17, 2019 until such date as the amount improperly withheld is returned to petitioners.

DATED at Burlington, Vermont this 7th day of January, 2020.

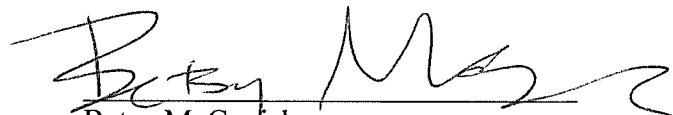
CITY OF BURLINGTON
HOUSING BOARD OF REVIEW




Josh O'Hara



Olivia Pena



Betsy McGayisk



Patrick Murphy

I respectfully dissent from the majority's decision with respect to the issue of notice to the tenants and with respect to the deduction for bed bugs.

Notice

On the issue of notice to the tenants, the Board voted 4-1 that the landlord fulfilled his obligations by sending the security deposit and transmittal to only one of the three tenants. I disagree with the majority. In my opinion the lease is a contract between the three tenants and the landlord. The three tenants should all be treated equally regarding the security deposit unless there is a written agreement between the landlord and the three tenants as to how the security deposit is to be returned. In this case, there was no evidence that such an agreement existed. Although the landlord said he received the deposit from only one tenant, I do not believe this excuses him from the contract with the three tenants. Because the landlord sent the deposit and transmittal to one tenant it begs the question, do all three tenants have a claim or only the two tenants who did not receive the transmittal from the landlord? The landlord in effect delegated his responsibility to one of the tenants without the consent of the other two tenants. Therefore, the landlord forfeits his rights to recover any damages from the two that did not receive proper notice.

The lease was “joint and several”. The question then is, can the landlord deduct from the security deposit all charges to the one tenant who did get proper notice? I suggest he cannot; he can recover up to 1/3 of the security deposit which was \$1,800 or \$600 (the share of the deposit given by the tenant who received proper notice). Can the one tenant who received proper notice collect from her roommates? I suggest she can because the lease was joint and several.

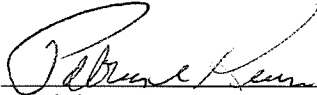
Bed bugs

With respect to the deduction to exterminate bed bugs, the Board voted 4-1 indicating the bed bugs were the fault of the Landlord. I do not agree with the conclusion of the majority on this issue.

The tenants claim “the landlord did not provide a safe and clean environment”. I believe the landlord did deliver a clean and safe environment because there was no problem between June 1st and mid-September. If the bed bugs were left over from a previous tenant, they would have shown up soon after the new tenants moved in not months later.

The landlord hired an exterminator when notified and the exterminator found bed bugs in two of the three bedrooms in petitioners’ apartment. The exterminator also inspected the adjoining units and found no evidence of bed bugs. **Bedbugs are hitchhikers**, I suggest that either one or more tenant visited a place that had bed bugs, purchased furniture that had bed bugs, as they can lay dormant for up to six months, or the tenants had a visitor who brought them to the apartment.

The exterminator eliminated the bed bugs in September. The tenants had no more problems and moved out the following October. The tenants are liable for their action and those of their visitors. Therefore, in this case, I would conclude that petitioners are liable for the cost to exterminate the bed bugs because no other apartment was affected. Accordingly, I would conclude it was reasonable to deduct the cost from the security deposit.



Patrick G. Kearney