HOUSING BOARD OF REVIEW

City of Burlington

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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 5/18/22

CITY OF BURLINGTON
HOUSING BOARD OF REVIEW

/s/ Josh O'Hara
Josh O'Hara
Board Chair

cc: Casey Pope
Sisters & Brothers Investment Group, Attn: Mac Stevens

CITY OF BURLINGTON, VERMONT
HOUSING BOARD OF REVIEW

In re: Request for Hearing of CASEY POPE, DAVID WEINER, MAXWELL GRAHAM and McCALL HEIMERT Regarding Withholding of Security Deposit by SISTERS & BROTHERS INVESTMENT GROUP, LLP for Rental Unit at 371 College Street	)	**Security Deposit Appeal**

DECISION AND ORDER

The above-named hearing came before the Housing Board of Review on April 18, 2022; the hearing was held remotely via Zoom. Board Chair Josh O'Hara presided. Board Members Betsy McGavisk, Charlie Gliserman, Evan Litwin and Olivia Taylor were also present. Petitioners Casey Pope, Daniel Weiner and Maxwell Graham were present and testified. Respondent Sisters & Brothers Investment Group, LLP was represented at the hearing by Mac Stevens who 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 Sisters & Brothers Investment Group, LLP is the owner of a rental unit, 371 College Street, in the City of Burlington which is the subject of these proceedings. Mac Stevens manages the property.

2. Petitioners Casey Pope, Daniel Weiner, McCall Heimert and Maxwell Graham moved into the rental unit with a written lease which ran from June 1, 2021 to May 31, 2022.

3. Although the written lease specified the amount of the security deposit was $3,000.00, petitioners only paid a security deposit of $2,800.00 to respondent. 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 February 28, 2022.

5. On March 8, 2022, respondent sent a statement to petitioners in accordance with ordinance requirements. Said statement itemized deductions of $3,725.00 from the deposit. Interest in the amount of $7.50 was credited to the deposit. None of the deposit was returned; the statement indicated that $717.50 was owed to respondent as the deposit did not cover all the damages. At the hearing, Mac Stevens withdrew all the claims for damages except the deduction of $1800.00 for underpayment of rent.

6. The written lease signed by all the parties provides that monthly rent is $3,000.00. However, both parties acknowledged that throughout the term of the lease petitioners paid $2,800.00 in rent based on information provided by a worker in respondent's office who told petitioners that the amount due for rent was $2,800.00. Based on that information, petitioners continued to pay $2,800.00/month for rent throughout their tenancy. Respondent's tenant ledger also indicates the monthly rent charge was $2,800.00. However, Mac Stevens testified that at the end of the tenancy he discovered the error and withheld $1,800.00 for the underpayment of rent over the course of petitioner's tenancy.

7. By written agreement, the lease was terminated as of February 28, 2022. The termination agreement is silent as to any responsibility for rent. However, the tenant ledger shows a zero balance on their account as of February 28, 2022.

Conclusions of Law

8. 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.

9. 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.

10. Under the city ordinance, as well as state law (the terms of which must be implied in the parties' rental agreement), a landlord must return the security deposit to a tenant within 14 days from the date on which the tenant vacated or abandoned the dwelling unit, with a written statement itemizing any deductions. 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). Proper notice was provided.

11. The sole issue before the Board is the deduction of $1,800.00 for underpayment of rent throughout the tenancy. When a tenant disputes the withholding of a deposit, the Board is tasked with determining the reasonableness of the deductions based on the evidence and testimony before it. Minimum Housing Code Sec. 18-120(e). In this case, the Board concludes that the withholding of the deposit for underpayment of rent was not reasonable despite the written lease. Both parties believed the monthly rent was $2,800.00 until Mac Stevens was preparing the itemized statement and found the error; the tenants were never told there was an error in the amount of rent that was being collected each month; the tenant ledger at the end of the tenancy indicated a zero balance on the account; and the termination agreement is silent about the payment of rent.

Order

Accordingly, it is hereby ORDERED:

12. Petitioners Casey Pope, Daniel Weiner, McCall Heimert and Maxwell Graham are entitled to recover from Sisters and Brothers Investment Group, LLP the following amounts:

a) $2,800.00[1] of the security deposit improperly withheld after March 14, 2022;

b) Interest in the amount of $7.50 on the entire deposit for the period June 1, 2021 through March 14, 2022; and

c) Additional interest of $0.02 per day from March 15, 2022 until such date as the amount improperly withheld is returned to petitioners.

DATED at Burlington, Vermont this 18th day of May, 2022.

CITY OF BURLINGTON
HOUSING BOARD OF REVIEW

/s/ Betsy McGavisk
Betsy McGavisk

/s/ Charlie Gliserman
Charlie Gliserman

/s/ Evan Litwin
Evan Litwin

/s/ Olivia Taylor
Olivia Taylor

Josh O'Hara, Board Chair, dissenting

The Board concludes that because someone in the Landlord's employ mistakenly told the Tenants they could pay less monthly rent than their lease clearly states, it is unreasonable for the Landlord to have used the Tenants' security deposit to recoup the Tenants' unpaid rent. I cannot agree, and therefore I respectfully dissent.

[1] This amount includes the deductions of $1,825.00 that were withdrawn by Mac Stevens at the hearing; the Board's Order assumes that amount has not been returned to petitioners.

The Board's job in security deposit disputes is to "make findings and conclusions regarding the reasonableness of [a landlord's] deductions from the deposit." Burlington Code of Ordinances § 18-120(e). The ordinance does not tell the Board how to judge the reasonableness of a deduction, so the Board may use the dictionary definition of the word. State v. Berard, 2019 VT 65, ¶ 12, 211 Vt. 39, 220 A.3d 759. "Reasonable" can either mean "being in accordance with reason[;]" on the other, it can also mean fair, moderate, or "not extreme or excessive." Definition of Reasonable, Merriam-Webster.com (last visited May 13, 2022). In either case, it means that when the Board makes a decision about whether a landlord properly withheld from a security deposit, it must ground its decision in the factors relevant to the type of deduction the Board has before it. The ordinance does not give the Board authority to make free-form or ad hoc decisions about the reasonableness of a deduction.

> Pursuant to Burlington's ordinance, landlords may deduct from a security deposit for
>
> the actual cost to repair damage beyond normal wear and tear which is attributable to the tenant in order to maintain the condition and habitability of the unit, for nonpayment of rent, for nonpayment of utility or other charges which the tenant was required to pay directly to the landlord or to a utility, and for expenses required to remove from the rental unit articles abandoned by the tenant

Id. § 18-120(c). The Board has lots of experience looking to the objective reasons why a deduction might be reasonable or not. For example, when deciding whether deductions related to damages beyond wear and tear were reasonable, the Board bases its decision on a range of factors, such as the tenant's use of the property, how long they lived there, the type of physical damage that occurred (if any), and whether the landlord's deduction was consistent with the prevailing rates for things like labor and materials. In those cases, the Board needs to exercise broad discretion to determine whether a deduction was reasonable.

A deduction for underpayment of rent is far simpler. The relevant factors are straightforward and the Board's discretion is limited. The Board should look to the lease to determine how much the rent was, to the Tenants' payments to see if they were adequate, and to whether the parties modified the lease agreement to reduce the rent. Here, there is no dispute that Tenants did not pay enough rent. The lease said $3,000 a month, and the Tenants paid $2,800 until the parties agreed to terminate the lease. The resulting underpayment totaled $1,800.

The reason the Tenants underpaid is because someone working for the Landlord verbally informed them that the rent was less than what the written lease said. The majority places great weight on this fact, but I cannot see how this matters. At the hearing, no one explained who this person was and whether the person had any authority to modify the lease on the Landlord's behalf. The testimony did not suggest that this was anything but a mistake. There was never a written modification of the lease to reduce the rent, though the parties did commit their termination of the lease to writing. At all times, the Tenants had a copy of their lease and could have found out for themselves the correct amount of rent to pay. Paragraph 23 of the lease reserved the Landlord's right to pursue legal remedies if the Tenants breached the lease, even if the Landlord did not take immediate action. And finally, the Landlord's withholding of the rent for underpayment certainly is evidence that, in its view, there was no agreement to reduce the monthly rent. There was no meeting of the minds to change the terms of the lease. Therefore, I cannot find any kind of modification of the lease, and I would hold that the Landlord's withholding of $1,800 was reasonable.

Although I'm sure the majority has concluded that its decision is justified by a broad sense of fairness, I do not believe that its decision is justified by evidence in this case or the type of deduction at issue here. I am also concerned that the rationale here - that a good-faith mistake by

a landlord must be held against it notwithstanding a written lease - will degrade relations between landlords and tenants here in Burlington. If a landlord cannot rely on the lease, I doubt that they will be willing to accommodate tenants who struggle to pay rent on time or in the full amount out of fear that their accommodation will be construed under the guise of reasonableness to have been a change to the lease. That is not an outcome that is in anyone's interest.

For these reasons, I respectfully dissent.

/s/ Josh O'Hara
Josh O'Hara