STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CIVIL DIVISION
Docket No. 1045-12-16 Cncv

Diemer vs. Dillon

DOCUMENT COVER SHEET

Ruling on Appeal from Housing Board of Review

VERMONT SUPERIOR COURT
CHITTENDEN UNIT
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JILL DIEMER, d/b/a DIEMER HOLDINGS, LLC, Appellant v. ABIGAIL DILLON, Appellee	Docket No. 1045-12-16 Cncv

RULING ON APPEAL FROM HOUSING BOARD OF REVIEW

Landlord Jill Diemer appeals from a decision of the Burlington Housing Board of Review concluding that she had improperly withheld $1,197.85 of former tenant Abigail Dillon's security deposit. The Board concluded that Diemer forfeited her right to withhold any portion of the security deposit because she failed to provide notice to Tenant of her right to request a hearing before the Board. Both parties are pro se.

Background

Appellant Abigail Dillon and her roommates Michaella Mathews and Emily Guilmette rented an apartment at 37 South Williams Street, # 222 in Burlington for the 2015-2016 school year. The lease ran from August 15, 2015 through May 26, 2016. Monthly rent was $2,200, with a security deposit of the same amount.

While the Board concluded that the apartment was vacant on May 26th, documents submitted by Landlord during the course of the appeal indicate that all three tenants vacated the rental unit by May 15, 2016. Landlord mailed a check of $903.49 representing a partial return of the security deposit and $1.32 of credited interest, with a statement documenting $1,297.85 of itemized deductions, to tenants on May 25, 2016. Tenants received the check and statement on May 31, 2016. Landlord later returned an additional $100 when tenants returned a parking pass. The statement did not provide tenants with notice of their right to request a hearing with the Housing Board of Review.

On July 8, 2016, Tenant Dillon filed her request for a Board hearing.[1] The hearing was held on October 17, 2016 before two Board members, Ben Traverse and Patrick

[1] Landlord contends the request was not filed until July 11, 2016. It appears the request was, in fact, transmitted electronically late in the day on Friday, July 8th, and was not processed by the City Attorney's Office until Monday, July 11th.

Kearney, who were appointed hearing officers for this matter for purposes of expedition. Tenant was present and testified. Landlord was not present despite notice and opportunity to be heard because she instead attended her son's football game. The Board had denied her request to reschedule.

In a written decision dated November 7, 2016 and signed by hearing officers Traverse and Kearney, the Board concluded that Tenant's hearing request was timely. It further concluded that Landlord forfeited the right to withhold any portion of the security deposit because she failed to provide proper notice to Tenant of Tenant's right to request a Board hearing pursuant to Burlington Code of Ordinances § 18-120(c). The Board ordered that Tenant was entitled to recover $1,197.85 (the principal amount of the deposit improperly withheld after June 9, 2016), as well as additional interest of $0.008 per day dating back to June 10, 2016.

Discussion

Appeals from decisions of the Housing Board of Review under 24 V.S.A. § 5006 are governed by V.R.C.P. 74. In re Soon Kwon, 2011 VT 26, ¶ 6, 189 Vt. 598. The court reviews the decision of the Board "on the record" rather than by conducting a new hearing. Id. (citing State Dep't of Taxes v. Tri-State Indus. Laundries, Inc., 138 Vt. 292, 294–95 (1980)). Unless the court determines that it must take evidence or appoint a referee for proper disposition of the matter, the court reviews the record of the hearing and exhibits acted upon by the Board. *See* 24 V.S.A. § 5006(b); V.R.C.P. 74(d).

Landlord raises several arguments on appeal: (1) that Tenant's request for a Board hearing was untimely; (2) that Landlord was denied the opportunity to reschedule the hearing; (3) that Landlord was not given notice that only two of the five Board members were present at the hearing; (4) that Tenants broke the lease several times by smoking cigarettes and marijuana inside the rental unit; and (5) even assuming Tenant was entitled to a return of her portion of the security deposit, she could recover only one-third of the total deposit and not her roommates' portions.

At a status conference on December 27, 2016, Landlord complained that she had been denied an opportunity to be heard by the Board of Housing Review. The court granted Landlord 10 days to file any materials she wished the court to consider, and Tenant 10 days to respond. Landlord submitted a memorandum and supporting materials, and Tenant also submitted her own memoranda. None of the submissions, however, demonstrate that Landlord was denied her opportunity to be heard by the Board.

Landlord claims she was denied the opportunity to reschedule the hearing and that, as a result, she was denied her opportunity to be heard. Landlord did not attend because her son's football game was at the same time. That hearing had already been rescheduled from two weeks prior at Landlord's request because of another conflict with her son's football game. The Board apparently has a policy of allowing only one continuance per party for a valid reason. While Landlord's devotion to her son's extracurricular activities is admirable, it is unfortunately not a valid excuse for missing

legal proceedings to which she is a party. Landlord has had her opportunity to be heard. That she failed to exercise that opportunity was her own decision. What Landlord seeks by her appeal can only be classified as a second bite at the proverbial apple. The court will not permit litigation of a case on appeal that should have been litigated in the first instance in front of the Board of Housing Review in October.

Landlord does not dispute that she failed to provide Tenants with notice of their right to a hearing with the Housing Board of Review. She contends only that Tenants' request for a hearing was untimely. The Board concluded the request was timely based on the evidence before it. While Landlord has submitted evidence regarding that issue on appeal, it should have been submitted to the Board at the hearing which Landlord opted not to attend. Had Landlord truly been denied her opportunity to be heard, that would be a valid reason to consider the matters raised in her appeal which she did not raise at the hearing below. However, Landlord has waived those issues by not raising them in front of the Board. *See* State v. Rideout, 2007 VT 59A, ¶ 19, 182 Vt. 113 ("An issue is not preserved for appeal unless it has been raised at trial with sufficient specificity to afford the trial court 'an opportunity to fully develop the relevant facts and to reach considered legal conclusions.'").[2]

That Tenants might have broken the lease several times by smoking inside the premises is not relevant at this point. All this demonstrates is that perhaps Landlord should have initiated eviction proceedings against Tenants during their tenancy. Landlord chose not to do so, however. To the extent it goes to the reasonableness of the amount of the security deposit withheld, Landlord had an opportunity to present that evidence to the Board, but opted not to attend the hearing. The court will not consider issues on appeal that were not raised below. *See* Rideout, 2007 VT 59A, ¶ 19.

Landlord's complaint that only two of the five Board members were present for the hearing is dispelled by the very language of the code ordinance she quotes. Although the general rule is that a majority of the board must be present, "the board may, for purposes of expedition . . . , designate one (1) or more of its members to sit as hearing officer(s) to hear and decide matters brought before the board." Burlington Code of Ordinances § 18–54. In that instance, "[a] concurring vote of a majority of the members of the board present at a hearing shall be necessary to decide the matter before the board." Id. That is exactly what happened here, and Landlord points to no requirement that she be given notice of that occurrence. *See* In re Soon Kwon, 2011 VT 26, ¶ 21, 189 Vt. 598 (hearing before single member of housing board of review, rather than before majority of board, to address tenants' challenge to effectiveness of landlord's security-deposit statement, was not improper; case did not involve appeal to which statute requiring majority of board

[2] The court is aware that Landlord requested to dismiss the proceeding below before any hearing took place on the grounds that Tenant did not file her request for a hearing on time. The Board, in a letter dated October 7, 2016, denied Landlord's request, stating that "there may be facts in dispute that have a bearing on whether or not the tenants filed their requests for a hearing on time. At the hearing . . . both sides may present their arguments regarding the timeliness of the filing." Landlord was specifically told that the hearing was her opportunity to present evidence and arguments regarding the timeliness of the hearing request, and she did not attend the hearing. She cannot now complain that the Board found in favor of Tenant on that issue.

to be present applied, but rather a first-instance security-deposit hearing specifically authorized by municipal housing code provision, which did not contain majority requirement). Moreover, this is another issue that could have been raised below, had Landlord attended the Board hearing.

Lastly, as to Landlord's claim that Tenant can recover only one-third of the withheld deposit, there was evidence taken at the hearing which supported the Board's conclusion. While Tenant's response to the question whether she was here on her roommates' behalf was ambiguous, Tenant did state "I guess." Furthermore, Tenant and her two roommates were all on the lease together. Moreover, like the other issues Landlord raises in her appeal, this also could have and should have been raised in front of the Board, not for the first time on appeal. *See* Rideout, 2007 VT 59A, ¶ 19. The court must affirm the Board's decision.

Landlord stated that she has rented apartments for many years, has never evicted anyone because she prefers to work with her tenants, and that she is not intimately familiar with the landlord-tenant law and procedure. The court recognizes this, and that the result may seem unfair to her. While her preference to work with tenants rather than initiate eviction proceedings is admirable, and her less than full understanding of landlord-tenant laws is understandable, these are not legally valid excuses that allow her to prevail in this case. The court offers two suggestions for the future which, if adhered to in this case, would have avoided a lot of trouble. First, Landlord should include notice of a tenant's right to request a hearing with all security deposit returns in accordance with Burlington Code of Ordinances § 18-120(c). Second, Landlord should make arrangements to personally attend all legal hearings to which she is a party.

Order

The decision of the Burlington Housing Board of Review is affirmed.

Dated at Burlington this 15th day of March, 2017.

Robert A. Mello
Superior Court Judge