STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CIVIL DIVISION
Docket No. 938-10-17 Cncv

WHITEYVILLE PROPERTIES, LLC,
Appellant,

v.

BRENDAN HUNT et al.,
Appellees.

VERMONT SUPERIOR COURT
DEC 19 2017
CHITTENDEN UNIT

RULING ON APPEAL

This is an appeal from a decision issued by the City of Burlington's Housing Board of Review ("Board") on September 9, 2017. The Board's decision concluded that Appellant Whiteyville Properties, LLC had improperly withheld $2,200 of a $2,325 security deposit. Appellant challenges the decision on procedural and substantive grounds. Michael D. Johnson, Esq. represents Whiteyville and Appellees represent themselves. The City of Burlington appears as an interested party represented by Richard W. Haesler, Jr., Esq.

Background

The following background is recounted for purposes of deciding the pending appeal. Brendan Hunt, Corbin Hill, and Bradley Chandler petitioned the Board for return of their security deposit, which Appellant retained after Appellees vacated their apartment at the end of their lease term. Board members Josh O'Hara and Patrick Kearney were appointed to serve as Hearing Officers and conducted a hearing on August 7, 2017. Appellees attended the hearing, and property manager Eric Hanley represented Appellant.

The Board made the following findings of fact. Appellant owns 22 Summit Street, Unit 1, in Burlington. Appellees rented the unit under a written lease, and Eric Hanley manages the property. The written lease ran from June 1, 2015 to May 25, 2017. Corbin Hill was not on the lease until October 25, 2016. He resided in the unit from September 1, 2016 and withheld rent until he was named on the lease on November 1, 2016, at which time he paid all rent due, and Appellant accepted and cashed his check.

Appellees paid a security deposit of $2,325.00, and rent was $2,325 per month. Under the terms of the lease, Appellant was to return the security deposit at the end of the lease minus any amounts withheld for damage to the premises. When Appellees moved out of the premises, Appellant withheld the $2,325.00 security deposit and reimbursed Appellees for $23.25 in accrued interest. Appellant also provided Appellees with an itemized list of deductions from the security deposit, as follows:

1. Late Rent Fees: $475 (19 x $25);
2. Trash Removal and Tires: $500;
3. Cleaning Charge: $175;
4. Legal Fees—Eviction Proceeding: $375;
5. Extra Tenant Charge—$800 ($100 x 8 months);

Appellees disputed all deductions. The lease provided for a $50 fee for payments made more than five days late. Appellant did not provide any explanation as to why it reduced the late fees to $25 per late payment, and provided no evidence or testimony regarding costs, expenses, or hardship incurred as a result of late payments.

Appellant represented to the Board that it assessed a $500 fee for trash removal based on a pro-rata apportionment to their unit of the overall expenses incurred for the entire property's trash removal when all units left trash during their move-outs. No evidence specifically linked Appellees to the excess trash that resulted in the expenses. Appellant admitted that it did not remove the tires.

Appellants testified that they had done a walk-through of the unit with Hanley at the end of the lease term, and that Hanley had assured them that the unit was "fine." An inspection form showed that all categories of the inspection were checked okay except for the category "Kitchen – Clean," which was unchecked but noted "some cleaning." Hanley testified that the unit required 3 ½ hours of cleaning at $50 per hour for a total of $175. The lease contained a provision that stated that Appellees were responsible for having the unit professionally cleaned, and Appellees admitted that they did not do so.

Appellant claimed that the legal fees resulted when Appellant initiated an eviction proceeding when Corbin Hill did not pay his rent. Appellant dropped the eviction proceeding after Corbin Hill was added to the lease and paid his back rent.

Appellees testified that they had used a futon for overnight guests but that there was no fourth tenant at any time during their tenancy.

The Board concluded that Appellant was not entitled to withhold the full amount of the security deposit. Specifically, the Board found that the $475 deduction for late fees was "improper." The Board found that the trash removal deduction was improper because none of the cost was specifically attributable to Appellees, and Appellant claimed to have nothing to do with the removal of the tires. The Board found that $50 per hour for 3 ½ hours for cleaning the kitchen, which the inspection form indicated needed "some cleaning," was excessive, but it allowed Appellant to retain $125 for cleaning. The Board concluded that there was no basis for deducting the legal fees from the security deposit. Finally, the Board found that the evidence did not support Appellant's deduction of $800 as an extra tenant charge.

The Board ordered Appellant to turn to Appellees $2,200.00 of the principal amount of the security deposit withheld after June 9, 2017, plus interest.

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).

Appellant challenges three aspects of the Board's decision. First, Appellant argues that the Board did not have a quorum as required by BCO § 18-54. Second, Appellant contends that the Board did not timely issue its decision under BCO § 18-57. Third, Appellant claims that the Board's findings "are wholly unsupported by the facts and are in complete disagreement and without regard to the contract between the parties."

Burlington's ordinances provide that "[i]n order to conduct a hearing pursuant to a request, a majority of the board must be present, provided that the board may, for purposes of expedition or in cases of emergency, designate one (1) or more of its members to sit as hearing officer(s) to hear and decide matters brought before the board." BCO § 18-54. In first-instance security deposit hearings, a majority of the Board need not be present because the matter is not an appeal as provided by 24 V.S.A. § 5005(c)(4). In re Soon Kwon, 2011 VT 26, ¶ 21, 189 Vt. 598 (mem.). The Board was therefore within its authority to designate two members to conduct the hearing. Therefore, the Court will not reverse the Board's decision for lack of a quorum.

Burlington's ordinances also require that "[t]he decision of the housing board of review shall be made within a reasonable time after the hearing, but in no event shall the decision, which shall include findings of fact, be made later than thirty (30) days after the hearing." BCO § 18-57. The ordinance does not specify any consequence for failure to comply with the 30-day time period. The Court concludes that despite the use of the word "shall" in the ordinance, the ordinance is not mandatory, but rather, it "directs the manner of doing a thing, and is not of the essence of the authority for doing it." In re Mullestein, 148 Vt. 170, 174 (1987); see also In re William McSweeney, No. S0296-11 Cnc at 6 (June 29, 2011) (Toor, J.) (declining to reverse Public Works Commission, Board of Appeals decision that issued after deadline, where city ordinance set time limit with no consequence for failure to comply). Although it is undisputed that the Board did not comply with the 30-day time limit, there is no indication that the ordinance is intended to invalidate or otherwise vacate Board decisions that are issued more than 30 days after the hearing. The Court will not reverse the decision because the Board issued it several days late.

Appellant argues that the facts do not support the Board's findings and "are in complete disagreement and without regard to the contract between the parties." The Court has reviewed the audio recording of the hearing, the exhibits that the Board considered, and the Board's decision, and concludes that the evidence supports the Board's findings of fact.

Vermont's landlord-tenant statutes and Burlington's ordinances enumerate the limited, allowable deductions from a security deposit. A landlord may withhold a security deposit for "(1) nonpayment of rent; (2) damage to property of the landlord, unless the damage is the result of normal wear and tear or the result of actions or events beyond the control of the tenant; (3)

nonpayment of utility or other charges which the tenant was required to pay directly to the landlord or to a utility; and (4) expenses required to remove from the rental unit articles abandoned by the tenant." 9 V.S.A. § 4461(b)(1)–(4); see also BCO § 18-120(a)(1) (permitting landlords to require a deposit as security "against damage beyond normal wear and tear to the premises which is attributable to the tenant, against nonpayment of rent, against nonpayment of utility or other charges which the tenant was required to pay directly to the landlord or to a utility, and against expenses required to remove from the rental unit articles abandoned by the tenant."). Based on the evidence before it, the Board correctly concluded that of the amounts deducted from the security deposit in Appellant's Notice to Tenant of Withholding of Security Deposit," Appellant could not properly deduct the late fees, legal fees, and extra tenant charges from the security deposit.

As for the Board's determination that deduction for cleaning the kitchen was excessive, it was within the Board's authority to determine whether the deduction was reasonable. The Board also found, based on the evidence, that none of the excess trash left outside of the building was attributable to Appellees, and that Appellant had agreed to allow Appellees to leave their tires on the premises. Therefore, the Board properly determined that Appellant could not properly deduct the trash and tire removal from the security deposit.

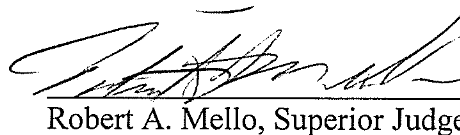
Appellant argues that it is entitled to some or all of these claimed deductions under the parties' lease. However, the Board's decision is limited to what a landlord may or may not deduct from the tenants' security deposit. Whether Appellant is entitled to recover the claimed amounts under the parties' lease is a separate legal matter that is beyond the Board's jurisdiction to determine in the context of a security deposit hearing.

For the reasons stated above, the Court will not disturb the Board's decision.

ORDER

The Housing Board of Review's September 9, 2017 Findings of Fact, Conclusions of Law, and Order is *affirmed.*

Dated this 18th day of December, 2017



Robert A. Mello, Superior Judge