BURLINGTON HOUSING BOARD OF REVIEW

Monday, February 3, 2020

7:00 p.m.

Community Room, Burlington Police Department
1 North Avenue

AGENDA

1. George Bennum, Carrie Alexander (tenants); Donald Harrington (landlord) (security deposit case) re: 10B Pearl Street

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 3/6/20

CITY OF BURLINGTON
HOUSING BOARD OF REVIEW

Josh O'Hara
Board Chair

cc: George Bennum & Carrie Alexander
Donald Harrington

CITY OF BURLINGTON, VERMONT
HOUSING BOARD OF REVIEW

In re: Request for Hearing of GEORGE BENNUM and CARRIE ALEXANDER Regarding Withholding of Security Deposit by DONALD HARRINGTON for Rental Unit at 10B Pearl Street	)	Security Deposit Appeal

DECISION AND ORDER

The above-named hearing came before the Housing Board of Review on February 3, 2020. Board Chair Josh O'Hara presided. Board Members Patrick Kearney and Betsy McGavisk were also present. Petitioners George Bennum and Carrie Alexander were present and testified. Respondent Donald Harrington was also present and testified. Appearing and testifying as a witness was Seth Golding.

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 Donald Harrington is the owner of a rental unit, 10B Pearl Street, in the City of Burlington which is the subject of these proceedings.

2. Petitioners George Bennum and Carrie Alexander moved into the rental unit with a written lease which ran from June 1, 2019 to May 28, 2020. Monthly rent was $2,025.00. The first page of the lease contained the following terms regarding early termination of the lease:

> Tenant is liable for the full term of this lease. Any early termination will still obligate the tenant to pay the full amount of the lease to the end until a new tenant can be secured. In addition the tenant agrees that they are responsible for payment of any leasing fee (normally charged to the owner) but due from the tenant upon breaking a lease. The leasing fee is ½ of 1 months [sic] rent, with a minimum of $850. The fee covers marketing, showings, follow up, processing applications, lease signing[,] and move in of new tenant.

No other terms in the lease deal with early termination of the lease.

3. Petitioners paid a security deposit of $2025.00 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 November 21, 2019, following a lengthy discussion with Mr. Harrington, Seth Golding, and Mr. Harrington's leasing agent. By email on September 30, Mr. Bennum and Ms. Alexander informed Mr. Harrington that they were under contract to purchase a house and that they proposed to terminate the lease on December 1. Notwithstanding the term of the lease that the tenants were responsible for the full amount of the rent "until a new tenant [could be] secured," the parties negotiated unsuccessfully by email to resolve how much the tenants would pay, if anything, of the difference between their monthly rent and the monthly rent of the tenants who would eventually replace them. The tenants objected to Mr. Harrington renting the unit for less than the rent they were paying, and they attempted to find full-rent replacements. Mr. Harrington and his associates preferred to rent at a lower rate in order to secure a tenant by the time Mr. Bennum and Ms. Alexander vacated the unit. In the end, Mr. Harrington re-leased the apartment at a discounted rate of $1,850 a month beginning December 1, 2019 and ending May 30, 2020.

5. On December 3, 2019, respondent sent petitioners a written statement informing them that their entire deposit was being withheld for damages and unpaid rent. Said statement itemized damages of $3,000.00. Petitioners disputed the deductions and argued that the deposit was willfully withheld.

6. Interest in the amount of $1.00 was credited to the deposit.

7. Respondent deducted $50 to paint a closet that he had converted to a small office space for petitioners. Petitioners put up file folders on the walls in the office; after removing the

file folders from the walls, petitioners spackled over the small holes left by them. Respondent painted the small office and deducted the cost from the deposit.

8. Respondent deducted $1050.00 from the deposit to repair the bedroom ceiling. During their tenancy, respondent allowed petitioners to use the attic for storage. At the beginning of the tenancy when respondent showed petitioners the attic, they pointed out the holes in the floor and suggested he fix them. Respondent laughed off the suggestion of fixing an area meant only for storage. Petitioners also testified credibly that parts of the floor were covered in carpets and rugs so that it would not have been completely clear where it would be safe for a person to step. In November, when Carrie Alexander went up to the attic to retrieve empty boxes for their move, her foot went through a floorboard and caused a piece of the ceiling in the bedroom to crumble. In order to repair the damage to the ceiling (which was plaster), sheetrock was installed (including taping) and the entire ceiling painted.

9. Respondent deducted $1,000.00 from the deposit for a leasing fee. Under the terms of the lease, a tenant who terminates the lease early is obligated to pay a leasing fee of ½ to 1 month's rent, with a minimum of $850.00. According to the lease, "[t]he fee covers marketing, showings, follow up, processing applications, lease signing and move in of new tenant." Petitioners disputed the deduction because they believed the fee was a penalty; in addition, they were told the releasing fee would be $650.00. When petitioners questioned the fee, respondent stated the lease allowed for ½ a month's rent for early termination. Respondent also told petitioner he could opt to give them a break on the charge if things went smoothly with the leasing agent. Respondent argued that he was allowed to charge a leasing fee as long as he could demonstrate actual damage to him by the need to re-let the apartment. To demonstrate actual damage to him, respondent submitted an invoice from Five Seasons Property Management in the

amount of $1,000.00 for a leasing fee. The invoice does not indicate the amount of time Five Seasons spent finding new tenants for the apartment; the fee they charged is merely a flat fee. According to an email between the parties, respondent has a contract with Five Seasons to do all his leasing and re-leasing.

10. Respondent deducted $900.00 for loss of rental income. Petitioners terminated the lease 6 months early. Respondent's leasing agent re-rented the apartment to tenants at a lesser monthly rent than what petitioners paid for rent - $1850.00 per month versus petitioners' monthly rent of $2,000.00. Respondent deducted the loss of rent from petitioners' deposit. Petitioner disputed the deduction because they did not agree to a reduced rent and asked the leasing agent, Grace Ruvelson, who was working on re-renting the apartment to consider a tenant they found who was able to pay the full monthly rent. Ms. Ruvelson was concerned about losing the tenants, but told petitioners in an email that the decision was up to them. Nonetheless, Seth Golding informed petitioners that the applicants they had were ready to sign the lease (at $1850 monthly rent) and they were moving forward with them. Respondent agreed with Mr. Golding's decision to rent at a lower monthly rate despite petitioners' objections.

11. At the hearing, when discussing the re-leasing fee, the Board provided the parties with a decision of the Superior Court, Civil Division affirming an earlier decision of the Board regarding fees included within residential lease agreement. To briefly summarize, in *In re Hunt, et al.* (Burl. Housing Bd. of Review Sept. 9, 2017), the Board held that the landlord could not use the security deposit to satisfy late rent, extra tenant, and legal fees imposed by the lease agreement. The landlord appealed to the Civil Division of the Superior Court. 9 V.S.A. § 4461(g), 24 V.S.A. § 5006(a). On appeal, the Civil Division affirmed, holding that the Board

correctly concluded the landlord could not deduct those fees. *Whiteyville Props. v. Hunt*, Docket No. 938-10-17 Cncv, slip op. at 4 (Vt. Sup. Ct. Dec. 18, 2017).

12. The Board expressed to Mr. Harrington its belief that it was bound to follow the *Whiteyville* decision as precedent. Mr. Harrington responded by providing the Board with the last page of a different judicial decision, this one of the Small Claims Court, in support of his argument that he was entitled to deduct both the re-leasing fees and the difference in rent. The page Mr. Harrington provided the Board had only the docket number; the Board stated it would consider Mr. Harrington's submission and try to get a full copy of the decision.

13. The Board was able to get a fully copy of the decision, *McCauley & Hawthorn v. Harrington & Harrington Props.*, Docket No. 622-6-19 Cnsc (Vt. Sup. Ct. Nov. 7, 2019). It does not say what Mr. Harrington represented it would. In *McCauley*, the plaintiffs appealed a security-deposit withholding to this Board and that case, like this one, involved tenants who terminated a lease agreement with Mr. Harrington before its expiration. When the day for the hearing before this Board arrived, Mr. Harrington did not appear because, as he testified in Small Claims Court, "in his opinion, the board is not a court of law and is predisposed against landlords. He stated he often 'fluffs off' the Board." *McCauley* at 2.

14. And fluff off he did. When Mr. Harrington received a copy of this Board's order in the plaintiffs' favor, he chose not to comply. *Id.* When the Burlington City Attorney informed Mr. Harrington he risked a civil ordinance violation for noncompliance, he still did not return the plaintiffs their money. *Id.* So the plaintiffs sued Mr. Harrington to enforce their judgment. *Id.* In court, Mr. Harrington argued the Board lacked authority to issue orders and contended the plaintiffs had to relitigate the claims they made before this Board.

15. The Small Claims Court rejected Mr. Harrington's arguments. *McCauley* at 3. The Small Claims Court found Mr. Harrington's conduct "reflects [an] intentional and profound disregard for the legal process." *Id.* In so doing, the court awarded the plaintiff double damages under 9 V.S.A. § 4461(e) because Mr. Harrington's unlawful withholding of their security deposit had been willful. *Id.*

16. Mr. Harrington counter-claimed, contending that he was owed money to cover a releasing fee under the lease agreement and that he was owed the difference between the rent the plaintiffs would have paid and the rent new tenants were paying. *McCauley* at 4-5. The Small Claims Court agreed that the plaintiffs owed Mr. Harrington the difference in rent, but the Small Claims decision couches the judgment in terms of Mr. Harrington's counterclaim for breaching the lease, not in terms of Burlington's security deposit ordinances. Likewise, the Small Claims Court *did not* find in Mr. Harrington's favor on the re-leasing fee because he could not prove his damages flowed from plaintiffs' breach of their lease. *Id.* at 5. Nothing in the decision supports Mr. Harrington's representation that a court has held fees in a lease may be recovered using a security deposit pursuant to Burlington's security deposit ordinances.

17. Returning to this matter, petitioners also argued that the withholding of their deposit was willful. Petitioners believed that the email exchanges between themselves and respondent and Seth Golding had a sense of malice to them. Petitioners believed in particular that respondent's email with respect to the amount to be charged for a leasing fee was a threat. In general, petitioners felt the interactions between themselves and respondent was personal and exhibited willfulness. Respondent countered that he believed willful to be having no reason to withhold a deposit, but doing it any way.

Conclusions of Law

18. 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.

19. 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.

20. 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). 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). Proper notice was provided, and therefore the Board must consider the merits of Mr. Harrington's withholdings from the security deposit.

21. 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 § 18-2. The Vermont Supreme Court has interpreted the concept of "normal wear and tear" within the context of a commercial lease, but when it did so, it used the term as it would apply to residential leases. In that case, the Court explained that the contours of the normal-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 the type of the property. *Mongeon Bay Props., LLC v. Malletts Bay Homeowner's Ass'n*, 2016 VT 64, ¶¶ 33-37, 202 Vt. 434, 149 A.3d 940.

22. The Board finds that the deduction for paint was improper because the small holes left by the tenants were normal wear and tear considering the office use for which the tenants used the room. The tenants used the room as an office and Mr. Harrington did not allege the tenants used the room unreasonably. The $50 deduction was improper.

23. The Board finds the deduction for $1,050 for the damage caused when Ms. Alexander's foot went through the floorboards in the attic was improper. Mr. Harrington held this attic space out to be a space for storage, and the petitioners used the attic space for that purpose. When her foot went through the floor, Ms. Alexander was doing nothing more than retrieving a box from the attic. She was not being careless or negligent when she retrieved the box. The testimony at the hearing revealed that the floor Mr. Harrington provided to the tenants in this attic was not safe to walk on, that it was not clear which parts of the floor were safe to step on, and Mr. Harrington laughed off the suggestion that he fix the flooring. The $1,050 deduction was improper.

24. The Board concludes the deduction of $900 for the difference in rental income was improper because there was no rent due from the tenants under the terms of the lease. The terms of the early-termination clause of the lease agreement obligated the tenants to "pay the full amount of the lease to the end until a new tenant can be secured." The emails exchanged by Mr. Harrington, his associates, and the tenants do not reflect that they reached any kind of consensual amendment to this agreement. In fact, Mr. Bennum's email of November 6 says the tenants did not consent to the discounted-rent proposal, and Mr. Harrington's response ("This is how we do business in Vermont") confirms the tenants did not give affirmative consent to change this term. By the terms of this lease, no rent was due from the tenants once Mr. Harrington and his associates found new renters for December 1, 2019. Since no rent was due at all, the tenants were not obligated under this lease to pay the difference between their monthly rent and that of the new tenants. The deduction was improper.

25. The Board concludes that the $1,000 was not proper. As a threshold matter, penalties within lease agreements do not fall within § 18-120. The purpose of a security deposit is to "secure the performance of the tenant's obligations to pay rent and to maintain a dwelling unit." 9 V.S.A. § 4461(a). The security-deposit ordinance enforces the tenant's obligations, which are the converse of the landlord's obligations to provide a habitable dwelling. See 9 V.S.A. § 4457 (specifying a landlord's obligations). Viewed with these purposes in mind, the language of § 18-120(c) allowing a landlord to withhold from a security deposit "for nonpayment of utility or other charges which the tenant was required to pay directly to the landlord or to a utility" is narrow. See *Pearl Street Housing Venture, LP v. Casava*, Docket No. 1145-12-19 Cncv, slip op. at 2 (Vt. Sup. Ct. 2019) (holding that the ordinance must not be construed to frustrate the Legislature's intent regarding the security-deposit statute). A landlord may deduct

for nonpayment of utility or like charges, related to the habitability of the unit, that are attributable to the tenant or tenants. This is a sensible limitation. Landlords and tenants might insert fees for all sorts of purposes into a lease,[1] but few relate to the purpose of a security deposit.

26. The releasing fees here do not meet that standard. The fee has nothing to do with maintaining the habitability of the unit. It was improper for Mr. Harrington to use the security deposit to satisfy this fee.

27. Additionally, the evidence in this case did not establish that the amount of the releasing fee was a set amount. While the lease says that the tenants could be charged a releasing fee in the amount of half a month of rent (with a minimum of $850), Mr. Harrington alternately offered to give the tenants "a break on that if things go smoothly[,]" but then ominously stated that the tenants' insistence on a full-rent replacement "is not helping things go smoothly." Additionally, in a text, he referred to a $650 releasing fee. The invoice from Five Seasons Property Management appears to conveniently be a $1,000 flat fee for re-leasing. Based on this evidence, the Board cannot conclude that the $1,000 fee was actually attributable to the tenants' early termination of their lease. The Board expresses no opinion as to whether the fee may be recovered in another venue.

28. Mr. Bennum and Ms. Alexander have also moved for double damages, alleging Mr. Harrington's failure to return their security deposit was unlawful and willful. As the Superior Court has recently held, "willfully" for purposes of the ordinances can mean violating the

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[1] Recent examples include fees for late rent payments, see *Whiteyville Props. v. Hunt*, supra, and even fees for sorting through a tenant's rubbish and recyclables. *In re Ostojic*, slip op. at 2 (Burl. Housing Bd. of Review Aug. 7, 2018), *available at* https://www.burlingtonvt.gov/sites/default/files/agendas/SupportingDocuments/Ostojic%20v%20Shriner.pdf (last visited Feb. 24, 2020).

ordinance by design, by intention, by being obstinate or indifferent to the requirements of the law. *Harrington v. McCauley*, 1095-12-19 Cncv, slip op. at 1-2 (Vt. Sup. Ct. Feb. 4, 2020). The Board agrees with Mr. Harrington that the deductions for painting and the repair of the ceiling were the result of an honest disagreement over whether the damage was normal wear and tear. The Board also concludes that the deduction for the difference in rent was not a willfully unlawful deduction: the parties did not appear aware of the terms of their lease agreement.

29. The releasing fee is a close question. As the Small Claims Court found in its case, Mr. Harrington exhibits a profound disregard for legal process and his obligations. That disregard manifested itself by his attempt to mislead the Board by giving it one page of an unfavorable court decision in support of his withholding of the leasing fee from the tenants' security deposit. It manifested itself in Mr. Harrington's response to the tenants: he was willing to cut them a break if things went smoothly, but told them that insisting on a full-rent replacement was not making things go smoothly. On the other hand, Mr. Harrington would not necessarily have had the specific reason the Board decided that his withholding of the releasing fee was improper in mind when he withheld from the security deposit. However, considering Mr. Harrington's course of conduct from the time the tenants informed him of their intent to break the lease through to the hearing, the Board concludes Mr. Harrington's unlawful withholding was willful. He has demonstrated a continuing indifference or obstinance to his legal obligations.

Order

Accordingly, it is hereby ORDERED:

30. Petitioners George Bennum and Carrie Alexander are entitled to recover from respondent Donald Harrington the following amounts:

a) $2,026.00 of the principal amount of the security deposit (including interest) improperly withheld after December 5, 2019;

b) $1,000.00, double the amount of that portion of the security deposit willfully withheld; and

c) Additional interest of $0.01 per day from December 6, 2019 until such date as the amount improperly withheld is returned to petitioners.

DATED at Burlington, Vermont this 6th day of March, 2020.

CITY OF BURLINGTON
HOUSING BOARD OF REVIEW

Josh O'Hara

FOR

Patrick G. Kearney w/permission

Betsy McGavisk

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Harr

STATE OF VERMONT

Superior Court
Chittenden Unit

Civil Division
Docket No. 622-6-19 Cnsc

Sara McCauley & Christopher Hawthorn, Plaintiffs,	)	
v.	)	
	)	
Don Harrington & Harrington Properties, Defendants.	)	

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FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER

I Summary

Plaintiffs filed this action seeking to enforce the Burlington Housing Board of Review's decision that Defendants wrongfully withheld their security deposit. Defendants counterclaim for lost rental income and other damages.

The Court held a hearing on October 18, 2019. Plaintiffs appeared and represented themselves. Don Harrington appeared and was represented by Attorney David Sunshine.

II Findings of Fact

1. Don Harrington is a landlord. Through his company, Harrington Properties, he owns and manages dozens of rental properties, including several in Burlington. Mr. Harrington has been a landlord since 1994.

2. On April 10, 2018, Plaintiffs and Harrington Properties entered into a residential rental agreement. Plaintiffs agreed to rent from Defendants a unit described as 12A Park Street in Burlington, Vermont. The agreement was to begin on June 1, 2018 and terminate on May 26, 2019. The agreement was for $14,880 to be paid in 12 equal monthly installments of $1,240. Per the agreement, Plaintiffs gave Defendants a security deposit in the amount of $1,220.

3. At the time that they entered into the agreement with Defendants, Plaintiffs believed that they would have to vacate their current residence at the end of May 2018. In fact, in late May, Plaintiffs learned that they would not have to leave their residence. So, by email dated May 29, 2018, Mr. Hawthorn informed Mr. Harrington that "Sara and I will not be moving into 12 A Park Street."

4. In the same email, Mr. Hawthorn wrote:

> "Rather than let the apartment sit empty while you search for a new tenant, would you be open to transferring our lease (and corresponding security deposit) to a new tenant if we were to refer one to you? We've already put feelers out and there is definitely some interest."

Just over an hour later, Mr. Harrington replied "if you have one that will be great? {sic} Or we will start searching immediately. Just over two hours later, Mr. Hawthorn informed Mr. Harrington that Plaintiffs leads had fallen through and that Mr. Harrington should start searching for a new tenant.

5. On June 9, 2018, Mr. Harrington sent an email to the Plaintiffs. He informed them that a tenant had agreed to rent 12A Park Street. He also informed them that the tenant would begin paying in July and that he was attempting to work out a "prorated amount" for June. He concluded by writing:

> "Your deposit will cover the releasing fee and 2 weeks of June. If I get a prorated 2 weeks of June we will be all set. If not you are liable for the second ½ of June. Will know more by Monday."

6. The Plaintiffs contacted Mr. Harrington several times over the next few weeks. He did not reply

7. On July 10, Mr. Hawthorn sent Mr. Harrington an email. He reminded Mr. Harrington that Mr. Harrington had indicated that he would be in touch but had not contacted them. Mr. Hawthorn added that he and Ms. McCauley "need to know what is the balance of our deposit money."

8. A tenant moved into 12A Park Street in June 2018. The tenant paid $562.50 for June. Mr. Harrington agreed to accept $1,125 per month for the following 11 months.

9. On July 13, 2018, Harrington Properties sent the Plaintiffs an invoice for $1,082.50. The invoice was for one month's rent, a "re leasing fee" of $600, and 11 months of the difference between what Plaintiffs had agreed to pay in rent and what Mr. Harrington charged the new tenant. Harrington Properties credited Plaintiffs' security deposit and the prorated amount that the new tenant paid for June against the bill.

10. Plaintiffs made a claim with the City of Burlington's Housing Board of Review. The Board held a hearing on September 17, 2018. Plaintiffs attended. Defendants received notice of the hearing but did not attend. During the small claims hearing, Mr. Harrington testified that, in his opinion, the Board is not a court of law and is predisposed against landlords. He stated the he often "fluffs off" the Board.

11. On October 2, 2018, the Board issued its "Findings of Fact, Conclusions of Law, and Order." The Board concluded that Mr. Harrington failed to comply with the state laws and city ordinances that governed Plaintiffs' security deposit. As such, the Board concluded that he had forfeited the right to withhold any part of the security deposit. The Board ordered Mr. Harrington to pay the Plaintiffs the $1,220 security deposit plus interest in the amount of "$0.008 per day from May 29, 2018 until such date as the amount improperly withheld is returned to petitioners."

12. Mr. Harrington received a copy of the Board's order. He and Harrington Properties chose not to comply. As such, the Plaintiffs asked the City of Burlington to enforce the order. By letter dated December 11, 2018, the City Attorney informed Mr. Harrington that failure to comply with the order is a civil ordinance violation for which he could be ticketed. The letter instructed Mr. Harrington to remit to the City $1,221.65 no later than December 21, 2018. Mr. Harrington received the letter.

13. The City Attorney's office informed Plaintiffs that to enforce the judgment they would need to sue in Superior Court.

14. As of October 18, 2019, Mr. Harrington had not returned the security deposit to Plaintiffs or remitted it to the City of Burlington.

II **Conclusions of Law**

A. Plaintiffs' Claim

Plaintiffs proved that Mr. Harrington owes them $1,220.00 plus interest in the amount of $0.008 per day since May 29, 2018. They did so by establishing that they have an order to that effect from the City of Burlington's Housing Review Board. The Court finds no reason to treat the Board's order any differently from any other debt a plaintiff attempts to collect in this court.

Defendants argue that Plaintiffs must prove anew that Defendants failed to comply with the laws and ordinances that govern security deposits. The crux of Defendants' argument is that the City of Burlington Housing Review Board lacks the authority to order landlords to return security deposits.

By statute, municipalities may adopt ordinances that govern minimum standards for dwellings. 24 V.S.A. § 5003(a). Such ordinances may fix the "rights and responsibilities of owners [and] lessees . . . including security deposits." 24 V.S.A. § 5003(b)(6). Any municipality that adopts such ordinances may create a Housing Board of Review to hear and decide disputes that arise under the ordinances. 24 V.S.A. § 5005.

In addition, the Vermont Legislature has adopted the Residential Rental Agreements Act ("The RRAA"). The RRAA regulates most aspects of landlord-tenant relationships, including the return of security deposits. Per 9 V.S.A. § 4461(g), a municipality may adopt ordinances governing security deposits. The statute states that municipalities "may provide that a Housing Board of Review constituted pursuant to 24 V.S.A. § 5005 may hear and decide disputes regarding security deposits."

The City of Burlington has done exactly that. In 1986, it adopted a security deposit ordinance: Municipal Housing Code Sec. 18-120. As authorized by statute, the ordinance governs security deposits in Burlington and authorizes the Housing Review Board to hear and decide security deposit disputes. Indeed, page 2 of the lease agreement specifically refers to the authority of the Housing Review Board – the very Board that Defendants now argue lacks any authority.

To accept Defendants' argument that Plaintiffs must prove their claim anew would eviscerate the authority of a Housing Review Board that has been duly created pursuant to state law. Further, it would countenance behavior – such as Mr. Harrington's – that reflects and intentional and profound disregard for the legal process. The Court will do no such thing. Defendants' argument fails. Rather, the Board's order operates as an enforceable debt that Defendants owe to Plaintiffs.

Next, Defendants argue that this is an appeal. The Court agrees that Vermont law authorizes anyone "aggrieved by any decision" of a Housing Board of Review to "appeal to the superior court." 24 V.S.A. § 5006(a). Of course, here, Defendants did not appeal. By his own admission, Mr. Harrington ignored the order of the Housing Review Board and then filed a counterclaim once Plaintiffs took steps to enforce the order. Moreover, even if this were an appeal, it would likely be dismissed for being filed far too late.[1]

Finally, Plaintiffs requests costs and "double the amount of the security deposit due to willful withholding."

By law, within 14 days of learning that a tenant has vacated or abandoned a dwelling unit, a landlord must return the security deposit along with a written itemization of deductions. 9 V.S.A. § 4461(c). Compliance is to be by hand-delivery or mail to the last known address. 9 V.S.A. § 4461(d). A landlord who fails to comply forfeits the right to retain any portion of the security deposit, with a willful failure subjecting the landlord to liability for double the amount wrongfully withheld. 9 V.S.A. § 4461(e).

The Court agrees with Plaintiffs that the Housing Review Board concluded that Defendants willfully failed to return the security deposit or provide them with a written itemization of deductions within 14 days of learning that they did not intend to move in. Indeed, at the small claims hearing, Defendants admitted as much. They argued that they did not provide the required written notice or return the deposit because Plaintiffs had waived their rights under the law.

Even if the protections of 9 V.S.A. § 4461(c) can be waived, the Plaintiffs did not do so. The evidence reflects that they persistently asked Mr. Harrington, a long-time landlord with many properties in Burlington, to inform them how their deposit would be treated and the amount, if any, that would be returned. He did not do so within 14 days of learning that they would not be moving in. As such, Defendants are liable to Plaintiffs for double the amount wrongfully withheld.

To summarize, on Plaintiffs' claim, the Court finds for Plaintiffs in the amount of $2530.04. The amount represents double the $1,220 security deposit, 4 cents in interest that accrued per the Board's order between May 29, 2018 and the date of the small claims hearing, and $90 in costs.

B. <u>Defendants' Counterclaim</u>

Defendants allege that Plaintiffs breached the rental agreement and are liable for lost rent, a $600 re-leasing fee, and attorney's fees.

There is no dispute that Plaintiffs backed out of the lease. Thus, the Court agrees that they are liable to Defendants for the difference between what Defendants collected and what Plaintiffs would have paid. The evidence establishes that amount as $1,722.50, allocated as follows:

- Defendants are entitled to the difference between what Plaintiffs would have paid in rent in June 2018 - $1,240 – and the prorated $542.50 that the replacement tenant paid that month. Thus, $677.50.

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[1] While Title 24 is silent as to the time frame in which an aggrieved person must appeal a decision of a Housing Review Board, an appeal from a Housing Review Board is pursuant to V.R.C.P. 74. <u>In re Kwon</u>, 2011 VT 26 ¶6. Rule 74(b) requires a notice of appeal to be filed "within the time provided by Rules 3 and 4 of the Rules of Appellate Procedure." Here, the deadline ran 30 days after the Housing Review Board issued its order. *V.R.A.P. 4(b).* Defendants did not meet the deadline.

- In addition, Defendants are entitled to$1,045. This amount reflects the fact that the tenant who replaced Plaintiffs paid $95 per month less than they would have paid over the final 11 months of the lease.[2]

Defendants also demand $600 as a "re-leasing fee." During trial, Mr. Harrington testified that the lease requires the re-leasing fee if broken. In other words, he argues that the $600 re-leasing fee represents liquidated damages.

The Court admitted the lease into evidence. It does not include any mention of a re-leasing fee, whether $600 or another amount. Moreover, while Mr. Harrington testified that the leasing agency he uses charged him $600 to find a replacement tenant, he provided no evidence of the leasing agency's actual costs in locating the new tenant. Parties must prove actual damages that flow from a breach. Here, Defendants have not.

Finally, Defendants request attorney's fees and costs. The Court declines to award either.

During the hearing, Mr. Harrington testified that his losses were covered by the security deposit. As such, he was willing to ignore the Housing Review Board and forego suing the Plaintiffs for lost rent under the theory that, really, it was all a wash anyway. In other words, the only reason that Defendants incurred attorney's fees is because they ignored the legal process that the City of Burlington has established to govern security deposits, a process that the City implemented pursuant to an act of the Vermont Legislature. Requiring the Plaintiffs' to bear the costs of Mr. Harrington's conduct and choices would not be appropriate.

In sum, on the counterclaim, the Court enters judgment in favor of the Defendant in the amount of $1,722.50. The amount reflects rental income that Defendants would have received but for Plaintiffs' breach.

III Order

1. On Plaintiffs' claim, the Court enters judgment in favor of Plaintiffs' and orders Defendants to pay Plaintiffs $2,530.04. Interest on unpaid amounts will accrue at 12% per year.

2. On Defendants' counterclaim, the Court enters judgment in favor of the Defendants and orders Plaintiffs to pay Defendants $1,722.50. Interest on unpaid amounts will accrue at 12% per year.

To assist the parties, the difference between the two judgments is $807.54.

Dated at Burlington, Vermont on November 7, 2019.

Michael Kennedy
Acting Judge

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[2] It was not unreasonable for Defendants to accept the offer made by the replacement tenant. While less than what Plaintiffs would have paid each month, ignoring the offer in search of a better one might have breached the duty to mitigate damages.

STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CIVIL DIVISION
Docket No. 1095-12-19 Cncv

Don Harrington, Harrington Properties, Appellants v. Sara McCauley, Christopher Hawthorn, Appellees	VERMONT SUPERIOR COURT FILED FEB - 4 2020 CHITTENDEN UNIT

RULING ON APPEAL

This is an appeal from a decision of the Small Claims court. Landlord appeals only one issue: the court's award of double damges to Tenants based upon willful failure to send the required notice with regard to the security deposit. This court's role is solely to determine if the lower court made any errors of law or fact, not to second-guess the decision merely because there might have been another way to analyze the evidence, or because this court might have reached different credibility determinations. The court has reviewed the exhibits and the audio record.

The court finds no error. Landlord argues that because the tenants had said he could apply the security deposit to what they owed, he did not send them the statutorily required letter telling them he was doing so. He argues that he therefore did not "willfully" fail to do so. "[T]he word 'willful' denotes intention and that that means 'by design.'" State v. Parenteau, 153 Vt. 123, 125 (1989)(internal quotations and citation omitted); see also, United States v. Illinois Cent. R. Co., 303 U.S. 239, 243 (1938) (willfully "means purposely or obstinately and is designed to describe the attitude of a [party], who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.")(citation omitted). Landlord clearly intended not to send the letter. Thus, his act was willful.

Order

The decision of the Small Claims court is affirmed.

Dated at Burlington this 3rd day of February, 2020.

Helen M. Toor
Superior Court Judge

BURLINGTON HOUSING BOARD OF REVIEW

Monday, February 3, 2020

7:00 p.m.

Community Room, Burlington Police Department
1 North Avenue

Minutes

Members present: Josh O'Hara, Patrick Kearney, Betsy McGavisk

Staff present: Lisa Jones

1. George Bennum, Carrie Alexander (tenants); Donald Harrington (landlord) (security deposit case) re: 10B Pearl Street
   Present were: George Bennum, Carrie Alexander, Donald Harrington, Seth Golding; all parties were sworn in.
   The Board took evidence and testimony from both parties. Hearing concluded.