

MICHAEL P. MORTON, P.A.

E-Newsletter

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"When Security Is No Security"

By: David Zerbato, Esquire

The process of accounting for damages upon a tenant's move out and applying the security deposit to the outstanding balance should be a fairly simple and straight forward matter, but it's not! The damages are determined through a walk through and the security deposit is applied to any outstanding balance. If there remains a balance after the security deposit is applied, it should be forwarded to

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the tenant at their new address that they are required to provide in writing at or prior to their move out. A landlord should always send the security deposit letter even if no forwarding address has been provided. At the very least service by Proof of Mailing to the rental address within 20 days.

Frequently, however, a dispute arises as to what constitutes damages, i.e. what defects exceed "normal wear and tear," or what money is owed for unpaid rent or premature termination. This brings us to the key questions of what should a landlord do when a tenant contests the charges applied against their security deposit, and what rights and remedies does a tenant have in relation to damages they believe were inappropriately deducted from their security deposit.

We're Growing



We will be opening a new office in Millsboro, Delaware, located at Cove Village, 34814 Longneck Road, adjacent to many of the manufactured housing communities downstate. Look for more news in upcoming newsletters.

Attorney News



Please join us in welcoming *Nicole Faries, Esquire* to the firm! Nicole has extensive experience in residential landlord tenant law and in manufactured home law. She will be a resident in the Greenville office, but will also frequently work at the Millsboro office located on Longneck Road.

Caitlyn E. Quinn, Esquire has recently passed the Pennsylvania bar. She is now admitted to practice in both New Jersey and Pennsylvania, and will be taking the Delaware bar exam in July.

The Code provides clear guidance for landlords as to how to determine what may be deducted and what may not be deducted from a tenant's security deposit. The Code permits deductions for damages which "exceed normal wear and tear, **or which cannot be corrected by painting and ordinary cleaning.**" See 25 Del. C. §5514(c)(1). The Code further allows deductions for unpaid rent and "reasonable expenses incurred in renovating and rerenting the premises caused by the premature termination of the rental agreement." See 25 Del. C. §5514(c)(2)-(3). While these provisions provide basic guidelines, they leave a significant "grey" area, particularly when it comes to things like cleaning and painting. For example, if a tenant paints a wall a bright red color without authorization, can a landlord deduct the cost of extra primer or paint required to restore the wall back to its original color; if a stove requires a "deep cleaning" due to a buildup of grease, can the landlord deduct that expense from the

Staff News



Please join us in welcoming *Patricia (Pattie) Donoghue* as our new administrative assistant to the firm! Pattie was recently the assistant registrar for Widener University School of Law. She will be assisting the firm with court scheduling, file preparation, billing and other administrative duties.

Sherry Lyons, DCP has achieved the designation of Delaware Certified Paralegal by the Delaware Paralegal Association. The Delaware Certified Paralegal (DCP) Program is an effort to continue to promote a high level of education and professionalism and to encourage continuing legal education for Delaware paralegals.

security deposit? There is no clear answer, and whether the deduction is proper will be determined on a case by case basis that requires its own analysis. However, as a general rule, the landlord should deduct any and all costs it believes exceed normal wear and tear as otherwise, it loses the right to seek such damages.

This grey area in determining what exactly constitutes permissible deductions for damages is most frequently what forms the basis of a security deposit dispute. The Code requires the former tenant

to object in writing to such damages in order to have any right to later contest or bring an action to recover any alleged impermissible deductions. Specifically, once the tenant accepts payment for the balance of the security deposit remitted, they are deemed to have agreed upon the damages as specified in the security deposit letter unless, within ten (10) days of the tenant's receipt of such payment, the tenant objects **in writing** to the amount withheld by the landlord. See 25 Del. C. §5514(f). This ten (10) day period is critical to a landlord since failure by the tenant to make such

objection **in writing** within that period, waives any right the tenant might otherwise have to contest or otherwise bring a claim for any amount they believe was unlawfully withheld.

Let us assume now that the tenant has made such written objection within the ten (10) day period. In our experience, what happens next is largely determined by: 1) the landlord's goals; 2)



the amount in dispute; 3) the basis of the actual deductions; and 4) did the tenant comply with

requirement of providing a forwarding address. One inexpensive and quick option would be for the landlord to open a dialogue with the tenant and come to mutually agreeable terms as to what specific amounts were properly deducted and what additional amounts, if any, will be returned to the tenant. This option would be best if the amounts in dispute are small and the damage not extensive. If such action is taken, the landlord should obtain a written waiver and release of any claim(s) the tenant may have arising from such

dispute. This will serve to protect the landlord from claims which have already been resolved.

If the parties are unable to come to an agreement, or, if the landlord believes all the charges were properly deducted, the landlord has two primary courses of action. First, they can simply do nothing and wait for the tenant to take some action which would normally take the form of a debt action filed in the Justice of the Peace Court. The account can be sent to collections at that time to try to recover the outstanding balance. This would be most beneficial if the security deposit covered all of the damages, or, if there is only a small outstanding balance owed by the tenant. Even if no action is filed by the former tenant, if the damages far exceeded the security deposit, or, if the landlord simply wished to pursue any outstanding balance, the landlord would have the right to file a debt action against the tenant to recover the balance owed. This again would most prudently be brought in the Justice of the Peace Court unless, in the rare instance, the damages exceed the jurisdictional limit of \$15,000.00.

However, as a general rule, the landlord should deduct any and all costs it believes exceed normal wear and tear as otherwise, it loses the right to seek such damages.

As previously alluded to, if the tenant properly objected to the deductions made by the landlord, he or she would have a right to bring a debt action against the landlord seeking any deduction he or she believes was improper. This would require the landlord to defend this action and justify the deductions made by providing adequate proof that the deductions were in fact permissible under 25 Del. C. §5514(c)(1)-(3). Further, if the tenant has an outstanding balance, the landlord must bring a counterclaim seeking such deficiency. The failure to do so may result in the landlord being unable to file a future complaint seeking such outstanding balance.

When faced with a tenant's objections to deductions made against the security deposit, the landlord has no affirmative obligation to do anything. However, failure to act may result in a complaint being filed against the landlord seeking the amounts in question. Absent such complaint, the landlord should abide by its policies relating to such situations. If no such policies exist, we can help the landlord craft a policy on how to deal with situations where a tenant objects to deductions made against the security deposit. Please make sure any policy is clear so that your employees know how to handle such situations.

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Thank you for reading our newsletter.
If you have any topics that you would like to see addressed in future newsletters, please email David Zerbato at dzerbato@michaelpmorton.com