Arizona Tenants Advocates & Association
Tenants Library
Articles written by Ken Volk
Landlord's Greed Versus Duty to Mitigate
by Ken Volk

The play book of landlords is to run up damage claims against tenants. From the beginning, they fabricate claims in the lease by, for instance, offering a monthly rent supposedly discounted down from a fictitious, unrealistically high market rate. Then, when the tenant breaches the contract, perhaps by leaving before the full term has concluded, the landlord bills the tenant for the so-called concession which was predicated upon the contract's completion. It is a blame game designed to line the pockets of landlords.

I believe these inducements, concessions, free rent or discounts - all these terms are used - should be illegal because they are almost invariably fraudulent in nature. They are, by design, intended to augment the damages suffered, based on falsehoods. In reality, landlords only get away with charging the real market rent, because they would never find takers willing to pay the inflated rate.

Another scam is charging a flat rate for utilities. It is illegal. The is because, under A.R.S. § 33-1314.01(E) a tenant may be held liable for utility charges ONLY by way of
(1) contracting directly with the utility provider,
(2) direct metering for the charges incurred,
(3) sub-metering as a means of assigning a portion of the aggregate charges in an apartment community, or
(4) allocating a portion of the aggregate charges by some reasonable means of calculation, called a ratio utility billing system, aka RUBS.

For any assessment of charges other than by way of direct utility contracting between the tenant and the utility provider, a landlord must provide a bill for the period showing opening and closing meter readings, and the dates for the meter readings. Since this statute was enacted I have yet to see a landlord submit a utility bill that contains all these elements. Landlords write the laws but do not abide by them, at the literal expense of tenants. They line their pockets with ill-gotten gains each and every billing period, paid by each and every tenant. It adds up to millions of dollars every year.

Getting back to the subject of a flat rate billing paid each month, it is even more egregious than an inadequate billing submission because there is no justification whatsoever breaking down the charges; it is unabashed theft. For a detailed analysis about utilities and essential services, see our website article, Utility of the Landlord-Tenant Act.

The other side of the coin of this realm is for landlords to maneuver circumstances to augment damages claims, which is contrary to their duty to mitigate (read: reduce, minimize or eliminate) the damages suffered. The legal doctrine of mitigation of damages is specifically incorporated into the Arizona Residential Landlord & Tenant Act in:
A.R.S. § 33-1305(A), which generally establishes that an aggrieved party has a duty to mitigate damages;
A.R.S. § 33-1321(D), which restates the duty in the context of applying the security deposit after the conclusion of tenancy;

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A.R.S. § 33-1369, which mandates that a landlord, prior to effecting a repair himself at his tenant's expense, must give the tenant notice of an alleged health/safety concern in the rental dwelling, allowing the tenant the opportunity to cure the violation; and
A.R.S. § 33-1370(C), which requires a landlord must use reasonable efforts to re-rent a dwelling that has been abandoned.

Each of these statutes obliges the landlord to minimize the effects and losses resulting from the injury. For example, under A.R.S. § 33-1321(D) if the landlord accuses the tenant of damaging the carpet, it must be brought to the tenant's attention at the joint-move out inspection. This would allow him to mitigate the landlord's damages by making the repair using the least expensive method he can. Or, pursuant to A.R.S. § 33-1369 if during the tenancy a landlord wants to charge his tenant for repairing a stove range burner damaged by the tenant and that poses a safety risk, he must first allow the tenant 14 days to repair it. Or, under A.R.S. § 33-1370(C) if a tenant gives his landlord a notice of abandonment and leaves before the expiration of his lease, the landlord has a duty to attempt to re-rent the dwelling unit at a fair price, and, failing to do so, the lease is deemed terminated as of the date the landlord received the tenant's notice.

In each of this instances it can be argued that a landlord who fails to comply with these requirements has lost the right to hold the tenant liable, irrespective of the fact that the tenant may have caused the circumstance or condition. Under the doctrine of mitigation of damages, the landlord would be unable to recover those expenses. This is a very important principle that generally favors tenants, and in our casework at Arizona Tenants Advocates we constantly help tenants exercise this right. By so doing, we help tenants reduce their financial exposure, often reducing or totally eliminating landlords' claims.

Sometimes the concept of mitigation of damages can be employed in a back-door manner, where its application is implied by virtue of landlord overreach, and/or when the landlord's duties are not fulfilled. For example, a tenant can give notice of intent to vacate early, as if to abandon, leaving the dwelling spotlessly clean and rent-ready, with possession delivered to the landlord as a "turn-key" scenario. Of course, the landlord has a duty to try to relet the premises whereby, on the one hand, intentional or negligent failure to do so violates the duty to mitigate damages. Conversely, many landlords can't resist illicitly doubling their revenues by renting to a new tenant whilst retaining the old tenant's deposit (or prepaid rent) as compensation for the ostensibly lost rent. Collecting simultaneous rents is a big no-no, and also violates the duty to mitigate damages.

I would take this one step further. In my opinion, many non-refundable fees and specified-purpose deposits are nothing more than a scheme to evade the security deposit limitation of one and one-half times the value of the monthly rent. See A.R.S. § 33-1321(A). Despite that this statutory section establishes the limitation imposed on deposits "however denominated," landlords routinely charge non-refundable fees/charges or excess deposits for pets, administrative fees, wear & tear, move-in, et cetera ad nauseum, invariably exceeding 150% of the rent amount. It is also quite common for landlords to assess fees (both refundable and nonrefundable) for redecorating and cleaning, despite that these are specifically prohibited by A.R.S. B§ 33-1310(14). If all this does not constitute an augmentation of damages, then the world is far more screwed up than my normal cynicism takes into account. Landlord charges are like . . . never ending and unfathomable (legally).

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But one thing you can definitively count on - they want to keep your money, if not to simply line their pockets, then to have you underwrite renovation of the dwelling unit. There are many arguments you can make why a certain so-called damage condition is unwarranted, and we have an article on this subject in the Tenants Library, entitled How To Refute Landlord Monetary Claims. While it is the standard practice of landlords to assess the entire cost for replacing the item (such as a carpet), even if you actually caused the deficient condition the landlord must take into account its depreciated value. As with an automobile, the carpet value is reduced in proportion to its age, based on its normal lifespan. So you could argue that the a carpet is fully depreciated in seven years would, as of the sixth year, only have a value that is one-seventh of its original cost. And that would be your maximum liability for its replacement. Anything more is unjustified and, again, would constitute an augmentation of the charge. Learn those terms: mitigation versus augmentation.

Landlords sometimes attempt a work-around the duty to mitigate by assignment of a liquidated worth of the damage, in substitution of what the actual damage might be. For example, $5.00 to replace each stove range drip pan. This may be a reasonable approach, so long as the amount reasonably approximates the actual damage. If not, the argument could be made that it violates contract law because it is excessively high, rendering the charge void as a penalty. For example, a $100.00 charge for each drip pan is unenforceable. Also, landlords occasionally try to collect the liquidated value in addition to the actual charge. This, too, will not fly, as the whole purpose of an assigned liquidated charge is to designate a predetermined sum in replacement of damages that would otherwise be uncertain or difficult to quantify. For this reason, collection of liquidated on top of actual charges constitutes an augmentation, rather than mitigation, of the damages.

The argument of mitigation of damages is powerful, and Arizona Tenants Advocates can assist you in presenting it. Benefit by using our knowledge for free. Join us and we can directly help you enforce your rights.

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