

March 2021

Landlord-Tenant - Security Deposits - Colorado's Wrongful Withholding of Security Deposits Act: Three Litigious Snares in an Untested Law - Colo. Rev. Stat. Ann. 58-1-26 to -28

Kathryn Porter Reimer

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Recommended Citation

Kathryn Porter Reimer, Landlord-Tenant - Security Deposits - Colorado's Wrongful Withholding of Security Deposits Act: Three Litigious Snares in an Untested Law - Colo. Rev. Stat. Ann. 58-1-26 to -28, 49 Denv. L.J. 453 (1973).

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COMMENT

LANDLORD-TENANT — SECURITY DEPOSITS — COLORADO'S
WRONGFUL WITHHOLDING OF SECURITY DEPOSITS ACT:
THREE LITIGIOUS SNARES IN AN UNTESTED LAW —
COLO. REV. STAT. ANN. §§ 58-1-26 to -28

INTRODUCTION

WHEN the Colorado General Assembly, in 1971, enacted sections 58-1-26 through -28 of the Colorado Revised Statutes "to insure the proper administration of security deposits and protect the interests of tenants and landlords,"¹ it was responding to a widespread situation of disparate bargaining power between landlords and tenants.² The disparity lay in the knowledge of tenant and landlord alike that the tenant's expense in enforcing his right to the return of the security deposit through the judicial process would virtually always exceed the amount of the recovered deposit. Thus, tenants frequently waived their right to the return of the deposit rather than seek court redress. Many landlords, recognizing this economic dilemma of the departing tenant, retained the deposit as a matter of policy.³ The legislature's response promulgated standards and procedures for the proper withholding of security deposits and provided powerful incentives for landlord compliance with the statute through provision for tenant's recovery of attorney's fees, treble damages, and court costs.⁴ This response ostensibly brought the positions of landlord and tenant closer to parity, potentially assuring a just disposition of the security deposit. However, a closer examination of the legislation—still un-

¹ COLO. REV. STAT. ANN. § 58-1-26 (Supp. 1971).

² Interview with William Hazleton, Legislative Drafter, in Denver, Colorado, June 27, 1972. See Comment, *Housing the Poor: A Study of the Landlord-Tenant Relationship*, 41 U. COLO. L. REV. 541, 557 (1969).

³ Interview with Robert Keeler, attorney, in Denver, Colorado, Aug. 11, 1972.

⁴ As enacted, Colorado's Security Deposit Act is one of the most protective of tenant's rights thus far adopted by a state. See CAL. CIVIL CODE § 1951 (West Supp. 1972); MASS. GEN. LAWS ch. 186, § 15b (Supp. 1972); N.J. STAT. ANN. §§ 46:18-19 to -26 (Supp. 1971); N.Y. REAL PROP. LAW §§ 6:248 to 255 (McKinney Supp. 1972); PA. STAT. ANN. tit. 68, § 250.512 (Supp. 1972). Colorado is the only state allowing recovery of attorney's fees and treble damages. While several other states prohibit retention of the deposit for normal or reasonable wear and tear, only the Colorado Act makes an attempt to define what constitutes normal wear and tear. Only Colorado and Pennsylvania require a shifting of the burden of proving no wrongful retention to the landlord, and only in these states does the landlord automatically forfeit any claim to the deposit and his right to sue for damages if he fails to provide a written statement of claimed damages to the tenant.

tested in Colorado appellate courts — suggests three troublesome questions of legislative intent and interpretation which may be anticipated by the courts.

This comment, while not attempting to analyze the Act comprehensively, will focus on these problems and suggest guidelines for their resolution. The problems lie in the areas of contracts for repair, the meaning of landlord's willful retention, and the legality of counterclaims when the landlord has failed to provide the statement required by the statute.

I. CONTRACTS FOR REPAIR

To insure "the proper administration of security deposits"⁵ the legislature defined the nature of a wrongful withholding of a security deposit. In seeking to fix the boundaries of wrongfulness, the Act states, "[n]o security deposit shall be retained to cover normal wear and tear."⁶ Normal wear and tear is defined as:

that deterioration which occurs, based upon the use for which the rental unit is intended, without negligence, carelessness, accident, or abuse of the premises or equipment or chattels by the tenant or members of his household, or their invitees or guests.⁷

Further, a deposit is wrongfully retained, regardless of deterioration of the premises, if the landlord fails to "provide the tenant with a written statement listing the exact reasons for the re-

⁵ COLO. REV. STAT. ANN. § 58-1-26 (Supp. 1971).

⁶ *Id.* § 58-1-28(1).

⁷ *Id.* § 58-1-27(3). In defining normal wear and tear, the Act, assuming a prior understanding between landlord and tenant, requires that the differentiation between negligence, carelessness, accident or abuse, and normal deterioration be made in light of the use for which the housing unit was rented. This requirement reflects the common law flexibility of the standards of negligence and carelessness and of the bounds of an accident. Under Colorado law, a person is held to a standard of care commensurate with his age and condition. See cases cited in *Swerdfeger v. Krueger*, 145 Colo. 180, 187-88, 358 P.2d 479, 483 (1961) (dissenting opinion); *Kopplekom v. Colorado Cement Pipe Co.*, 16 Colo. App. 274, 279, 64 P. 1047, 1049 (1901). Thus, if the landlord and tenant agree that the unit is to be rented for housing children or persons who fall below a normal level of competency, the limits of normal wear and tear must be more liberal than otherwise. An accident is commonly defined as that which is unforeseen or unexpected. See *Industrial Comm'n v. Ule*, 97 Colo. 253, 256, 48 P.2d 803, 804 (1935); *Carroll v. Industrial Comm'n*, 69 Colo. 473, 475, 195 P. 1097, 1098 (1920). In this area the intended use of a unit for housing children or pets would require that any deterioration foreseeable from such a use not be deducted from the deposit. Likewise, if the premises are rented with the expectation that only adults will reside therein, any deterioration caused by children or pets that is either normal for their age and condition or that is foreseeable from their character should still be deductible as the deterioration was not normal within the intended use. Thus, to protect landlord and tenant alike, no fixed standard for normal wear and tear should be drawn. A flexible standard should be recognized by the courts to reflect the intended use of the premises and the age and condition of the tenants within the bounds of that use.

tention of any portion of the security deposit"⁸ within 30 days (or up to and including 60 days, if so specified in the lease) of the termination of the tenancy or of abandonment and acceptance.⁹

In potential contradiction to the above definitions of wrongful withholding, the Act further provides that:

Nothing in this section shall preclude the landlord from retaining the security deposit for nonpayment of rent, abandonment of the premises, or nonpayment of utility charges, repair work, or cleaning contracted for by the tenant.¹⁰

Thus, when two provisions of subsection 58-1-28(1) are read together — the first requiring that “[n]o security deposit shall be retained to cover normal wear and tear,”¹¹ the second stating that “[n]othing in this section shall preclude a landlord from retaining the security deposit for . . . repair work . . . contracted for by the tenant”¹² — a conflict may be expected where a tenant, who has contracted with the landlord for repairs, asserts his right to that portion of the security deposit used by the landlord to repair normal wear and tear to the premises. As the definition of normal wear and tear refers to deterioration of the premises, and such deterioration has been judicially defined as a loss in value which cannot be remedied by cleaning,¹³ a controversy is not anticipated in the area of contractual cleaning. The conflict as to contracts for repair will focus on whether the legislature’s command that no deposit will be withheld for normal wear and tear is overcome by its command that nothing shall preclude a landlord from retaining repair costs from the deposit when the tenant has contracted for such repair.

When faced with such an ambiguity, the courts seek to give

⁸ COLO. REV. STAT. ANN. §§ 58-1-28(1) to -28(3) (Supp. 1971). Whether this written notice requirement is sufficient to meet the constitutional due process limitation on the taking of property has been put into question by the Supreme Court’s holding in *Fuentes v. Shevin*, 407 U.S. 67 (1972). In the *Fuentes* case, a replevin statute requiring no notice or hearing before property was seized was held unconstitutional as a taking of property without due process of law. If the Supreme Court follows the reasoning used by a U.S. District Court in *Adams v. Egley* to hold the repossession portions of the U.C.C. unconstitutional — that the legislative sanctioning of certain procedures is sufficient state action to bring due process limitations into play — this security deposit statute could be held constitutionally infirm. 338 F. Supp. 614 (S.D. Cal. 1972). See *Reitman v. Mulkey*, 387 U.S. 369 (1967).

⁹ COLO. REV. STAT. ANN. § 58-1-28(1) (Supp. 1971).

¹⁰ *Id.*

¹¹ *Id.* (emphasis added).

¹² *Id.* (emphasis added).

¹³ *Rosen-Reichardt Brokerage Co. v. London Assur. Corp.*, 214 Mo. App. 672, 680-81, 264 S.W. 433, 436 (1924).

effect to both provisions, looking to the statute as a whole,¹⁴ the evil to be remedied,¹⁵ and the effect of the interpretation¹⁶ to determine legislative intent. An aid in picturing the statute as a whole is subsection 58-1-28(7), which provides:

*Any provision, whether oral or written, in or pertaining to a rental agreement whereby any provision of this section for the benefit of a tenant or members of his household is waived, shall be deemed to be against public policy and shall be void.*¹⁷

As the provision of subsection 58-1-28(1) prohibiting retention of the deposit for normal wear and tear is for the benefit of the tenant, subsection 58-1-28(7) lends support to a reading of subsection 58-1-28(1) which would allow a landlord to retain monies under a contract for repair only to remedy deterioration beyond the bounds of normal wear and tear.

The evil the legislature perceived was the arbitrary withholding of security deposits.¹⁸ Efforts to remedy this would be frustrated by an interpretation allowing the landlord to bypass, through the use of a contract for *all* repair, the subsection 58-1-28(1) command that he withhold only for reasons beyond the limits of normal wear and tear. Finally, in light of the landlord's greater negotiating power at the time of the making of the lease, the effect of such an interpretation would be to credit the legislature with sanctioning the situation it sought to remedy.

Thus, the legislature's decree that no deposit be retained for normal wear and tear and its public policy command that any provision pertaining to a rental agreement that is in derogation of a tenant's rights be void—coupled with the unlikelihood of an interpretation giving fullest effect to a clause which would strengthen the very evil being remedied—dictate that a consistent reading of subsection 58-1-28(1) would allow a landlord to claim, under a contract for repair, only those costs due to deterioration beyond normal wear and tear.

II. WILLFUL RETENTION

Where the landlord has failed to properly return or satisfactorily account for the withholding of the security deposit, the tenant may seek redress in court. Prior to the adoption of this

¹⁴ *E.g.*, Wheeler v. Rudolph, 162 Colo. 410, 414, 426 P.2d 762, 763 (1967); Hartner v. Davis, 100 Colo. 464, 467, 68 P.2d 456, 457 (1937); Ferris v. Chambers, 51 Colo. 368, 370, 117 P. 994, 995 (1911).

¹⁵ *In re* Estate of Plich, 141 Colo. 425, 431, 348 P.2d 706, 709 (1960); Richardson v. El Paso Consol. Gold Mining Co., 51 Colo. 440, 447, 118 P. 982, 985 (1911).

¹⁶ Casados v. People, 119 Colo. 444, 448, 204 P.2d 557, 559 (1949).

¹⁷ COLO. REV. STAT. ANN. § 58-1-28(7) (Supp. 1971) (emphasis added).

¹⁸ Hazleton interview, *supra* note 2.

Act, the tenant's freedom to assert this right in court was restricted because the cost of claiming the return of his deposit was greater than the potential recovery. As District Court Judge Scott stated in *Shapiro v. SCM Development Company*:

[T]enants who are denied return of their deposit are usually not in a financial position to take legal action for small sums (an attorney's fee would be far more than the amount involved)¹⁹

Continuing, he stated that in response "the legislature saw fit to give [tenants] assistance by providing [in subsection 58-1-28(3) (a)] for treble damages and attorney's fees."²⁰ Subsection 58-1-28(3) (a) provides:

The willful retention of a security deposit in violation of this section shall render a landlord liable for treble the amount of that portion of the security deposit wrongfully withheld from the tenant, together with reasonable attorney's fees and court costs²¹

What must the tenant prove to avail himself of this legislatively created assistance? The Act clearly requires proof of two elements: (1) a willful retention; and (2) a wrongful retention (one violative of section 58-1-28). As subsection 58-1-28(3) (b) expressly places upon the landlord a burden of proving that the retention was not wrongful,²² this element is presumptively established in the tenant's favor. What remains is a showing of willfulness. There has been a split of authority in Colorado's lower courts as to the mental state required for a showing of willfulness, one court requiring a malicious retention,²³ the other requiring only a voluntary act for which a good faith error is not a defense.²⁴ The second line of authority is in accord with the interpretation given willfulness in other civil statutes. While a malicious intent is required for a willful act in a penal statute,²⁵ in those statutes with civil sanctions, the courts have required only a conscious,²⁶ voluntary, or intentional act.²⁷ It is not necessary to a showing of willfulness that the

¹⁹ Civil No. 29251 (Dist. Ct., Boulder, Colo., June 2, 1972).

²⁰ *Id.*

²¹ COLO. REV. STAT. ANN. § 58-1-28(3) (a) (Supp. 1971).

²² See discussion of wrongful withholding pp. 454-56 *supra*.

²³ *Ortiz v. Brownlee*, Civil No. Z-4815 (Adams County Ct., Brighton, Colo., Apr. 28, 1972).

²⁴ *Shapiro v. SCM Dev. Co.*, Civil No. 29251 (Dist. Ct., Boulder, Colo., June 2, 1972).

²⁵ *Williams v. People*, 26 Colo. 272, 274, 57 P. 701, 702 (1899).

²⁶ *E.g.*, *Pupke v. Pupke*, 102 Colo. 337, 340, 79 P.2d 290, 292 (1938) (guest statute); *Millington v. Hiedloff*, 96 Colo. 581, 586, 45 P.2d 937, 939 (1935) (guest statute).

²⁷ *E.g.*, *Burrell v. Anderson*, 133 Colo. 386, 389, 295 P.2d 1039, 1040 (1956) (guest statute); *McCulloch v. Industrial Comm'n*, 109 Colo. 123, 127-28, 123 P.2d 414, 416 (1942) (workmen's compensation statute).

actor "having the rule in mind, determined to break it; it is enough to show that, knowing the rule, he intentionally performed the forbidden act."²⁸ Thus, the courts should follow the second line of authority, requiring only that the landlord's retention be an intentional and voluntary act.

An argument asserting that, regardless of the civil nature of the imposed sanctions, treble damages are exemplary in nature, and thus should require a showing of malice, is properly rejected on either of two grounds. First, the expense of litigation is not fully compensated by an award of court costs and attorney's fees. Second, while a common law award of treble damages is considered punitive and requires malice, the legislature has previously fashioned remedies of treble damages which are not conditioned on a showing of malice.²⁹

The problem, however, is not completely solved by a judicial determination that "willful," as used in this statute, requires only a showing of an intentional or voluntary act. A lingering obstacle to the legislature's purpose of insuring proper administration of security deposits is the possible abuse inherent in a defense of negligent retention. This problem may have been anticipated by the legislature in subsection 58-1-28(3) (a), which requires:

The tenant shall have the obligation to give notice to the landlord of his intention to file legal proceedings a minimum of seven days prior to filing said action.³⁰

Because the tenant is required to give notice of his intent to file, proof of such notice should serve to show that the landlord knew of his alleged violation. In the absence of a reasonable offer of settlement, this should provide enough evidence of the "intentional act" necessary to a showing of "willful retention" to shift to the landlord the burden of going forward.

III. COUNTERCLAIMS

When a tenant, in response to a landlord's failure to provide a written statement listing the exact reasons for retention of the deposit, initiates legal proceedings for recovery, he is commonly answered with a counterclaim — in an amount sev-

²⁸ *Stockdale v. Industrial Comm'n*, 76 Colo. 494, 495, 232 P. 669, 670 (1925).

²⁹ COLO. REV. STAT. ANN. § 12-1-16 (1963) (receiving fee for unlicensed practice of law); *Id.* § 35-5-21 (unlawful demand, asking or receiving of fees by sheriff); *Id.* § 73-2-7 (receiving of usurious interest); *Id.* § 77-4-8 (failure to return within prescribed time limit exempt property improperly levied).

³⁰ *Id.* § 58-1-28(3) (a) (Supp. 1971).

eral times that of the deposit — for damages to the premises.³¹ Although at least one county court has expressly sanctioned such a counterclaim,³² the practice is highly questionable.

The Act requires that a landlord's failure to provide the written statement "shall work a forfeiture of all his rights to withhold any portion of the security deposit under this section or to bring suit against the tenant for damages to the premises."³³ Thus, there exists the incongruous situation in which the Act prohibits the landlord from bringing suit against the tenant for damages to the premises but in which a county court has allowed a counterclaim. This result is contrary to the established nature of a counterclaim as evidenced in a line of cases beginning with *Flying Tiger Lines, Inc. v. United States* where the court stated:

A counterclaim is, in its nature and effect, like an independent action by the defendant against the plaintiff, and, as a general rule, a party cannot avail himself of a . . . counterclaim unless it is a legally subsisting cause of action upon which he could maintain an independent action.³⁴

Since the ability to maintain an independent suit is necessary to the legal sufficiency of a counterclaim, and the right to maintain such an independent action is forfeited by a landlord who fails to provide a written statement, the courts should bar any landlord's counterclaim if a written statement was not furnished within the statutory period.

CONCLUSION

The Colorado legislature's purpose in adopting this Act was to insure the proper administration of security deposits. They sought to achieve this purpose by providing the impetus for a landlord to return or properly account for the withholding of the tenant's security deposit. In so doing, they brought the respective positions of landlord and tenant closer to parity. This comment has dealt with several problems in the legislation and suggests guidelines for their resolution in line with the legislature's purpose.

Under the statute, a tenant's rights are given substance by prohibiting retention for normal wear and tear (as determined by the intended use), and by requiring the landlord to bear

³¹ Interviews with Tom Ehrenkranz, attorney, and Dave Fletcher, Vice President, Capitol Hill Tenants Union, in Denver, Colo., June 21, 1972.

³² *Ortiz v. Brownlee*, Civil No. Z-4815 (Adams County Ct., Brighton, Colo., Apr. 28, 1972).

³³ COLO. REV. STAT. ANN. § 58-1-28(2) (Supp. 1971).

³⁴ 170 F. Supp. 422, 425 (Ct. Cl. 1959); e.g., *Erie Lackawanna R.R. v. United States*, 439 F.2d 194, 200 (Ct. Cl. 1971). Colorado's rules of civil procedure concerning counterclaims are similar to the federal rules.

the burden of proving that any retention was not wrongful. The landlord should not be allowed to bypass this requirement through a clause in the lease (or by a separate contract) providing that *all* repair costs be met by the tenant.

The Act provides further impetus toward parity by allowing a tenant's recovery of attorney's fees, treble damages, and court costs. These rights should not be contingent upon a showing of malice — but merely upon a willful (intentional) withholding. Additionally, access to the courts should not be undermined by a landlord's threat of a counterclaim where the required written statement has not been provided.

Kathryn Porter Reimer

