

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY  
SMALL CLAIMS DIVISION

NABIAH AHMED and  
FAWWAZ AHMED,

Plaintiffs,

vs.

TRACY BARKALOW, BIG TEN  
PROPERTY MANAGEMENT, L.L.C. and  
TSB HOLDINGS, L.L.C.,

Defendants.

No. SCSC082744

JUDGMENT ORDER

FILED  
2013 MAY 16 AM 9:59  
CLERK OF DISTRICT COURT  
JOHNSON COUNTY IOWA

The parties appeared before the Court on February 18, 2013. Attorney Christopher Warnock appeared on behalf of Plaintiffs. Plaintiffs Nabiah Ahmed and Fawwaz Ahmed appeared in person. Attorney James Affeldt appeared on behalf of the Defendants and Defendant Tracy Barkalow appeared in person.

The Plaintiffs request the amount of \$5,000 plus punitive damages and attorney fees from the Defendants for return of the balance of a rental deposit and damages suffered for a rental property located at 906 North Dodge Street, Apt. #5, Iowa City, Iowa.

Findings of Fact:

- Nabiah Ahmed and Fawwaz Ahmed executed a lease with Tracy Barkalow for property described as 906 North Dodge Street, Apt. #5, Iowa City, Iowa on August 20, 2011. The lease is dated August 18, 2011. Defendants' Exhibit A.
- Both Nabiah Ahmed and Fawwaz Ahmed were tenants of the property. Both Nabiah Ahmed and Fawwaz Ahmed initialed each page of the lease and both of them signed the lease on the last page. Defendants' Exhibit A.
- The term of the lease executed was from August 19, 2011, through July 26, 2012. Defendants' Exhibit A, page 1.
- Fawwaz Ahmed paid \$850 to TSB Holdings, L.L.C. as a security deposit on August 20, 2011. Defendants' Exhibit C.
- The lease indicates that the tenants are responsible for the security deposit. Defendants' Exhibit A, page 1.
- The lease designates Fawwaz Ahmed as the security deposit holder only for purposes of returning the security deposit. Defendants' Exhibit A, page 1.
- The monthly rent for the property was \$750. Defendants' Exhibit A, page 1.

- The monthly utility cost for the property was \$100. Defendants' Exhibit A, page 1.
- Utility costs include water, sewer, electricity, natural gas, recycling and garbage removal. Defendants' Exhibit A, page 3.
- The Defendant classifies the \$150 charge for the open window as a fee on August 18, 2011 (Defendants' Exhibit A, page 3); as a fine on a date after June 1, 2012 (Defendants' Exhibit E); and as rent on July 26, 2012 (Defendants' Exhibit B).
- The Plaintiffs vacated the rental property, cleaned it and had it ready for inspection on July 26, 2012. Defendants' Exhibit S. Plaintiffs' Exhibits 1 – 6.
- The Defendant issued a check for a partial refund of the Plaintiffs' security deposit on August 20, 2012. Defendants' Exhibit T, page 3.
- The Plaintiffs never received the check issued by the Defendant on August 20, 2012. The check issued by the Defendant on August 20, 2012 was never cashed.
- The Defendant returned \$358.75 of the original \$850 deposit on October 11, 2012. Defendants' Exhibits O, P, G and H.
- The only written explanation of the deductions from the security deposit provided by the Defendant to the Plaintiffs was the statement with single line entries dated 07/26/2012 (Defendants' Exhibit B) and the amounts listed as deducted on the print-out of the check sent to the Plaintiffs (Defendants' Exhibit O).

**Burden and standard of proof:** Pursuant to Iowa Code Section 631.11(4), the plaintiffs Nabihah Ahmed and Fawwaz Ahmed must demonstrate by a preponderance of the evidence that they have been damaged by the action (or lack of action) of the Defendants. However, under Iowa Code Section 562A.12(3)(c), the Defendants have the burden of proving the reason for withholding any portion of the rental deposit by a preponderance of the evidence.

**Real party in interest:** The Defendants argue that Nabihah Ahmed, the named plaintiff at the time of filing, is not the real party in interest because she is not the "deposit holder" designated in the lease. The Court notes that the lease requires that all the tenants are responsible for providing the security deposit. Defendants' Exhibit A, page 1. The Defendant is indifferent as to how the tenants determine they will provide the security deposit. The designation of "deposit holder" exists for the convenience of the landlord to administer the return of the security deposit at the end of the lease period.

Ms. Ahmed retains all the rights of a tenant under the lease just as she retains all the responsibilities of a tenant under the lease. The landlord is able to hold Ms. Ahmed liable for rent amounts and the amount of the security deposit under the terms of the lease. Ms. Ahmed has a legal and real interest in the return of the security deposit as a tenant on the lease.

At the commencement of the hearing in this matter, Plaintiffs' counsel moved to add Fawwaz Ahmed as a named plaintiff in this case. The Defendants had no objection to this request.

The Court FINDS that Nabihah Ahmed is a real party in interest and that she is properly named as a plaintiff in this case. The Court FINDS that Fawwaz Ahmed was properly added as a named plaintiff in this case.

Defendants' request to dismiss claims against Tracy Barkalow individually: The Defendants request that the claims against Mr. Barkalow as an individual be dismissed for the reasons that he was not the landlord, he did not prepare the lease, he did not personally receive rent, and that he did not personally withhold money from the security deposit.

The Court notes the following: Mr. Barkalow signed the lease as a representative of Big Ten Property Management, L.L.C. and TSB Holdings, L.L.C. Defendants' Exhibit A. Mr. Barkalow signed the check returning a portion of the deposit to the Plaintiffs. Defendants' Exhibit O. Mr. Barkalow performed the check-out inspection of the rental unit. Defendants' Exhibit S.

Mr. Barkalow is not an employee of Big Ten Property Management, L.L.C. or TSB Holdings, L.L.C. Rather, Mr. Barkalow has an ownership interest in each of the named entities. Mr. Barkalow has the authority to determine the contents of the leases used by these entities, the authority to determine whether or not a refund of the security deposit is issued, and the authority to determine if amounts are withheld from a security deposit.

The Court declines to dismiss the claims against Mr. Barkalow individually and FINDS that he should remain as a named Defendant with an interest in the case.

Accord and Satisfaction: The Defendant urges that Fawwaz Ahmed's endorsement of the check returning a portion of the original security deposit constitutes a settlement of this matter under the common law doctrine of accord and satisfaction. The doctrine requires that both parties understand that there is a dispute and that acceptance of a check is an accord and satisfaction for the claim. Seidler v. Vaughn Oil Company, 468 N.W.2d 474, 477 (Iowa, 1991).

Fawwaz Ahmed testified at the time of hearing that he did not understand that the check returning a portion of the security deposit to him constituted settlement of a dispute over the security deposit. The Court notes that Mr. Ahmed had no idea what the amount of the check would be prior to October 12, 2012, since he did not know what deductions, if any, were made by the Defendants. Plaintiffs' Exhibit 7, pages 4-5. Although Mr. Ahmed had had communication with the Defendants prior to receiving the check, there was no indication from the communication that there had been any settlement negotiations or discussion. Plaintiffs' Exhibit 7.

Tracy Barkalow testified at the time of hearing that he did not know of any legal reason for writing "paid in full" at the bottom of the checks he issued refunding security deposits to tenants.

The hallmark of any legal settlement is that both parties know about the settlement. Based on the evidence and testimony at hearing in this matter, neither party understood that the check issued by Mr. Barkalow to Mr. Ahmed returning a portion of the security deposit constituted a legal settlement of this matter.

The Court FINDS the following: (1) The issuance of the check by Mr. Barkalow to Mr. Ahmed does not constitute an accord and satisfaction resolving this matter; and (2) Mr. Ahmed's acceptance and endorsement of the check issued by Mr. Barkalow did not waive either Fawwaz Ahmed's or Nabihah Ahmed's rights under the lease executed by the parties.

Return of security deposit within 30 days: Pursuant to Iowa Code Section 562A.12(3), the landlord must return the security deposit to the tenant within 30 days of the end of the tenancy.

Mr. Barkalow mailed a partial refund of the security deposit along with written notice regarding what amounts he withheld from the security deposit to the plaintiffs on or about August 20, 2012. Defendants' Exhibits B and M. This date was approximately 25 days after the July 26, 2012, lease termination.

Fawwaz Ahmed testified that he never received the check and written explanation mailed out by the Defendants on August 20, 2012. Tracy Barkalow testified that the check issued to Mr. Ahmed on August 20, 2012, had never been cashed.

Fawwaz Ahmed initiated an e-mail conversation with the Defendants in an effort to obtain the security deposit due to the Plaintiffs. The conversation was taking place during September and October of 2012. Plaintiffs' Exhibit 7.

The Defendants refused to issue another check to Mr. Ahmed unless he would agree to pay a fee of \$75. Plaintiff's Exhibit 7, pages 1- 5. The Defendants refused to let Mr. Ahmed know what deductions they had made from the Plaintiffs' security deposit. Plaintiffs' Exhibit 7, page 1. The Defendants required Mr. Ahmed to physically pick up the check during business hours and refused to mail the check to Mr. Ahmed. Plaintiffs' Exhibit 7, page 1. Mr. Ahmed refused to pay the \$75 charge and the Defendants did not issue a replacement check.

The Plaintiffs filed suit on October 2, 2012. The Defendants issued a replacement check refunding a portion of the security deposit to Plaintiffs on October 10, 2012. Defendants' Exhibit 0. The Defendants' sent the check to the Plaintiffs by certified mail on October 11, 2012. Defendants' Exhibits G and H. This date was approximately 77 days after the lease termination (July 26, 2012) and 52 days after the first check was issued (August 20, 2012).

Tracy Baraklow testified that the \$75 fee was to cover the costs of a stop payment charge at the bank and the staff time at Big Ten Property Management required to prepare a replacement check.

The Defendants are sophisticated landlords in the Iowa City community, running a high-volume rental business. Stop payment fees and staff time are regular costs of doing business for the Defendants. The Defendants are aware of the law requiring landlords to return security deposits within 30 days of termination of a lease.

Initially, the Defendants acted within the 30 day deadline when they sent a check out on August 20, 2012. However, when the Defendants were informed by Mr. Ahmed that the check had not been received, the Defendants refused to issue the refund of the security deposit. The Defendants did not investigate what may have happened to the check. When Mr. Ahmed persisted in his attempts to have the security deposit returned to him, the Defendants demanded a

fee, shifting the Defendants' costs of doing business to the Plaintiffs, before the Defendants would carry out their statutory duty.

The Court FINDS that the Defendants withheld the Plaintiffs' security deposit in bad faith. The plaintiffs are entitled to the return of the entire security deposit in this matter.

Legality of open window provision in lease at paragraph 42(a): The Defendants included a written statement (pursuant to Iowa Code Section 562A.12 (3)) with the check refunding a portion of the security deposit to the tenants. Defendants' Exhibit B. The statement lists four deductions. The first deduction, characterized as "rent past due," was in the amount of \$150 and arose out of a penalty imposed for an open window. The Defendants characterize the \$150 charge as a fee in the lease. Defendants' Exhibit A, page 3. The Defendants characterize the \$150 charge as a fine on a date after June 1, 2012. Defendants' Exhibit E. When the Defendants prepared the statement of deductions from the security deposit, the charge was characterized as rent. Defendants' Exhibit B.

The Defendants urge that the Plaintiffs agreed to the charge for the open window when they executed the lease. The Defendants cite paragraph 42(a) of the lease, stating that a fee of \$150 will be imposed for any windows found to be open when the heat is on. Defendants' Exhibit A, page 3.

Fawwaz Ahmed testified that he thought the window was left open one time in October of 2011 for approximately twenty (20) minutes. Mr. Ahmed testified that he received one phone call from his sister to shut the window because Mr. Barkalow had called Nabihah Ahmed.

The Court notes that the lease contemplates a monthly utility cost for the rental unit to be approximately \$100. Defendants' Exhibit A, page 1. The \$100 utility cost is inclusive of water, sewer, gas, electric, recycling and garbage collection. Defendants' Exhibit A, page 3. The lease indicates at paragraph 43 that tenants are liable for excessive utility costs. The Defendants did not provide any evidence that the Plaintiffs incurred excessive utility costs at any time they occupied the unit.

"Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on the grounds of public policy as a penalty." Rohlin Construction Co., Inc. v. City of Hinton, 476 N.W.2d 78, 80 (Iowa, 1991).

The Court notes that Iowa Code section 562A.32 contemplates actual damages as the remedy for a landlord that suffers damages or loss due to a tenant's actions. The Defendants did not provide any proof of actual damages as a result of the open window to the Court. Without proof of actual damages, the Defendants are not entitled to collect the \$150 penalty from the Plaintiffs. D.R. Mobile Home Rentals v. Frost, 545 N.W.2d 302, 306 (Iowa, 1996).

The Court FINDS that the \$150 fee listed at paragraph 42(a) of the lease is a penalty and excessive. The Court FINDS that paragraph 42(a) of the lease is illegal and unenforceable.

Legality of other lease provisions: The Plaintiffs invite the Court to rule on other provisions of the lease as to their legality and enforceability. The Court FINDS that these other provisions are not at issue in this case and declines to rule on them.

Because the Court has determined that the entire security deposit must be returned to the Plaintiffs on the basis of bad faith retention by the Defendants, the Court need not address issues concerning charges for cleaning the rental unit, charges for refrigerator maintenance, or the sufficiency of the written statement of reasons for deductions from the security deposit produced by the Defendants.

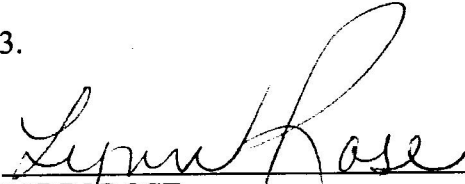
Damages: Pursuant to Iowa Code Section 562A.12(7), if a landlord retains a security deposit in bad faith, the landlord is subject to punitive damages not to exceed two hundred dollars. The Defendants retained the plaintiffs' security deposit for more than 30 days, demanded a fee from the Plaintiffs to return the security deposit, withheld excessive amounts from the security deposit, and only returned the security deposit after the plaintiffs filed suit. The Court FINDS that the Defendants retained the deposit in bad faith and that Plaintiffs are entitled to \$200 in damages.

The Court FINDS the following:

1. The Plaintiffs are entitled to a full refund of their security deposit. The Plaintiffs have already received \$358.75 of their security deposit. The Plaintiffs are entitled to the balance of their security deposit in the amount of \$491.25.
2. The Plaintiffs are entitled to damages in the amount of \$200 for the Defendants' bad faith retention of their security deposit.
3. The Plaintiffs are entitled to \$2,000 in damages for the Defendants' improper deduction from a security deposit and willful use of a rental agreement with prohibited provisions.

IT IS THEREFORE ORDERED that judgment is entered in favor of the Plaintiffs and against the Defendants in this matter in the amount of \$2691.25 with interest at 2.12% per annum from October 2, 2012. The parties are responsible for their own attorney fees. Court costs in the amount of \$182.70 are to be assessed to the Defendants. Defendants shall pay court costs directly to the clerk of court. Appeal bond is set in the amount of \$5,000.

It is so ordered. Dated this 15<sup>th</sup> day of May, 2013.

  
LYNN ROSE  
Magistrate Judge  
Sixth Judicial District of Iowa

cc: AF 5/16/13  
J. Affeldt  
C. Warrick