LEGAL Q & A

Better Late than Never

With San Francisco's ever-changing legislation, it's not uncommon for well-meaning property owners to make mistakes.

Q. In March of this year, I paid a tenant to vacate his unit. He accepted, moved out a month later, and I haven't heard from him since. This was all conducted unofficially over email, as I wasn't aware of the buyout laws at the time. Is there anything I can do now to protect myself?

A. Even though it was by email, you entered a "tenant buyout agreement"—the (highly regulated) payment of consideration for an empty apartment. Emails and handshakes were fine until April 2015, when San Francisco's first-of-its-kind ordinance came on line. Now you must disclose certain tenant rights first (Rent Board Form 1000), tell the Rent Board you did (Form 1001) and file your code-compliant agreements with the Rent Board between 46 and 60 days after execution. (Tenants can rescind for the first 45 days.)You deprived your tenant of important rights, ranging from common sense ones ("you don't have to enter a buyout agreement"), well-meaning ones (contact information for tenants' rights organizations) and even political ones (the knowledge that they can leverage a landlord's ability to condo-convert for a bigger payout).

The city created this law to address a perceived problem: "Unlike no-fault evictions, buyouts are unregulated, and can enable landlords to circumvent many of the restrictions that apply when a landlord executes a no-fault eviction." The ordinance followed other, failed attempts to regulate this conversation: Baba v. CCSF overturned a law regulating the "Ellis Bluff" (threatening an eviction to urge a buyout, without a "present intent to evict"). Larson v. CCSF overturned a law prohibiting further buyout offers after a tenant said "no." SFAA challenged the current law on constitutional grounds, but the 9th Circuit found it to be a permissible regulation on speech that advanced the city's legitimate interests in leveling the field.

Penalties for non-compliance are significant. You failed to provide tenant disclosures, a $500 penalty. Your email agreement lacked the specific language/initialing requirements, a penalty of up to 50% of the tenant's "damages" (undefined, but perhaps based on increased housing costs), and tenants can rescind a non-compliant agreement "at any time" (which may simply mean "not limited to the 45 day right to rescind" rather than "indefinitely," as state law imposes a four-year statute of limitations on rescission of written agreements.) You will also owe a $20,000 administrative penalty to the city for failure to file the buyout agreement. And, depending on whether you threatened an eviction to motivate your tenant's departure, the city might even try to limit new rents to what your former tenant was paying.

Or maybe nothing will happen, if no one finds out. But if you'd like to start mitigating your damages now, you might try this: contact your tenant, provide the disclosure, register with the Rent Board, let them know that you were not aware of the ordinance and you want to make it right: ask your tenant if they want to move back in (if the unit is available) and return the payment (after you compensate for moving expenses). If they decline, ask if you can provide an additional payment for them to enter the proper agreement now (with a release of claims), which you would file with the Rent Board. This does not get you immunity. But it will look much better to a jury (and may discourage a PI attorney from taking the case on).

—Justin A. Goodman

Q. When returning a security deposit, what is considered normal wear and tear? A tenant painted a bedroom's walls black. Can I keep funds from the deposit to repaint? Or no, since I'd repaint between tenancies anyway?

A. Security deposits are meant to help landlords by mitigating tenant expenses at the end of a tenancy. However, they can also be a headache because landlords are obligated to account for deductions to tenants' security deposits, and the rules for deductions are not always clear.

California clearly designates four specific categories as lawful deductions from security deposits: 1) Repayment of back rent at the end of the tenancy; 2) repair damage to the unit that is not ordinary wear and tear; 3) cleaning the premises to restore it to the condition at the beginning

of the tenancy; and 4) to remedy other defaults that may be designated by the rental agreement. However, this is not an exhaustive list, so under the right circumstances, other charges could conceivably be justified.

The law has no further explanation of the meaning of “ordinary wear and tear,” so for landlords it will always be a judgment call. Along with personal experience, landlords can consider the expected useful life for the various appliances and fixtures inside each unit. If the carpet, paint, or stove need to be replaced prematurely, it suggests that they were damaged beyond “ordinary wear and tear.”

In the given example, whether repainting a bedroom would be deductible from the deposit would depend primarily on the circumstances of the painting during the tenancy. If the tenant unilaterally painted the walls without the landlord’s consent, it would clearly be a deductible expense to restore the walls to their original color. But if the tenant consulted with the landlord, who then consented to the panting, the landlord may have waived their right to recover the cost of restoring the walls, unless the landlord explicitly reserved their rights in writing.

The difference is that in the first case, the tenant is arguably “damaging” the property, whereas in the second case, the landlord is authorizing a modification or improvement to the property that the landlord could benefit from even after the tenancy concludes. However, if the unit would have been repainted regardless of the move-out condition, a landlord should not deduct the cost from the deposit, because it’s not a default in rent, repairing damage, or “restoring” the condition of the premises.

Because this is not always a clear line, landlords should anticipate that there may be disputes with their tenants. One way to avoid a dispute with a litigious or demanding tenant is to simply refund the deposit in full and spare yourself the trouble. But when a landlord chooses to take justifiable deductions, make sure that all actual expenses to date are disclosed to the tenant at their forwarding address within 21 days of vacancy. If the work associated with the deduction cannot reasonably be completed within 21 days, the landlord should make a good-faith estimate of the value of the work, then later issue a complete accounting and disposition within 14 days after the completion of the work.

Rigorously documenting all the deduction expenses may seem like a hassle, but it is good practice if the deductions are disputed. Landlords should keep move-in inspection reports, photographs, or videos to document the relative condition of the unit at the start and end of each tenancy, as well as any upgrades or improvements installed during longer-term tenancies. Tenants who object to security deposit deductions will have to take their case to small claims court, where such evidence will be useful. A landlord who can show good faith compliance with all the security deposit deduction procedures will be a big step closer to defending their claim.

—Matthew P. Quiring

The information contained in this article is general in nature. Consult the advice of an attorney for any specific problem. Matthew P. Quiring is with Fried & Williams LLP and can be reached at 510-625-0100. Justin A. Goodman is with Zacks, Freedman & Patterson, P.C. and can be reached at 415-956-8100.