

BEFORE THE
COMMISSION ON LANDLORD-TENANT AFFAIRS
FOR MONTGOMERY COUNTY MARYLAND

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| In the Matter of Delmar Witcher and Donna Brooks Complainant | |
| v. | Case No. 25660 |
| Brian W. Ulmer and Phuong K. Pham Rental Facility: 8232 Emory Grove Road, Gaithersburg, MD (Rental License No. 43962) Respondent | |

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DECISION AND ORDER

The above captioned case having come before the Commission on Landlord-Tenant Affairs for Montgomery County, Maryland (the "Commission"), pursuant to Sections 29-10, 29-14, 29-41, and 29-44 of the Montgomery County Code, 2001, as amended, and the Commission

having considered the testimony and evidence of record, it is therefore, this 7th day of March, 2005, found, determined, and ordered, as follows:

BACKGROUND

On June 7, 2004, Delmar R. Witcher and Donna E. Brooks, (the "Complainants"), former tenants of 8232 Emory Grove Road, Gaithersburg, Maryland (the "Property"), a licensed single-family rental property in Montgomery County, Maryland, filed a formal complaint with the Office of Landlord-Tenant Affairs, Department of Housing and Community Affairs (the "Department"), in which they alleged that Brian Ulmer and Phuong K. Pham (the "Respondents"), owners of the Property: (1) failed to be present for a final walk-through inspection of the Property at 12:00 noon on June 30, 2004, as requested by the Complainants, in violation of § 8-203(f)(1) of the Real Property Article, Annotated Code of Maryland, 1999, as amended ("State Code"); (2) assessed unjust charges against their security deposit after the termination of their tenancy, in violation of § 8-203(f)(1) of the State Code; and (3) without a reasonable basis, failed to refund any portion of their \$3,850.00 security deposit plus accrued interest, within 45 days after the termination of their tenancy, in violation of § 8-203(e)(4) of the State Code.

On or about August 24, 2004, the Complainants amended their original complaint to acknowledge failing to clean the carpet and the master bedroom shower, and for failing to replace one light bulb, at a cost to Respondents of \$506.00. The amended complaint also requested, in addition to the refund of the amount wrongfully withheld from their security deposit, a penalty of three times that amount plus reasonable attorney's fees.

Specifically, the Complainants assert that: (1) the Respondents agreed to conduct a final walkthrough inspection of the Property at 12:00 noon on June 30, 2004; however, Respondents appeared at the Property unannounced on June 29, 2004, while Complainants were still cleaning the Property; (2) prior to vacating the Property, the carpets, bathroom tiles and kitchen floor were not cleaned, and a light bulb was not replaced; and (3) the Respondents had no reasonable basis to withhold from their security deposit any money other than the cost they actually incurred to clean the carpets and bathrooms and to replace a light bulb.

The Respondents contend that: (1) the Complainants damaged the Property in excess of ordinary wear and tear during their tenancy; and (2) the cost actually incurred to repair that

damage far exceeded the amount of the Complainants' security deposit plus accrued interest, and therefore, the Complainants are not entitled to a refund.

After determining that the subject complaint was not susceptible to conciliation, the Department referred this case to the Commission for its review, and on September 14, 2004, the Commission accepted jurisdiction of the amended complaint only, and subsequently scheduled a public hearing for January 11, 2005.

The public hearing in the matter of Delmar Witcher and Donna Brooks v. Brian Ulmer and Phuong Kim Pham, relative to Case No. 25660, commenced on January 11, 2005, and ended on that date. However, the Commission agreed to leave the hearing record open for an additional 10 days, until 5:00 PM, Friday, January 21, 2005, to allow the Complainants the opportunity to provide documentation regarding their request for a final inspection. The Complainants did not provide the documentation.

The record reflects that the Complainants and the Respondents were given proper notice of the hearing date and time. Present at the hearing and presenting testimony and evidence were Complainants Delmar Witcher and Donna Brooks, and Respondents Brian Ulmer and Phuong K. Pham, and one witness called by the Respondents, Andrea Poselli, the current tenant in the Property. The Complainants were represented at the hearing by attorney Thomas Young, and the Respondents were represented at the hearing by attorney Diana Theologou.

Without objection, the Commission entered into the record of the hearing the case file compiled by the Department, including a series of photographs of the Property, identified as Commission's Exhibit No. 1. Without objection from the Respondents, the Commission also accepted into evidence 2 exhibits offered by the Complainants: (1) a listing from the Maryland Department of Assessments and Taxation indicating that the Respondents own the Property which was built in 1987; and (2) an itemized listing of damages being claimed by the Complainants in the amount of \$12,319.18.

FINDINGS OF FACT

Based on the testimony and evidence of record, the Commission makes the following findings of fact:

1. On or about June 16, 2003, the Complainants and Respondents entered into a one-year lease agreement (the "Lease") for the rental of the Property, which commenced on July 1, 2003, and ended on June 30, 2004.

2. On or about June 16, 2003, the Complainants paid the Respondents a security deposit in the amount of \$3,850.00, which was properly received in the Lease.

3. On or about May 31, 2004, the Complainants issued the Respondents a proper written notice of their intention to vacate the Property by June 30, 2004, at the end of the Lease term.

4. By a letter dated May 24, 2004, Complainants attorney, Thomas Young, requested of the Respondents a final walkthrough inspection of the Property "...at noon on June 30, 2004 unless Delmar Witcher or Donna Brooks request otherwise." The Commission finds that the letter was not sent by certified mail to the Respondents.

5. The Commission finds credible Respondents' uncontradicted testimony that the parties mutually agreed to change the date of the final walkthrough inspection to June 29, 2004.

6. On June 29, 2004, while the Complainants were cleaning the Property, Respondent Phuong Kim Pham arrived at the Property with several cleaning persons and began to conduct a final inspection, including taking numerous photographs which are part of Commission's Exhibit No. 1.

7. The Commission finds credible the testimony of the Complainants that shortly after Ms. Pham arrived at the Property, they departed without finishing the cleaning they had started, and did not return at any time.

8. By letter dated August 11, 2004, within 45 days after the termination of the Complainants' tenancy, the Respondents mailed to Complainants a list of damages being assessed against their security deposit, itemized as follows:

| | | |
|----|---------------------------------------|---------------|
| A. | Carpet replacement | \$1,234.75 |
| B. | Vinyl floor | 384.00 |
| C. | Wood casement window | 514.80 |
| D. | Bathroom tile | 2,310.00 |
| E. | Shower door | 121.21 |
| F. | Screen door | 92.00 |
| G. | Heat pump – remove dirty filter | <u>119.00</u> |
| | TOTAL | \$4,775.76 |

9. Respondents' August 11, 2004 letter advised the Complainants, regarding the disposition of their security deposit, that "...the cost to repair the premises exceed the security deposit of \$3,850.00, therefore, the entire security deposit will be used to pay down the expenses. We ask that you reimburse us for the remaining \$925.76, which is \$4,775.76 minus \$3,850.00."

10. The Respondents' August 11, 2004 notice of security deposit disposition failed to credit the Complainants' security deposit with one year's simple interest (4%), \$154.00.

11. The Commission finds that the carpets in the Property were approximately four and one-half years old (4 ½) at the time the Complainants vacated. The Commission further finds, based on the testimony of Respondents' witness, Ms. Poselli, and the photographic evidence presented by Respondents, that the carpets were soiled and stained at the time the Complainants vacated, and furthermore, that Complainants failed to clean the carpets prior to vacating. Rather than attempt to clean the carpet the Respondents chose to replace the carpet at a cost of \$1,763.93 of which \$1,234.75 was assessed against the Complainants' security deposit.

The Commission finds that the Respondents ordered new carpet on May 30, 2004, one month before the termination of the Complainants' tenancy, and before inspecting the carpet to determine its condition. Respondents' actions evidence their intent to replace the carpet regardless of its condition and without first attempting to determine whether the carpets could be cleaned. The Commission does not find credible Respondents' testimony that it purchased the carpeting for installation in their personal home and only installed it in the Property after inspecting the Property after the termination of the Complainants' tenancy. Based on the above, the Commission finds that Respondents did not establish that the carpeting warranted replacement, and therefore, the charge of \$1,234.75 is disallowed.

12. The Complainants admitted that, based on their failure to clean the carpets prior to vacating, they owed the Respondents for the cost to clean the carpets. However, because the Respondents did not incur any actual expense to clean the carpets, the Respondents have no basis to withhold carpet cleaning costs from the Complainants' security deposit.

13. The Commission finds that the kitchen floor was not cleaned by the Complainants prior to vacating the Property. This finding is supported by the testimony of the Complainants and the photographic evidence presented by Respondents. Rather than clean the existing dirty floor, the Respondents chose to replace the floor with new vinyl floor covering installed by Respondent Ulmer at a cost of \$1,200.00 of which \$384.00 was assessed against the Complainants' security deposit. The Commission finds that the Respondents ordered new vinyl flooring on June 6, 2004, nearly one full month before the termination of the Complainants' tenancy, and without having performed a final inspection to determine the condition of the flooring, evidencing their intent to replace the flooring regardless of its condition. The Commission does not find credible Respondents' testimony that they purchased the flooring for installation in their personal home and only installed it in the Property after inspecting the Property after the termination of the Complainants' tenancy. Based on the above, the Commission finds that the condition of the kitchen floor did not warrant replacement, and therefore, the charge of \$384.00 is disallowed.

14. The Commission finds, based on the testimony of the parties and review of the photographic evidence presented by Respondents, that Complainants damaged one casement window in the Property during their tenancy, which constitutes damage in excess of ordinary wear and tear. The Commission was not persuaded by Respondents' testimony that the Complainants damaged a second window and further finds that the photographic evidence was inconclusive to make such a determination. The Respondents assessed against the Complainants' security deposit the cost for replacing two (2) windows, at a cost of \$1,001.00 (\$500.50 each), of which a pro rata cost of \$514.80 (\$257.40 each), was assessed against the Complainants' security deposit. Therefore, the Commission finds that the Respondents lawfully withheld the cost of replacing one window, \$257.40, from the Complainants security deposit.

15. The Commission finds that the floor and wall tile in the bathrooms were not cleaned by the Complainants prior to vacating. This finding is supported by the testimony of the Complainants and the photographic evidence presented by Respondents. The Respondents chose to replace all of the floor and wall tiles in the bathrooms with new ceramic tile, rather than clean the existing tiles, at a cost of \$3,500.00, of which \$2,310.00 was assessed against the Complainants' security deposit. The Commission finds that the Respondents ordered new ceramic tile on June 12, 2004, approximately 3 weeks before the termination of the Complainants' tenancy, and without having performed a final inspection to determine the condition of the tile, evidencing Respondents' intent to replace the tile regardless of its condition. The Commission does not find credible Respondents' testimony that they purchased the tile for installation in their personal home and only installed it in the Property after inspecting the Property. Based on the above, the Commission finds that the condition of the tile in the bathrooms did not warrant replacement, and therefore, the charge of \$2,310.00 is disallowed.

16. The Complainants admitted that, based on their failure to clean the bathroom tiles prior to vacating, they owed the Respondents for the cost to clean the tile. However, because the Respondents did not incur any actual expense to clean the bathroom tiles, the Respondents have no basis to withhold tile cleaning costs from the Complainants' security deposit.

17. The Commission finds that the sliding shower door in the bathroom was damaged (broken handle) by the Complainants in excess of ordinary wear and tear as a result of their tenancy. This finding is supported by the testimony of the parties and the photographic evidence presented by Respondents. However, the Respondents failed to provide to the Commission any evidence, such as a paid bill or receipt, to demonstrate that a new shower door was ever purchased, or that they incurred any actual expense to make such a repair. Therefore, the charge of \$121.00 is disallowed.

18. The Commission finds that the screen door in the Property was damaged by the Complainants in excess of ordinary wear and tear as a result of their tenancy. This finding is supported by the testimony of the Respondents and the photographic evidence they presented at the hearing. Therefore, the Commission finds that the Respondents could lawfully withhold from the Complainants' security deposit \$92.00, the cost incurred to replace the screen door.

19. The Commission credits the undisputed testimony of Complainant Delmar Witcher that he changed the filters in the heat pump on a regular basis, approximately every two months. The Commission further finds that the two lists of damages provided by the

Respondents, at pages 51 and 60 of Commission's Exhibit No. 1, conflict regarding the \$119.00 charge assessed against the Complainants' security deposit related to the heat pump. The list at Page 60 states, "Heat Pump – Fix broken drain pipe, \$119.00" and the list as Page 51 states, "Heat Pump – remove dirty filter, \$119.00." Furthermore, the invoice from Gaithersburg Air Conditioning & Heating, Inc. (See page 83 of Commission's Exhibit No. 1) states:

"Fan runs fine. **Filter is clean.** Another filter was sucked up against coil. Took that filter out. Electrical is good. **Installed 2 new PVC fittings to complete drain that was broken.** Drain is good. Freon levels are good 17° temp drop. Operations are normal. O.D. coil is clean." (Emphasis added)

Based on the above, the Commission finds that the Complainants did not damage the heat pump in excess of ordinary wear and tear, and did not fail to do required tenant maintenance during their tenancy. The Commission further finds that the \$119.00 charge was to repair a broken drain pipe, which is not a tenant responsibility. Therefore, the charge of \$119.00 is disallowed.

CONCLUSIONS OF LAW

Accordingly, based upon a fair consideration of the testimony and evidence contained in the record, the Commission on Landlord-Tenant Affairs concludes:

1. The Complainants failed to request a final walkthrough inspection of the Property in accordance with § 8-203(f)(1)(i) of the State Code, and Paragraph 23 b, "Move-Out Inspection/Surrender of Premises" of the Lease, which requires such notice to be sent to the Respondents by certified mail. Therefore, the Respondents were under no obligation to conduct a final inspection of the Property with the Complainants, and as a result, no violation of this provision of the State Code has occurred.

2. The Respondents withheld from the Complainants' security deposit the cost to replace elements in the Property that, although unclean, were not damaged in excess of ordinary

wear and tear and did not warrant replacement (\$1,234.75 for carpet replacement, \$384.00 for vinyl floor installation in the kitchen, and \$2,310.00 to replace bathroom tile), the cost to repair damage for which no proof of repair was provided (shower door - \$121.21), and the cost to make repairs which were the Respondents' obligation (one window repair - \$257.40, and maintenance to the heat pump - \$119.00), in violation of § 8-203(f)(1) and (4) of the State Code, which have resulted in a defective tenancy.

3. The Respondents lawfully withheld from the Complainants' security deposit the cost to replace one casement window (\$257.40) and to repair a screen door (\$92.00), which were damages caused by the Complainants in excess of ordinary wear and tear, pursuant to § 8-203(g) of the State Code.

4. The Respondents failed to credit the Complainants' security deposit with one-year simple interest (4%), which sum is \$154.00, in violation of § 8-203(e) of the State Code, and has caused a defective tenancy.

5. The Respondents, without a reasonable basis, withheld \$3,654.00 from the Complainants' security deposit plus accrued interest after the termination of their tenancy, in violation of § 8-203(e)(4) of the State Code. However, the Commission finds that the Respondents' actions, although misguided, do not rise to the level of egregiousness and bad faith necessary to warrant a penalty or attorney's fees, and therefore, Complainants' request is denied.

6. The Respondents' failure to handle and dispose of the Complainants' security deposit in accordance with the applicable provisions of § 8-203, "Security Deposits," of the State Code and Paragraph 3, "Security Deposit," of the Lease, has caused a defective tenancy.

ORDER

In view of the foregoing, the Commission on Landlord-Tenant Affairs hereby Orders the Respondents to pay the Complainants **\$3,654.60**, which sum represents the Complainants

security deposit (\$3,850.00) plus accrued interest (\$154.00) less damages rightfully withheld (\$349.40).

Commissioner Kwaku Ofori, Commissioner Christopher Toven, and Commissioner Jeffrey Burritt, Panel Chairperson, concurred in the foregoing decision unanimously.

To comply with this Order, Respondents, Brian W. Ulmer and Phuong K. Pham, must forward to the Office of Landlord-Tenant Affairs, 100 Maryland Avenue, 4th Floor, Rockville, MD 20850, within thirty (30) calendar days of the date of this Decision and Order, a check made payable to Delmar Witcher and Donna Brooks in the full amount of \$3,654.60.

The Respondents, Brian W. Ulmer and Phuong K. Pham, are hereby notified that Section 29-48 of the County Code declares that failure to comply with this Decision and Order is punishable by a \$500.00 civil fine Class A violation as set forth in Section 1-19 of the County Code. This civil fine may, at the discretion of the Commission, be imposed on a daily basis until there is compliance with this Decision and Order.

In addition to the issuance of a \$500.00 civil fine Class A violation, should the Commission determine that the Respondents have not, within thirty (30) calendar days of the date of this Decision and Order, made a bona fide effort to comply with the terms of this Decision and Order, it may also refer the matter to the Office of the County Attorney for additional legal enforcement.

Any party aggrieved by this action of the Commission may file an administrative appeal to the Circuit Court for Montgomery County, Maryland within thirty (30) days from the date of this Decision and Order, pursuant to the Maryland Rules governing administrative appeals. Be advised that pursuant to Section 29-49 of the County Code, should the Respondents choose to appeal the Commission's Order, they must post a bond with the Circuit Court in the amount of the award (\$3,654.60) if they seek a stay of enforcement of this Order.

Jeffrey W. Burritt, Panel Chairperson

Commission on Landlord-Tenant Affairs