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Warranty of Habitability, CRS §§ 38-12-501 et seq.

BY LINDSAY J. MILLER

As we approach the 10-year anniversary of "Part 5" of Title 38, Article 12, I find myself reflecting on my experience in landlord/tenant law and the various "habitability" issues that have come across my desk over the past several years. As a landlord attorney, you'd think I would love a statute that seemingly spells out the maintenance and repair obligations of both the landlord and tenant, specifying what can happen if those obligations aren't met (especially because Part 5 is, in my humble opinion, deceptively pro-landlord in practice). But I don't.

Part 5 as written isn't working and, in my experience, creates more confusion than clarity. The complete lack of case law interpreting *any portion* of Part 5 is equal parts maddening, unsurprising, and enlightening. It simply needs work—and after 10 years, it's time. For example, practitioners need guidance on whether verbal notice to a landlord could ever be considered adequate actual "notice" under Part 5, thus triggering a landlord's obligation to repair a habitability issue under CRS § 38-12-507. Perhaps you all see areas for improvement too.

I get a number of calls and inquiries from tenants who don't realize I handle cases mainly for landlords. Many of these calls relate to critical matters of health or safety (pest infestations, significant mold and water damage, lack of basic necessities, etc.) and are especially concerning when young children reside in the rental property. These tenants—the very people Part 5 was seemingly designed to protect—are probably not thinking about the statutory requirements for having the best chance at lodging a habitability defense when they inevitably get sued by their landlord for failure to pay rent. These tenants also probably don't have the resources needed to litigate the extent of the protections of Part 5; their time and money are being dedicated toward securing safe housing.

Of course, it's only a matter of time before the landlord contacts a real estate attorney (like me) to sue the tenants for breaching the lease. The story at that point from the tenant is nearly always the same: "our landlord knew we had a problem with mice," or "I've tried calling our landlord a dozen times to fix the plumbing," or "our landlord said he/she'd be over to fix the issue, but it's been a month with no fix." As well-intentioned as I'd like to think Part 5 was meant to be, it does nothing to account for any of these situations.

Instead, CRS § 38-12-507 (ironically titled "Breach of Warranty of Habitability—Tenant's Remedies") places inflexible and complicated deadlines on a tenant to comply with a strict provision for "written notice" to the landlord. There are no forms provided for pro se tenants and no firm guidelines in Part 5 as to how the notice should read (or, as I mentioned above, whether verbal notice via phone, for example, would suffice). Strictly interpreting section 507, as I often do when it suits my clients, results in a slam dunk in terms of dispensing with an otherwise legitimate habitability claim. A typical response goes something like this: "Unfortunately, CRS § 38-12-507 requires advanced written notice to my client of the issues which are now the subject of this dispute. Because such written notice was not received

within the timeframe required by statute, any habitability defense will be legally ineffective."

While I've protected my client and acted in my client's best interests, has justice really been served or anything actually resolved? What if my client was aware of the issue, but never technically received the required "written notice"? The result is that the landlord will likely sue for past-due rent, late fees, attorney fees, and costs owed under the Lease Agreement, and the tenant will have unknowingly and completely unintentionally waived a partial defense to the suit. I say "partial" because even the best, perfectly compliant habitability notices are just that—a partial defense to a suit by the landlord after the property has been abandoned. Part 5 does not provide for a complete defense, even in extreme situations.

Moreover, in the common situation where the landlord sues for breach of the Lease and accompanying rent and the tenant counterclaims for habitability issues, section 507 requires a tenant to pay into the registry of the court "upon the filing of the tenant's answer . . . all or part of the accrued rent" after the tenant accounts for any "expenses" incurred as a result of landlord's "breach of the warranty of habitability." At first blush, this appears reasonable, until the landlord's attorney realizes that because there has been no *determination* that the landlord "breached" anything at the time the tenant files his or her answer, there is a solid argument to be made for demanding that the entirety of the accrued rent be paid into the registry, ignoring the reality that the money has likely already been spent on another, safer place to live.

While I enjoy representing my landlord clients, have had success in doing so, and am by no means criticizing any of my landlord attorney colleagues in this article, I am also mindful of what I feel is my obligation to speak up when something can (and should) be improved, truly to the betterment of landlord/tenant law and practice as a whole. If the practical goals of the Colorado Legislature are as described in section 501, to "(a) simplify, clarify, modernize, and revise the law governing the rental of dwelling units and the rights and obligations of landlords and tenants" and "(b) encourage landlords and tenants to maintain and improve the quality of housing," doesn't it make sense to do just that? Let's start by leveling the playing field and making these protections more workable and accessible:

1. Rewrite and remove the legalese from the notification requirements for tenants (if any of you can figure out how to read CRS § 38-12-507(a)(1), congratulations).
2. Allow for verbal notification or at least some flexibility in the notification of a habitability issue.
3. Eliminate the requirement for accrued rent to be paid into the court registry.
4. Consider a complete defense in extreme situations.

By making these, and perhaps other, changes, our laws regarding habitability will actually protect and ensure some measure of "habitability." Until then—if anyone wants co-counsel on an appeal of a habitability case, I'm open to the opportunity! CL

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