ANATOMY OF A WARRANTY OF HABITABLILITY CASE

Since the Colorado General Assembly enacted the Warranty of Habitability Act ("WOH") in 2008, each year the number of warranty of habitability claims in evictions cases has increased. At first tenants continued to raise failure-to-repair claims as defenses in eviction cases, but unless the tenant specifically alleged warranty of habitability, judges did not evaluate them under the warranty of habitability statute. Now tenants commonly allege warranty of habitability in evictions. The courts now routinely evaluate failure-to-repair allegations made by tenants in eviction cases under the warranty of habitability statute even if the tenant does not raise warranty of habitability issues.

Using a recent case we tried in district court on a WOH claim, we will discuss key issues and best practices to maximize your chances of success in court if a tenant raises warranty of habitability issues. In February, a tenant reported that water had seeped into his unit, damaging some drywall and carpeting. The community's onsite team responded the day the tenant made the maintenance request. Maintenance stopped the leak, removed the wet carpet, and applied BioKill. Outside vendors replaced drywall and carpeting. Several months later, water again seeped into the tenant's unit. The community once again rapidly and comprehensively responded to this incident the same way it had responded to the first.

Unfortunately, the tenant's unit experienced a third water intrusion event. The community again responded rapidly and comprehensively as well as hiring an expert, at significant cost to the community, who determined the source of the problem. Over the years the building settled causing a crushed underground pipe that caused the three separate leaks in the tenant's unit over a five-month period.

After the third incident, the tenant refused to pay his rent. The community posted the tenant with a three-day demand for rent or possession. The tenant refused to pay during the three-day period, and the eviction notice was sent to us to file. The tenant answered the eviction case, asserting a counterclaim for breach of the warranty of habitability and he requested that the case be transferred from county court to district court. Based on the facts, we wondered how the tenant thought he could win.

In discussing our case, let's first review key aspects of the WOH law. To prove a warranty of habitability claim, a tenant must prove four elements. First, the tenant must prove an uninhabitable condition. Second, the tenant must prove that the condition is materially dangerous to the tenant's health, life, or safety. Third, the tenant must give written notice to the landlord of the condition. Fourth, the landlord must fail to remedy the condition within a reasonable time.

A rental unit is uninhabitable if it substantially lacks key characteristics. For examples, a rental unit must have adequate waterproofing and weather protection,

unbroken windows and doors, running water and reasonable amounts of hot water, adequate heat and electricity, and appropriate pest extermination. In our case, the tenant attempted to establish that his unit lacked adequate waterproofing because of multiple leaks.

Courts have significant discretion when deciding whether a condition is materially hazardous and dangerous to a tenant's health, life, or safety. Some judges hold that a water leak, like the one at issue in our case, is not a materially or hazardous condition. Other judges hold that most water leaks do constitute a materially hazardous and dangerous condition. In our experience, a judge's finding on the materially dangerous and hazardous condition is greatly impacted by the landlord's overall response.

The tenant in our case gave the landlord written notice of the problem. What constitutes a reasonable amount of time to remedy a problem depends on the facts and circumstances. The universal measuring stick is how long it would take a reasonably diligent landlord to fix the problem. If you don't fix the problem as fast as a reasonably diligent landlord, you have not fixed the problem within a reasonable time.

The warranty of habitability law gives tenants rights, but it also imposes specific duties upon tenants that are often overlooked. Specifically, the warranty of habitability law requires tenants to promptly notify the landlord if the rental property is uninhabitable or if any condition exists that could result in the property becoming uninhabitable if not remedied. Under the law, tenants are also required to act reasonably and cooperate in addressing problems and repairs. A tenant's actions or inactions are a statutory defense to a warranty of habitability claim.

Based on the facts of our case, the tenant was able to conclusively establish that there was written notice of an uninhabitable condition. The case now centered on whether the condition was materially hazardous and dangerous, and if the landlord remedied the problem within a reasonable amount of time. The court held that the water leak was not a materially dangerous or hazardous condition. Because judges do have so much discretion in deciding the materially hazardous and dangerous issue, you never want to have the outcome of the case turn on this issue.

While we also prevailed on the issue that the problem was fixed in a reasonable amount of time, the tenant was able to make this issue a close call despite the client's outstanding response and overwhelming amount of documentation. How did the tenant do this? The tenant combined lies with some damaging surprise evidence. First, the tenant lied by testifying there were additional leaks beyond the three promptly addressed water leaks. The tenant testified that the water leak problem was ongoing, and was only addressed by the landlord on three occasions after the tenant begged the landlord to respond. Second, the tenant falsely testified that he had an oral agreement with the landlord that he didn't have to pay rent until the water leak was permanently fixed. Third, the tenant introduced a video. The tenant had hidden a video camera in his unit and recorded the community's maintenance tech bad-mouthing the community's response to the water leak situation and the community's management.

This case illustrates best practices to defend tenant warranty of habitability claims. Best practices start with your lease. Your lease should require tenants to notify you in writing of needed repairs and uninhabitable conditions. Your onsite staff should also be familiar with the warranty of habitability law. The onsite team should know that there is big difference between a torn window screen, and a unit that lacks heat in the middle of winter. If your staff is trained properly, they should be able to recognize repair situations that have WOH implications. For example, regardless of your lease language, your team should know that failure to supply heat gives a tenant the right to terminate his lease, if not remedied within a reasonable amount of time. Your staff needs to know how to recognize potential WOH claims and defenses, so that they can properly document key facts to provide a strong defense.

Combining company policy with consistently generating written documentation is critical to defend warranty of habitability cases. If your staff recognizes potential claims and timely responds, you still need to have proper documentation to support your case. A timely, proper repair with written documentation helps prevent "he said, she said situation", and tenant's lies. Written documentation starts with a policy that onsite staff is required to document in writing all WOH situations. In our case the community had excellent documentation, but the tenant still muddled the issue of timely response by testifying that there were additional episodes where the community failed to respond.

If the community has a policy to always document warranty of habitability situations in writing, this policy can be introduced to attack the tenant's credibility. Specifically, because the community's policy is to always document in writing warranty of habitability situations and there is no written documentation about these alleged additional incidents, these additional incidents never happened.

Assuming a tenant reports a WHO situation, documentation should focus on dates, response, resolution, and the tenant's actions or inactions. Because a landlord is required to remedy within a reasonable time, it is essential that both the date of an incident and the date the tenant reported it is documented. If a tenant reports mold on March 15, but admits that the problem has existed since January, the tenant's admission supports the defense that the tenant's inaction resulted in the uninhabitable condition.

Even in today's world of property management database software, a landlord's response is often poorly documented. For example, computer maintenance records have a field for "action taken". However, this field is often left blank. Maintenance techs often complete service orders by simple entering the date completed in the date closed field, without further documentation. The maintenance tech's failure to properly document a service order has now left the door wide open for a clever tenant to cast significant doubt about your repair efforts.

The tenant can argue landlord's own records document no action was taken. Without documentation about action taken, when the action was taken, and when it was completed, the tenant can argue that landlord's could easily enter any date into the date-closed field, making the information virtually worthless. Between the time of tenant's incident and the trial, the maintenance tech involved has likely dealt with hundreds of repair issues. If the service record was properly documented, the record

can be used to refresh the maintenance tech's memory, if it's not then the tech's testimony can quickly become suspect. You didn't document this in writing, you make hundreds of repairs a year, and you are telling us you remember this one repair from a year ago?

Depending on the seriousness of the situation, the landlord should consider following up with the tenant in writing after the uninhabitable condition has been resolved. For example, on March 15 you reported a water leak, we completely fixed the leak by March 17, and you reported no damage. If the leak has not been completely fixed, please immediately advise us in writing. If a similar letter had been sent to the tenant in our case, the tenant's testimony regarding other unreported incidents could quickly be shown to be unbelievable on cross examination. We fixed the first leak, right? We sent you a letter asking you to advise us if the leak wasn't fixed, right? You never advised us of any additional leaks, right? These additional leaks never happened, did they?

Similarly, a landlord should always document a tenant's action, inaction, and failure to cooperate. How a tenant's behavior is documented can be decisive in winning or losing in court. When a tenant refuses to cooperate in remedying a WOH situation, the tenant's refusal should always be documented by sending the tenant a letter. On May 10, you first reported the situation despite knowing about it since March 1. We immediately scheduled a vendor to repair on May 11, but you refused the vendor access to your apartment. We are ready, willing, and able to immediately address this situation, however, we can't do it without your cooperation. Please contact us immediately to reschedule the repairs you requested.

Unfortunately, the type of critical information necessary to successfully defend a warranty of habitability case frequently gets reduced to an entry in the tenant's conversation log. "May 11, Mr. Jones in 302 refused to let the vendor in to make repairs". Now the door is open for the tenant to argue that this simply never happened. After all, nobody in their right mind would refuse repairs when their unit is uninhabitable.

Since roughly sixty percent of all contested evictions involve warranty of habitability claims, landlords need to be prepared to defend against such claims through proper documentation. While you can't prevent tenants from lying in court, you can implement best practices that will lessen the impact or rebut a tenant's false testimony, and maximize your chances of winning on the warranty of habitability's statutory defenses. Good documentation is the key to reducing a landlord's exposure, poor documentation serves little purpose, and in many cases can even help a tenant's case. Proper documentation means timely and completely documenting service orders, and generating tenant letters when necessary. Finally, in the age of the Internet, mini-microphones and tiny video cameras, onsite staff should always assume that they are being recorded.