

§ 38-12-103. Return of security deposit

(1) A landlord shall, within one month after the termination of a lease or surrender and acceptance of the premises, whichever occurs last, return to the tenant the full security deposit deposited with the landlord by the tenant, unless the lease agreement specifies a longer period of time, but not to exceed sixty days. No security deposit shall be retained to cover normal wear and tear. In the event that actual cause exists for retaining any portion of the security deposit, the landlord shall provide the tenant with a written statement listing the exact reasons for the retention of any portion of the security deposit. When the statement is delivered, it shall be accompanied by payment of the difference between any sum deposited and the amount retained. The landlord is deemed to have complied with this section by mailing said statement and any payment required to the last known address of the tenant. Nothing in this section shall preclude the landlord from retaining the security deposit for nonpayment of rent, abandonment of the premises, or nonpayment of utility charges, repair work, or cleaning contracted for by the tenant.

(2) The failure of a landlord to provide a written statement within the required time specified in subsection (1) of this section shall work a forfeiture of all his rights to withhold any portion of the security deposit under this section.

(3)

(a) The willful retention of a security deposit in violation of this section shall render a landlord liable for treble the amount of that portion of the security deposit wrongfully withheld from the tenant, together with reasonable attorney fees and court costs; except that the tenant has the obligation to give notice to the landlord of his intention to file legal proceedings a minimum of seven days prior to filing said action.

(b) In any court action brought by a tenant under this section, the landlord shall bear the burden of proving that his withholding of the security deposit or any portion of it was not wrongful.

(4) Upon cessation of his interest in the dwelling unit, whether by sale, assignment, death, appointment of a receiver, or otherwise, the person in possession of the security deposit, including but not limited to the landlord, his agent, or his executor, shall, within a reasonable time:

(a) Transfer the funds, or any remainder after lawful deductions under subsection (1) of this section, to the landlord's successor in interest and

notify the tenant by mail of such transfer and of the transferee's name and address; or

(b) Return the funds, or any remainder after lawful deductions under subsection (1) of this section, to the tenant.

(5) Upon compliance with subsection (4) of this section, the person in possession of the security deposit shall be relieved of further liability.

(6) Upon receipt of transferred funds under subsection (4)(a) of this section, the transferee, in relation to such funds, shall be deemed to have all of the rights and obligations of a landlord holding the funds as a security deposit.

(7) Any provision, whether oral or written, in or pertaining to a rental agreement whereby any provision of this section for the benefit of a tenant or members of his household is waived shall be deemed to be against public policy and shall be void.

(L. 71: p. 592, § 1. C.R.S. 1963: § 58-1-28. L. 76: (2) amended, p. 314, § 67, effective May 20.)

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For comment, "Colorado's Wrongful Withholding of Security Deposits Act: Three Litigious Shares in an Untested Law", see 49 Den. L.J. 453 (1973). For article, "The Colorado Security Deposit Act", see 50 U. Colo. L. Rev. 29 (1978).

Purpose of section. From a consideration of the language of the entire section, it is evident that the legislative purpose of this section is to assure that tenants will not be wrongfully deprived of their security deposits, and that if so deprived they will be entitled to adequate judicial relief. Ball v. Weller, 39 Colo. App. 14, 563 P.2d 371 (1977).

This section is designed to assist tenants in vindicating their legal rights and to equalize the disparity in power which exists between landlord and tenant in conflicts over relatively small sums. Martin v. Allen, 193 Colo. 395, 566 P.2d 1075 (1977).

This section provides a court remedy against landlords who withhold security deposits willfully and wrongfully, and the tenant's attorney should be paid for the time necessary to prevail; absent reasonable attorneys' fees, the security deposit law would not be enforced. Mau v. E.P.H. Corp., 638 P.2d 777 (Colo. 1981).

Security deposit actually belongs to tenant; it is only security for the landlord. *Turner v. Lyon*, 189 Colo. 234, 539 P.2d 1241 (1975).

Landlords not absolved from notice requirement. The last sentence in subsection (1) does not absolve landlords from the notice requirement; it merely permits them, upon proper notice, to apply deposits against unpaid rent. *Heatherridge Mgt. Co. v. Benson*, 192 Colo. 190, 558 P.2d 435 (1976).

Justification for requiring tenants to notify landlords prior to claiming treble damages, attorneys' fees, and court costs is to give the landlord one last week to return the security deposit. *Turner v. Lyon*, 189 Colo. 234, 539 P.2d 1241 (1975).

"Willful" defined. The term "willful" in subsection (3)(a) means "deliberate". *Turner v. Lyon*, 189 Colo. 234, 539 P.2d 1241 (1975).

When retention "willful". If the landlord deliberately fails to return the security deposit during the additional seven-day period, the retention is logically "willful" under this section. *Turner v. Lyon*, 189 Colo. 234, 539 P.2d 1241 (1975).

Wrongful withholding of deposit determined. Failure to return the deposit, coupled with failure to provide a tenant with statutorily mandated written statement of reasons for the retention, makes the withholding of a deposit wrongful. *Martinez v. Steinbaum*, 623 P.2d 49 (Colo. 1981).

Deposit not "wrongfully" held. Where respondent authorized petitioner in writing to retain that portion of his deposit equal to one month's rent, petitioner did not withhold that part of the deposit "wrongfully", within the contemplation of subsection (3)(a). *Heatherridge Mgt. Co. v. Benson*, 192 Colo. 190, 558 P.2d 435 (1976).

Evidence of landlord's good faith. The discrepancy between the amount of a security deposit retained and the amount of actual damages proved by the landlord is important evidence of his good faith. *Guzman v. McDonald*, 194 Colo. 160, 570 P.2d 532 (1977).

Tenant may not accelerate statutory time requirements. *McAuliffe v. Rooney*, 38 Colo. App. 137, 552 P.2d 1031 (1976).

Where the statutory notice was given within the one-month period allowed by subsection (1), and only nine days after the surrender of the key to the premises, and suit was commenced prior to the expiration of the additional seven-day period contemplated by the notice requirements of subsection (3)(a), award of treble damages is improper. *McAuliffe v. Rooney*, 38 Colo. App. 137, 552 P.2d 1031 (1976).

A restrictive endorsement, by which a landlord attempts to create a waiver of a tenant's right to legal recourse, is void under this section. *Anderson v. Rosebrook*, 737 P.2d 417 (Colo. 1987).

A tenant cannot be compelled to arbitrate a claim for violation of the wrongful withholding of security deposits act. The act creates a cause of action enforceable in Colorado courts; the enforceability of the statutory cause of action in a legal proceeding cannot be limited or waived by an arbitration agreement. Thus an arbitration provision that would waive this cause of action in favor of mandatory arbitration is unenforceable to the extent that it applies to an action brought under the act. *Ingold v. AIMCO/Bluffs, L.L.C. Apartments*, 159 P.3d 116 (Colo. 2007).

Statute as basis for jurisdiction. *Houle v. Adams State Coll.*, 190 Colo. 406, 547 P.2d 926 (1976).

Applied in *In re Quintana*, 28 B.R. 269 (Bankr. D. Colo. 1983).

II. TREBLE DAMAGES AND ATTORNEYS' FEES.

Constitutionality of attorneys' fees provision. The legitimate aims of subsection (3)(a) supply a rational basis for the distinction between prevailing tenant-plaintiffs, who are entitled to attorneys' fees, and prevailing landlord-defendants, who are not, and therefore the provision is constitutional. *Torres v. Portillos*, 638 P.2d 274 (Colo. 1981).

Equality of opportunity to recover attorneys' fees is not a fundamental right, and therefore the rational relationship test, not the strict scrutiny test, is the appropriate standard for equal protection review. *Torres v. Portillos*, 638 P.2d 274 (Colo. 1981).

Entitlement to attorneys' fees. Tenants who are successful on appeal are entitled to an award of reasonable attorneys' fees. *Martin v. Allen*, 193 Colo. 395, 566 P.2d 1075 (1977); *Kirkland v. Allen*, 678 P.2d 568 (Colo. App. 1984).

Attorneys' fees allowable include those incurred on appeal. *Martinez v. Steinbaum*, 623 P.2d 49 (Colo. 1981).

Attorney fees allowable include those incurred in resolving an issue as to the amount of reasonable attorney fees incurred in the underlying litigation and those incurred on appeal. *Mau v. E.P.H. Corp.*, 638 P.2d 777 (Colo. 1981).

Rationale for award of attorney fees. The reason this section provides for an award of attorney fees is two-fold: (1) To insulate the award of damages from being substantially reduced by the fees; and (2) to encourage

the private bar to enforce its provisions in actions which generally involve small amounts of money. *Ball v. Weller*, 39 Colo. App. 14, 563 P.2d 371 (1977); *Torres v. Portillos*, 638 P.2d 274 (Colo. 1981).

Successful tenants are entitled to recover attorney fees for landlord's independent actions challenging rulings and fee awards in the underlying security deposit litigation. *Mishkin v. Young*, 198 P.3d 1269 (Colo. App. 2008).

Hearing to determine amount of attorneys' fees. When a successful plaintiff has requested attorneys' fees in his complaint, such an award is mandatory, and it becomes incumbent upon the trial court to hold a hearing to determine the amount of reasonable attorneys' fees to be awarded. *Ball v. Weller*, 39 Colo. App. 14, 563 P.2d 371 (1977); *Kirkland v. Allen*, 678 P.2d 568 (Colo. App. 1984).

Awarding fees without hearing error. The trial court erred in awarding attorneys' fees to respondent without a hearing on their reasonableness. *Heatherridge Mgt. Co. v. Benson*, 192 Colo. 190, 558 P.2d 435 (1976).

Factors considered in determining of reasonable fee. If the fee requested is reasonable in light of community standards and the other criteria to be considered by the court, it is not appropriate for a court to take into consideration what a major client may pay the attorney on an hourly basis or the possible absence of overhead expenses comparable to those borne by lawyers in private practice. *Mau v. E.P.H. Corp.*, 638 P.2d 777 (Colo. 1981).

When penalty provision attaches. If a landlord does not return a security deposit within the required time, the penalty provision of subsection (3)(a) attaches to that portion of the money wrongfully retained, plus attorneys' fees, and court costs. *Turner v. Lyon*, 189 Colo. 234, 539 P.2d 1241 (1975); *Kirkland v. Allen*, 678 P.2d 568 (Colo. App. 1984).

Where landlord deliberately fails to return security deposit within the additional seven-day period following the tenant's notice to landlord of his intention to file legal proceedings, such retention is logically "willful" under subsection (3)(a) treble damages provisions. *Kirkland v. Allen*, 678 P.2d 568 (Colo. App. 1984).

The purpose of the seven-day notice provision in subsection (3)(a) is to give landlords one last week to avoid treble damages by returning the security deposit. *Mishkin v. Young*, 107 P.3d 393 (Colo. 2005).

A landlord may not avoid treble damages by accounting for a security deposit during the seven-day period established by subsection (3)(a). The seven-day period is beyond the statutory deadline of subsection (1) and, therefore, the landlord has already forfeited all rights to retain the deposit. *Mishkin v. Young*, 107 P.3d 393 (Colo. 2005).

Statutory liability of subsection (3)(a) may be offset by an award, if any, made to the landlord by counterclaim for damages caused by the tenant to the property, and the landlord has the burden of proving the claim by a preponderance of the evidence. *Turner v. Lyon*, 189 Colo. 234, 539 P.2d 1241 (1975).

Treble damages action not "frivolous" merely because landlord wins. A treble damages action under subsection (3)(a) cannot be characterized as "frivolous" or "groundless", as used in §13-17-101(3), merely because the landlord prevails on the merits of his defense. *Torres v. Portillos*, 638 P.2d 274 (Colo. 1981).

Prospective renter was not entitled to treble damages pursuant to this section since deposit paid for rental of condominium unit was not a security deposit but was instead prepayment of the entire rent for said unit. *Mtn. Queen Condo. Ass'n v. Haan*, 753 P.2d 1234 (Colo. 1988).

Statute of limitations. The treble damages provision of this section, being penal in nature, is governed by the one-year statute of limitations; however, the recovery of the actual security deposit and the award of attorneys' fees, being remedial in nature, are limited by the six-year statute of limitations. *Carlson v. McCoy*, 193 Colo. 391, 566 P.2d 1073 (1977).

§ 38-12-104. Return of security deposit - hazardous condition - gas appliance

(1) Anytime service personnel from any organization providing gas service to a residential building become aware of any hazardous condition of a gas appliance, piping, or other gas equipment, such personnel shall inform the customer of record at the affected address in writing of the hazardous condition and take any further action provided for by the policies of such personnel's employer. Such written notification shall state the potential nature of the hazard as a fire hazard or a hazard to life, health, property, or public welfare and shall explain the possible cause of the hazard.

(2) If the resident of the residential building is a tenant, such tenant shall immediately inform the landlord of the property or the landlord's agent in writing of the existence of the hazard.

(3) The landlord shall then have seventy-two hours excluding a Saturday, Sunday, or a legal holiday after the actual receipt of the written notice of the hazardous condition to have the hazardous condition repaired by a professional. "Professional" for the purposes of this section means a person authorized by the state of Colorado or by a county or municipal government through license or certificate where such government authorization is required. Where no person with such government authorization is available, and where there are no local requirements for government authorization, a person who is otherwise qualified and who possesses insurance with a minimum of one hundred thousand dollars public liability and property damage coverage shall be deemed a professional for purposes of this section. Proof of such repairs shall be forwarded to the landlord or the landlord's agent. Such proof may also be used as an affirmative defense in any action to recover the security deposit, as provided for in this section.

(4) If the landlord does not have the repairs made within seventy-two hours excluding a Saturday, Sunday, or a legal holiday, and the condition of the building remains hazardous, the tenant may opt to vacate the premises. After the tenant vacates the premises, the lease or other rental agreement between the landlord and tenant becomes null and void, all rights and future obligations between the landlord and tenant pursuant to the lease or other rental agreement terminate, and the tenant may demand the immediate return of all or any portion of the security deposit held by the landlord to which the tenant is entitled. The landlord shall have seventy-two hours following the tenant's vacation of the premises to deliver to the tenant all of, or the appropriate portion of, the security deposit plus any rent rebate owed to the tenant for rent paid by the tenant for the period of time after the tenant has vacated. If the seventy-second hour falls on a Saturday, Sunday, or legal holiday, the security deposit must be delivered by noon on the next

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day that is not a Saturday, Sunday, or legal holiday. The tenant shall provide the landlord with a correct forwarding address. No security deposit shall be retained to cover normal wear and tear. In the event that actual cause exists for retaining any portion of the security deposit, the landlord shall provide the tenant with a written statement listing the exact reasons for the retention of any portion of the security deposit. When the statement is delivered, it shall be accompanied by payment of the difference between any sum deposited and the amount retained. The landlord is deemed to have complied with this section by mailing said statement and any payments required by this section to the forwarding address of the tenant. Nothing in this section shall preclude the landlord from withholding the security deposit for nonpayment of rent or for nonpayment of utility charges, repair work, or cleaning contracted for by the tenant. If the tenant does not receive the entire security deposit or a portion of the security deposit together with a written statement listing the exact reasons for the retention of any portion of the security deposit within the time period provided for in this section, the retention of the security deposit shall be deemed willful and wrongful and, notwithstanding the provisions of section 38-12-103(3), shall entitle the tenant to twice the amount of the security deposit and to reasonable attorney fees.

(L. 91: Entire section added, p. 1691, § 1, effective July 1.)

ANNOTATION

Section does not abrogate common law remedy of constructive eviction for hazardous condition caused by an unsafe gas appliance. Copeland v. Lincoln, 166 P.3d 245 (Colo. App. 2007).