

Landlord & Tenant Obligations

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Duty to Deliver Possession

One of the primary obligations of a lessor to his lessee is to deliver the thing leased.¹

Landlord is under a duty to deliver actual possession of the premises to the tenant when the term of the lease begins. Failure to do so puts the landlord in breach and subject to damages. Tenant may recover costs to find housing during the term she cannot inhabit the premises and any business losses that may have occurred because of the holdover tenant.

This is a very simple rule, the landlord must make the property available when the agreement says it will be available. But many things can happen to intervene in that simple process.

1. The previous tenant gives proper notice he is vacating. The Landlord finds a new tenant and enters into a lease that commences right after the previous tenant vacates. The previous tenant, 2 days before they are to vacate, announces that their planned next residence fell through and they now have no place to go. The Landlord cannot commence eviction proceedings until the end of the term, but nonetheless cannot deliver possession on time.
2. A property is unoccupied, and 1 week before the new tenant is to move in, a vermin infestation is discovered. The exterminator says it will take 2 weeks to fix. The tenant could move in, but won't have quite enjoyment for the first week.

Under general contract law, impossibility of performance is an excuse. If the property is destroyed in a fire, the landlord will not have to deliver possession. If the landlord and the tenant agree to lease property that, without the knowledge of either, does not in fact exist, the landlord will be excused from the duty to deliver possession. But where the failure to deliver possession

¹ Moore v. Cameron Parish School Bd., 511 So.2d 62, 64 (La.App. 3 Cir. 1987)

is from a foreseeable circumstance, the defense of impossibility is not available.² However neither of the above examples is a case of impossibility.

The landlord has a duty to deliver possession to the tenant, and must give the tenant what he needs to gain access to the property (e.g. keys or garage door opener). The landlord must also not interfere with the tenant taking possession of the real property. If the landlord cannot or will not deliver possession, the tenant may rescind the lease or hold the landlord to the lease when the property becomes available. And in both cases, the tenant may be entitled to damages for the failure to deliver the property.

The landlord can be subjected to paying damages for breach of contract, in addition to expenses incurred by the tenant who reasonably relied on the promise of the availability of the property. The landlord must also return any deposits and prepaid rent.

As a practical matter, in most residential real estate situations, and in some smaller commercial ones, the small amount of damages to the tenant do not make it practical to seek redress through litigation. Thus the landlord and tenant may seek some reasonable accommodation. The landlord could offer to rent another property (e.g. another unit at an apartment complex, another house of similar size and rent, etc.). The parties could mutually agree to rescind the lease agreement. If the property will become available within a reasonable amount of time, a rent abatement could be worked out.

Duty to Repair

Before the Nevada Legislature stepped in, there was no implied duty for a landlord to repair the leased premises. Such a duty could arise from a contract or lease, but there was no

² Shop 'N Save Warehouse Foods, Inc. v. Soffer, 918 S.W.2d 851, 863 (Mo.App. E.D. 1996) (“Here, the parties could foresee the litigation over the radius restriction and mortgagee exclusion and the possibility of Shop 'N Save being prohibited from operating a grocery store at 650 Carlyle. The parties could anticipate the outcome and, indeed, sought advice from counsel on the matter. True, neither party wanted the result that was eventually reached, however, the doctrine of commercial frustration does not provide Soffer with a means to avoid a bad result.”)

automatic duty to repair.³ The Nevada Legislature changed that beginning in 1977.

The landlord now has a duty to repair, or in Nevada, a duty to keep the premises habitable.⁴ Inhabitability is a favorite defense raised by tenants in eviction proceedings. There will be few tenants who will claim they have paid their rent, or attempted to, and even fewer who will know to raise procedural defect defenses. The majority of the defenses raised will be habitability defenses.

The Habitability defense only apply to landlords who come under the requirements of Chapter 118A of the Nevada Revised Statutes.⁵ This defense is statutory, and to use it, the Tenant must show that they qualify under all of the statutory requirements.

Habitability defenses, as the name implies, have to do with living conditions. Certain conditions, if existing and remaining uncorrected, entitle the tenant to either remedy the

³ *Ripps v. Kline*, 70 Nev. 510, 515, 275 P.2d 381, 383 (1954) (“We look, then, for a duty owed by the lessor. As we have noted, the lease places upon her no duty of repair. She was not, then, obligated by contract to act to prevent the premises from falling into a ruinous condition.”)

⁴ NRS 118A.280. Delivery of possession of premises. At the commencement of the rental term the landlord shall deliver possession of the premises to the tenant in compliance with the rental agreement and in a habitable condition as provided in this chapter.

⁵ NRS 118A.180 Applicability.

1. Except as provided in subsection 2, this chapter applies to, regulates and determines rights, obligations and remedies under a rental agreement, wherever made, for a dwelling unit or premises located within this state.

2. This chapter does not apply to:

- (a) A rental agreement subject to the provisions of chapter 118B of NRS;
- (b) Low-rent housing programs operated by public housing authorities and established pursuant to the United States Housing Act of 1937, 42 U.S.C. §§ 1437 et seq.;
- (c) A person who owns and personally manages four or fewer dwelling units, except with respect to the provisions of NRS 118A.200, 118A.300, 118A.325, 118A.340, 118A.380, 118A.450 and 118A.460;
- (d) Residence in an institution, public or private, incident to detention or the provision of medical, geriatric, educational, counseling, religious or similar service;
- (e) Occupancy under a contract of sale of a dwelling unit or the property of which it is a part, if the occupant is the purchaser or his successor in interest;
- (f) Occupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization;
- (g) Occupancy in a hotel or motel for less than 30 consecutive days unless the occupant clearly manifests an intent to remain for a longer continuous period;
- (h) Occupancy by an employee of a landlord whose right to occupancy is solely conditional upon employment in or about the premises;
- (i) Occupancy by an owner of a condominium unit or by a holder of a proprietary lease in a cooperative apartment; or
- (j) Occupancy under a rental agreement covering premises used by the occupant primarily for agricultural purposes.

conditions themselves and deduct rent, or to terminate the lease and vacate. By statute, a dwelling unit is inhabitable if it substantially lacks:

- a Effective waterproofing and weather protection of the roof and exterior walls, including windows and doors.
- b Plumbing facilities which conformed to applicable law when installed and which are maintained in good working order.
- c A water supply approved under applicable law, which is:
 - 1 Under the control of the tenant or landlord and is capable of producing hot and cold running water;
 - 2 Furnished to appropriate fixtures; and
 - 3 Connected to a sewage disposal system approved under applicable law and maintained in good working order to the extent that the system can be controlled by the landlord.
- d Adequate heating facilities which conformed to applicable law when installed and are maintained in good working order.
- e Electrical lighting, outlets, wiring and electrical equipment which conformed to applicable law when installed and are maintained in good working order.
- f An adequate number of appropriate receptacles for garbage and rubbish in clean condition and good repair at the commencement of the tenancy. The landlord shall arrange for the removal of garbage and rubbish from the premises unless the parties by written agreement provide otherwise.
- g Building, grounds, appurtenances and all other areas under the landlord's control at the time of the commencement of the tenancy in every part clean, sanitary and reasonably free from all accumulations of debris, filth, rubbish, garbage, rodents, insects and vermin.
- h Floors, walls, ceilings, stairways and railings maintained in good repair.
- i Ventilating, air-conditioning and other facilities and appliances, including elevators, maintained in good repair if supplied or required to be supplied by the landlord.⁶

Please note that no where in the statute does it say that mold is an inhabitable condition.

If one of these conditions exist, the tenant then must follow certain statutorily defined procedures. There are two statutes the tenant may proceed under. The amount of the cost to repair the condition determines which statute applies. If the cost of repair is “\$100 or an amount equal to one month's periodic rent” then the tenant uses NRS § 118A.360,⁷ otherwise, the tenant

⁶ NRS § 118A.290 (1) (2003)

⁷ NRS § 118A.360 Failure of landlord to comply with rental agreement or maintain dwelling unit in habitable condition where cost of compliance less than specified amount.

1. If the landlord fails to comply with the rental agreement or his obligation to maintain the dwelling unit in a

uses NRS § 118A.350.⁸ Both statutes require similar procedures be followed, with the differentiation between them being the results. If the repair is less than one month's rent, the tenant may fix it and deduct rent. If the repair cost is more than one month's rent, the tenant may elect to terminate the lease.

The procedure the tenant must follow is:

1. First, the condition may not have been caused by the tenant

habitable condition as required by this chapter, and the reasonable cost of compliance or repair is less than \$100 or an amount equal to one month's periodic rent, whichever amount is greater, the tenant may recover damages for the breach or notify the landlord of the tenant's intention to correct the condition at the landlord's expense. If the landlord fails to use his best efforts to comply within 14 days after being notified by the tenant in writing or more promptly if conditions require in case of emergency, the tenant may cause the work to be done in a workmanlike manner and after submitting to the landlord an itemized statement, the tenant may deduct from his rent the actual and reasonable cost or the fair or reasonable value of the work, not exceeding the amount specified in this subsection.

2. The landlord may specify in the rental agreement or otherwise that work done under this section and NRS 118A.380 must be performed by a named person or firm or class of persons or firms qualified to do the work and the tenant must comply with the specifications. If the person qualified to do the work is unavailable or unable to perform the repairs the tenant shall use another qualified repairman.

3. A tenant may not repair at the landlord's expense if the condition was caused by the deliberate or negligent act or omission of the tenant, a member of his household or other person on the premises with his consent.

4. The landlord's liability under this section is limited to \$100 or an amount equal to one month's periodic rent, whichever amount is greater, within any 12-month period.

5. A tenant may not proceed under this section unless he has given notice to the landlord that the dwelling is not in a habitable condition as required by this chapter.

⁸ NRS 118A.350 Failure of landlord to comply with rental agreement or maintain dwelling unit in habitable condition.

1. Except as otherwise provided in this chapter, if the landlord fails to comply with the rental agreement or fails to maintain the dwelling unit in a habitable condition as required by this chapter, the tenant shall deliver a written notice to the landlord specifying the acts and omissions constituting the breach and stating that the rental agreement will terminate as provided in this section. If the breach is remediable and the landlord adequately remedies the breach or uses his best efforts to remedy the breach within 14 days after receipt of the notice, the rental agreement does not terminate by reason of the breach. If the landlord fails to remedy the breach or make a reasonable effort to do so within the prescribed time, the tenant may:

(a) Terminate the rental agreement immediately.

(b) Recover actual damages.

(c) Apply to the court for such relief as the court deems proper under the circumstances.

2. The tenant may not terminate for a condition caused by his own deliberate or negligent act or omission or that of a member of his household or other person on the premises with his consent.

3. If the rental agreement is terminated, the landlord shall return all prepaid rent and security recoverable by the tenant under this chapter.

4. A tenant may not proceed under this section unless he has given notice as required by subsection 1, except that the tenant may, without giving that notice, recover damages under paragraph (b) of subsection 1 if the landlord:

(a) Admits to the court that he had knowledge of the condition constituting the breach; or

(b) Has received written notice of that condition from a governmental agency authorized to inspect for violations of building, housing or health codes.

2. The tenant must notify the landlord in writing of the condition and give the landlord 14 days to repair. (Note that time may be shortened “if conditions require in case of emergency.”)
3. If the landlord does not repair the condition then:
 - a. if the repair costs less than one month’s rent, then
 - tenant may have a licensed contractor fix the problem
 - tenant pays the licensed contractor
 - tenant provides proof payment and invoice to Landlord
 - AT THAT POINT, tenant can deduct the amount paid from rent
 - b. if the repair costs more than one month’s rent, then
 - Tenant can terminate the lease

The tenant must follow all of the statutory requirements to assert the defense. The tenant also has the right to seek their damages (in a separate action) if they use the defense or not.

In a summary eviction setting, this defense will stop the hearing and require the summary eviction to be dismissed. Landlords and their attorneys should ensure the judge looks at all of the requirements. A tenant asserting this defense usually is trying to stay and not pay rent, and will allege a repair of less than one month’s rent. Therefore, they must show: 1. written notice, 2. that they hired a licensed contractor and 3. pay the licensed contractor before they may assert the defense. Ensure the judge looks at the entire requirements before she or he makes a ruling on dismissing the hearing.

DUTY TO PROVIDE QUIET ENJOYMENT

The Landlord has a duty to provide quite enjoyment to the tenant. “The covenant of quiet enjoyment generally is interpreted to secure the lessee against the acts or hindrances of the lessor and thus requires that the lessor refrain from voluntarily impairing the character and value of the leased premises.”⁹ This duty is an implied covenant.¹⁰ Courts have interpreted this duty means the tenant is to be protected from serious interference with their tenancy.¹¹

“Minor inconveniences and annoyances are not actionable breaches of the implied

⁹ Ripps v. Kline, 70 Nev. 510, 513, 275 P.2d 381, 382 (1954).

¹⁰ Jablonski v. Casey, 835 N.E.2d 615, 619 (Mass.App.Ct.,2005)

¹¹ Id.

covenant of quiet enjoyment. To be actionable, the landlords act or omission must substantially interfere with a tenants right to use and enjoy the premises for the purposes contemplated by the tenancy.”¹²

However to be liable for breach of this duty, the landlord generally “must have had notice of the condition interfering with the tenant's quiet enjoyment of the premises, and he must have at least acted negligently in not alleviating the condition.”¹³ And landlord who acts to correct defective conditions will not be held liable for breach of the duty to provide quiet enjoyment of the property.

Now this duty does not force the owner to take care of every complaint of the tenant. “A covenant of quiet enjoyment does not enlarge the rights granted to the lessee by the lease. It is simply a promise by the lessor that it will not interfere with the rights granted.”¹⁴ The New Mexico Court of Appeals held that a landlord is not required to control a noisy tenant that bothers his neighboring tenants. The court stated that the landlord has the power to deal with disruptive tenants but may exercise of that power to the owner's discretion. Failure to evict the noisy tenant did not violate the neighboring tenant’s right to quiet enjoyment.¹⁵ Acts of other cotenants do not violate the duty to provide quiet enjoyment.¹⁶

¹² Andrews v. Mobile Aire Estates, 22 Cal.Rptr.3d 832, 839 (Cal.App. 2 Dist. 2005).

¹³ Id.

¹⁴ Trans Pacific Leasing Corp. v. Aero Micronesia, Inc., 26 F.Supp.2d 698, 706 (S.D.N.Y. 1998)

¹⁵ Casa Blanca Mobile Home Park v. Hill, 963 P.2d 542, 547 (N.M.App.,1998)

¹⁶ Kulman v. Sulcer, 107 S.E.2d 674, 677 (Ga.App.1959) (“Nor does the landlord's covenant of quiet enjoyment extend to an undertaking that the lessee will not be disturbed or annoyed by the acts or negligence of a cotenant. The [landlord is] liable, if at all, for their own acts of negligence, and not for the negligence of other tenants.”) *But see however*, Andrews v. Mobile Aire Estates, 22 Cal.Rptr.3d 832, 839 (Cal.App. 2 Dist. 2005) (“The perpetrator of the interference with the tenants quiet enjoyment need not be the landlord personally. There may be an actionable breach where the interference is caused by a neighbor or tenant claiming under the landlord.”)

Additionally, actions by parties other than the landlord are not interference with the quiet enjoyment of the leased premises. “[T]he covenants for quiet possession relate only to acts of the lessor and those acting under him, or of the holder of a better title, and do not extend to the conduct of other persons by which the value or the comfort of the leasehold may be diminished.”¹⁷

Breach of this the duty to provide quiet enjoyment requires showing the landlord “substantially and materially deprived the tenant of the beneficial use and enjoyment of the premises. There must be an actual ouster, either total or partial, or if the eviction is constructive, there must have been an abandonment of the premises by the tenant.”¹⁸ The tenant must lose possession of the property to establish breach.¹⁹

Some examples of breaches of the duty to provide quiet enjoyment are:

1. Litigation by a landlord/lessor which substantially impairs a lessee's possessory interests can constitute a breach of the covenant of quiet enjoyment where such litigation is pursued in bad faith, maliciously, or without probable cause.²⁰
2. Placing “concrete barriers in the leased area for the purpose of defining the northern boundary of the easement, and later stored the barriers in the shared parking lot. It is clear that [the Landlord’s] actions interfered with [the tenant’s] business. The barriers made it difficult for delivery trucks to make deliveries to the restaurant and took up available parking used by the restaurants patrons. The district courts finding that by placing concrete barriers on the leased premises [landlord] breached the covenant of quiet enjoyment was not clearly erroneous.”²¹

Examples of actions that were held not to be breaches:

¹⁷ No. 14 Coal Co. v. Pennsylvania Coal Co., 206 A.2d 57, 58 (PA. 1965) citing Oakford v. Nixon, 35 A. 588.

¹⁸ Jackson v. Westminster House Owners Inc., 806 N.Y.S.2d 495, 495-96 (N.Y.A.D. 1 Dept. 2005) (“[Tenants] did not abandon the premises, and are claiming only to have been ‘evicted’ from the terrace area, due to exterior renovations on the cooperative residential building where they resided. But alterations to leased premises, made with the consent of the tenant, do not amount to an eviction, no matter how extensive or the degree of interference with the tenant's occupancy.”)

¹⁹ Adams v. Woodlands of Nashua, 864 A.2d 322, 324 (N.H. 2005).

²⁰ Kohl v. PNC Bank Nat. Ass'n, 863 A.2d 23, 27 (Pa.Super. 2004).

²¹ Brown v. Johnston, 85 P.3d 422, 432 (Wyo. 2004).

1. Failure of tenant to obtain a certificate of occupancy for their business and the resulting city ordered shut downs were not a breach of the duty to provide quiet enjoyment because tenant remained in full possession of the leased premises at all relevant times.²²
2. The covenant of quiet enjoyment does not extend to the acts of trespassers and wrongdoers.²³
3. Landlord has no duty to prevent criminal acts by third parties.²⁴
4. Failure to disclose prior criminal acts of third parties (the premises had been robbed in the past) does not breach the duty to provide quiet enjoyment.²⁵

It is the Landlord's responsibility to let the tenant use the property for the intended purposes.

Security Deposits

In Nevada "Security" for a residential lease is defined as follows:

1. Any payment, deposit, fee or charge that is to be used for any of the following purposes is "security" and is governed by the provisions of this section and NRS 118A.242 and 118A.244:
 - (a) Remedying any default of the tenant in the payments of rent.
 - (b) Repairing damages to the premises other than normal wear caused by the tenant.
 - (c) Cleaning the dwelling unit.
2. "Security" does not include any payment, deposit or fee to secure an option to purchase the premises.²⁶

In essence, security is any payment other than the first month's rent.

Nevada has statutory limitation and requirements on how much security may be required from a residential tenant.

NRS 118A.242 Security: Limitation on amount or value; duties and liability of landlord; damages; prohibited provisions.

1. The landlord may not demand or receive security, including the last month's rent, whose total amount or value exceeds 3 months' periodic rent.
2. Upon termination of the tenancy by either party for any reason, the landlord may claim of the security only such amounts as are reasonably necessary to remedy any default of the tenant in the payment of rent, to repair damages to the premises caused by the tenant other than normal wear and to pay the reasonable costs of cleaning the

²² Rivera v. JRJ Land Property Corp., 812 N.Y.S.2d 63, 66 (N.Y.A.D. 1 Dept. 2006).

²³ Charlotte Eastland Mall, LLC v. Sole Survivor, Inc., 608 S.E.2d 70, 73 (N.C.App. 2004).

²⁴ Id.

²⁵ Hong v. Estate of Graham, 70 P.3d 647, (Hawai'I 2003).

²⁶ NRS 118A.240 (2005).

- premises. The landlord shall provide the tenant with an itemized written accounting of the disposition of the security and return any remaining portion of the security to the tenant no later than 30 days after the termination of the tenancy by handing it to him personally at the place where the rent is paid, or by mailing it to him at his present address, or if that address is unknown, at the tenant's last known address.
3. If the landlord fails or refuses to return the remainder of a security deposit within 30 days after the end of a tenancy, he is liable to the tenant for damages:
 - (a) In an amount equal to the entire deposit; and
 - (b) For a sum to be fixed by the court of not more than the amount of the entire deposit.
 4. In determining the sum, if any, to be awarded under paragraph (b) of subsection 3, the court shall consider:
 - (a) Whether the landlord acted in good faith;
 - (b) The course of conduct between the landlord and the tenant; and
 - (c) The degree of harm to the tenant caused by the landlord's conduct.
 5. Except for an agreement which provides for a nonrefundable charge for cleaning, in a reasonable amount, no rental agreement may contain any provision characterizing any security under this section as nonrefundable or any provision waiving or modifying a tenant's rights under this section. Any such provision is void as contrary to public policy.
 6. The claim of a tenant to security to which he is entitled under this chapter takes precedence over the claim of any creditor of the landlord.

Thus, a landlord must provide a statement of accounting of security within 30 days of the termination of the tenancy. This accounting must return any unused portion of the security. Failure to do so may result in double damages against the landlord. Additionally, except for a cleaning deposit, no security can be deemed non-refundable.

Finally, should the landlord seek damages through small claims court or the state court system? That is a question of how much is owed. For most residential leases, the amount owed to the landlord will not be enough to justify the cost of litigation in state court. If the landlord chooses to pursue the tenant for amount owed, the landlord should look to small claims court. At the time of this writing, small claims court has a jurisdictional limit of \$5000.00. Please also note that when seeking to enforce any judgment from small claims court or justice court, an abstract of judgment from the justice court is required to record the judgment against real property owned by the debtor.²⁷

²⁷ A judgment rendered in a Justice Court creates no lien upon any lands of the defendant, unless an abstract is recorded in the office of the county recorder of the county in which the lands are situated. When so recorded and from the time of the recording, the judgment becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in the county, owned by him at the time, or which he acquires before the lien expires. The lien continues for 6 years, unless the judgment is previously satisfied. NRS 68.040 (2005).