

Stop the Rent Cycle - I Want to Disembark

NOTE: This article's limited focus is about when rental payments may be withheld. The referenced statutory provisions may contain additional remedies other than the issue of when rent is not paid directly to the landlord.

In Arizona, if you arbitrarily stop paying rent because something is broken, or an essential service is not provided, or the premises are overrun with cockroaches, expect to find yourself evicted. Unless the matter is already in court proceedings, there is no provision for putting rent into an escrow or court account pending resolution of a conflict. Before you disembark, you had better disabuse yourself of the misconception that your landlord's misdeeds automatically justify your withholding of the rent.

A.R.S. § 33-1368(B) gets right to the point: "A tenant may not withhold rent for any reason not authorized by this chapter."

So, when can a tenant legally withhold the rent? Read on for summaries, but be sure to examine the actual statutes for details on how to proceed. Never take anybody else's word for what the statutes require - including my interpretation - because invariably much gets lost in translation.

A. THE MATTER HAS NOT YET PROGRESSED TO LITIGATION.

Security deposit recovery is permitted under each provision below when the lease is terminated.

1. Non-Possession.

When you, a tenant, are prevented from actually moving into the promised rental premises, it is defined as a failure to deliver physical possession. A.R.S. § 33-1362 provides that rent abates in such circumstances, which may include a refusal to turn over keys, or that someone else is still living in the pledged dwelling. Another example might be that you have keys, but they don't unlock the doors. However, once possession is delivered, then rent would start becoming due.

In order to trigger permanent freedom from rental liability, a tenant whose premises have not been physically delivered must give the landlord at least five days' written notice to terminate. Once that has occurred, all prepaid rent and security deposits must be returned to the tenant. A.R.S. § 33-1362 also contemplates receipt of physical possession despite noncompliance conditions contrary to A.R.S. § 33-1324. This scenario is construed as the failure to provide constructive possession, which may provide a basis for remedies under A.R.S. § 33-1361, but does not permit rent abatement.

It gets better. If you can demonstrate that the landlord's failure to deliver possession (physical or constructive) is willful and not in good faith, then you can recover damages from the landlord, in an amount of either twice the monthly rent, or twice your actual damages, whichever is more.

2. Self-help.

Under A.R.S. § 33-1363, upon having provided the requisite notice to the landlord, a tenant may conduct a small repair to the premises. This is only for actual repairs, using a licensed contractor, and is limited to either one-half of the monthly rent, or \$299.99, whichever is the greater amount. It is a one-time deal during a given month, requiring new notice each month.

In general terms, you pay for the repair up-front, and deduct its cost out of the next rental payment.

There are numerous restrictions regarding exercise of this clause, including that the notice provides the landlord ten days to first remedy the matter (except for emergencies), the repair is conducted by a licensed contractor, an itemized statement is presented to the landlord, and a waiver of lien is presented to the landlord.

Arizona Tenants Advocates provides a separate article instructing how to proceed with a self-help repair, entitled "Making Repairs to Your Dwelling." Please review for details.

3. No Essential Services.

The Arizona Residential Landlord & Tenant Act does not take kindly to landlords who deprive tenants of essential services. There are several sections that mandate provision of essential services, from different perspectives. Of these, only A.R.S. § 33-1364 permits forms of withholding rent.

Under A.R.S. § 33-1324(A)(6) a landlord must provide water, hot water, seasonal heat and cooling except when such utilities are exclusively controlled by the tenant and directly supplied through by a public utility provider. A.R.S. § 33-1361(A) mandates promised utility services by way of defining a material falsification to include the misrepresentation regarding the provision of utility services and the designation of the party responsible for utility services.

Under A.R.S. § 33-1364(B), a landlord shall provide all utilities and services specified in the lease agreement, and may not terminate such services except to make repairs. A landlord may not transfer responsibility for such utility services to the tenant without the tenant's written consent.

When a landlord does not provide essential services, including running water, gas or electrical service, reasonable amount of hot water or heat, air-conditioning or cooling, or other essential services, a tenant has numerous options under A.R.S. § 33-1364. After "reasonable notice," a tenant may:

- * Procure the service himself during the period that the landlord fails to provide the service, deducting the cost from the next month's rent;
- * If the service is cut off due to the landlord's nonpayment to the utility service provider, and there is not a separate meter for each tenant in the apartment community, then the tenant may, by himself or together with other tenants, arrange to pay the landlord's utility bill and deduct the ongoing costs out of the rent until the landlord provides "adequate assurances to the tenant that the above utility services will be maintained;"
- * Under A.R.S. § 33-1364(A)(3), temporarily move out to substitute housing during the period of the noncompliance, and during that period be excused from paying rent on a pro-rata basis. The amount would be deducted from the next monthly payment. How do you calculate that? Let's say you move out for seven days in July due to no cooling, so the calculation would be seven out of (divided by) 31 days as a proportion of (multiplied by) the periodic monthly rent. If you moved into a relative's house and had no expenses, this would equate to a deduction of rent at no cost to you. However, if you had to move to, for example, a motel, and the cost exceeded your daily rent, then the statute allows you to deduct up to 25% more than the daily rent, so long as you can deliver proof of payment for such substitute housing.

It gets better. Under A.R.S. § 33-1364(F), if you can demonstrate that the landlord's noncompliance is deliberate, not only are you entitled to being excused from paying pro-rated rent, but also you may recover your actual and reasonable cost of the substitute housing, up to the amount of your monthly rent. However, this would likely entail litigation, because it makes no sense to deduct from what you are excused from paying in the first place, although some attorneys might argue that it could be deducted from future rents. I am not sure.

NOTE: Some caveats to A.R.S. § 33-1364. If you choose to exercise any of your rights therein, you may not simultaneously exercise your rights under A.R.S. § 33-1361 (termination, damages other than permitted under A.R.S. § 33-1364, and injunctive relief) or A.R.S. § 33-1363 (self-help repair). Also, the exercise of your rights under A.R.S. § 33-1364 does not include the right to repair. So, for example, you can obtain the service by renting a water heater, but you may not, under A.R.S. § 33-1364, repair the existing water heater. Also, forget it if you, the tenant, caused the condition by your acts, negligence or omission.

4. Fire or Casualty Damage

A.R.S. § 33-1366 is a well-defined, but liberal, clause. It includes fires, floods and other circumstances (e.g. a tree falls into your dwelling) that damage or destroy the premises "to an extent that enjoyment of the dwelling unit is substantially impaired." Whether or not the landlord directly caused the condition, or indirectly caused the condition by neglect, or the situation just happened. . . none of this matters, so long as you, the tenant, did not cause the condition.

The statute provides two remedy options. The first is to totally vacate and terminate the lease, having no further liability for rent. The other is to vacate only the part of the premises that is damaged, paying a reduced rent. Yet, Jack had better be pretty quick and nimble jumping over this candlestick. And don't neglect to promptly document with dated photographs and/or video, and collect evidence (e.g. sewage samples). You may need those later, when challenged, to substantiate your assertions.

People ask, so take my opinion for what it is worth. Mold conditions do not constitute a casualty.

Alternative 1: To Vacate and Terminate, Paying No Rent

If you want to not pay the rent at all, and thereupon terminate the lease, you must immediately vacate. What does "immediate" mean? My experience is that you must personally relocate to spend overnights somewhere else. Then, you must make every effort to move your personal property out of the damaged premises as quickly as possible, whether you find a new residence or merely rent a storage locker for your property. Finally, you must give notice of termination within fourteen calendar days.

If you do all of this properly, you can make the case under A.R.S. § 33-1366 that the lease agreement terminated on the date you actually vacated, and you are relieved of rental payment from that time.

Alternative 2: To Partially Vacate and Not Terminate, Paying a Reduced Rent

Okay, so what if the premises are damaged, but you want to stay? In that case, under A.R.S. § 33-1366 you can vacate the part of your dwelling that is made unusable by the casualty, and your liability for rent is "reduced in proportion to the diminution in the fair rental value of the dwelling unit." As with termination, accounting for the reduced apportionment is calculated as of the date the tenant vacates the part of the dwelling unit.

There are two ways one might calculate this. First, on a square footage basis. And second, on an equivalency basis with rents for a dwelling that lacks the facilities of which you are deprived. Whichever method you choose, you had better be prepared to objectively substantiate your determination.

B. OTHER CIRCUMSTANCES

Proceed with caution on the examples below. You may find yourself with a battle on your hands, and an unsympathetic justice of the peace who does not follow the law.

* A tenant may have overpaid rent or other charges to the landlord, and be able to claim the excess as an offset against rent as it comes due. Make sure you present to the landlord a clear accounting to document what you should have paid, what you actually paid, and how the excess is applied.

* A landlord may have charged a security deposit exceeding what is statutorily permitted (see A.R.S. § 33-1321). Upon demand for return by the tenant, should the landlord persist in wrongful withholding, the tenant might be able to use the excess paid as an offset against rent as it comes due.

* A landlord has charged a deposit that is clearly not in conformance with the Arizona Residential Landlord & Tenant Act. For example, a fee for refurbishing. A tenant may be within his rights to demand its return and, upon the landlord's refusal, to use it as an offset against rent as it comes due.

* A tenant may use the prepaid final month's rent to pay for the final month of rent. Now, I have had one attorney tell me that some judges have construed the prepaid last month of rent to not be what it says, but rather to be a deposit held as security against payment of the final month of rent. To me, not only does that sound preposterous, but also it recasts the prepaid final rent to be a disguised security deposit, which, when added to deposits already paid, may well exceed the amount of security permissible. Nevertheless, take this as a warning.

C. BY AGREEMENT

The landlord may authorize you to withhold rent for various reasons. Perhaps some appliance failed, or perhaps you did some work for the landlord. If such is the case, be sure to get a signed agreement in writing. If the landlord is unwilling to commit his words to paper, then you can anticipate he will not honor the agreement, and you can expect the worst.

D. THE MATTER HAS PROGRESSED TO LITIGATION.

Under A.R.S. § 33-1365, if you are being evicted for rent nonpayment or relating to rent, and you have made a counterclaim against the landlord, after notice and hearing the court may order you to pay into the court whatever amount of the rent is not at dispute. The court may also order you to pay the subsequent monthly periodic rent to the court, or a portion of the monthly rent as determined by the court.

CONCLUSION

Only withhold your rent if you have followed the procedures set forth in the statutes identified above. Never withhold rent as a knee-jerk reaction to the landlord's violations.

Rather, research and understand your rights, and then execute them with a predetermined plan. Make sure all notices are delivered in a timely, irrefutable manner. Certified mail may suffice, but if it is an urgent situation I recommend using a process server. Although it will cost you more, a process server is an officer of the court whose attestation of delivery will withhold challenge.

Assemble documentation to substantiate your positions. Keep your documentation, or at least copies, off-site, because landlords have been known to sneak into dwellings and steal documents.

Ready yourself for a battle. If you do not want a battle, then either be prepared to suffer, or perhaps you should contemplate terminating the lease. While the Arizona Residential Landlord & Tenant Act has several provisions for tenants to terminate their leases based on landlord violations, we have a specialty program to assist with this. However, it can be complicated and quite labor intensive, so we must charge a fee. Give us a call, if you are interested.

This article was written because so many tenants call our office to enquire about not paying rent. They are pissed at their landlords, and while we are sympathetic, it is very time consuming to go through all of this each time. The information provided above does not constitute recommendations on what to do. Understand that I am not an attorney and cannot give you legal advice, but can identify your statutory options along with these general explanations. You must take responsibility for your choices, and the consequences. If you do want legal advice, you may want to check out the attorneys experienced in landlord-tenant law, who are listed in the Links & Resources section of our website, www.arizonatenants.com.

Arizona is very much a landlord state. Once you end up in court, expect facts and morality to take a back seat to legal stratagems and judicial bias. As a tenant, you are at a disadvantage.