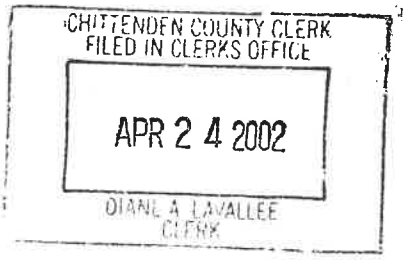
STATE OF VERMONT
CHITTENDEN COUNTY, SS.

CHITTENDEN SUPERIOR COURT
DOCKET NO. S0340-01CnC




PHILIP AARON, Trustee of the Keith S. Aaron Hickok Place Trust dated October 30th, 2000

vs.

JORDAN STERN, PAMELA AISENBREY, WILLIAM FLANNERY, JASON LIEBERMAN, CHRISTOPHER a/k/a Christopher Doe

## FINDINGS AND CONCLUSIONS

This matter came before the Court for a final hearing on the merits on February 19, 27, and 28, 2002. Plaintiffs were represented by Stuart M. Bennett, Esquire. Defendants were represented by Robert S. Behrens, Esquire.

This is a landlord/tenant case in which tenancy under a one-year residential lease was terminated early, and the tenants vacated the premises. The Plaintiff-Landlord seeks a judgment for unpaid rent, damages, and attorney's fees. Defendant-Tenants have raised a defense of breach of the warranty of habitability, and counterclaimed for return of rent previously paid, return of their security deposit, and attorneys' fees.

## FINDINGS OF FACT

The property at issue is a house located at 23 Hickok Place in Burlington. Until 1998 it was the long time family home of the Sorrell family whose members were actively involved in public life in Burlington. It is located in a residential area of Burlington conveniently near the University of Vermont campus. Many properties in the neighborhood are now used for student rental housing.

In January of 1999, the property was purchased by Keith S. Aaron, a young man who, together with his father, Philip Aaron of New York City, owned rental properties in Burlington. Keith Aaron planned to move in, live there for a period while preparing it for rental, and then rent the property, as he had done with other properties he and his father owned. Keith Aaron arranged with contractor Paul Low for some minor repairs to be made, which were done before he moved in. Keith Aaron resided in the house as his primary residence from February 1999 until the end of May 1999. While he was there, he hired contractor Matthew Cohen to make further minor repairs. He kept a dog in the home. He managed this and other properties that he and/or his father owned in the area. While living there, he held parties in the house.

In the Spring of 1999, Keith Aaron leased the property to a group of students. They signed a one year lease effective June 1, 1999. Some of the students moved in that day; others arrived later. As of June 1, 1999, the premises were reasonably neat and clean, with some exceptions: there were dog feces in the attic, piles of clothes in the basement, and furniture of Keith Aaron left in the garage.

The tenants lived in the property for one year, occupying the premises in a manner that could reasonably be expected of college students. They cleaned periodically, but did not maintain a high level of neatness. Keith Aaron managed the property throughout the tenancy. The house was not new and showed the wear and tear of many years of use by previous occupants and Keith Aaron. The garbage disposal did not work well. On the second floor, at the top of the stairs, there was a hole in the wall. The most serious visible problem was that the bathroom on the second floor had no shower stall, but only a freestanding bathtub with claw feet with an added showerhead and shower curtains hanging from a rod. Water routinely traveled through the floor to the light fixture in the ceiling in the bedroom below the bathroom. This caused the tenants to experience an electric shock when turning on the light and created a stain on the ceiling. Otherwise, there was nothing particularly eventful about the tenancy. The students had plans to go separate ways at the end of the academic year and thus did not intend to renew the lease, so the property became available to rent for the following year.

In February of 2000, the Defendants signed a lease to rent the property for a period of one year, from June 1, 2000 to May 31, 2001 at a monthly rental of $2,300.00. Like the previous tenants, Defendants are college students. Rentals appropriate for students typically run on a one year cycle starting on June 1st of each year. Not all the Defendants planned to be present for the entire lease year, so they had arranged for at least one other person to occupy the property as a summer subtenant with the permission of Keith Aaron. The full group of tenants under the lease planned to occupy the premises when school started in late August.

Defendant William Flannery and subtenant Susan Blank arrived to take possession of the property on June 1, 2000 pursuant to the lease. When they arrived, some of the prior tenants were still there, and sleeping. They had been given permission by Keith Aaron to stay an extra couple of days, which they did. Keith Aaron had not sought the Defendants' permission, or notified them. Keith Aaron was present on the premises only briefly on June 1st in order to provide new keys. He did not inspect the premises carefully to determine the extent of any damage for which the prior tenants were responsible. Subsequently, he did not return the tenants' security deposits to them within the time provided by law. As he was later asked by each individual tenant for the return of his or her share of the security deposit, he returned that person's share of the funds with no deductions for damages or other obligations.

Susan found the premises not satisfactorily clean and called Keith Aaron. When Keith Aaron returned to the premises a few days after June 1st in response, he was accompanied by a person named Jasmine who was supposed to do cleaning of the property. Rather than cleaning, Jasmine, Keith Aaron, and Susan smoked marijuana. Very little cleaning was done that day.

Prior to or around June 1st, 2000, Keith Aaron assured the Defendants that it was okay to have parties in the premises. The evidence shows that there is a distinction in the student rental market between those properties that are rented as so-called "party houses," and those that are not. Keith Aaron led the Defendants to believe that when he himself had occupied the premises it had been a satisfactory party house.

The condition of the property at the time of the Defendant Flannery's arrival on June 1, together with the manner in which Keith Aaron gave the prior tenants permission to stay a few

extra days without consulting the Defendants reasonably transmitted to the Defendants a message that the Landlord was not particularly demanding in the manner in which he himself treated the property, and that he would tolerate use of the property by the tenants as a so-called party house within the meaning of that term in the local culture.

Shortly after June 1, the Defendants called Keith Aaron to tell him that the condition of the carpets was unsatisfactory. He arranged for the carpets to be steam cleaned. He also arranged for broken windows, left over from the prior tenants, to be repaired, for the locks to be changed, for pest control services, and for maintenance to the outside. The situation with the second floor bathroom continued as it had during the prior tenancy, with water leaking from the bath tub area to the light fixture in the bedroom below. None of the Defendants notified Keith Aaron about this until much later.

After the initial work related to change of tenants, the Defendants had difficulty reaching Keith Aaron. One of the Defendant's parents had a concern about the condition of the premises and contacted the City concerning compliance with housing regulations. On July 14, 2000 the City Housing Inspector wrote a letter to Keith Aaron stating that it was time for a routine inspection of the property to determine compliance with housing regulations. On August 21, 2000, an inspection took place. Housing Inspector Steve Perron discovered many ways in which the property was out of compliance with housing requirements, some of them representing health and safety concerns. Specifically, there was a broken sewer pipe in the cellar which the Housing Inspector considered to be a health hazard because of the possibility of fire igniting from gas and oil in the public sewer system. In addition, there was a broken handrail which represents a safety hazard in the event of a need to exit the premises on an emergency basis. The Housing Inspector was not able to inspect the downstairs bedroom under the bathroom because the door was locked at the time of the inspection and the occupant was not present. He therefore did not discover the problem of bathroom water leaking onto the downstairs light fixture.

On August 24, 2000, the City Housing Inspector sent Keith Aaron a letter detailing the violations and requiring them to be repaired within thirty days. Keith Aaron did not act on these matters for several weeks. In the meantime, other developments were taking place. Defendants were having parties at the house, with noise levels sufficient to result in the police being called to the property on July 22, September 2, September 4, and October 15. On September 2, there were many people there partying. When there appeared to be underage drinking going on, the Defendants required minors to leave. After the police had had to return a second time in the same night due to the Defendants' failure to control the noise from the party, one of the Defendants was cited for disorderly conduct in accordance with standard police policy.

The Defendants continued to have trouble making contact with Keith Aaron concerning problems with the property. Despite having received the letter from the City, he was making no effort to repair any of the conditions as required by the City. In late September, as the weather began to get cold, the Tenants found they were unable to turn on the heat, and they were also unable to contact Keith Aaron to get him to do something about the problem. Finally, on September 29, they contacted the City Housing Inspector, who contacted Paul Low (a contractor who had previously done work for the Aarons on this and other properties owned by the Aarons in Burlington), and stated that if heat was not provided to the premises, he would shut down the property that day. Paul Low came to the property and was able to fix the problem and restore heat to the property quickly. When he arrived, he noticed what he considered to be very poor housekeeping habits on the part of Defendants.

On October 3, Steve Perron reinspected the house and found that the problems had not been fixed. On October 6, Keith Aaron left for Florida for a month. Before he left, he made

arrangements for repairs to be made during his absence. Contractor Matthew Cohen worked from October 6 to10 on many items on the list of problems the City required to be fixed. During that same time period, Paul Low performed repairs on other items on the list. All of the problems identified by the Housing Inspector as health and safety problems were fixed, but the problem of water running onto the electric light socket had not been identified by the Housing Inspector, and was not fixed. Other housing Code violations were not yet fixed but did not constitute health and safety violations.

On October 22, 2000, title to the property was conveyed by Keith S. Aaron to Philip Aaron, Trustee of the Keith S. Aaron Hickok Place Trust. On October 30th, all the landlord's rights under the lease with the Defendants were assigned to Philip Aaron as Trustee by a written assignment. Keith Aaron, the beneficiary of the Trust, continued to function as the property manager of the premises.

On November l, 2000 Lieutenant Long of the Burlington Police Department wrote a letter to Keith Aaron notifying him that there had been a continuing problem with noise violations at the premises. In Keith Aaron's absence, Philip Aaron, Keith Aaron's father, became involved in the property. He visited the premises on November 8th, 2000 to walk through it with Paul Low to review further work that Paul Low was to do on the property. During the walk-through, Philip Aaron expressed his displeasure at the condition of the premises, both as managed by his son and as occupied by the tenants.

On November 14, 2000 an attorney on behalf of the landlord Trust wrote a letter to the Defendants terminating their tenancy as of December 20, 2000, citing violation of the lease due to the noise disturbances resulting from the Defendants' parties. At the time of the November 14th letter terminating the tenancy, Defendants' rent was paid up to date. Within the next week, Paul Low was working at the property on remaining repairs required by the City. The Defendants told Paul Low of the condition of the water leak from the second floor bathroom to the first floor light fixture. He instructed them that the situation could be prevented if they were very careful in the way they took showers, ensuring that the shower curtain fully encircled the tub and stayed within the tub. Nothing else was done to prevent water from running into the light fixture.

On December 1, 2000, the Defendants did not pay rent for the month of December, or any portion of it. On December 4, an attorney on behalf of the Defendants notified the Plaintiff's attorney of Defendants' view that the property was in breach of the warranty of habitability. On December 5, Philip Aaron wrote to terminate the lease as of December 20th on grounds of nonpayment of the December rent. The following day, he sent a fax to the Defendants' attorney claiming that the reason the Defendants were vacating was not due to breach of the warranty of habitability, but because of Plaintiff's November letter terminating the tenancy. On December 14, Defendants' attorney wrote to Philip Aaron restating that there were problems with the habitability of the premises, but also assuring him that the tenants planned to vacate on December 20th and would cooperate with finding a replacement tenant with the hope that the issue would not need to be pressed.

The Defendants vacated the premises on December 20. At that time Keith Aaron took photos of the condition of the property. The Defendants left trash and items of furniture behind when they moved out. They had the carpet steamed cleaned (presumably because they had kept their own dog while they lived there). When they left, there were dog feces in the attic, but these had been there from the time that Keith Aaron had lived there, and had not been disturbed. There was a hole on the second floor, in the wall at the top of the stairs, but this had been observed by housing inspector Steve Perron on August 21st and because there was paint in the hole, it

appeared that it had been painted over when the walls were last painted. The walls were not painted during the Defendants' tenancy. Therefore, the Court finds that this hole was not created by the Defendants. The garbage disposal was not working and needed to be replaced, but the garbage disposal had not worked during the period of the prior tenants' lease either. There were two broken windows. On December 21, 2000, Keith Aaron wrote to the Defendants and stated that he was applying the full amount of the security deposit, $2,325.00, to payment of December rent. The Defendants left the premises in roughly the same structural condition in which they entered it on June lst, 2000, except for broken items. They also left behind rubbish, furniture, and other items that had to be removed, and did not leave the premises clean.

Plaintiff claims damages in the amount of $1,199.00 attributable to the Defendants, claiming that these costs were to repair damage above normal wear and tear. The Court has reviewed the bills for this work carefully, and taken into consideration the reasonable time and costs of cleaning and removing rubbish and furniture. The Court is mindful of the extent of renovation, repair, and painting that Plaintiff undertook over a month to upgrade the condition and quality of the premises, and finds that some of the costs of cleaning were related to the condition left by the Defendants, and some were related to renovation work the Plaintiff chose to undertake. Based on the evidence, the Court finds that the following represent the costs of cleaning and trash and furniture removal that the Defendants should have done and did not do when they vacated the premises, and for which Plaintiff paid:

| | |
|---|---|
| Broken windows | 84.00 |
| Broken stove handle | 140.00 |
| Cleaning bathrooms | 100.00 (4 of the 8 hours claimed) |
| Furniture removal & disposal cost | 275.00 |
| Kitchen cleaning | 100.00 (4 of the 8 hours claimed) |
| General household cleaning | 150.00 (6 of the 12 hours claimed) |
| Total | 849.00 |

Plaintiff seeks to hold Defendants responsible for work related to replacing carpeting on the grounds that the Defendants damaged the carpet with cigarette burns and animal urine stains and odors. The evidence showed that the carpet was old, that Keith Aaron had also kept a dog that left messes, that the carpet needed steam cleaning when the Defendants arrived, and that the Defendants had the carpet steam cleaned when they left. The reasonable inference from the evidence is that the carpet needed replacing from wear and tear of others in addition to Defendants, and that this was not a particular damage caused by the Defendants alone.

After the Defendants vacated, Keith Aaron arranged for significant renovations of the premises. Paul Low came and did $10,197.67 worth of work to improve the condition of the property, which resulted in a significant upgrade of its condition. Keith Aaron began advertising that the property would become available to rent, and he also contracted with Preston Property Management to separately advertise the property for rent. Under Preston's agreement with Plaintiff, it would have received financial compensation if it had been able to arrange for a rental.

During the period of December 21 to January 21, the property was undergoing renovations and was not available for rental. It was ready for rental again as of February 1, 2001. At that time it was in a much superior condition to the condition in which it had been on June 1, 2000. It was offered for rent at a monthly rental of $2,500.00. It was not until May 12, 2001 that the Plaintiff signed a lease for the property to be rented as of June 1, 2001, at a rental rate of $2,500.00 per month.

## CONCLUSIONS OF LAW

1. **Plaintiff's claim for unpaid rent.** Plaintiff claims rent for five months, from January 1, 2001 to May 31, 2001, which was the original expiration date of the lease. Defendants claim that because the Plaintiff breached the warranty of habitability, they owe no further rent beyond what they paid, and in fact should receive back some rent previously paid. Assuming the Plaintiff had a valid claim for holding the Tenants responsible for the rental during the remainder of the lease term, until May 31st, 2001 (and ignoring for the moment whether Defendants could defeat the claim with their own claim of termination as of December 31, 2000), whether Plaintiff can obtain a judgment for rent for that period depends on whether Plaintiff has shown that it satisfied its duty to mitigate damages by making reasonable efforts to relet the premises during the lease term. *O'Brien v. Black*, 162 Vt. 448 (1994). For the month of January 2001, the reason the property was off the market was that Plaintiff voluntarily chose to make significant improvements to upgrade its overall quality and condition. Plaintiff did not just make repairs necessitated by Defendants' tenancy, but rather caused it to be off the market for a month while a general upgrade was underway. This had nothing to do with Defendants' conduct as tenants, but was for Plaintiff's benefit. When the property become available for tenancy again as of February 1, 2001, it was a higher quality property at an increased rental price. It would not make sense to hold the Defendants responsible if the Plaintiff's goal was to increase its return from the property, and never made it available for rent at the same rent Defendants paid. Plaintiff has not shown that it satisfied its duty to mitigate, since it cannot show that it was unable to relet the premises at the same rental paid by Defendants, which presumably represented a fair market rate for the premises in the condition the property was in on June 1, 2000. Therefore, Plaintiff's claim for rent for the five months to May 31, 2001 fails based on the Plaintiff's failure to reasonably mitigate damages. While Defendants should be held responsible for the rent if it could not be relet at the same rental value they paid, they should not be held responsible for Plaintiff's failure to rent it in an upgraded condition at a higher rate.

2. **Plaintiff's claim for damages.** Plaintiff is entitled under the terms of the written lease to seek reimbursement from the Defendants for damages over and above normal wear and tear. Plaintiff claims damages of $1,190.00. As stated in the findings, the Court concludes that the damages are $849.00, representing broken windows and stove handle, and the costs Plaintiff incurred in cleaning the premises and removing the Defendants' left-behind furniture, personal property, and junk. These are the amounts that are above and beyond normal wear and tear. While Plaintiff's evidence showed the Defendants to be poor daily housekeepers and to live under conditions that were not particularly neat and clean, the test is the condition and cleanliness of the property when Defendants vacated. The damage costs as determined in the findings of fact reflect the costs under this standard of measurement.

The facts show that when the Defendants arrived, the premises had not been properly cleaned by either the prior tenants or the Plaintiff. That does not excuse the Defendants from their own obligation to cause no damage to the premises, except for normal wear and tear, nor does it relieve them from the obligation to remove all their trash and belongings and leave the premises properly cleaned. The Court holds the Defendants responsible for the costs they imposed on the Plaintiff of absorbing these costs. The fact that the Plaintiff neglected to hold the prior tenants responsible does not relieve these Defendants of their own independent responsibilities under the lease. On the other hand, when Plaintiff decided to upgrade the property, including extensive wall and woodwork repair and painting, it chose to do so as an owner, and cannot shift the extra cost of preparation for an upgrade to the latest tenants.

3. **Defendants' claim for return of previously paid rent.** The findings show that from the time the Tenants rented the premises on June 1st until August 10th, there were some health and safety violations on the property, but the Defendants did not seek to withhold or reduce rent based upon violations of the warranty of habitability. Fortunately, no harm occurred as a consequence of these violations. Defendants had the benefit of the property without being aware of health and safety problems, except for the water leaking into the light fixture. From the period of August 10th until the violations (except for the electricity/fixture problem) were corrected in October, they never sought a rent reduction or withholding based upon habitability problems. They had difficulty contacting Keith Aaron, and there was a significant delay in the repairs required by the Housing Inspector, so that they had reason to be concerned, but they did not withhold rent, and neither did they notify Keith Aaron or anyone of the problem of the water leak from the bathroom affecting the light fixture in the bedroom until after Plaintiff had terminated their lease. Although there was no heat when they tried to turn it on, the heat was turned on the same day the landlord was notified. The Defendants have not shown a factual basis for return of the rent they paid through the month of November.

4. **Defendants' claim for termination for breach of the warranty of habitability**. Defendants claim that they terminated the lease as of the end of December based on breach of the warranty of habitability, and therefore have no liability for any rent due after that. As of mid-November, the Defendants had notified the Plaintiff through his contractor that there was a safety problem on the premises in that water from the upstairs bathroom leaked to the electric light fixture on the first floor and created a safety hazard. This condition was not corrected until after the tenants vacated the premises. The Court agrees that this condition constituted a safety hazard. While such water leakage could be prevented by extreme care, it is unreasonable for a landlord to place on tenants the sole responsibility of preventing the harm by engaging in unrealistically careful conduct in the manner in which they used the bathroom, as showers in an old-fashioned free-standing bathtub are inevitably going to result in water outside the tub.

In addition, there had been other housing code violations affecting health and safety which had not been corrected in a timely manner. The Defendants could not have confidence that Plaintiff would respond to correct the safety hazard at all, much less in any reasonable time. As of December 1, 2000, Plaintiff had done nothing to correct the problem of water running to the light fixture. In determining whether Defendants had a valid basis for terminating the lease as of December 1, 2000, there are two issues: whether tenants may terminate the lease based on the warranty of habitability once a landlord has terminated the tenancy on other grounds; and if so, whether the Defendants actually terminated the lease.

The first issue is whether or not the tenants are entitled to terminate the lease based on breach of warranty of habitability after the landlord has already terminated the lease based on violation of other lease terms. The Court concludes that they may do so. When a landlord does not correct health and safety violations constituting a breach of the warranty of habitability, the tenants are entitled to statutory remedies. The fact that a landlord exercises a right to terminate a tenancy first, entitling the landlord to possession but not relieving the tenants of responsibility for rent during the remainder of the lease term, should not preclude tenants from the opportunity to exercise a statutory right to terminate the lease based on breach of the warranty of habitability where there is a factual basis for such termination. If tenants were prohibited from invoking statutory remedies under these circumstances, landlords might have an incentive to seek preemptive termination of tenancies on flimsy grounds. Therefore, the question is whether, in this case, Defendants had a valid factual basis for the termination and took the necessary steps to

effect a termination.[1]

In December of 2000, there was a condition on the premises–water running into a light fixture--that had continued uncorrected despite notice from the Defendants to the Plaintiff's contractor doing repairs. Moreover, this condition had been in place from prior to the time that the Defendants moved in. It was a visible condition, and would have been seen by the landlord at the time of transfer of possession from the prior tenants to the Defendants. It also would have been seen by the Housing Inspector, but for the absence of the occupant of the bedroom, who had the key.

As of early December, the Tenants had good reason to conclude that the Landlord had no intention of repairing this condition. When they had entered the lease, there were many safety and health violations which were not corrected by the Landlord between August 21st and October 10th, and not until the second inspection by the City Housing Inspector. The Tenants had had a great deal of difficulty in even making contact with the Landlord, even for problems such as lack of heat. They had notified the contractor doing work of the condition, and nothing had happened. Even if the Landlord was expecting the Tenants to move out by December 20th based upon the Landlord's termination of the tenancy, that does not justify the Landlord failing to correct a safety problem once he learned about it in mid-November. Between mid-November and early December, the Landlord did nothing to address the safety problem.

Under 9 V.S.A. §4458, if a tenant gives the landlord actual notice of noncompliance of the landlord's obligations for habitability, and the landlord fails to make repair within a reasonable time, and the noncompliance materially affects health and safety, the tenant has a number of available remedies, including termination of the rental agreement on reasonable notice. The Court concludes that the condition of water running into a light fixture does materially affect safety, and that the facts show that there was a valid basis for termination. It is noted that the remedies are not available if the noncompliance was caused by the negligent or deliberate acts or omissions of the tenant, but in this case, the facts show that the condition was present prior to the Defendants taking possession. The fact that the prior tenants tolerated it, and that the Defendants tolerated it for a period of time, does not excuse the landlord from performance of its responsibilities under the warranty of habitability once notice is given, nor does it preclude the tenants from invoking the statutory remedy. For these reasons, the Court concludes that the Defendants had valid grounds for termination of the lease as of December 2000 when their lawyer raised this issue in a letter to Plaintiff.

Although a valid basis existed, the evidence does not support a conclusion that Defendants actually exercised this right and notified Plaintiff specifically that they were terminating the lease. Defendants' attorney's letters to Philip Aaron in December made vague reference to the Defendants' position that there was a breach of the warranty of habitability, but never actually sought to terminate the lease agreement on those grounds. While the Court has determined that Defendants do not owe Plaintiff rent after December 2000, it is on other grounds, and not because Defendants properly terminated the lease agreement.

5. **Defendants' claim for return of their security deposit.** Defendants seek return of their security deposit of $2,325.00. Plaintiff notified the Defendants after they vacated that their security deposit was being applied toward rent for the month of December. The question is

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[1]This issue may seem moot, as the Court has determined that Plaintiff has not shown that it satisfied its duty to mitigate, but the Court will rule on it as it is the basis on which the Defendants have argued their counterclaim.

therefore whether Defendants are entitled to a reduction in any portion of the December rent. If they are, and if the reduction is greater than the amount the Court has determined the Defendants owe in damages, then the Defendants may be entitled to return of a portion of the security deposit.

When Plaintiff terminated the Defendant's tenancy, the effective date of termination was set at December 20, 2000. It is unlikely that Plaintiff would have been able to mitigate damages by reletting the premises as of December 20, 2001 even if it had done its best. Therefore, it is not unreasonable that Defendants should be charged with payment of the rental for the full month of December, absent other considerations.

As stated above, Defendants have shown a breach of the warranty of habitability due to unsafe condition as of early December of 2000. One of the remedies for breach under 9 V.S.A. §4458 is damages, which can include reduction in the rental value of the premises based on diminished value of the premises because of the violation. The Court concludes that the effective consequence of the failure to remedy the problem of water in the bedroom light fixture was loss of the value of full use of the upstairs bathroom, in order to prevent the condition, or loss of the value of full use of the first floor bedroom, in order to prevent the safety hazard from affecting living conditions. The remainder of the premises were usable, but the loss of either of those rooms represents a loss in use of the premises the Defendants rented from the Plaintiff. To the extent the Defendants continued to use both rooms, the premises were unsafe, and represented a risk to the Defendants. It is the Court's conclusion that loss of either of those rooms represents approximately 10% of the value of the premises, or $232.50. Therefore, Defendants are entitled to a reduction of December rent in that amount, leaving them responsible for December rental of $2,092.50 ($2,325.00 - 232.50 = 2,092.50). The Plaintiff was thus justified in withholding $2092.50 of the $2,325.00 security deposit.

As set forth above, the Court has concluded that the Plaintiff is entitled to damages of $849.00. Thus, the Defendants are not entitled to a return of any of their security deposit, and owe Plaintiff a net payment of $616.50 ($849.00 - 232.50 credit from balance of security deposit = $616.50).

6. **Attorneys fees.** Both parties seek attorneys' fees. Plaintiff claims fees based on the lease, and Defendants claim attorneys' fees based on statute.

> Paragraph 5 of the lease states as follows:
> If any rent owing under this lease is collected by or through an attorney at law, Lessee agrees to pay reasonable attorney's fee. If the Lessee shall withhold rent as a result of failure of the Lessor to comply with the terms and conditions of this Lease, the Lessee shall not be obligated to pay attorney's fees if the Lessor shall bring suit to recover the rent.

Plaintiff has not succeeded on its claim for unpaid rent. All rent was paid through November, and the Plaintiff applied the security deposit to the December rent on December 21, 2000. The Court has determined that no rent is owed for the period beginning January 1, 2001. Plaintiff has succeeded on its claim for damages, which otherwise would have been payable out of the security deposit, leaving Plaintiff obliged to sue for $232.50 in unpaid rent, which could have been accomplished in Small Claims Court at minimal cost. The amount of attorneys' fees attributable to this small portion of the claim would not be significant.

Attorneys' fees are among the remedies in 9 V.S.A.§4458 available to tenants for breach

of the warranty of habitability when noncompliance continues. In this case, while the breach of the warranty continued unremedied, it affected only a portion of the premises; all but one room in the house was able to be used safely. Defendants have not prevailed on their claim for return of rent previously paid, or return of the security deposit. The amount of attorneys' fees attributable to reduction of the December rent by $232.50 is not significant.

Therefore, the Court concludes that neither party is entitled to recovery of attorneys' fees spent in pursuing their claims in this suit.

7. **Summary.** Plaintiff is entitled to net damages of $616.50.

DATED at Burlington this 24th day of April, 2002.

Mary Miles Teachout

Mary Miles Teachout, Superior Judge