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THE TRIAL COURT

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss — Hampden Division

No. 88-SP-5595-S — Housing Court Department

DANIEL AND BARBARA BERNASHE,
Plaintiffs

v.

MARK COMTOIS,
Defendant

FINDINGS, RULINGS, AND ORDER ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

1. In this summary process case based upon a "for cause" termination notice by which the plaintiffs (landlords) seek to terminate the federally subsidized Section 8 tenancy of the defendant (tenant), the tenant moves for partial summary judgment on each of his four counterclaims. The first counterclaim alleges that a tenancy-at-will agreement executed by the parties before they entered into the Section 8 lease contains numerous violations of G.L. c. 93A. The second and third counterclaims allege that provisions of the tenancy-at-will agreement violate the security deposit statute, G.L. c. 186, § 15B. The fourth counterclaim alleges that the landlords demanded and received from the tenant unlawful "side payments" in violation of the Section 8 lease and program standards.

2. The facts as to each of the counterclaims are not significantly contested. The first three counterclaims are based upon the language of the tenancy-at-will agreement. As to the fourth counterclaim, the landlords do not dispute the fact of the

"side payments." They argue, rather, that a question of fact is presented as to whether they acted unfairly and deceptively because it was the tenant who proposed the side payments arrangement to avoid eviction. For purposes of this motion, the court must accept this allegation.

3. On the fourth counterclaim, the court must also determine whether a factual issue is raised as to the tenant's entitlement to multiple damages either because the landlords' conduct was knowing or willful and/or because the landlords refused to grant relief upon demand in bad faith with knowledge or reason to know that the act or practice complained of violated c. 93A, § 2.[1]

4. Rental Agreement Clauses Under G.L. c. 93A. The tenancy-at-will agreement, executed by the parties on November 29, 1986 and effective December 1, 1986, is a quilt of illegal clauses. These include provisions that the tenant will forfeit his security deposit if the tenancy lasts less than ninety days, that the tenant pay all court costs and attorney's fees if the landlords bring legal action, regardless of which party prevails,

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[1] G.L. c. 93A, § 9 provides that "[t]he demand requirements of this paragraph shall not apply if the claim is asserted by way of counterclaim or cross-claim... but [the] respondent may otherwise employ the provisions of this section by making a written offer of relief and paying the rejected tender into court as soon as practicable after receiving notice of an action commenced under this section." The tenant's answer and counterclaims were filed on February 22, 1988. It appears uncontested that by letter dated September 28, 1988 the landlords offered to settle the tenant's counterclaims for $600, enclosing a $600 check to their order with the letter. The landlord apparently filed this check with the court (but did not pay any sums into court) on or around October 4, 1988.

that termination notice may be waived at the landlords' option for breach of the agreement, that the landlords may employ a self-help eviction instead of judicial process, that the landlords shall have a lien on the tenant's personal property for unpaid rent, enforceable by a self-help remedy, "regardless of any provision of law," that the landlords may deem any removal of "furniture or baggage" from the unit by the tenant as an abandonment of the premises and may use a self-help remedy, that the tenants waive claims for the landlord's breach of the implied warranty of habitability and tortious injury even if caused by the landlords, and that the tenant is allowed less than the statutory time for rebutting the landlord's statement of condition of the premises (three days) after which it shall be "conclusively presumed" that the landlords' statement is correct. This list, as impressive as it is, is not 100% exhaustive. Several of the unlawful provisions are overlapping and/or redundant.

5. The above tenancy-at-will agreement was in effect during December, 1986 and January, 1987, after which it was superceded by the Section 8 lease. The landlords argue that the execution of the new lease worked a novation, discharging the original lease and releasing each party from liability thereunder. As a matter of contract law, this position is correct. <u>Zlotnick v. McNamara</u>, 301 Mass. 224, 16 N.E.2d 632 (1938); <u>Lipson v. Adelson</u>, 17 Mass. App. Ct. 90, 456 N.E.2d 470 (1983).

6. The statutory violation, however, was accomplished when

the parties executed the tenancy-at-will agreement, and persisted for two months. The execution of the new lease does not obviate the statutory violations even if it discharges contractual obligations. The "injury" under c. 93A, within the meaning of Leardi v. Brown, 394 Mass. 151, 474 N.E.2d 1094 (1985), was an accomplished fact that could not be made to disappear by the signing of a lawful lease. The tenant lived under the tenancy-at-will agreement for two months, a brief but indelible history that cannot be rewritten.

7. Because the tenant claims no injury beyond statutory damages, and because under the rule of Leardi v. Brown, supra, statutory damages are not to be multiplied, the only remaining question on this counterclaim is whether the tenant may recover statutory damages for each illegal lease clause, or only a single statutory award of $25. This was a question explicitly left open by the Leardi court, which noted the trial judge's reluctance to "[pile] on sanctions unthinkingly once an illegality is found." Id. at 164. On the other hand, trial courts have allowed the recovery of statutory damages for each illegal clause found in a lease. E.g., Small v. Gonzalez and Lopez, Hampden Housing Court No. 6412-S-85 (Peck, J. 1985).

8. In the case at bar, the illegal rental agreement clauses fall into six separate categories, as follows: (1) purported waiver of the tenant's rights under the security deposit statute, see G.L. c. 186 § 15B(8); 940 Code Mass.Regs. 3.17(3) & (4); (2) the requirement that the tenant pay the landlord's court costs

and attorney's fees if the landlord brings legal action, regardless of the outcome, see 940 Code Mass.Regs. 3.16(1); (3) purported waiver of termination notices, see G.L. c. 186 § 15A; 940 Code Mass.Regs. 3.17(5) & (6); (4) purported allowance of "self-help" evictions, see G.L. c. 184 § 18; G.L. c. 186 §§ 14 & 15F; G.L. c. 266 § 120; 940 Code Mass.Regs. 3.17(5) & (6)(f); (5) the allowance to the landlord of a lien on the tenant's personal property enforceable by a self-help remedy, see St. 1977, c. 284, § 2 (repealing boarding house lien formerly contained in G.L. c. 255 § 23); Grant v. Barnes, 177 Mass. 111 (1900); 940 Code Mass.Regs. 3.16(1) & (3); and (6) purported waiver of tort and warranty liability, see G.L. c. 111 § 127L; Boston Housing Authority v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); G.L. c. 186 §§ 15 & 19.

9. While the court of course agrees that sanctions should not be piled on unthinkingly once an illegality is found, the law does require the court to review a rental agreement carefully to determine which legally protected rights and interests are invaded by the specific language of the document. Each of the above categories of unlawful clauses invades a separately and distinctly protected legal interest of the tenant. See Ianello v. Court Management Co., 400 Mass. 321, 509 N.E.2d 1 (1987) (where single act invades two separate interests protected by statute, separate damages to be awarded for each interest invaded). For example, the tenant's rights under the security deposit statute are entirely distinct from her rights under the

common law implied warranty of habitability. While sanctions should not be piled on unthinkingly, neither should a party be excused from second and subsequent instances of unlawful conduct that invade distinct legal interests merely because liability has been imposed for the first instance. An upside-down rule that a dog has to pay for the first bite but gets the others for free would be subversive of the deterrent effect that statutory damages under c. 93A are designed to provide. And from a fairness perspective, it makes no sense to treat in the same category a landlord who makes one error in a lease and a landlord who uses the overwhelmingly unfair and unconscionable document in the case at bar. As the punishment should fit the crime, the sanction should fit the conduct.

10. Consequently, the court concludes that a court faced with a lease or rental agreement containing illegal clauses should determine which legal interests of the tenant those clauses invade, and, in the absence of greater actual damages, award statutory damages for each separate legal interest that is invaded. On the other hand, damages should not be awarded twice if, for example, two separate lease clauses overlap and invade the same interest, such as the right to be protected against "self-help" evictions. Applying this reasoning to the case at bar, the court concludes that the rental agreement contains six separate violations of G.L. c. 93A. Therefore, the tenant's motion for summary judgment, in the amount of $150, is allowed as to his first counterclaim.

11. Rental Agreement Clauses Under G.L. c. 186 § 15B. Paragraph #4 of the rental agreement provides in part that "Tenant also agrees that Security Dep. will be forfeited if his or her term of tenancy is ninety days or less." This collides directly with the provision of G.L. c. 186 § 15B(4), which provides that the landlord must return the tenant's security deposit within thirty days after the termination of occupancy under a tenancy at will, except for specified deductions if made in conformity with the statute. Cf. c. 186 § 15B(9) (statute inapplicable to tenancy of one hundred days or less for a vacation or recreational purpose).

12. G.L. c. 186 § 15B(6)(c) provides that

> [t]he lessor shall forfeit his right to retain any portion of the security deposit for any reason... if he... uses in any lease signed by the tenant any provision which conflicts with any provision in this section and attempts to enforce such provision or attempts to obtain from the tenant or prospective tenant a waiver of any provision of this section....

There is no real question that whether or not the landlord attempted to enforce this provision, the rental agreement is intended to act as a waiver of c. 186 § 15B(4).

13. The landlords, however, have established by uncontested affidavit that although they accepted a security deposit in the amount of $460 in connection with the tenancy at will, upon the execution of the Section 8 lease, which permits a security deposit of $271, they returned the difference ($189) to the tenant. This is the same transaction, in substance, that would

have occurred had the landlords written a check to the tenant for $460 and received from him a check for $271. In substance, the tenant has already obtained the remedy he seeks-- the return of the $460 security deposit under the rental agreement which, as the tenant correctly argues, the landlords had no right under the statute to retain. Damages have already been assessed against the landlords for the unlawful clauses relative to the security deposit in the rental agreement. The court concludes that the tenant has already obtained the return of the unlawfully held deposit, and that he is therefore not entitled to a further remedy on account of this violation. See Castenholz v. Caira, 21 Mass. App. Ct. 758, 490 N.E.2d 494 (1986).

14. The same reasoning applies to the other clause in the rental agreement (clause #15) violative of the security deposit statute. The statutory remedy sought here is again the return of the deposit. Consequently, the tenant's motion for summary judgment on his second and third counterclaims is denied and summary judgment is to enter for the landlords on these claims. Mass.R.Civ.P. 56(c).

15. "Side Payments". The Section 8 lease signed by the parties sets the contract rent level at $424 per month. It appears uncontested that from the commencement of the Section 8 tenancy and continuing for eleven months, the tenant made additional "side payments" to the landlords in the amount of $36 per month (so that the total received by the landlords was $460 per month, the rent level under the original tenancy at will

agreement). The total of payments made and received is $396.

16. As noted at the outset, the court must accept as true for purposes of this motion the landlords' allegation that this arrangement was at the tenant's suggestion, and that the landlords "gave in" to the suggestion. In the rent control context the law is clear that charges by landlords above the permissible rent control level constitute a violation of G.L. c. 93A as well as the applicable rent control ordinance. The cases further hold that even where the payments are made and received with the tenant's "full knowledge and complicity" the landlord is liable for the statutory violation. Rita v. Carella, 394 Mass. 822, 477 N.E.2d 1016 (1985); Scofield v. Berman & Sons, 393 Mass. 95, 469 N.E.2d 805 (1984). A showing by the landlord that the tenant made the payments voluntarily will not defeat the tenant's claim for multiple damages under the "willful or knowing" standard.

17. The question presented is whether the situation in the case at bar is analogous to that presented in the above cases. The landlords suggest that it is not because, in contrast to the rent control context, there is no statute or ordinance in this case specifically providing a tenant a remedy for a voluntary overpayment.

18. The governing law, however, does provide such a remedy. The lease itself provides (paragraph #19) that "This LEASE and any attachments represent the entire agreement between Owner and Tenant...." Paragraph 20 states that any changes in the contract

rent for the unit or the tenant's share of the rent shall be stated in a written notice to owner and tenant (from the housing authority). The side payments clearly violated the lease.

19. The Section 8 Existing Housing Program is administered by the United States Department of Housing and Urban Development (HUD), which has promulgated HUD Handbook 7420.7 to establish operating standards for the program. Many courts have viewed HUD issuances such as Handbooks as having the force of law, the leading case being Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969). See also Silva v. East Providence Housing Authority, 565 F.2d 1217 (1st Cir. 1977); Bloom v. Niagra Falls Housing Authority, 430 F. Supp. 1183 (W.D.N.Y. 1977).

20. HUD Handbook 7420.7 divides abuse of the Section 8 Program into three categories: PHA (housing authority) abuse, tenant abuse, and landlord abuse. The collection of side payments is categorized as a landlord abuse of the program and is prohibited, evidently in recognition of the unequal bargaining power of the parties in the housing market. This inequality is evidenced in this case by the choices facing the tenant: make side payments or face eviction. The Handbook requires that the housing authority compel the landlord to reimburse the tenant when a side payments arrangement is brought to its attention. Handbook 7420.7 para. 9-12(c)(1)(a). Thus the governing law in the Section 8 context, as in the rent control context, does indeed provide the tenant a specific remedy for voluntary overpayment, reimbursement of the amounts overpaid. The court

consequently concludes that it is a violation of G.L. c. 93A § 2 for a Section 8 landlord to accept unlawful "side payments" from a tenant in violation of the lease and of the controlling program standards. See 940 Code Mass.Regs. 3.17(1) & (3).

21. Under the reasoning in Rita v. Carella, supra, the overcharge is a willful or knowing violation of the statute. The landlords do not deny the tenant's allegation that the landlords acted knowingly, and that they were familiar with the program standards as a result of their other Section 8 rentals.

22. Assuming that the conduct was not knowing or willful, the landlords could perhaps have limited their liability to single rather than treble damages had they made an offer of settlement in compliance with the statute. But the written offer of relief and tender was made nine months after the tenant's counterclaim was served. As a matter of law, a delay of nine months cannot be viewed as meeting the "as soon as practicable" statutory standard. See n. 1, supra.

23. The court understands how this claim must appear from the landlords' perspective. In their view, they acceded to the tenant's request to "help him out," and now damages are being assessed against them. The law prohibits and penalizes certain conduct regardless of the subjective motivation behind it, in order to achieve policy goals set by the legislature, the appellate courts, or in this case HUD, and it is the responsibility of the courts to enforce that law. This is not to suggest that the goal of holding the parties to the contract they

sign is in any way inappropriate.

24. Consequently, the tenant's motion for summary judgment on his fourth counterclaim is allowed in the amount of $396 x 3 = $1,188.

25. Attorney's Fees. While an award of attorney's fees is mandatory under G.L. c. 93A, the fee claimed by counsel is substantially excessive for the issues involved and the presentation required. The court finds and rules that an attorney's fee of $500 is appropriate for attorney time reasonably necessary for the preparation and presentation of this motion and related papers.

26. Order. For the above reasons, the following ruling is to enter: defendant/tenant's motion for partial summary judgment allowed on First counterclaim and on Fourth counterclaim in the aggregate amount of $1,188 + $150 = $1,338, plus a statutory attorney's fee of $500. Defendant/tenant's motion for partial summary judgment on Second counterclaim and on Third counterclaim denied and partial summary judgment allowed for plaintiff/landlord on these counterclaims. Pursuant to Mass.R.Civ.P. 54(b), judgment is not to enter until all of the claims presented have been adjudicated, unless the court otherwise rules on motion for good cause shown.

So entered this 28th day of April, 1989.

William H. Abrashkin
First Justice