

**THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS**

Berkshire, ss.
No. 08-SP-2658

Western Division
Housing Court Department

MICHAEL DEEP,
Plaintiff

v.

FINDINGS, RULINGS AND ORDER

JEANETTE TATRO,
Defendant

After trial on October 15, 2008, for which both parties appeared, the following findings of fact and rulings of law are to enter:

1. *Findings of Fact.* Michael Deep (“landlord”) is the owner of a rental property located at 6 Lower Linden Street, Apartment 4, Adams (“subject property” or “premises”). Jeanette Tatro (“tenant”) has been a tenant at the subject property for several years. The tenant receives a Section 8 subsidy. Effective July 1, 2007, the parties entered into a written lease agreement, which established a contract rent of \$425 per month. From July 1, 2007 through November 30, 2007, the tenant’s share of the rent was \$86 per month. As of December 1, 2007, the tenant’s share increased to \$92 per month.

2. From July 1, 2007 through June 13, 2008, rent in the amount of \$5,100 came due. During this same period, the landlord received a total of \$5,276.26 in payments from the tenant and the Section 8 administrator.

3. The parties’ rental agreement authorizes the imposition of a \$25 late fee for any rent which is more than 31 days past due. The lease also provides that:

All rent received will be applied to back balances before any rent will

be credited for the current month. EXAMPLE: One cannot pay June rent in June if April rent is not paid in full, including late charges.

4. From July 1, 2007 through June 13, 2008, in addition to rent, the tenant's account was assessed several non-rent charges, including: four (4) late fees in the amount of \$25 each; four (4) charges for sheriff service; two (2) miscellaneous charges for batteries and screens; and one (1) charge for postage.

5. On or about December 16, 2005, the tenant paid, and the landlord received, a security deposit in the amount of \$300. On May 23, 2007, the parties agreed to apply \$200 of the security deposit towards unpaid rent, leaving a balance of \$100. On or about August 23, 2007, the landlord sent the tenant a notice stating that he was closing her security deposit account "to prevent additional maintenance charges being charged to you because your balance is below the required minimum." The notice also stated that \$15 was being deducted from the security deposit for accrued maintenance fees, and that the landlord was applying \$46 from the deposit towards unpaid rent. A check made out to the tenant for the remaining balance of \$40.05 was included with the notice.

6. On or about June 14, 2008, the landlord served and the tenant received a 14 day notice to quit which stated that the tenant owed "A TOTAL OF \$306.13 FOR YOUR PORTION OF RENT, SHERIFF FEES, CERTIFIED MAILING COSTS AND LATE FEES." The notice did not separately identify which portion of the \$306.13 was claimed as rent, and which portion related to the other non-rent charges. On or about July 19, 2008 the tenant was served with the summons and complaint herein, which claimed \$306.13 in rent, as well as claims for "damage to screens, disposed battery in smoke detector, sheriff + certified mail". A "transaction history" was attached to the summons.

7. In defense to the landlord's claims for rent and possession, the tenant contends that she owed no rent at the time the notice to quit was served, and that the tenancy was not properly terminated. The tenant also counterclaims for violations of G.L. c. 186, §15B and G.L. c. 93A.

8. **Possession and Rent.** The landlord's transaction log includes both rent and non-rent charges. The log does not separate rent from other charges; all charges and payments are merged into one account balance. All payments made by the tenant or on her behalf were applied to the general account balance, and rent payments were not separately applied to the rent balance.

9. Having brought claims for possession and rent pursuant to a notice to quit for nonpayment of rent, the landlord has the burden of proving that the tenancy was properly terminated on that basis. On both the notice to quit and the summons, however, the landlord claimed both rent and non-rent charges as unpaid "rent." Charges for items such as postage and batteries are not "rent," and the failure to pay those charges cannot serve as the basis for terminating a lease for nonpayment of rent pursuant to G.L. c. 186, §11. Nor are non-rent charges recoverable in a summary process action. G.L. c. 239, §2. (relief in summary process actions is limited to possession, rent, and use and occupation).

10. The landlord's accounting method merges and thereby confuses rent with other miscellaneous charges. The consequences of improperly commingling rent and non-rent charges were exacerbated in this case by the fact that the landlord assessed a \$25 late fee when the tenant had a balance of greater than thirty days duration, irrespective of whether the balance consisted of unpaid rent, other charges, (including other late charges), or both. I need

not and do not reach the general question of whether the landlord's lease provision authorizing that application of rent payments to back balances is lawful if the back balance consists entirely of unpaid rent; the landlord's conduct herein, in applying rent payments to a balance that included non-rent charges, thereby rendering rent late for the month in which payment was made and generating another late charge which in turn was folded into the balance, was unlawful. In addition, irrespective of whether the "late charges" imposed by the landlord are properly authorized by the lease, they are not "rent." The notice to quit in this case was therefore defective, as it included in the amount claimed as rent various non-rent charges, thereby misleading the tenant and compromising her cure rights under G.L. c. 186, §11.

11. As the notice to quit was defective, the landlord's claim for possession must be dismissed. In addition, a ruling will enter for the defendant on the landlord's rent claim. In order to determine on the basis of the record whether any rent is in fact unpaid, it would be necessary for me to back out all of the non-rent charges, determine thereafter whether any of the late charges were improperly charged and, if so, back those out, and calculate whether any unpaid rent balance remained. "It is not the court's responsibility to do the math; that responsibility lies with the party who bears the burden of proof - here, the landlord." *Deep v. Bucier*, Western Division Housing Court No. 07-SP-0993 (Fein, J.) Where the party who bears the burden of proof fails to meet it, he is not entitled to recover.

12. **G.L. c. 93A.** Charging the tenant for the costs of sheriff service and certified mail delivery of a "court notice," without a court order authorizing the charge, is an unfair and deceptive act in violation of G.L. c. 93A. *Commonwealth v. Chatham*, 49 Mass.App.Ct. 525 (2000)(by exacting litigation costs prior to the entry of a judgment in an eviction action, the

landlord violated G.L. c. 93A). “It is the function of the court, not the litigants, to make that determination on the basis of statutory authority.” *Commonwealth v. Chatham*, 49 Mass.App.Ct. at 527. (Lease provision charging tenant for sheriff service violates c. 93A). The tenant is entitled to an award of single damages in the amount of the improperly charged fees, or \$184.54.

13. In addition, the tenant is entitled to an award of multiple damages (not less than double nor more than treble) if the court finds that the landlord’s violation of Chapter 93A was willful or knowing. “The ‘willful or knowing’ requirement of § 9(3), goes not to actual knowledge of the terms of the statute...” *Montanez v. Bagg*, 24 Mass.App.Ct. 954, 956, 510 N.E.2d 298, 300 (1987). The focus is rather on whether the landlord knowingly and intentionally engaged in the practices which were unfair and deceptive, irrespective of whether he actually knew that those practices violated statutes and regulations. The court may consider the “egregiousness” of the landlord’s conduct in determining whether to double or treble damages. *Brown v. LeClair*, 20 Mass.App.Ct. 976, 980, 482 N.E.2d 870, 874 (1985).

14. The landlord herein has been a professional landlord for over thirty years, owns multiple mobile home parks and apartment rental units, and has conducted countless summary process actions in this court. His practice in assessing the fees in question was intentional. Particularly in light of the fact that the landlord’s accounting practice has been the subject of previous litigation, see *Deep v. Bucier*, Western Division Housing Court No. 07-SP-0993 (Fein, J.), I find that his failure to conform his record keeping and charges to proper standards was both wilful and knowing, and egregious. I am therefore awarding treble damages, or 3 x \$184.54 = **\$553.62**, plus attorney's fees and costs.

15. *G.L. c. 186, s. 15B.* A landlord is required to hold a security deposit in a separate, interest bearing account in a Massachusetts bank, beyond the reach of his creditors. G.L. c. 186, s. 15B. The security deposit funds received by the landlord were mishandled, and the tenant is entitled to a judgment in her favor on this claim.

16. In deducting \$61 from the security deposit prior to the termination of the tenancy (\$46 for unpaid rent and \$15 for bank fees), the landlord violated G.L. c. 186, s. 15B. A landlord may only make deductions from a security deposit at the termination of a tenancy, for damages and unpaid rent; the governing statute does not allow for deductions during the course of the tenancy. G.L. c. 186, s. 15B(4).¹

17. The tenant's counterclaim under G.L. c. 186, s.15B constituted a demand for return of the remaining security deposit funds. The landlord's failure to return the security deposit promptly upon the tenant's demand violated G.L. c. 186, s.15B(7), entitling the tenant to treble damages. *Castenholz v. Caira*, 21 Mass. App. Ct. 758, 762 (1986). The tenant is entitled to **\$183** in damages representing three (3) times the amount wrongfully deducted from the security deposit, plus statutory interest in the amount of **\$3.30** (calculated at the rate of 5% from the date when such payment became due - i.e. the \$61 was wrongfully deducted - for the 13 month period between August, 2007 and September, 2008 when the tenant's counterclaim was filed). The tenant is also entitled by statute to costs and reasonable attorney's fees.

18. *Order.* Based on the foregoing, the following Order is to enter:

(1) An order, but not a judgment shall enter for the tenant on the

¹ The landlord's claim that the tenant agreed to the deduction is not persuasive. The tenant was merely notified of the landlord's activities after they occurred. Therefore, I need not reach the question of whether a landlord may make deductions from a security deposit during the course of a tenancy upon express agreement with the tenant that he do so.

landlord's claim for possession and rent.

- (2) An order, but not a judgment, shall enter awarding the tenant \$553.62 on her counterclaim under G.L. c. 93A.
- (3) An order, but not a judgment, shall enter awarding the tenant \$186.30 on her counterclaim under G.L. c. 186, s. 15B.
- (4) At the election of the tenant, the sum awarded to her hereunder may be applied to future rent.
- (5) Within ten (10) days from the entry date of this order, counsel for the tenant shall file a petition for costs and attorney's fees. Within 10 days thereafter, the landlord shall file his opposition, if any, to the tenant's petition. I will rule on the papers, after which final judgment will enter.

So entered this 17th day of November, 2008



Dina E. Fein
First Justice

cc: Kelly Jones, Esq.
Law Clerk