

RECORDED AT 22 MASS. SUP. 101 (1986)

COMMONWEALTH OF MASSACHUSETTS.

APPEALS COURT FOR THE COMMONWEALTH,

At Boston,

April 7, 1986 .

IN THE CASE OF

PEABODY PROPERTIES, INC.

vs.

JOYCE DONNELLY.

pending in the Superior

Court for the County of Bristol

ORDERED, that the following entry be made in the docket; viz.,—  
Judgment affirmed.

BY THE COURT,

*Nancy Truck Foley*, CLERK.

April 7, 1986.

NOTE:

The original of the within rescript will issue in due course, pursuant to M.R.A.P. 23.

APPEALS COURT

OVER

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 85-868

PEABODY PROPERTIES, INC.

vs.

JOYCE DONNELLY.

MEMORANDUM AND ORDER

1. After hearing the landlord's appeal (see G. L. c. 239, § 5, and G. L. 231, § 97), a judge of the Superior Court found that the tenant "could not have foreseen nor prevented" two incidents which the landlord claimed were in material noncompliance with the tenant's lease. See Spence v. Gormley, 387 Mass. 258, 266 (1982). There was ample evidence from the tenant supporting the judge's findings. He heard the witnesses and we cannot say, on the record, that the findings were clearly erroneous. See Mass.R.Civ.P. 52(a), 365 Mass. 816 (1974).

2. We need not reach the question whether the police reports were improperly excluded, see Bouchie v. Murray, 376 Mass. 524, 528-530 (1978); Wingate v. Emery Air Freight Corp., 385 Mass. 402, 406-407 (1982), as the plaintiff has not shown by an offer of proof that their contents would have materially aided his cause.

3. Contrary to the plaintiff's contention, it was within the trial judge's discretion to limit the testimony as to the relationship of the tenant with

her boyfriend subsequent to the time of the trial in the District Court. Not only was such evidence cumulative of testimony already elicited at trial, but it could also be considered of little relevance. What was pertinent was whether the boyfriend was a member of the tenant's household, see Spence v. Reeder, 382 Mass. 398, 420 (1981), at the time of the incidents.

Accordingly, upon consideration of oral argument, transcript, the appendix and briefs, it is ordered, under the provisions of Rule 1:28 of this court, that the following entry be made on the docket of the Superior Court Department in the above matter:

Judgment affirmed.

By the Court (Perretta, Dreben  
and Smith, J.J.)

*Nancy Truck Foley*  
Clerk

Entered: April 7, 1986.

Clearinghouse #45,509

4-26-85

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 18066

PEABODY PROPERTIES INC.

vs.

JOYCE DONNELLY

BRISTOL SUPERIOR COURT  
FILED

April 26, 1985

WILLIAM P. GRANT  
MAGISTRATE

FINDINGS OF FACT, RULINGS OF LAW AND ORDER

BACKGROUND

This summary process action was first tried in New Bedford District Court. Judgment entered for the defendant, Joyce Donnelly, ("Donnelly"), on June 12, 1984, whereupon the plaintiff, Peabody Properties Inc., ("Peabody"), landlord of the defendant, timely moved for a trial de novo in Superior Court pursuant to G.L. c. 239, § 5. The parties came before this court on February 15, 1985, for a jury waived trial on the merits of plaintiff's action. After affording full consideration to the testimony of witnesses presented, the exhibits submitted, responses to requests for admissions, with all reasonable inferences derived therefrom, this court finds and rules as follows:

FINDINGS OF FACT

1. The plaintiff is the owner of Bedford Towers, a 157 unit apartment complex located in New Bedford, Massachusetts. This complex is a project subsidized under the so called "HUD Section 8 New Construction Program".

2. Plaintiff, landlord, and defendant, tenant were parties to a written lease for an apartment in Bedford Towers in 1981. On or about December 1, 1982 the parties executed a second lease (admitted as plaintiff's exhibit 1, attached and incorporated herein as Appendix A) for premises located at 227 Cottage St., also within the same complex. At the present time, Donnelly, a welfare recipient, lives in this apartment with her retarded son, daughter and grandson.

3. The tenancy between Peabody & Donnelly is governed by the lease agreement between the parties and by federal regulations related to the HUD Section 8 New Construction Program, particularly 24 CFR 880.607 (admitted as plaintiff's Exhibit 7 attached and incorporated herein as Appendix B). Defendant's rent at 227 Cottage St. is subsidized through this Section 8 program.

4. Paragraph 2 of the lease agreement above contains a provision which automatically renews the defendant's tenancy on a monthly basis, unless terminated under Paragraph 22.

5. During defendant's tenancy at 227 Cottage St., on or about July 6, 1983, an altercation took place between defendant's former husband Gil Ventura (Ventura) and defendant's boyfriend John Duarte (Duarte).

6. This altercation took place in the evening outside defendant's apartment. It occurred after Ventura had come to defendant's apartment to visit his daughter and resulted in Duarte being stabbed in the arm. Both men then transported themselves to the hospital.

7. Donnelly was not involved in this altercation, nor could she have done anything to prevent it. There had been no previous altercations between Duarte and Ventura. Nor had there been any similar incidents between the two men subsequent to July 6, 1984. Neither Duarte nor Ventura was a member of defendant's household at the time of the July 6, 1983 incident.

8. Defendant reported this incident to Patricia Roderick, the building administrator at Bedford Towers, on the morning of July 7, 1983. Roderick filled out an "Incident Report" which states inter alia that it was the defendant who reported the incident. Roderick subsequently sent defendant a letter on July 8, 1983 regarding the incident. Roderick admitted in court that she "couldn't suggest anything Mrs. Donnelly could have done to prevent the stabbing" incident.

9. Several weeks after the July 1983 incident, Donnelly changed her locks in order to prevent Duarte's admittance to her apartment. Donnelly paid for the lock changes. Subsequent to this incident, she also caused to be issued and served four (4) Notices Not to Trespass against Duarte.

10. On or about March 4, 1984, defendant was the victim of an unprovoked assault by Duarte. This assault occurred while defendant was walking in her parking lot at Bedford Towers. When Duarte assaulted her, Donnelly ran to her apartment and locked the door behind her to prevent Duarte from gaining admittance. She immediately telephoned the police. Before the police arrived, Duarte had kicked down Donnelly's back door and damaged it. Duarte was not a member of a defendant's household when this assault occurred.

11. On the afternoon of March 4, defendant reported this incident to the plaintiff's building administrator who then prepared an incident report.

12. After this incident, Donnelly obtained another Notice Not to Trespass against Duarte. She also pressed charges against Duarte for destruction of property and obtained a restitution order from the court for the damaged door.

13. After this incident, Donnelly also asked that Peabody, as landlord, obtain an order restraining Duarte from entering Bedford Towers. She received a negative response on the basis that Duarte had relatives living in Bedford Towers with whom he had a right to visit. At that time, Duarte's sister and brother in law lived at Bedford Towers.

14. On or about March 17, 1984 plaintiff served a Notice of Termination of Tenancy (admitted as plaintiff's E exhibit #5 attached and incorporated herein as Appendix C.)

15. This Notice of Termination referred to the July 6, 1983 and March 4, 1984 incidents as reasons for termination and specified that Donnelly was in material non-compliance with the following paragraphs of her lease.

1. Paragraph 10b: Not to destroy deface or damage any part of the unit.
2. Paragraph 13(c): Not to engage in or permit unlawful activities in the unit, in the common areas or on the project grounds.
3. Paragraph 13(c): Not to make or permit acts that will disturb the rights or comfort of neighbors.
4. Paragraph 23: Not to create or permit serious or repeated interference with the rights and quiet enjoyment of other tenants and not to damage the unit or common areas.



16. Subsequent to receipt of this Notice of Termination, defendant requested an informal conference between the parties on or about April 4, 1984. Following this conference plaintiff filed this Summary Process Action, causing a Summons and Complaint to be served upon Donnelly on or about April 28, 1984.

17. On March 3, 1984, this matter was tried on the merits in New Bedford District Court. Judgment entered for the defendant on or about June 12, 1984. Plaintiff timely appealed this judgment pursuant to G.L. c. 239, § 5 and G.L. c. 231, § 97. The parties came before this court on February 15, 1985 for a trial de novo.

#### RULINGS OF LAW

1. The December 1, 1982 lease between the parties and Section 8 of the United States Housing Act of 1937 and related subsidized housing regulations (see e.g. 24 CRF 880.607 et seq.) govern the tenancy at issue here.

2. Paragraph 23 of this lease agreement entered into by the parties permits termination of defendant's tenancy for inter alia "material non-compliance" with the terms of the lease. Paragraph 23 also dictates that "any termination of

this agreement" -- must be carried out in accordance with HUD regulations, state and local law and the terms of this agreement.

3. The lease defines "material non-compliance" as:

"Material noncompliance includes, but is not limited to, nonpayment of rent beyond any grace period available under State Law; failure to reimburse the Landlord with 30 days for repairs made under Paragraph 11 of this Agreement; repeated late payment of rent; permitting unauthorized persons to live in the unit; serious or repeated damage to the unit or common areas; creation of physical hazards, serious or repeated interference with the rights and quiet enjoyment of other tenants; failure to repay unauthorized assistance payments; and giving the Landlord false information regarding income or other factors considered in determining the Tenant's rent." (para. # 23(b)).

Federal regulation further defines "material non-compliance" as:

"(3) Material noncompliance. The term material noncompliance with the lease includes (i) one or more substantial violations of the lease or (ii) repeated minor violations of the lease which disrupt the livability of the building, adversely affect the health or safety of any person or the right of the leased premises and related facilities, interfere with the management of the building or have an adverse financial effect on the building. Nonpayment of rent or any other financial obligation due under the lease (including any portion thereof) beyond any grace period permitted under State law will constitute a material noncompliance with the lease. The payment of rent or any other financial obligation due under the lease after the due date but with the grace period permitted under State Law will constitute a minor violation." (24 C.R.F. 881.607(b)(3).)

3. Regulations governing the Section 8 tenancy at issue here provide that "in any judicial action instituted to evict the family, the owner may not rely on any grounds which are different from the reasons set forth in the notice." 24 C.F.R. 880.607(3).

4. This court rules that any proven violation of the lease, constituting "material noncompliance," and cited as reasons for termination of the tenancy, must be found to be substantial in nature or ones that have repeatedly occurred. Such violations must have a negative impact on other tenants, on the management of the project itself or on the project's physical or financial condition. This court finds no such showing here. There were no "serious or repeated" "instances of damage" to the unit, (paragraph 10 of the lease) unlawful activities, (paragraph 13 of the lease) or interference with the rights and quiet enjoyment of other tenants (paragrph 13(c) and 23 of the lease) which the defendant either permitted or caused.

5. Nor does this court find "other good cause" for termination of the tenancy here. (See paragraph 23(b)(3) of the lease).

6. In so ruling this court is mindful that cause may not always involve fault by a tenant. Spence v. O'Brien, 15 Mass. App. Ct. 489, 499 (1983). Cause is a general term and must take on much of its meaning from the context in which it is used. Id.

7. In this case, Duarte's and Ventura's conduct and related incidents involving the defendant do not constitute "good cause" for the termination here. Whether there was cause to evict depends upon Duarte's and Ventura's status within the apartment and upon Donnelly's awareness of an ability to prevent their activities. Id. at 494 and case cited. The Supreme Judicial Court has drawn distinctions between misconduct by household versus nonhousehold members. Spence v. Reeder, 382 Mass. 398, 420 (1981). If the criminal acts were performed by a tenant's relative who was not a resident in the household at the time he committed those acts - there might well be no cause to evict the tenant. Id. The situation may be different when the miscreant is a member of the tenant's household. Id. Here, however, neither Duarte nor Ventura was a member of the tenant's household at the time of the incidents.

8. Even if Duarte had been a member of the tenant's household, Donnelly could not be held liable for this activities because she sought outside help to prevent his continued presence. Spence v. Gormley, 387 Mass. 250, 266 (1982). Her attempts by means of notices not to quit and changing the locks constitute evidence of such measures. When a tenant has taken such measures, she has done all she can and should not be held responsible for violence that nevertheless occurs. Id.

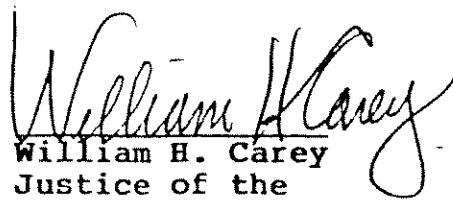
9. Since this court has found that Donnelly could not have foreseen nor prevented Duarte's or Ventura's violence, there is no cause to evict. Id. at 265. Therefore, this court rules that evidence of the circumstances of their activities at Donnelly's apartment is insufficient to impose upon defendant liability for those activities because she had no ability to prevent them. Spence v. O'Brien, at 494.

ORDER

For all the foregoing reasons, this court hereby Orders that judgment for possession of the premises at 227 Cottage Street Bedford Towers be entered in favor of the defendant, Joyce L. Donnelly.

Dated:

4/26/85

  
William H. Carey  
Justice of the  
Superior Court

COMMONWEALTH OF MASSACHUSETTS

# 6  
HIT # 21

BRISTOL, SS

SUPERIOR COURT  
NO. 18066

PEABODY PROPERTIES, INC., Plaintiff

VS.

BRISTOL SUPERIOR COURT  
FILED

JOYCE DONNELLY

Defendant

May 2, 1985

JUDGMENT

WILLIAM P. GRANT  
MAGISTRATE

RECEIVED AUG 26 1985

This action came on for trial before the Court, Carey, J. presiding, and the issues having been duly tried and findings having been duly rendered.

IT IS ORDERED AND ADJUDGED

that the defendant, Joyce Donnelly, retain possession of the premises at 227 Cottage Street, Bedford Towers.

Defendant is to recover her costs of action.

Dated at Taunton, Massachusetts, this Second day of May, 1985.

By the Court

(Carey, J.)

*David J. Cassidy*

DAVID J. CASSIDY  
Asst. Clerk of Courts.

cc: Charles S. Mancuso, Esq.  
Southeastern Mass. Legl Assistance Corp. (L. Shatz, Esq.)

A True Copy B. Photostatic Process  
A True Copy By Photostatic Process

Attest:

Attest:

*Cecile E. Cummings*  
Asst. Clerk of Courts