COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

HOUSING COURT DEPARTMENT
CITY OF BOSTON DIVISION
SUMMARY PROCESS
NO. **12H84SP002635**

THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT,
Plaintiff

VS.

RICARDO HENRY AND WEDDEE HENRY,
Defendants

ORDER

The plaintiff, the Secretary of Housing and Urban Development ("HUD"), commenced this summary process action seeking to recover possession of residential premises from the defendants, Ricardo and Weddee Henry. The defendants filed a written answer in which they asserted affirmative defenses to the claim for possession (including a defense under G.L. c. 239, § 8A) and counterclaims. The counterclaims include claims for breach of the implied warranty of habitability, breach of statutory covenant of quiet enjoyment (G.L. c. 186, § 14), retaliation (G.L. c. 186, § 18), and violation of state consumer protection act (G.L. c. 93A).

This matter is before the court on HUD's motion to dismiss Henry's counterclaims. HUD argues that the defendants are barred from asserting counterclaims against HUD because HUD is immune from suit based on the doctrine of sovereign immunity.

When considering the sufficiency of a complaint on a motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6), the court must accept as true the factual allegations set forth in the complaint, as well as any inferences favorable to the plaintiff that can be drawn from those facts. *Eyal v. Helen Broadcasting Corp.*, 411 Mass. 426, 429 (1991). The factual allegations, stripped of "labels and conclusions," are assumed to be true "even if doubtful in fact." *Iannacchino v. Ford Motor Company*, 451 Mass. 623, 636 (2008) (quoting *Bell At. Corp. v. Twombly*, 550 U.S.

554, 127 S.Ct. 1955, 1966, 167 L.Ed.2d 929 (1977). A complaint is sufficient, however, only if those "factual allegations plausibly suggest [ ] (not merely consistent with) an entitlement to relief, in order to reflect [ ] the threshold requirement of [Mass.R.Civ.P. 8(a)(1)] that the 'plain statement' possess enough heft to sho[w] that the pleader is entitled to relief." *Id.* (internal quotations omitted); *see also Flomenbaum v. Commonwealth, 451 Mass. 740, 751, n. 12 (2008)* ("to survive a motion to dismiss, a complaint must contain factual allegations 'enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true' ").

For purposes of resolving this issue I shall assume that the following facts are true. The defendants are the former owners of a residential dwelling at 24 Puritan Avenue, in the Dorchester section of Boston. The purchased the property in 2005 with a loan secured by a mortgage granted to Wells Fargo Bank, N.A. ("Wells Fargo"). HUD provided insurance to Wells Fargo to cover repayment of the mortgage loan balance in the event of default by the defendants under the provisions of National Housing Act, 12 U.S.C. § 1701-1715l, and HUD regulations at 24 C.F.R. Part 203. The defendants defaulted on their mortgage loan, and in August 2009 Wells Fargo acquired the premises upon foreclosure. The defendants have remained in possession of the premises since the foreclosure. They live with their two children (ages 8 and 2 years).

In accordance with the insurance provisions of its contract with Wells Fargo, HUD paid Wells Fargo the outstanding balance due on the defendants' mortgage loan, and in exchange on January 31, 2011 Wells Fargo conveyed the property to HUD. HUD, acting in accordance with the Occupied Conveyance Program, 24 C.F.R. §§ 203.670-681, entered into a tenancy agreement with the defendants (the former mortgagors). Under the terms of the Occupied Conveyance Program, "[o]ccupancy of HUD-acquired property is temporary in all cases and is subject to termination when necessary to facilitate preparing the property for sale and completing the sale." 24 C.F.R. § 203.673(a). After it acquired ownership of the property, HUD entered into a lease with the defendants. The agreed upon monthly rent was **$1,200.00**.

On March 30, 3012, HUD served the defendants with a notice to quit and vacate the premises by April 30, 2012. The defendants did not vacate the premises. On July 17, 2012, HUD commenced this summary process action against the defendants. The complaint includes an account annexed for unpaid rent for the period May 2011 to July 2012 at a monthly rate of **$1,200.00**. The defendants filed an answer that included counterclaims. The counterclaims

sought damages arising from certain alleged defective conditions, including, rodent infestation, water leaks, mold, water damage, and lead paint violations.

When it enacted the single family home mortgage insurance program (that included the Occupied Conveyance Program), Congress included a provision that explicitly waived sovereign immunity allowing the secretary of HUD to sue and be sued in state courts. See, 12 U.S.C. § 1702. However, this waiver of sovereign immunity is not without limits. It is subject to other express limitations enacted by Congress. With respect to tort claims, the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) and 2671-80, confers exclusive jurisdiction on federal courts. § 1346(c) provides that:

> The district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . .

§ 2679(a) provides:

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

Accordingly, state courts are without subject matter jurisdiction to hear tort claims against HUD asserted by former mortgagors who have continued to occupy the foreclosed premises as tenants under the Occupied Conveyance Program.

The defendants' counterclaims for breach of covenant of quiet enjoyment, retaliation and unfair or deceptive trade practice, to the extent they seek actual or consequential damages against HUD for purportedly wrongful acts or omissions, sound in tort. See, *Al Ziab v. Mourgis*, 424 Mass. 847, 850-851 (1997); *Cruz Management Co. v. Thomas*, 417 Mass. 782 (1994).

Accordingly, a state court (and specifically the Housing Court Department) is without subject matter jurisdiction over those claims. The defendants must assert those tort-based claims in federal court.[1]

As is set forth in 12 U.S.C. § 1702, Congress has waived sovereign immunity with respect to claims sounding in contract based upon a residential lease or tenancy enacted pursuant to the Occupied Conveyance Program, 24 C.F.R. §§ 203.670-681. Accordingly, the Housing

[1] Further, the Chapter 93A counterclaim must be dismissed as a matter of law because HUD, a government agency, is not engaged in "trade or commerce" within the meaning of the statute.

Court Department has subject matter jurisdiction to the extent that the defendants' counterclaims sound in contract.

Here, the only contract-based claim asserted by the defendants is for breach of the implied warranty of habitability. Absent any federal limitation, as a matter of state law the warranty is breached as of the date the landlord knew or should have known of the defective conditions. The measure of damages is the difference between the fair rental value of the premises free of defects and the fair rental value of the premises during the period that the defective conditions existed. *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 199 (1973); *Haddad v. Gonzalez*, 410 Mass. 855, 872 (1991). However, because HUD entered into a contract (tenancy agreement) with the defendants pursuant to a federal statute and regulations (the Occupied Conveyance Program) it is federal law that the state court must apply with respect to an implied warranty claim. *Conille v. Sec'y or Hous. And Urban Dev.*, 840 F.2d 105, 109 (1st Cir. 1988). In *Conille* (where a tenant, subject to a lease entered into pursuant to the NHA, sued HUD for breach of the implied warranty of habitability and interference with quiet enjoyment involving purportedly defective conditions in a property controlled by HUD as a mortgagee in possession) the court fashioned a federal common law rule with respect to contract-based breach of implied warranty claims involving HUD owned or controlled property.[2] The court refused to adopt the state common law maintenance obligation set forth in *Hemingway* because the federal maintenance obligation "is narrower in scope than the duties that would be imposed upon the Secretary as a private landlord under the Massachusetts implied warranty of habitability and the covenant of quiet enjoyment . . . Affirmative steps of private landlords towards meeting their obligations to tenants under these Massachusetts laws would not suffice to stave off liability . . . Thus, the incorporation of Massachusetts landlord-tenant laws would frustrate Congress's specific objectives in imposing a narrower maintenance obligation upon the Secretary . . ." Id. at 113. The court determined that as a matter of federal law the tenant was not entitled to recover consequential damages for breach of the implied warranty of habitability. "The imposition of consequential damages upon the Secretary in this case could potentially impede the realization of the overall purpose of the NHA: the upgrading of national housing . . . To impose upon the

[2] "Under the NHA . . . [the federal statute] provides only that the Secretary "*shall seek* to . . . maintain all occupied multifamily housing projects" owned by him or operated by him as a MIP in a decent , safe and sanitary condition . . . By choosing the words "shall seek" rather than "shall," Congress clearly intended to require only that the Secretary take reasonable, affirmative steps toward maintaining housing projects under his ownership or control in a decent, safe and sanitary condition." Id. at 112.

Secretary a consequential damages penalty for breaching duties implied under leases with his tenants would expose the federal government to unpredictable costs. This would frustrate Congress's considered judgment to allocate scare financial resources to improve the overall quality of the nation's housing stock." Id. at 113-114. As a remedy for a breach of HUD's duty to maintain the residential premises in a decent, safe and sanitary condition upon a showing that HUD failed to take "reasonable, affirmative steps" to correct such defective conditions, the court held that the tenant "would be entitled to restitution of rental payments made during the period of breach, representing the difference between the value of the premises in a 'decent, safe and sanitary condition' and the value of the premises in their deteriorated condition." Id. At 117. By affording the tenant a remedy (albeit one more limited than a right to recover consequential damages), the rule upheld the "general force of state laws in a manner consistent with the NHA." Id. at 114.

Accordingly, while the defendants can pursue a federal common law breach of implied warranty of habitability counterclaim in this summary process action, they must establish not only that defective conditions exist, but that HUD failed to take "reasonable, affirmative steps" to correct such defective conditions. Further, the defendants cannot recover consequential damages for such a breach. Their remedy should they establish a breach is limited as a matter of federal law to restitution of rental payments actually made.[3]

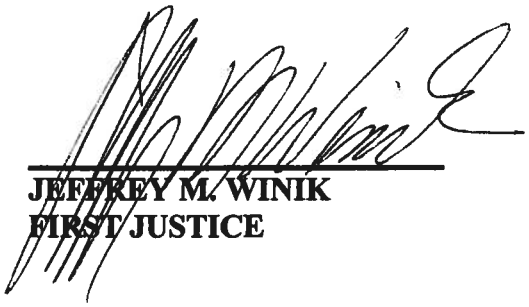
Conclusion

For these reasons, HUD's Motion to Dismiss is **ALLOWED** with respect to the defendants' counterclaims for interference with quiet enjoyment, retaliation and violation of G.L.c. 93A. The motion is **DENIED** as to the defendants violation of the consumer protection statute. The motion is **DENIED** with respect to the defendants' breach of implied warranty of

[3] To the extent that a breach of the statutory covenant of quiet enjoyment (G.L. c. 186, § 14) may sound in contract, the same federal rule concerning restitution as the sole remedy would apply.

habitability counterclaim subject to the limitations as to remedy set forth in this order. See, G.L. c. 239, § 8A.[4]

SO ORDERED.



JEFFREY M. WINIK
FIRST JUSTICE

December 27, 2012

cc: Matthew Braucher, Esq.
William J. Sprouse, Esq.

[4] This formulation of warranty damages would allow the defendants to prevail on their affirmative defense to possession if they were able to establish that HUD knew or should have known of the defective conditions prior to the date on which the defendants were first in arrears in their rent. To retain possession, the defendants would have to pay the amount the court determines is due (fair rental value less amount actually paid) within the statutory period. The defendants could also retain possession if they prevail on their retaliation affirmative defense under G.L. c. 239, § 2A. The retention of possession under either theory would not conflict with Congressional intent or with HUD's mandate under the NHA.