Lapatin on the Law

TRIAL RUN

Any number of interesting new decisions, all courtesy of the Massachusetts Appeals Court, have found their way through the judicial system recently. In no particular order of significance, here's a summary to keep conscientious landlords and property managers in the know.

In *Comos v. Savarese*, a tenant challenged an eviction order on the ground that the complaint erroneously described him as a tenant-at-will rather than a lessee. However, his lease provided that once the term expired, which it had, he would become a tenant from month to month. It was therefore altogether appropriate to consider him a tenant at will when the landlord wanted him out.

The tenant in *Fort Point Investments, LLC v. Kirunge-Smith* had more success keeping her apartment. The landlord in that case had agreed to forestall the eviction after the outstanding rent was paid pursuant to a COVID relief program but the tenant was no longer protected when her rent later fell into arrears once again. However, the execution for possession became stale and unenforceable because it was requested by the landlord more than three months after the judgment in violation of a 1987 statute designed to prevent landlords from holding eviction orders over the heads of tenants indefinitely like the proverbial Sword of Damocles.

Typically, a tenant's rent default is established by introducing an accounting ledger into evidence. In *Watermark II Member LLC v. Kim*, the landlord's ledger was technically inadmissible as hearsay absent proof that it had been kept in the regular course of business. However, the tenant graciously admitted that she owed a considerable amount of unpaid rent, which was enough to justify an eviction without an award of damages.

Brewer v. Anthony featured a 95 year old woman who rented her home to a tenant who had lived there for approximately nine years and had recently stopped paying rent. She had also given him the right to purchase the house for a stipulated sum. Just before she died, her conservator initiated eviction proceedings against the tenant. A settlement agreement was reached requiring the tenant to vacate the premises but relieving him from any monetary obligations. In turn, he executed a release waiving "any and all claims" against the landlord. He then had the temerity to bring a suit for enforcement of the purchase option but the court determined that the release was clear and unambiguous, forsaking not only the tenancy but also the option.

In two of the new cases, tenants unsuccessfully alleged that they had been the victims of illegal retaliation. To be sure, the tenant in *Bees, LLC v Harrold* had filed numerous complaints about the landlord with the town and the state Attorney General. His eviction was nonetheless justified because he had verbally abused the property manager, physically assaulted another tenant and repeatedly parked in a space designated for someone else. The outcome was similar in *VA 7 Cohannet LLC v Donovan*, where a tenant had reported a defective sliding glass door to the local board of health. That didn't entitle her to avoid eviction based on multiple encounters with the landlord's management staff, including using vulgar language and leaving voicemail

messages, some as long as ten minutes, while seemingly intoxicated. The tenant tried to block the eviction by raising a counterclaim, but that strategy works only where the landlord's claim for possession is based on nonpayment of rent.

The eviction action in *Tenney Place I, LLC v. Flanders* should have been dismissed where the tenant had vacated the apartment before the case got to court. Concerned about the effect which the publicly available record of the summary process action might have on her ability to rent another apartment in the future, the tenant essentially asked that the court papers be impounded. The court acknowledged the tenant's dilemma but it was more important, in its view, to serve the public's interest in accessing court records.

Statistics indicate that landlords are ten times as likely as tenants to have legal representation in residential summary process eviction cases. That probably explains the downfall of unrepresented tenants in several recent cases. For example, in *Akbarian v. Abdelhaliem,* an eviction order was upheld because the tenant failed on appeal to articulate any specific mistakes made by the trial judge. In a similar vein, a tenant was barred from appealing an eviction order in *Chicopee Housing Authority v. Boutin* where his briefs did not include any citation of legal authority. The same fate awaited the tenant in *Grasli Investment Vo*, whose brief didn't conform to applicable court rules. Landlords fortunate enough to afford lawyers can hopefully avoid such procedural pitfalls and preserve their day in court.

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