***Lapatin on the Law***

CASES AND COMMENTARY

There are four new court decisions to tell you about this month. Two are downright disturbing while the others recognize the ways in which technology has reshaped real estate transactions.

As we’ve explained in the past, the same statute (Chapter 239, Section 8A of the General Laws) which permits Massachusetts tenants to withhold rent also forbids evictions in cases where (1) a tenancy has been terminated other than because of the tenant’s default and (2) any sums due to the landlord are equal to or less than amounts payable on account of a counterclaim by the tenant. In *Ferreira v. Charland*, a tenant leased a single-family house which had previously been the landlord’s primary residence. In addition to rent, the tenant was obligated to pay for utilities, including water and sewer charges. A few years later, the landlord announced that she wanted to move back into her house. By this time, the lease had apparently expired but the tenant remained in occupancy as a tenant-at-will. When the tenant refused to budge, the landlord issued a termination notice ordering her to depart by the end of the following month. After she refused to do so, the landlord initiated a summary process eviction action.

The tenant filed a counterclaim, asserting a violation of the statute which prohibits landlords from passing along water and sewer costs unless certain conservation devices have been installed on faucets, showerheads and toilets. Prior to trial, the landlord admitted her mistake, sending refund checks to the tenant plus an additional amount for anticipated punitive damages. Although the tenant acknowledged that the payments would be sufficient to make her financially whole, the checks weren’t cashed.

On this basis, the Massachusetts Appeals Court held that the tenant had preserved her right to avoid eviction. Even if the amount payable on account of her counterclaim had been reduced to zero, that would still be the exact same amount she owed the landlord given that her rent was current. If the landlord wanted the house back, it would be necessary to start the eviction process all over again.

Several of the justices authored blistering dissents, suggesting that the majority’s decision was absurd and unreasonable. In their view, the tenant’s counterclaim essentially vanished once the landlord had tendered payment. One of the dissenting opinions complained that the majority’s decision “adds to the steady judicial drumbeat warning every small residential landowner that, whatever you do, do not rent out your property. There are many reasons for the housing crisis in Massachusetts, but we would do well to acknowledge that our landlord-tenant jurisprudence is one of them.” Amen.

Another of our recurring themes is that the fair housing laws can be violated not only by directly mistreating members of a protected class but also by following policies and procedures which disproportionately affect members of minority groups. The latest example is *Louis v. SafeRent Solutions*, handed down by a federal District Court judge. It should be noted at the outset that this was not a final decision; the judge ruled only that the allegations merited a full-blown trial and could not be dismissed out of hand. And just what were those allegations? A group of Black women holding so-called Section 8 rental assistance vouchers contended that their rental applications had been unfairly denied because of adverse credit reports.

At first, Judge Angel Kelley focused on certain factors which specifically and adversely affected these women. Their credit rating, which is designed to measure their “lease performance risk”, did not consider the financial benefits of housing vouchers. Moreover, the reports failed to take into account the fact that subsidized tenants may request exemptions from the minimum rent they’re expected to pay if they’ve experienced certain hardships such as loss of employment or a death in the family. The critical part of the opinion came when the judge set aside any particular concerns regarding voucher holders and noted more generally that Black and Hispanic consumers tend to have much lower credit scores than whites: “these racial disparities in credit health reflect historical inequities that reduced wealth and limited economic choices for communities of color. The past credit data factored into credit scoring models is systemically and historically biased against non-white consumers. These racial disparities in credit health further perpetuate wealth inequalities through reduced financial opportunities and fewer financial safety nets.” The unmistakable suggestion is that landlords (like the one who was added as a defendant in *Louis*) may be taken to task for relying on credit reports which have the effect of keeping minorities out of apartments. We will continue to follow this case with no small degree of trepidation as it works it way through the judicial system.

That brings us to a couple of decisions, both decided by the Massachusetts Appeals Court, acknowledging the outsized role of e-mail in real estate dealings. *Sourcing Unlimited, Inc. v. Cummings Properties, LLC* was a case in which a commercial lease would be automatically extended unless the tenant notified the landlord to the contrary on or before a specified date. The lease itself identified the different ways in which notice could be given; in particular, “no oral, facsimile or electronic notice shall have any force or effect.” Nonetheless, the court approved an e-mail from the tenant’s declining to extend the lease term; the message was clear, timely and unambiguous and had admittedly been received on time by the landlord.

To the same effect is *K&K Development, Inc. v. Andrews*, where the court held that an offer to purchase two rental properties in Lynn could be accepted electronically. Citing a state statute providing that a contract “may not be denied legal affect or enforceability solely because an electronic record was used in its formation,” the justices declared that electronic signatures are the norm in the private sector and that the law should reflect the realities of how business is conducted in today’s marketplace. It remains to be seen how the courts will deal with a 1971 statute entitling tenants to receive a copy of their lease “duly signed and executed” by the landlord. Presumably an electronic signature will do the trick. Less easy to predict is how the rental housing industry will cope with the turmoil caused by decisions like *Ferreira* and *Louis*.

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