DOWNTIME

The recent series of gas leak explosions in the Merrimack Valley, leaving one person dead and more than 20 people injured while forcing the evacuation of 8,600 homes and businesses, brings to mind an incident which occurred not too far away some 40 years ago and would have an historic impact on the course of landlord-tenant law in Massachusetts.

Cynthia Jefferson leased a Peabody apartment for a term of one year. On October 8, 1976, an underground heating pipe burst, leaving her without heat or adequate hot water until the pipe was repaired twelve days later. Jefferson withheld $35 from her next month's rent, prompting the landlord to seek her eviction. The tenant prevailed at trial but the landlord appealed and the case found its way to the Supreme Judicial Court.

The notion that a landlord could be forced to abate rent if an apartment wasn't up to code had been established by the same court in 1973 by way of *Boston Housing Authority v. Hemingway*. At the time, the BHA was a notoriously irresponsible landlord. The apartment in question had, among other defects, leaking ceilings, wet walls, insufficient heating and broken doors and windows, not to mention infestation by rodents and vermin. Repeated complaints were essentially ignored by the landlord. The court sympathized with the plight of a tenant who had neither the technical ability nor the financial resources necessary to make the required repairs herself. Accordingly, it was declared that each residential lease in Massachusetts came with an implied warranty that the apartment would remain fit for human habitation at all times. Tenants would be expected to pay rent only to the extent that the warranty was honored by the landlord. In other words, the landlord's duty to repair and right to receive rent became interdependent.

Cynthia Jefferson's landlord was a conscientious property owner having nothing in common with the Boston Housing Authority. The bursting of the water pipe was clearly not the landlord's fault and occurred

without prior warning. The issue before the court in *Berman & Sons, Inc. v. Jefferson* was whether the implied warranty recognized in *Hemingway* would apply with equal force and effect to landlords who were not to blame for defective conditions.

The Greater Boston Real Estate Board filed an amicus brief, taking the position that so-called "strict" warranties, imposed without regard to fault, were appropriate only in the case of mass-produced new goods, like automobiles, where consumers shouldn't be expected to prove that there was negligence on the assembly line. Imposing an unconditional and unforgiving warranty on the rental housing industry, on the other hand, was unjustified and would create a higher standard of performance than landlords had been accustomed to. Moreover, increasing a landlord's potential liability could very well trigger offsetting rent increases. Older buildings, whose maintenance is hardest to ensure, tend to house lower income tenants, who would be disproportionately affected.

The court wasn't impressed. Upholding the rent abatement, the justices ruled that "considerations of fault do not belong in an analysis of warranty. The landlord may be correct in characterizing itself as an innocent party, and we are cognizant of the economic burdens that a landlord typically bears. Nevertheless, we note that the landlord's liability without fault is merely an economic burden; the tenant living in an uninhabitable building suffers a loss of shelter, a necessity. The essential objective of the warranty is to make sure that the tenant receives what she is paying for. The tenant may not excuse her obligation with mere reasonable efforts to pay rent. Nor may the landlord avoid his duty with mere reasonable efforts to provide a habitable dwelling. The contract between the parties, seen through the law's clarifying lens, requires such symmetry." The only saving grace was that the landlord would not be subject to penalties which can be imposed where the failure to provide services was willful or negligent.

The section of the State Sanitary Code obligating landlords to heat their apartments includes an exception where tenants are required under their leases to purchase their own gas or other fuel. Such tenants are not entitled to rent abatements when service is interrupted. Fortunately, the utility company has promised to provide full compensation to Merrimack Valley customers affected by the gas explosions.

In the case of water, landlords have been permitted since 2005 to require tenants to pay for their own consumption, as measured by separate meters. However, the applicable statute makes clear that the landlord will still be considered the "customer of record", retaining the affirmative obligation to make sure that water continues to be provided.

In retrospect, the landlord in *Berman* can certainly be criticized for going to war over $35, especially considering the consequences to the rental housing industry. That said, there probably would have been another case giving the court the same opportunity to reach the same conclusion. Like it or not, landlords who lease defective housing, regardless of their good intentions, are in the same boat as manufacturers who sell defective automobiles. Keeping that boat afloat is the job at hand.

Three Center Plaza, Mezzanine Suite | Boston, MA
Tel: 617.423.8700 | Fax: 617.338.2600 | www.gbreb.com