Lapatin on the Law. . .

CATCHING UP

We've been on sabbatical for four months while the Rental Housing Association reformatted its publications, so there's lots to tell you about. In particular, an array of new court decisions address issues which are likely at one point or another to confront landlords and property managers.

Two Appeals Court opinions offer some guidance which may come in handy when it's necessary to prove that an unauthorized occupant has been allowed to share an apartment with the tenant of record. In *New Bedford Housing Authority v. Marcial*, a landlord submitted a Post Office form requesting verification that mail was being sent to the occupant at the tenant's address. The form was returned with a checkmark next to the box for "Mail is Delivered to Address Given." The landlord also obtained copies of police reports identifying the apartment as the occupant's address. Meanwhile, in *McLaren v. Cespedes*, a landlord was able to testify that an unauthorized occupant's car was parked on the premises just about every day while he was observed on-site as many as 100 times during the past two or three years. The tenant herself admitted in court that the occupant, who had fathered her younger children, had no regular place of residence and kept clothing at the apartment.

Landlords face the likelihood of liability whenever they retaliate against tenants who have reported code violations. In fact, if adverse action is taken against a tenant within six months after such a report was made, the landlord is presumed to have retaliated and must prove otherwise by clear and convincing evidence. In *Lindquist v. Stella*, the landlord was unable to dispel the negative inference which arose when she served an eviction notice within six months after her tenant had complained to a code enforcement officer about a deteriorating porch. The landlord was also accused of telling his "maintenance manager" to park in the space which was customarily used by the tenant, who suffered from limited mobility and needed to leave her car close to the building entrance. The Appeals Court found, however, that the landlord had no control over who parked in the space, which was located on a public street. Moreover, the

"maintenance manager" was in reality an independent handyman and there was no evidence that he had parked in the tenant's usual spot at the landlord's behest.

In *Dararaksmey v. Evans*, another tenant was likewise able to demonstrate that she had received an eviction notice within six months after complaining to the local health board. In this instance, however, the landlord was able to successfully rebut the presumption of retaliation. He wanted the apartment in order to provide housing for his elderly mother, who wished to be closer to her Cambodian community and temple. A Northeast Housing Court judge also noted that the landlord had graciously accommodated the tenant's financial needs, for example by waiving a security deposit and the advance payment of last month's rent. He also had a history of responding diligently to any notice from the tenant or the health board regarding repairs which needed to be made.

On two recent occasions, appellate courts held that trial judges have discretion to delay eviction cases where tenants need more time in order to secure legal representation. In *Nuruzzman v. Korotouov*, the tenant was 62 years old and had lived in a Cambridge apartment for 10 years religiously paying his rent with the benefit of a government subsidy. An eviction was sought after he refused to accept a rent increase proposed by the landlord. On the day of trial, the tenant asked that the proceedings be delayed while he looked for a lawyer. The judge told him he was "fighting a losing battle" and had no defense to a no-fault eviction. The trial went forward on schedule, resulting in a judgment for the landlord. The Appellate Division of the District Court concluded that the judge should have granted the postponement. An attorney might have been able to demonstrate that the eviction was not justified by "good cause," which is typically required whenever a subsidized tenant is forced to leave. In general, as the court noted, "tenants of public and subsidized housing have the advantage of greater procedural protections against eviction than tenants of private housing."

A similar result was reached in *Cambridge Street Realty, LLC v. Stewart*, where the Supreme Judicial Court's decision relied in part on a Housing Court rule contemplating a two-week continuance where a tenant facing eviction will be assisted by a pro-bono volunteer attorney. Be that as it may, the Appeals Court held in *Bathory v. Abegunde* that an unrepresented tenant is not entitled to delay an eviction action where he offered no explanation whatsoever as to why he had not yet been able to retain counsel. Under such circumstances, giving the tenant

additional time to find a lawyer would frustrate the purpose of summary process, which is to secure the just and speedy determination of every eviction case.

To the same effect is *Costello v. Merrill Lynch Credit Corporation*, where a tenant about to be evicted filed a petition asking the Supreme Judicial Court for relief. A state statute gives that court broad authority to supervise inferior tribunals, like the District Court which had ordered the eviction in the first place, but the SJC refused to intervene. It was clear that the tenant's "claims could be and were raised in the ordinary appellate process." The SJC's "extraordinary power of general superintendence is exercised sparingly, not as a substitute for the normal appellate process or merely to provide an additional layer of appellate review after the normal process has run its course." As landlords will attest, that process is certainly long and difficult enough as is.