17-010-12

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

FRANKLIN, SS

HOUSING COURT DEPARTMENT
WESTERN DIVISION

DOCKET NO. 09-CV-1955

KARL PUMIGLIA, on behalf of himself and all others similarly situated,

Plaintiffs

v.

NORTHLAND CLIFFSIDE, ET AL,

Defendants

RULINGS, ORDER AND MEMORANDUM OF DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The above-captioned class action is before the court on cross-motions for summary judgment. For the reasons set forth herein, summary judgment shall enter in favor of the defendants on the security deposit claims, and in favor of the plaintiffs on the lease provision claims.

UNDISPUTED FACTS:

1. The plaintiff Karl Pumiglia (Pumiglia) and the class members he represents are or were tenants at an apartment complex consisting of 280 residential units in Sunderland, Massachusetts known as Cliffside Apartments ("Cliffside"). Cliffside was originally owned by Amherst Portfolio Limited Partnership ("Amherst Portfolio"), which also owned another large complex in the area called The Boulders. In 2007, Amherst Portfolio sought to refinance then outstanding loans on the two properties, which required separating ownership of the properties into two entities. As a result, on July 23, 2007, Amherst Portfolio and its general partners formed a wholly owned subsidiary named Northland Cliffside, LCC ("Northland Cliffside"), a Delaware

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limited liability company with a principle office in Newton, Massachusetts, as to which Amherst Portfolio was the sole member. On August 10, 2007, Amherst Portfolio transferred "the land and buildings known as Cliffside" as well as "rents, issues, and profits thereof" and "all the estate, right, title, interest, claim, or demand, whatsoever, of Grantor, either in law or in equity, of, in and to the Premises..." to Northland Cliffside for nominal consideration. None of the tenants were notified that the property was deeded from Amherst Portfolio to Northland Cliffside at the time the transfer took place. Amherst Portfolio was dissolved on or around February 12, 2008.

2. At all times relevant hereto, Northland Investment Corporation ("Northland Investment") managed Cliffside for the owner of the property, first Amherst Portfolio, and then Northland Cliffside. The management contract between Northland Investment and the owners provided in pertinent part as follows: "Manager shall establish and maintain an escrow account in Owner's name for apartment security deposits, if required by state, county or municipal law, regulation or order..." Karen Young, the on-site manager of Cliffside from January, 2005 through June, 2010, was employed by Northland Investment. Her responsibilities and duties as the on-site manager of Cliffside did not change when the property was transferred from Amherst Portfolio to Northland Cliffside, and included signing leases as well as collecting and returning security deposits.

3. The tenants' leases identified Cliffside Apartments as the "owner," which term was defined in the lease as being the "name of the apartment community or title holder." The lease also defined the terms "we," "us", and "our" as being the owner identified in the lease "or any of the owner's successors' (sic) in interest or assigns," and provided that "[w]ritten notice to or

from our managers constitutes notice to or from us." Neither Amherst Portfolio nor Northland Cliffside played any role in leasing units at the apartment complex; their sole role was in holding title to the property, and at all times relevant hereto Northland Investment handled the leasing and day-to-day operations of the complex.

4. At the inception of their tenancies, the class members all paid security deposits. The security deposits were paid to "Cliffside Apartments," and were originally placed into a Citizens Bank account in the name of "Amherst Portfolio LP dba The Cliffside Apts." The tenants completed W-9 forms, and sub-accounts were created for each security deposit and the interest that accrued thereon. Statements for the account were mailed to Northland Investment. After Amherst Portfolio deeded the property to Northland Cliffside, the security deposits remained in the original account until May, 2008 when, following receipt of a demand letter from the plaintiffs, they were transferred into a new account in the name of Northland Cliffside.[1]

5. All Cliffside tenants who resided at the complex on August 10, 2007 when the property was deeded from Amherst Portfolio to Northland Cliffside, and have since vacated, have had their security deposits returned in full, or were provided with an itemized statement listing proper deductions.[2]

6. Form leases executed by Pumiglia and class members during the years 2007 and 2008 included provisions that violated Massachusetts law. Examples include provisions denying the

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1 The plaintiffs assert that the new account was created in June, 2008. See Plaintiffs' Motion for Summary Judgment, page 5. The only evidence that includes a date, however, is Northland Cliffside's response to the Chapter 93A demand letter, which identifies May 23, 2008 as the date on which the new account was opened.

2 I infer that all deductions were proper from the fact that no class members are claiming actual damages as a result of the alleged violations of G.L. c. 186, §15B.

lessor's duty to remove any natural accumulation of ice, sleet, or snow; waiving the tenant's right to trial by jury "to the extent allowed by law;" permitting the owner and its agents to enter units without authorization of the tenant; and stating that tenants could only exercise their legal rights if their rent was current. The illegal lease provisions did not give rise to any actual damages on the part of any class members.

7. On or around April 24, 2008, Pumiglia sent Northland Cliffside a demand letter pursuant to G.L. c. 93A, on behalf of himself and all other similarly situated Cliffside tenants. The letter demanded return of the tenants' security deposits plus five percent interest per year dating back to August 10, 2007 based on the failure to notify tenants that the property had been transferred by Amherst Portfolio, and failure to open a new account in the name of Northland Cliffside. The letter also identified 15 allegedly unlawful provisions of the leases in effect from January, 2007 through December, 2008, and demanded $25 or actual damages per tenant for each of twelve lease provisions. Finally, the letter demanded the greater of three months' rent or actual and consequential damages for Northland Cliffside's alleged violation of G. L. C. 186, §14.

8. Northland Cliffside responded to Pumiglia's demand letter on May 23, 2008. In pertinent part, the response denied liability for the alleged illegal lease provisions and denied that the transfer of Cliffside from Amherst Portfolio to Northland Cliffside triggered the notice and other provisions of the security deposit statute. The response also informed Pumiglia that as of that date his security deposit was transferred into an interest-bearing account in the name of Northland Cliffside. Finally, the response offered $150 in settlement of "any and all" claims of Pumiglia.

SUMMARY JUDGMENT STANDARD:

9. Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to a judgment as a matter of law. Mass.R.Civ.P. 56(c); *Highlands Ins. Co. v. Aerovox*, 424 Mass. 226, 232, 676 N.E.2d 801, 805 (1997). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue. *Pederson v. Time Inc.*, 404 Mass. 14, 16-17, 532 N.E.2d 1211, 1212-13 (1989). A moving party which does not bear the burden of proof at trial is entitled to summary judgment if it submits affirmative evidence, unmet by countervailing materials, that either negates an essential element of the nonmoving party's case or demonstrates that the nonmoving party has no reasonable expectation of proving an essential element of its case. *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716, 575 N.E.2d 734, 740 (1991). The opposing party cannot rest on the pleadings or on mere assertions of disputed facts to defeat the summary judgment motion. "If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact ..." *Pederson*, 404 Mass. at 17, 532 N.E.2d at 1213. When reviewing a summary judgment record, the court credits facts in the light most favorable to the nonmoving party. *Bisson v. Eck*, 430 Mass. 406, 407, 720 N.E.2d 784, 785-86 (1990); *Gray v. Giroux*, 49 Mass.App.Ct. 436, 437, 730 N.E.2d 338, 339-40 (2000).

DISCUSSION:

10. **Security Deposit Claims:** The cross-motions for summary judgment with respect to the security deposit claims frame two questions for the court's determination: did the transfer of Cliffside from Amherst Portfolio to Northland Cliffside trigger the provisions of G.L. c. 186,

§15B(5) ("§15B(5)"); and, if so, was the statute violated? Based on the undisputed facts regarding the management of Cliffside, I conclude that the transfer in question did not trigger §15B(5). I further conclude that if §15B(5) was triggered by the transfer, it was not violated by the defendants.

11. G.L. c. 186, §15B(1)(e) provides as follows: "A security deposit shall continue to be the property of the tenant making such deposit, shall not be commingled with the assets of the lessor, and shall not be subject to the claims of any creditor of the lessor or of the lessor's successor in interest..." The remaining sections put meat on the bones, but this section expresses the basic principles underlying the statute. *Hampshire Village Assoc. v. District Court of Hampshire*, 381 Mass. 148 (1980), cert. denied sub nom. *Ruhlander v. District Court of Hampshire*, 449 U.S. 1062 (1980) (security deposit remains the tenant's property, to be held as a fund in trust); *Taylor v. Burke*, 69 Mass.App.Ct. 77 (2007) (statute recognizes that ownership of deposit remains with tenant, to be held in trust by the landlord); *Neihaus v. Maxwell*, 54 Mass.App.Ct. 558 (2002) (statute insures that tenant's monies are not diverted by landlord for personal use).

12. G.L. c. 186, §15B(5) provides in pertinent part as follows:

> Whenever a lessor who receives a security deposit transfers his interest in the dwelling unit for which the security deposit is held, whether by sale, assignment, death, appointment of a receiver or trustee in bankruptcy, or otherwise, the lessor shall transfer such security deposit together with any interest which has accrued thereon for the benefit of the tenant who made such security deposit to his successor in interest, and said successor in interest shall be liable for the retention and return of said security deposit in accordance with the provisions of this section from the date upon which said transfer is made[3]

[3] The statute goes on to provide that "the granting of a mortgage on such premises shall not be a transfer of interest." The defendants argue that this language applies to the transaction at issue, as it occurred in the context of refinancing a mortgage on Cliffside Apartments. Given the basis for my ruling herein, I need not reach this argument and decline to do so, other than to note that the plaintiffs do not identify the granting of the mortgage as triggering the statute, but rather the

13. The plaintiffs argue that the term "lessor" in §15B(5) necessarily and exclusively signifies the individual or entity that owns the real property in question. That being Amherst Portfolio until August 10, 2007 and Northland Cliffside thereafter, the argument goes, a "transfer" under the statute occurred, triggering the requirements of §15B(5), forfeiture of the security deposits when those requirements were not followed, return of the security deposits upon demand as a result, and treble damages when the security deposits were not returned. I conclude that the plaintiff's formulation is too restrictive, and that the term "lessor" as applied to the facts of this case included Northland Investment. Northland Investment having remained at all times in control of the security deposits such that those funds were always available to the tenants and never exposed to creditors of Amherst Portfolio or Northland Cliffside, the provisions of §15B(5) were not triggered.

14. Recognizing Northland Investment as a "lessor" for purposes of §15B(5) is consistent with the meaning of "owner" under the State Sanitary Code, which is defined in pertinent part as follows:

> Owner means every person who alone or severally with others:
> (1) has legal title to any dwelling, dwelling unit, mobile dwelling unit, or parcel of land, vacant or otherwise, including a mobile home park; or
> (2) has care, charge or control of any dwelling, dwelling unit, mobile dwelling unit or parcel of land, vacant or otherwise, including a mobile home park, in any capacity including but not limited to agent, executor, executrix, administrator, administratrix, trustee or guardian of the estate of the holder of legal title;

105 C.M.R. 410.020

transfer of the property by deed from one corporate entity to another.

15. It is also consistent with the definition of "owner" in the Attorney General's regulations at 940 C.M.R. 3.17, as follows:

> Owner. Any person who holds title to one or more dwelling units in any manner including but not limited to a partnership, corporation or trust. For purposes of these regulations the term "owner" shall include one who manages, controls, and/or customarily accepts rent on behalf of the owner.

16. These regulations protect consumers by defining "owner" expansively, insuring that those individuals and entities in the trade or business of managing residential rental property are accountable to the tenant consumer equally with those who hold title to the property. *Ianello v. Court Management Corporation,* 400 Mass. 321 (1987)(manager liable for violations of G.L. c. 186, §14)*; Scofield v. Berman & Sons, Inc.,* 393 Mass. 95 (1984) (manager liable under G.L. c. 186, §14). Just as more than one individual or entity can be the "owner" under these regulations, so too can more than one individual or entity be the "lessor" under §15B(5).

17. This reading of the statute finds support in *Neihaus v. Maxwell,* 54 Mass. App. Ct. at 558, which held that there was no statutory violation when a property manager co-mingled a security deposit paid for one property with aggregated last month rent and security deposit payments for other properties. *Neihaus* reiterated that the statute is "designed to insure that tenant monies are protected from potential diversion to the personal use of the landlord, earn interest for the tenant if held for a year or longer, and are kept from the reach of the landlord's creditors," *id.* at 561, and expressed no concern over the fact that security deposits belonging to tenants of multiple owners, as that term is commonly understood, were co-mingled. As applied to *Neihaus,* the plaintiffs' restrictive interpretation of the term "lessor" would have required the owner himself,

not the manager, to open a separate interest bearing account for Maxwell's security deposit. Implicit in the court's ruling, however, is a recognition that the statutory obligations of the "lessor" may be fulfilled by a property manager, as was the case here when Amherst Portfolio and Northland Cliffside delegated the responsibility for managing security deposits to Northland Investment. As the transfer from Amherst Portfolio to Northland Cliffside did not alter Northland Investment's role or responsibilities as a "lessor" within the meaning of the statute, that transfer did not trigger §15B(5).[4]

18. Even were §15B(5) triggered by the transfer in this case, however, it is clear on the undisputed facts that no violation of that provision occurred. Although §15B(5) requires that the security deposit be transferred to the successor in interest, it does not establish a time frame within which that transfer must occur. Rather, tenants are protected by the following language in §15B(5):

> Upon such transfer [of the lessor's interest in the dwelling unit], the lessor or his agent shall continue to be liable with respect to the provisions of this section until:
>
> (a) there has been a transfer of the amount of the security deposit so held to the lessor's successor in interest and the tenant has been notified in writing of the transfer and of the successor in interest's name, business address, and business telephone number;
>
> (b) there has been compliance with this clause by the successor in interest; or
>
> (c) the security deposit has been returned to the tenant.
>
> In the event that the lessor fails to transfer said security deposit to his successor in interest as required by this subsection the successor in interest shall, without regard to the nature of the transfer, assume liability for payment of the security deposit to the tenant in accordance with the provisions of this section...

[4] The plaintiffs point out that the account in which the security deposits were held remained in the name of Amherst Portfolio d/b/a/ Cliffside Apartments after the property was transferred and Amherst Portfolio was dissolved. Nevertheless, the undisputed facts are that employees of Northland Investment were at all times able to transact with the account and process security deposits, and that no tenants were deprived of their security deposits as a result of this oversight.

19. This language is noteworthy for two reasons. First, it expressly references the ongoing liability of the agent, here Northland Investment, in the event of a transfer. As required, Northland Investment has at all times before and after the transfer from Amherst Portfolio to Northland Cliffside acknowledged its liability for the tenants' security deposits. Second, the statute protects tenants by providing that until such time as the security deposit is itself transferred with notice to the tenant, or returned, both parties to the transfer are liable under the statute. As applied to this case, to the extent that §15B(5) was triggered, both Amherst Portfolio and Northland Cliffside remained liable thereunder for the tenants' security deposits, and both delegated that responsibility to Northland Investment, which properly discharged it.

20. The plaintiffs posit hypothetical circumstances in which transfer within an overarching corporate structure, such as occurred here, could interfere with a tenant's ability to identify the entity holding the security deposit, or otherwise compromise a tenant's rights. It is not alleged, however, nor does the record indicate, that any such circumstances are operative in this case. Were such circumstances experienced in fact, the tenants to whom the security deposits were due would have remedies under the statute. The position advocated by the plaintiffs is not necessary to provide the class members with all of the protection the statute is intended to provide, for the simple reason that the security deposits were at all times held in an account accessible to the property manager, Northland Investment, which satisfies the statute as a matter of law.

21. **Illegal Lease Provisions:** There is no dispute that the operative leases (2007 and 2008) included one or more provisions that violated Massachusetts law. It is also undisputed that no class member suffered actual damages as a result of the illegal lease provisions. Rather, the parties dispute whether the plaintiffs nevertheless have an actionable claim under Chapter 93A,

in light of *Hershenow v. Enterprise Rent-A-Car*, 445 Mass. 790 (2006); and, if so, whether they are entitled to a single award of nominal damages, or multiple awards. I conclude that each class member is entitled to a single award of nominal damages for each lease (2007 and 2008) to which he or she was a party.

22. This case raises squarely the question of how to apply *Leardi v. Brown*, 394 Mass. 151 (1985), in light of the Supreme Judicial Court's ruling in *Hershenow*. For purposes of their Chapter 93A claim, the Court in *Leardi* ruled that "the tenants comprising the plaintiff class [had] been 'injured' by the use of deceptive and illegal clauses in the defendants' standard apartment lease, despite the fact that the plaintiffs were unaware of, and the defendants [had] never attempted to enforce, these illegal provisions." *Leardi*, 394 Mass. at 152. Accordingly, "under circumstances where there has been an invasion of a legally protected interest, but no harm for which actual damages can be awarded, [the Court concluded that] the statute provides for the recovery of minimum damages in the amount of $25." *Id.* at 160.

23. Twenty one years after *Leardi*, the SJC was again called upon to determine whether plaintiffs in a class action case had suffered an "injury" for purposes of their Chapter 93A claim. *Hershenow* held that "because the [illegal contract provision] did not cause the plaintiffs to suffer any loss, they have failed to satisfy the causation requirement of the "injury" provision of G. L. c. 93A, s. 9 (1); proving a causal connection between a deceptive act and a loss to the consumer is an essential predicate for recovery under our consumer protection statute." *Hershenow v. Enterprise Rent-A-Car*, 445 Mass. at 791.

24. Notwithstanding the specific ruling in *Hershenow*, however, a majority of the Court specifically declined to overrule *Leardi*, reasoning as follows:

> Leardi thus established that, in the wake of the 1979 amendment to G. L. c. 93A, s. 9, a claim of "injury" now encompassed "the invasion of any legally protected interest of another," just as it now encompassed severe emotional stress or personal injury. What Leardi did not do was to eliminate the required causal connection between the deceptive act and an adverse consequence or loss. In Leardi, the requisite causal connection was established: confronted by unhabitable conditions, the illegal lease terms would deter tenants from exercising their legal rights on pain of loss of their tenancy. Stated differently, the illegal lease terms acted as a powerful obstacle to a tenant's exercise of his legal rights. If a tenant challenged unhabitable conditions by withholding rent, for example, he faced immediate eviction. The mere existence of statutorily prohibited lease provisions placed all tenants in a worse and untenable position than they would have been had the leases complied with the requirements of Massachusetts law.

Hershenow, 445 Mass. at 799-800 (citations omitted).

25. This case is on all fours with *Leardi.* The majority opinion in *Hershenow* having affirmed *Leardi*, that case controls here, and is dispositive. The SJC's stated rationale for declining to overturn *Leardi* in *Hershenow* is also instructive, however, and reinforces the conclusion that the plaintiffs in this case have established an "injury" for purposes of Chapter 93A.

26. In *Hershenow,* the offending contract provision would have operated unlawfully to deny coverage in certain circumstances if, but only if, a claim had been filed under those circumstances. As in *Leardi,* however, the illegal lease provisions in this case affirmatively abridged the tenants' rights by obligating them to contractual terms that effectively redefined the landlord- tenant relationship. While those provisions were not applied to class members so as to give rise to actual damages, the tenants were nonetheless bound by them, and they could have been applied at any point over the course of the lease term. The landlord-tenant relationship has legal significance, and has been formed over time by a host of statutes, regulations, and case decisions. Tenants have a "legally protected interest" in that relationship. The lesson of *Leardi*, as informed but not overturned by *Hershenow,* is that invading that interest is itself an "injury"

under Chapter 93A.

27. This analysis also makes clear that the plaintiffs are entitled to nominal damages for each offending lease, not for each offending lease provision or cluster of lease provisions. The legal injury here arises out of and in relation to the landlord-tenant relationship, a relationship with independent legal significance; it does not, in the absence of actual damages, arise with respect to each right that exists within that relationship. Thus, the injury occurred on each occasion when the relationship was invaded by a lease that included illegal provisions. I am mindful that the decision in *Bernashe v. Comotois*, Docket No. 88-SP-5595 (Abrashkin, J. 1989) ruled differently, and awarded damages for each constellation of legal rights invaded by the lease at issue therein. In the absence of actual damages, and in light of the intervening *Hershenow* decision, I decline to adopt the reasoning of that decision. I therefore conclude that class members are entitled to nominal damages ($25) for each lease (2007 and 2008) to which they were party, which wrongfully altered their relationship to the landlord by containing one or more illegal provisions.

CONCLUSION AND ORDER FOR ENTRY OF JUDGMENT

21. For the reasons set forth above, the following order shall enter:

A. Summary judgment shall enter in favor of the defendants on the plaintiffs' claims under the security deposit statute, G.L. c. 186, §15B.

B. Summary judgment shall enter in favor of the plaintiffs on their claims under Chapter 93A, awarding each class member $25 per lease to which he or she was party, plus costs and attorney's fees.

C. The Clerk's office is requested to schedule this matter for case management conference before the undersigned.

So entered this _____ day of September, 2012.

_____
Dina E. Fein
First Justice

cc: Clerk Magistrate Peter Montori