

The Landlord-Tenant Impacts of Buying or Selling a Multi-Family Dwelling

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THE LANDLORD-TENANT IMPACTS OF BUYING OR SELLING A MULTI-FAMILY DWELLING

Massachusetts landlord-tenant law impacts both the buyer and the seller in the conveyance of multi-family buildings. Because of the implications of the Consumer Protection Act, G.L. c. 93A, real estate professionals need to consider these the landlord-tenant implications of these transactions. *Mongeau v. Bolutelle*, 10 Mass. App.Ct. 246 (1980). Under the Attorney General's 93A regulations, 940 CMR Section 3.16(2), a 93A occurs when "any person or other legal entity subject to this act fails to disclose to a buyer or prospective buyer any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction."

The legal issues are interrelated and affected by the individual facts of each situation. The parties to a multi-family sale should consider these issues:

◆ **The security deposits/last month's rents** ~ Are there any deposits or last month's rents? When did the seller take them? Where did the seller deposit them? Has the seller paid any interest? Does the seller have any concerns if she transfers the deposits to the buyer? What are those concerns? What does the buyer do to protect herself if the seller has not complied with the statute? Or if the seller does not fully disclose what security deposits/last month's rents she holds? How does the buyer protect herself? How should these issues impact the P & S? The closing? The buyer after the closing?

◆ **Delivering vacant premises at the closing** ~ Does one of the parties want the property vacant at the time of conveyance? Can this realistically happen? What should the seller consider when contracting to deliver premises free of existing tenancies? What are the buyer's concerns if takes title subject to existing tenancies? How does the summary process statute impact these concerns? Should the seller ever obligate herself to deliver the premises free of occupants? Should the buyer accept the building with tenants? How should these concerns affect negotiating the P & S agreement?

◆ **Code violations** ~ Are there any code violations? Is it helpful to have the property inspected by the board of health? If there is a code inspection report, what has the seller done in response to it? What have the tenants done in response to the

report ? Have they withheld rent? Have the tenants given the seller any written complaints? Oral complaints? Does this have an impact on a eviction? Has the buyer inspected the property? What does she now "know," in the legal sense, about the code violations because of the inspection? How will this knowledge affect her as the new owner? Should repairs be made before the closing? Does it make a legal difference? Who should make the code repairs - the seller or the buyer? What should the buyer do if she wants to protect herself from tenants' claims once she takes title? Is there anything the buyer can do? How should the parties deal with these issues in the P & S agreement ? Does it make any difference if the code violations can't be corrected with the occupants in place?

◆ **Terms of the tenancy** ~ What are the names of the occupants ? What is their status? Are they tenants at will? ~ under an oral? or written agreement? ~ Are they tenants with leases? What are the terms of the tenancies? What are the monthly rents? Are the occupants under a judgment of the court to vacate? What is the status of the rents? Has a notice to quit been served? Should one be served ? By whom ? Has the seller received any oral or written complaints about the building? Who owns the stoves? The refrigerators? The other personal property? The seller? The occupants? How do the answers affect the buyer Seller? Should the parties address these issues in the P & S ?

◆ **Pending claims** ~ Are there any pending insurance claims of the occupants? Is the seller on notice of any occupant's concerns about safety or warranty issues? Has the Board of Health served any orders?

I SECURITY DEPOSITS/LAST MONTHS' RENTS

The security deposit statute, G.L. c. 186, Section 15B (5) and (7A), imposes very specific obligations on both buyers and sellers of buildings with residential tenants. If a landlord, holding a security deposit and/or a last month's rent, transfers¹ the property, the statute requires that:

¹Transfer is not limited to sales. It means a conveyance by "sale, assignment, death, appointment of a receiver or trustee in bankruptcy, or otherwise." Granting a mortgage on the property is not a transfer.

1. the landlord must transfer the last month's rents/deposit(s) and all accumulated interest to the successor in interest;
2. the successor must comply with the provisions of the statute from the date of transfer;
3. the successor must notify the tenants in writing within 45 days that the security deposit/last month's rent was transferred and that she is holding the deposit/last month's rent as of the date of transfer. The notice must contain the landlord's (seller's) name, business address, and business telephone number, and the name, business address, and business telephone number of his agent, if any. [See also 4(a) below];
4. **even after the transfer, the landlord/seller continues to be liable** under the security deposit law until:
 - a. the deposit/last month's rent is transferred to the successor and the tenant has been notified in writing of the transfer and of the successor's name, business address, and business telephone number;
 - b. the successor complies with the G.L. c.186, Section 15B, obligations of a landlord regarding last month's rents and security deposits and has assumed these statutory responsibilities; or
 - c. the security deposit has been returned to the tenant or the rent advance "credited to the tenant and all accrued interest" paid.
5. If the landlord doesn't transfer the security deposit/last month's rent, the successor must assume liability for payment of the security deposit/last month's rent to the tenant but can fulfill this obligation by letting the tenant live rent free for the period of time equivalent to dollar value of the deposit and/or the last month's rent.²

The seller who doesn't comply with the statute faces

² This assumes that the deposit is the equivalent of one month's rent. The statute actually requires the successor to let the tenant to live rent free "for a period of time equivalent to that period of time for which the dwelling unit could be leased or occupied if the security deposit were deemed to be rent."

liability for triple the deposit, interest, court costs and tenants' attorney's fees. The buyer who doesn't get the deposit/last month's rents, which the tenants have paid, has to pay these amounts to the tenants or face triple damages. G.L. c. 186, Section 15B (7).

The liabilities imposed by the statute have to be dealt with both in the P & S and at the closing.

The buyer needs the seller to disclose accurately whether she is holding deposits/last month's rents, when she took them (to calculate the interest due), and whether and how much interest the seller has paid. The buyer needs this clause to "survive the closing." Both parties may want to be indemnified from the other to cover potential liability. The potential liability increases with the number of apartments sold. If there are six apartments with deposits of \$750 and last month's rents in the equivalent amount, the buyer could have to pay \$13,500 to the tenants for the deposits [$\$750 \times 6 \times 3 = \$13,500$] and \$4500 for the last month's rents [$\$750 \times 6 = \4500]!

The seller needs to know that the buyer will comply with the statutory notice and other provisions or that the buyer is returning the money to the tenants. The seller should obligate the buyer to these duties in the P & S. At the closing each party has an interest in knowing that the other will in fact comply with the statute. If the buyer is keeping the deposits/last month's rents, seller should draft the appropriate notice, from the buyer to the tenants. At the closing, the buyer should sign it and the seller mail it to the tenants. From the seller's perspective this may be the safest way to assure that buyer will comply with the notice provisions.

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DELIVERING VACANT PREMISES

Many buyers want to purchase property without occupants. Many buyers and sellers live in the mistaken belief that the legal complications in eviction cases disappear for the buyer because he just purchased the property. Some believe that this fact changes the legal consequences for the buyer. This is not the case.

Many sellers unwittingly sign P & S agreements contractually obligating themselves to deliver the property "free of all occupants." This may set them up for a breach. Because of the summary process statute, it may be impossible to convey vacant property.

G.L. c. 239, Section 8A, applies to every eviction case

except for those where the tenancy has been terminated because of the “fault” of the tenant. The statute gives the tenant the right to continue in possession if the tenant wins any counterclaim. The statute provides:

“In any action under this chapter to recover possession of any premises rented or leased for dwelling purposes, brought pursuant to a notice to quit for nonpayment of rent, or where the tenancy has been terminated without fault of the tenant or occupant, the tenant or occupant shall be entitled to raise, by defense or counterclaim, any claim against the plaintiff relating to or arising out of such property, rental, tenancy, or occupancy for breach of warranty, for a breach of any material provision of the rental agreement, or for a violation of any other law. The amounts which the tenant or occupant may claim hereunder shall include, but shall not be limited to, the difference between the agreed upon rent and the fair value of the use and occupation of the premises, and any amounts reasonably spent by the tenant or occupant pursuant to section one hundred and twenty-seven L of chapter one hundred and eleven and such other damages as may be authorized by any law having as its objective the regulation of residential premises.”

Using this statute, a residential tenant or an “occupant” may assert a counterclaim or defense against the landlord. Even tenants at sufferance can raise claims under the statute. *Hodge v. Klug*, 33 Mass. App. Ct. 746 (1992). For the landlord - seller, this statute creates a major obstacle to conveying the property without tenants. If the tenant wins a counterclaim, the tenant may defeat the landlord’s claim for possession. Here’s how. Chapter 239, § 8A, provides:

1. If the landlord’s case is based on (a) non-payment or (b) a termination **without fault of the tenant**,³ the tenant can assert any of three kinds of claims against the landlord connected with the property, or occupancy: (1) for breach of warranty, (2) for a breach of any material provision of the rental agreement, or (3) for a violation of any other law. If the tenant wins a claim, the tenant is entitled to damages.⁴

³In other words, in a “fault” eviction, the statute does not give these rights to a tenant. The Summary Process Rules permit counterclaims in accordance with Section 8A. See Rule 5.

⁴The tenant’s monetary damages include, but are not limited to, “the difference between the rent and the fair value of the premises, and any amounts reasonably spent by the tenant to repair code violations and any other damages authorized by any law which regulates residential premises.”

2. If the claim relates to the condition of the property or to the services/equipment at the property, the tenant must prove: (1) the owner⁵ knew of the conditions before the tenant got behind in the rent; (2) the property is not in a hotel/motel, or lodging/rooming house which the tenant has lived in for less than three consecutive months; and (3) that he didn't cause the violation if it is an area of the property under his control and the condition is not by its nature reasonably attributable to the landlord's act or failure to act.

The tenant is not entitled to relief if: (1) the landlord shows that the conditions were caused by the tenant or a person under the tenant's control; or (2) that the conditions can't be remedied unless the tenant vacates.⁶

3. After computing rent due the court computes the damages awarded to the tenant. **The court cannot grant possession to the seller/landlord:**
 - a. if the rent due equals or is less than the money due the tenant;
 - b. if the rent due is more than the money due the tenant **and** if the tenant pays the difference to the court with interest and the costs of the landlord's suit within one week after getting notice from the court of the balance due. The court cannot enter judgment until the seven days has passed.

Finally, the statute expressly declares that the retaliatory

⁵The tenant can alternatively prove that the owner's "agents, servants, or employees, or the person to whom the tenant customarily paid his rent" knew of the conditions.

⁶See *Knott v. Laythe*, 42 Mass. App. Ct. 908 (1997). (The landlord prevailed on his good faith determination that the repairs could not be made unless the tenant vacated.) This rule does not apply if the reason for temporarily vacating is to delead the premises.

eviction statutes (G.L. c. 239, § 2A, and G.L. c. 186, § 18) apply when any tenant exercises the rights granted in Section 8A. In other words, the statute specifically makes the retaliation statutes apply to protect a tenant who uses it. These retaliation statutes (G.L. c. 239, § 2A, and G.L. c. 186, § 18) create a presumption of retaliation as a defense and a counterclaim for any termination of tenancy or change in rental terms occurring within six months.

A tenant can raise many kinds of counterclaims raising issues from substandard conditions to discrimination. In *Mulvanity v. Pelletier*, 40 Mass. App. Ct. 106 (1996), the Court interpreted Section 8A expansively to permit counterclaims by a grandmother against her grandson for emotional distress. She claimed he breached an oral agreement for a life tenancy she made with his mother and father. The Court, noting how summary process has evolved from its original focus to regain possession recognized that **tenants "may now counterclaim on any matter arising out of the rental of such property ..."**

The tenant can extend the summary process case for two additional weeks by asking for discovery. Even assuming the entry of judgment for the seller/landlord, there is a ten day wait for the issuance of execution. Service of the execution by the constable requires her giving an additional 48 hours notice.

A tenant without counterclaims or defenses can ask the court for up to six months stay of the execution for possession in an eviction not based on fault or non-payment. She can ask for up to one year if one of the occupants is disabled or over 60. G.L. c. 239, Section 9.

The practical effect of Chapter 239, Section 8A, in the purchase and sales context is simply that it is usually unwise for a seller to obligate himself contractually to deliver the premises free of tenants.

3

THE EFFECT OF CODE VIOLATIONS ON BUYER

While code violations can prevent the seller from evicting the tenants, they may also haunt the buyer. **When the property conveys, the buyer takes the property subject to the tenancy existing when title passes.** This applies to tenancies at will and to tenancies under a lease. See G.L. c. 186, Section 13; *Judkins v. Charette*, 255 Mass. 76 (1926); *75A Chestnut, Inc. v.*

Fiumara, 361 Mass. 882 (1972). The buyer in effect inherits the contractual relationship the seller had with her tenants. The same statutory limitations on evictions also apply to the buyer. This means that the tenant cannot be evicted until the tenancy is terminated and only through summary process. This forces the buyer to face Chapter 239, Section 8A, defenses and counterclaims. If there are existing code violations, the tenant can use them to keep possession. The buyer will have an added disadvantage in the buyer will more than likely have inspected the premises or had them inspected. The buyer will "know" of the code violations. This leaves the buyer in the position in which it may be difficult to evict the tenant.

At the time of the P & S, the buyer needs assurances that either she can evict the tenant or that from the time she takes title, the tenant has no claims against her.

Two Possible Solutions

- I. If the buyer wants the property free of tenants, he can negotiate to have the seller deliver vacant property. If this negotiation fails, he may begin the process to evict the tenants. Of course, if the property has code violations or if the parties haven't handled the security deposits/last month's rent, Chapter 239 will create problems obtaining possession of the property. However, the buyer is in a position to set himself up to have fewer problems. The tenant's contract (for example, warranty of habitability) claims lie against the seller. The tenant has had no relationship with the buyer from which claims could arise.

The warranty of habitability is a contractual obligation running from the landlord to the tenant. Claims for breach of warranty of habitability or for abatement of rent look to the past. Once the conditions are remedied, the tenant does not have a claim for future rent reduction against the new owner. **If the seller corrects the violations**, she can deliver the property "code free" and the buyer can terminate the tenancy and begin the summary process action with assurances that the tenant cannot successfully raise conditions counterclaims.

The security deposit claims lie against the seller at least for conduct up to the conveyance. The buyer can prevent claims against herself by controlling the handling of security deposits/last month's rent in the P & S, and after the closing.

The Chapter 93A, Consumer Protection Act, claims also lie against the seller in relation to whom the tenant is a consumer. They can't be raised against the buyer except for the buyer's conduct which is usually going to occur after the closing.

Since it is easier for the buyer to evict the tenant, the parties can shift this requirement to the buyer. However, the buyer needs proof that the property is free of code violations at the closing. This is the evidence to defeat any conditions counterclaim. The seller can get a clean bill of health from the board of health or an admission from the tenant that conditions are repaired to prove that there are no code violations at the time of closing. The P & S can be written to require the seller to correct code violations to the satisfaction of the board of health. The parties can

adjust the financial arrangements to account for the sellers work and the improved condition of the property.

2. G.L. c. 239, Section 8A, and *Knott v. Laythe*, 42 Mass. App. Ct. 908 (1997) suggest a different approach for some situations. Section 8A grants possession to the landlord if the code violations require such extensive work that the buyer cannot reasonably repair the property while the tenants live there. Under 8A, the tenant can prevent eviction if the tenant proves that the property is "in violation of the standard of fitness for human habitation established under the state sanitary code ... and that such conditions may endanger or materially impair the health, safety or well-being of a person occupying the premises ..."
Section 8A. However, "***the tenant or occupant shall not be entitled to relief under this section unless: ... (4) the plaintiff does not show that the conditions complained of cannot be remedied without the premises being vacated.***"⁷
Section 8A.

The Appeals Court's comments about this part of 8A point to possible limitations. The Court said:

"In view of the extensive renovations proposed by the landlord as set forth in his letters of April and June, **and the absence of any claim or even hint that the projected improvements were a ruse or not intended in good faith**, the tenants cannot rely upon c. 239, § 8A, to deny recovery of possession. We do not read the statute as precluding a landlord from determining **in good faith** that the required repairs are so extensive that the conditions constituting violations **can not reasonably be remedied** without causing the premises to be vacated, **and that it makes economic sense to gut all the apartments**. In these circumstances, the assertion of violations of the State Sanitary Code may not be relied upon to bar the landlord from recovering possession of his premises." *Knott v. Laythe, supra*.

To rely on this the buyer must be prepared to offer some evidence showing that the property cannot reasonably be made to conform to code while the tenants remain living there.

⁷The statute has an express exclusion for lead paint. The landlord cannot defeat the tenant's claim for possession under this provision if the condition is lead based paint.

4 KNOWLEDGE ABOUT THE TENANCY

1. Terms of the Tenancy Agreement

All of the provisions of the tenancies existing at the closing are transferred to the buyer. The buyer obviously needs to know these terms. The terms may not be written. The tenancy could be oral or the terms may have become included in the tenancy by the conduct of the seller and the tenant. The P & S should address this issue. The buyer must obtain the leases or written tenancy at will agreements. The buyer should review any written agreements to determine if they comply with the Attorney General's Consumer Protection regulations. 940 CMR 3.17 and the provisions of the General Laws and the State Sanitary Code. See for example, G.L. c. 186, Sections 14; 15; 15B(1)(a),(c) and (8); G.L. c. 15C; 15D; 15E; 15F; 16; 18; 19; 20; 21; and the State Sanitary Code, 105 CMR 410.190, 201,254 (Code provisions relating to written rental agreements).

The buyer should know the terms of the oral tenancy agreement. especially any unusual terms. This information is important. For example, the date the rent is due, may determine the date for service of the 30 notice to quit. If the tenant has had access to a portion of the premises other than the immediate dwelling area [the basement, a storage area, a shed], the buyer needs to know. Keeping the tenant from such an area may constitute breach of the covenant of quiet enjoyment or worse a "partial actual eviction." These claims entitle the tenant to damages.

2. Identification of Seller's/Landlord's Personal Property

While landlords must supply a stove, unless a written agreement provides otherwise, and may supply a refrigerator, a tenant often uses his/her own personal stove and refrigerator. The P & S typically identifies personal property which is being conveyed with the real estate. The P & S should identify the ownership of personal property which the tenants are using.

3. Pending Claims

The buyer needs to know if there are pending claims against

the seller brought by a code enforcement or similar agency of government. Obviously, if there are board of health inspection reports, orders, court proceedings, this will impact the buyer. However, it is also important for the buyer to know the history and present pendency of insurance claims. This need pertains to property damage claims or personal injury claims arising out of conditions in the premises. Insurance companies may share information about claims arising out of a property resulting in the buyer's inability to obtain coverage at expected prevailing rates.

This article is only a summary about one aspect of the law. The summary presents information about the law through the date of its publication. Legislatures amend statutes. Courts interpret the law and statutes and by doing so affect legal rights and duties. This article is not intended as, and cannot be substituted for, legal advice which always must be tailored to each unique circumstance. Therefore, you should always consult a lawyer before simple relying on opinions or statements in this summary.