20-P-342 Appeals Court

JOHN MORSE vs. JORGE ORTIZ-VAZQUEZ.

No. 20-P-342.

Hampden. January 14, 2021. - April 13, 2021.

Present: Blake, Desmond, & Hand, JJ.

Summary Process, Notice to quit. Housing. Housing Court. Uniform Summary Process Rules. Landlord and Tenant, Eviction, Rent, Habitability, Dependence of obligations. Judgment, Default. Practice, Civil, Summary process, Affirmative defense, Counterclaim and cross-claim, Default, Continuance, Answer, Waiver. Waiver.

Summary Process. Complaint filed in the Western Division of the Housing Court Department on March 11, 2019.

The case was heard by Dina E. Fein, J.

Uri Strauss for the defendant.
Katharine Higgins-Shea for the plaintiff.
Richard M.W. Bauer, Deena Zakim, Caitlin Creamer, Julia E. Devanthery, Susan Hegel, & Andrew L. Bardetti, for City Life/Vida Urbana, amicus curiae, submitted a brief.

BLAKE, J. The defendant, Jorge Ortiz-Vazquez (tenant), appeals from a judgment entered in favor of the plaintiff, John Morse (landlord), awarding the landlord possession, unpaid rent,

and fees and costs.[1] The question presented in this case is whether a Housing Court judge erred in precluding the tenant from filing a late answer to a complaint at a summary process eviction hearing, thereby preventing him from raising affirmative defenses. Concluding that this judge erred, we vacate the judgment.

1. Background. In June 2016, the landlord and the tenant entered into a residential lease agreement for an apartment owned by the landlord (apartment). In October 2018, prior to the eviction at issue here, the landlord commenced a summary process action against the tenant for nonpayment of rent. The landlord was represented by an attorney; the tenant, who proceeded pro se, did not file a timely answer.[2] His motion to file an answer late was allowed, without opposition.[3] Based on the alleged presence of mold and mildew in the apartment, the tenant raised a conditions-based defense to possession and a counterclaim under the rent withholding statute. See G. L.

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[1] We acknowledge the amicus brief submitted by City Life/Vida Urbana.

[2] This is, if not the norm, at least a common circumstance. See Adjartey v. Central Div. of the Hous. Court Dep't, 481 Mass. 830, 838 (2019) (where "vast majority of tenants" are self-represented in Housing Court proceedings, result, in most cases, is that landlord has attorney who understands how to navigate eviction process, while tenant does not).

[3] The record is unclear whether the tenant's motion was prepared with the assistance of a limited assistance representation attorney. See note 7, infra.

c. 239, § 8A, first par.[4] After a bench trial, a Housing Court judge (first judge) ruled in favor of the tenant on his affirmative defense and counterclaim under G. L. c. 239, § 8A.[5] The tenant exercised his right to cure under the statute, preserving his tenancy. See G. L. c. 239, § 8A, fifth par. On December 21, 2018, a final judgment entered against the landlord.

A dispute quickly arose over whether the landlord properly remediated the unsanitary conditions in the apartment. Thus, the tenant began withholding rent again. By notice to quit dated January 28, 2019, the landlord terminated the tenant's tenancy for nonpayment of rent. On March 11, 2019, the landlord, represented by the same attorney as in the prior

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[4] General Laws c. 239, § 8A, first par., provides, in relevant part:

> "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 . . . the tenant or occupant shall be entitled to raise, by defense or counterclaim, any claim against the [landlord] relating to or arising out of such property, rental, tenancy, or occupancy for breach of warranty . . . or for a violation of any other law."

[5] Shortly after the first trial, the first judge issued his findings and an escrow order. See Davis v. Comerford, 483 Mass. 164, 175-177 (2019). He found that the apartment was humid to an inappropriate degree, concluded that the tenant had proved his conditions-based affirmative defense, and awarded to the tenant three months' rent in damages. Neither the first judge's decision nor the escrow order is included in the record appendix, but these facts are uncontested.

summary process action, filed another summary process summons and complaint, seeking unpaid rent of $1,100 and future rent or use and occupancy charges for the apartment. The tenant again appeared pro se and again missed the seven-day deadline for filing an answer. See Rule 3 of the Uniform Summary Process Rules (1993). On March 21, 2019, the original trial date set forth in the summons and complaint, the tenant appeared in court and submitted a motion to file an answer late, claiming that he "did not have any help due to [his] langu[a]ge problems."[6] He requested a two-week extension to prepare for trial. In contrast to the first case, the landlord's attorney opposed the tenant's request to file a late answer, but assented to the two-week continuance. In his proposed answer, which was attached to the motion, the tenant stated, "The apartment continue[s] with mildew and I need to replace my personal belong[ing]s and they have not resolve[d] the hea[l]th issue yet." The trial was postponed for one day because of an issue with the technology in the court room. At that hearing on the motion to file a late answer, the tenant was represented by a limited assistance

[6] The tenant's primary language is Spanish. We note that on the form in use at the time of this case, page one of the two-page summons and complaint provided the tenant with the deadline for filing an answer, and page two stated in bold capital letters, with a translation in Spanish, that "if you do not file and serve an answer, or if you do not defend at the time of the hearing, judgment may be entered against you for possession and the rent as requested in the complaint."

representation (LAR) attorney.[7] A second Housing Court judge (second judge) denied the tenant's motion on the ground that a "[l]ate answer was permitted in [the] earlier case between the parties."[8] The second judge said that the tenant was free to pursue his conditions-based claims in an independent action. With the consent of the landlord's attorney, the second judge continued the trial to April 4, 2019.

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[7] In addition to the "lawyer for a day" program, see note 14, infra, the limited assistance representation (LAR) program is another source of legal services available to self-represented litigants in civil matters, including summary process proceedings. See Rule 2 of the Limited Assistance Representation Rules (2019). Housing Court Standing Order 1-10 (2010), governing LAR, was rescinded effective February 1, 2019, the day that the Limited Assistance Representation Rules became effective. Under Rules 4 and 5 of the Limited Assistance Representation Rules (2019), LAR attorneys retained in connection with a discrete event or issue are required to file a notice of limited appearance as well as a withdrawal of the limited appearance at the conclusion of the particular event. Thus, as in this case, litigants may phase in and out of pro se status over the course of an eviction proceeding. Under Rule 7 of the Limited Assistance Representation Rules (2019), LAR attorneys must note their LAR appearance on all pleadings and motions. If the representation is limited to assisting a pro se litigant in preparing a pleading or motion to be signed and filed by the litigant, Rule 9 of the Limited Assistance Representation Rules (2019) requires the LAR attorney to insert the notation "prepared with assistance of counsel."

[8] The second judge reasoned that the tenant had the duty to "prove both that he didn't know to file [the answer] on time, and that . . . he would have had something . . . significant to say. It's close and I understand that, but when I'm looking at a history here where this is round two, same parties, same facts, and an earlier motion for leave to file a late answer, it really seems that it tips in favor of the landlord this round."

Due to a court oversight, the new trial date was not added to the court calendar, and no written notice was given to the parties. Although the case was neither listed on the docket nor called by the clerk, the landlord appeared for trial on April 4, 2019, but the tenant did not. The landlord's attorney requested and received the entry of a default for the tenant's failure to appear. See Rule 10 (a) of the Uniform Summary Process Rules (2004). The following day the tenant appeared at the court house only to learn he had misremembered the trial date. He immediately filed a motion to "remove" the default. On April 11, 2019, the tenant's motion was heard by the first judge, who had presided over the first trial.[9] The tenant told the first judge that he had evidence to prove that the apartment contained "extreme mold and mildew conditions" and that he intended to defend the eviction under G. L. c. 239, § 8A, based on the continued presence of mold and mildew in the apartment.[10] The

[9] A default judgment entered on the docket on April 5, 2019, by operation of Rule 10 (d) of the Uniform Summary Process Rules (2004). The first judge treated the tenant's motion as one to remove a default. See Rule 10 (c) of the Uniform Summary Process Rules (2004).

[10] After the first summary process trial, the tenant retained at his own expense a mold expert to test the apartment. Prior to the beginning of the second case, the tenant provided the landlord with a copy of the report prepared by the tenant's mold expert, putting the landlord on notice of the alleged defects. The findings of the parties' respective mold experts were at variance from one another.

first judge noted that "[t]hese exact conditions were in fact found to exist" at the prior trial. After weighing all the factors, including the court's scheduling error, the interests of the court to decide the case on the merits of the claim, and the tenant's pro se status, the first judge allowed the motion to remove the default. See Housing Court Standing Order 1-04(VI) (2004). He also scheduled a case management conference for April 22, 2019.[11]

Although the LAR attorney filed a withdrawal of his representation, it was not docketed until April 30, 2019. Believing that he had withdrawn from the case, the LAR attorney did not appear at the April 22, 2019 conference. The docket reflected that the conference was "[r]escheduled" and, in fact, it was never held. As a result, the effect of the lack of an answer on the upcoming summary process trial remained unresolved.

On May 31, 2019, the parties appeared for trial. The trial judge was the second judge, the same judge who had denied the tenant's motion to file a late answer. The landlord was present

[11] The landlord's attorney took the position at the April 11, 2019 hearing that the order denying the tenant's motion to file an answer late foreclosed the tenant from raising counterclaims and defenses at the trial. The first judge noted that if the landlord wanted to be heard on this position, a hearing on the matter could be scheduled "for a date prior to the trial."

with his attorney and two witnesses who were prepared to rebut the tenant's mold claim. The tenant appeared with the same LAR attorney, who filed his appearance that morning, a mold analysis and inspection report,[12] and photographs of the apartment. The second judge again precluded the tenant from presenting affirmative defenses under G. L. c. 239, § 8A. She also denied the LAR attorney's oral motion for reconsideration and his request to postpone the trial.

At the start of the trial, the tenant's LAR attorney objected to the second judge's refusal to allow the tenant to present his defenses. The second judge overruled the objection and reiterated that the tenant was free to contest the landlord's prima facie case, but that he was precluded from asserting affirmative defenses. With few other options, the tenant stipulated to the landlord's prima facie case.[13] See Adjartey v. Central Div. of the Hous. Court Dep't, 481 Mass. 830, 850-851 (2019) (Appendix); Cambridge St. Realty, LLC v. Stewart, 481 Mass. 121, 132-133 (2018). Judgment entered for

[12] The tenant was unaware of the need to subpoena his expert witness for trial. Without the expert, the report would have been inadmissible as hearsay.

[13] The parties stipulated that the tenant lived in a multifamily building that was not owner occupied; the tenancy was month to month; the rent was $550 per month; the amount of unpaid rent through the trial was $2,750; and the tenant had received the notice to quit.

the landlord for possession, and he was awarded $2,750 in back rent, plus court costs.

2. Legal framework. Summary process proceedings, which move faster than most other types of civil actions, "are governed by a distinct set of rules: the Uniform Summary Process Rules." Bank of Am., N.A. v. Rosa, 466 Mass. 613, 624 (2013). These rules cover the basic procedural steps in summary process actions. See Adjartey, 481 Mass. at 835-836; Rule 1 & commentary of the Uniform Summary Process Rules (1980). In the private housing context, our statutes, case law, and the Massachusetts Rules of Civil Procedure may also apply to various aspects of summary process. See Adjartey, supra at 836-837. Eviction procedures in the public housing context are even more complicated. To fill in the gaps and to augment the rules, the Chief Justice of the Housing Court has issued standing orders that govern important points of procedure. Promulgated through the Chief Justice's statutory authority, these standing orders reflect the reality that a significant number of litigants move through the process with no attorney and no familiarity with the rules.[14] See Adjartey, supra at 838-839; CMJ Mgt. Co. v. Wilkerson, 91 Mass. App. Ct. 276, 283 (2017).

[14] Housing Court Standing Order 1-01 (2001) created a volunteer "lawyer for a day" program (LDP) "to address the challenge and promote the fairness of the process [for self-

We recognize that presiding over cases involving pro se litigants can be challenging, not least because "[w]hile judges must apply the law without regard to a litigant's status as a self-represented party, see Mmoe v. Commonwealth, 393 Mass. 617, 620 (1985) . . . , our courts have recognized that self-represented litigants must be provided the opportunity to meaningfully present claims and defenses. See Carter v. Lynn Hous. Authy., 450 Mass. 626, 637 n.17 (2008); Loebel v. Loebel, 77 Mass. App. Ct. 740, 743 n.4 (2010)." I.S.H. v. M.D.B., 83 Mass. App. Ct. 553, 560-561 (2013). And a judge presiding over a summary process case must construe and apply the Uniform Summary Process Rules in a manner that will "secure the just, speedy, and inexpensive" resolution of the case. Rule 1 of the Uniform Summary Process Rules. The objectives of "speedy, and inexpensive," id., must be tempered with Housing Court Standing Order 1-04, governing time standards and case management procedures. See Adjartey, 481 Mass. at 838. Housing Court judges are required to "apply the rules in a fair, reasonable and practical manner consistent with the legitimate interests of all parties." Housing Court Standing Order 1-04(VI). See CMJ

represented litigants]." Cambridge St. Realty, LLC, 481 Mass. at 133. The LDP program operates in all Housing Courts in the Commonwealth. Attorneys provide free legal advice and services to pro se litigants on a first-come, first-served basis. See Adjartey, 481 Mass. at 838.

Mgt. Co., 91 Mass. App. Ct. at 283. This standing order provides that "[e]ach case is unique and [that] each judge . . . must, consistent with applicable statutes and the rules of court, exercise sound judgment in a manner that affords the parties a fair opportunity to develop and present their claims to the court." Housing Court Standing Order 1-04(I). Our appellate courts have adopted these principles. See Cambridge St. Realty, LLC, 481 Mass. at 132-133 ("self-represented litigants must be provided the opportunity to meaningfully present claims and defenses" [citation omitted]); CMJ Mgt. Co., supra (same), and cases cited. The standing order provides for flexibility so that "judges may allow late-filed motions, answers and other pleadings in the exercise of their sound discretion." Housing Court Standing Order 1-04(VI).

3. Uniform Summary Process Rules. The language and structure of the Uniform Summary Process Rules support the view that a tenant does not waive the right to assert affirmative defenses by failing to file a timely answer. Under traditional canons of construction, we begin our analysis with the language of the relevant rules.[15] See U.S. Bank Trust, N.A. v. Johnson,

[15] "[R]ules of court . . . have the force of law and are just as binding on the court and the parties as would be a statute." Berkwitz, petitioner, 323 Mass. 41, 47 (1948). Accord Spence v. Reeder, 382 Mass. 398, 416 (1981). Our courts regularly apply the same canons to regulations. See Johnson v.

96 Mass. App. Ct. 291, 294 (2019). "[W]hen the meaning of any particular section . . . is questioned, it is proper . . . to look into the other parts of the [rules]." Id., quoting Commonwealth v. Williamson, 462 Mass. 676, 681 (2012).

Here, Rule 3 of the Uniform Summary Process Rules, which governs answers, is silent as to the consequence of the failure to file a timely answer.[16] The drafters could have authorized the procedure employed by the second judge here, by including appropriate language in the rule, but they did not. See Fafard

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Commissioner of Pub. Welfare, 414 Mass. 572, 578 (1993); Namundi v. Rocky's Ace Hardware, LLC, 81 Mass. App. Ct. 665, 667-668 (2012). In its role as "final arbiter of what [a] rule means and permits," the Supreme Judicial Court applies the canons to the Massachusetts Rules of Criminal Procedure. Commonwealth v. Denehy, 466 Mass. 723, 733 (2014), quoting Commonwealth v. Dunham, 446 Mass. 212, 221, cert. denied, 549 U.S. 855 (2006). In light of this precedent, it is a logical extension to apply the canons to the Uniform Summary Process Rules. See Jafar v. Webb, 177 Wash. 2d 520, 527 (2013) ("[courts] alone are uniquely positioned to declare the correct interpretation of any court-adopted rule").

[16] Rule 3 provides in part:

> "The defendant shall prepare a written answer containing at the top of the page the caption 'Summary Process Answer' with the trial date set forth below the caption. The answer shall deny every statement in the complaint which is in dispute. The defendant shall also state in the answer any affirmative defense which may be asserted and may state any counterclaim permitted by Rule 5 of these rules."

The rule also sets forth the time limit for filing an answer, as well as the defendant's filing and service requirements. Moreover, "[d]efault for failure to answer properly is dealt with in Rule 10 of these rules." Commentary to Rule 3 of the Uniform Summary Process Rules.

v. Lincoln Pharmacy of Milford, Inc., 439 Mass. 512, 515 (2003). And we are not free to add words to the text that the drafters did not see fit to include. Id. Moreover, Rule 5 of the Uniform Summary Process Rules (1980), in contrast to Rule 3, states that the consequence of failing to file a counterclaim with the answer constitutes waiver "unless the court shall otherwise order on motion for cause shown." Because the drafters set forth in the rules a consequence for the failure to assert a counterclaim, but not a consequence for the failure to file an answer, it follows that the right to assert affirmative defenses is not waived when an answer is not filed. See Fafard, supra (relying on maxim that "expression of one thing is an implied exclusion of other things omitted" [citation omitted]). This construction is also supported by the plain language of Rule 10 (a) of the Uniform Summary Process Rules, applicable to tenants who appear for trial but fail to file timely answers. The prohibition on defaults in the rule and the concomitant right to trial on the merits -- without any qualifying language -- demonstrates an intent to allow tenants to defend evictions on any available basis.[17]

[17] When a tenant fails to file a timely answer, but appears for trial, rule 10 (a) mandates that "no default shall enter." See Adjartey, 481 Mass. at 856 (Appendix); Glendale Assocs., LP v. Harris, 97 Mass. App. Ct. 454, 465 (2020).

The rules permit judges, in the exercise of their discretion, to "sever a counterclaim which cannot appropriately be heard as part of the summary process action." Commentary to Rule 5 of the Uniform Summary Process Rules. But this discretionary authority is not unlimited, as the rules suggest an intention that conditions-based defenses and counterclaims be heard in the same action.[18] See Rule 5 & commentary of the Uniform Summary Process Rules; Residential Landlord-Tenant Benchbook 15 (W.E. Hartwell ed., 3d ed. 2013) ("Counterclaims may be severed and separately tried, but only in circumstances where the nature of the counterclaim is such that it cannot defeat the plaintiff's claim for possession"). See also Federal Nat'l Mtge. Ass'n v. Rego, 474 Mass. 329, 339 (2016) ("Where the affirmative defenses or counterclaims challenge the right to possession, the judge must resolve those claims as part of the summary process action"). There may be circumstances where a judge may justifiably deny the tenant's motion to file a late answer and bar the tenant from raising affirmative defenses to eviction (such as when the judge permits the tenant to file a late answer and he fails to do so, when there is an egregious delay in filing an answer, or when the affirmative defenses

[18] Because the issue of counterclaims was not raised by the tenant, we need not address it.

raised by the tenant amount to unfair surprise), but this case does not present such a circumstance.

4. Legislative intent and public policy. Prohibiting the tenant from asserting affirmative defenses to eviction and to the landlord's claim for back rent, in the circumstances of this case, is inconsistent with the legislative intent behind the statutory scheme and public policy. As originally enacted, the purpose of G. L. c. 239, § 8A, was to provide tenants living in uninhabitable premises with a conditions-based defense to eviction for nonpayment of rent.[19] See G. L. c. 239, § 8A, inserted by St. 1965, c. 888; Davis v. Comerford, 483 Mass. 164, 171 (2019). The Supreme Judicial Court, tracing the statute's history, confirmed a legislative intent "to provide tenants with a broad set of defenses and counterclaims in the summary process action." Meikle v. Nurse, 474 Mass. 207, 214 (2016). As long as certain preconditions are met, a tenant may now raise "[a]ny and all counterclaims . . . to offset the rent" that relate to

[19] General Laws c. 239, § 8A, is one in a series of statutes designed to give to tenants "remedies against landlords who fail to provide safe and sanitary housing." Simon v. Solomon, 385 Mass. 91, 100 (1982). The Legislature intended G. L. c. 239, § 8A, to serve as a "defensive remedy (rent withholding) that complemented the affirmative remedy of enforcement of the State sanitary code . . . 'especially [for] poor tenants, [who] would not avail themselves of a remedy which required them to sue their landlords.'" Bank of Am., N.A., 466 Mass. at 619, quoting Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 192-193 & n.7 (1973).

the rental or tenancy.[20] Davis, supra, quoting Residential Landlord-Tenant Benchbook, supra at 75.

Eight years after G. L. c. 239, § 8A, was enacted, the Supreme Judicial Court added common-law protections for tenants facing uninhabitable conditions. See Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 200-203 (1973). The court imposed a duty on landlords in all residential tenancies to deliver and to maintain the premises in a habitable condition, and provided tenants with a number of remedies for any breach of warranty by the landlord. Id. at 199. Abrogating the independent covenants rule, the court conditioned the tenant's duty to pay rent upon the landlord's maintenance of the apartment in a habitable condition. Id. at 197-199. This common-law rule implying a warranty of habitability reflects the well-established public policy favoring safe and habitable homes. See Trustees of the Cambridge Point Condominium Trust v. Cambridge Point, LLC, 478 Mass. 697, 705 (2018). In fact, the implied warranty is considered so important that it cannot be waived or disclaimed. See Adjartey, 481 Mass. at 854 n.11 (Appendix). See also G. L. c. 239, § 8A, sixth par. (provision in rental agreement waiving statutory protections afforded tenants "shall be deemed to be against public policy and void").

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[20] No claim is made that the tenant failed to meet these preconditions. See G. L. c. 239, § 8A, second par.

Given the legislative intent and the important public policy interests at stake, the tenant should have been allowed to assert a conditions-based defense in the circumstances of this case.[21]

5. The judge's rulings. The second judge denied both the tenant's motion to file a late answer and his oral motion for reconsideration. We review these rulings for abuse of discretion. See Malden Police Patrolman's Ass'n v. Malden, 92 Mass. App. Ct. 53, 56 (2017); Greenleaf v. Massachusetts Bay Transp. Auth., 22 Mass. App. Ct. 426, 429 (1986). We must assess whether "the judge made a clear error of judgment in weighing the factors relevant to the decision, . . . such that the decision falls outside the range of reasonable alternatives." Hlatky v. Steward Health Care Sys., LLC, 484 Mass. 566, 586-587 (2020) (Gants, C.J., concurring in part and

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[21] A tenant's conditions-based defense to eviction must be brought, if at all, pursuant to G. L. c. 239, § 8A. Boston Hous. Auth., 363 Mass. at 202-203 (discussing relationship between statute and warranty). Pursuant to the defensive remedy provided by the Legislature in G. L. c. 239, § 8A, if the landlord here failed to cure the alleged breach of warranty in December 2018, no rent would have been due, or some lesser amount would have been owed in January 2019, depending on the degree of the defect. See Davis, 483 Mass. at 173 & n.18. See also South Boston Elderly Residences, Inc. v. Moynahan, 91 Mass. App. Ct. 455, 465 n.9 (2017) (landlord not entitled to any "grace period" from damages for time required to bring apartment up to proper warranty standards). The breach of warranty defense is available to the landlord's rent claim even if the tenant failed to satisfy the preconditions of G. L. c. 239, § 8A. See Boston Hous. Auth., supra.

dissenting in part), quoting L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

A judge's inherent authority includes the power "to do what is necessary to achieve the orderly and expeditious disposition of cases" (quotation and citation omitted). CMJ Mgt. Co., 91 Mass. App. Ct. at 285. However, that authority is not without limitations. For example, judges must ensure that all parties, represented and unrepresented alike, receive a fair trial and that principles of due process are followed. See id. at 283-285; Commonwealth v. Sapoznik, 28 Mass. App. Ct. 236, 241 n.4 (1990).[22] In addition, "[t]he judge's function . . . is to be 'the directing and controlling mind' [during the summary process proceedings], and to provide a self-represented party with a meaningful opportunity to present [his or] her case by guiding the proceedings in a neutral but engaged way." CMJ Mgt. Co., supra at 283, quoting Sapoznik, supra.

Here, the second judge stated that "it was simply not fair to the . . . landlord to go through that exercise [of having the tenant file a late answer] again in a second case which followed

[22] We also note that "[a] judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge may make reasonable efforts, consistent with the law, to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard." S.J.C. Rule 3:09, Canon 2, Rule 2.6 (A) (2016).

shortly" after the first summary process action. She reasoned that the tenant knew or should have known about the need to file a timely answer.[23] Although an appropriate consideration, there is no indication that the second judge balanced the procedural unfairness to the landlord against the substantial prejudice to the tenant arising from the denial of his statutory right to present an affirmative defense.[24] See G. L. c. 239, § 8A. There was no prejudice to the landlord, who had witnesses present to rebut the tenant's conditions-based defense if the second judge allowed the tenant's motion and, importantly, none was claimed at that time. See Malden Police Patrolman's Ass'n, 92 Mass. App. Ct. at 56 ("Every violation of a procedural rule . . . need not -- and should not -- require the perpetrator to be undone. The defect may be harmless" [citation omitted]); USTrust Co. v.

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[23] Through his LAR attorney, the tenant made an initial showing of a potentially meritorious defense to the eviction. The landlord initiated the second summary process action against the tenant for nonpayment of rent within days of receiving payment from the first judgment, suggesting the possibility of retaliation. See G. L. c. 239, § 2A (creating defense to summary process and creating rebuttable presumption of reprisal for benefit of tenants where landlord sends notice to quit within six months of tenant obtaining judicial relief). See also Youghal, LLC v. Entwistle, 484 Mass. 1019, 1023 (2020); South Boston Elderly Residences, Inc. v. Moynahan, 91 Mass. App. Ct. 455, 467-469 (2017).

[24] Even if the tenant was on notice of his obligations from the prior trial, there is nothing in Rule 3 of the Uniform Summary Process Rules, or in any of the Uniform Summary Process Rules, that would have alerted him that noncompliance with the deadline would have such dire consequences.

Kennedy, 17 Mass. App. Ct. 131, 135 (1983) (although procedural rules are not mere guidelines, judge may "forgive a failure to comply with a rule if the failure does not affect the opposing party's opportunity to develop and prepare a response"). On balance, the prejudice to the tenant far outweighed any inconvenience to the landlord, who understandably preferred not to try the defense on the merits. See CMJ Mgt. Co., 91 Mass. App. Ct. at 283.

Judges possess "broad discretion in determining how to proceed with summary process hearings involving self-represented litigants." CMJ Mgt. Co., 91 Mass. App. Ct. at 282. On this record, however, we conclude that the judge did not correctly balance the legitimate interests of both parties and, as a result, failed to "apply the rules in a fair, reasonable[,] and practical manner." Id. at 283, quoting Housing Court Standing Order No. 1-04(VI). See Hlatky, 484 Mass. at 586-587.

Finally, we note that the landlord's reliance on the doctrine of waiver to support the second judge's rulings is misplaced. The tenant stood ready to file an answer and affirmative defenses, but was prohibited from doing so. As a result, the tenant cannot be deemed to have waived his

affirmative defenses.[25] See Rule 5 of the Uniform Summary Process Rules; Adjartey, 481 Mass. at 855 (Appendix); Aronovitz v. Fafard, 78 Mass. App. Ct. 1, 8 (2010). See also Federal Home Loan Mtge. Corp. v. Bartleman, 94 Mass. App. Ct. 800, 809 (2019) (general rule that affirmative defenses are waived unless asserted in answer is subject to exception in summary process proceedings; defense may be raised in later filing as long as issue is timely and fairly raised, giving other party opportunity to respond).[26]

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[25] The landlord provides no support for his contention that where, as here, defenses and counterclaims are not properly raised pretrial in accordance with Rules 3 and 5 of the Uniform Summary Process Rules, they must be waived at the trial if objected to by landlords. To the contrary, the doctrine of waiver is disfavored in the Housing Court. See G. Warshaw, Massachusetts Landlord-Tenant Law § 8:10 (Supp. 2020) ("In a residential eviction, tenants are accorded great leeway. Residential tenants facing eviction are rarely sophisticated, knowledgeable, or prepared to navigate the legal system. They view an eviction, where they are unrepresented, as an opportunity to show up in court and simply tell the judge their story. Many courts when faced with the landlord's claim that the defense or facts were not asserted in an answer to the complaint will either postpone the trial to give the tenant the opportunity to file an answer and seek legal assistance, or will proceed and hear the tenant anyway").

[26] In light of our ruling on the denial of the tenant's motion to file a late answer, we need not address the denial of the tenant's motion for reconsideration.

6. Conclusion.[27] Because we conclude that the second judge erred in denying the tenant's motion to file a late answer, we vacate the judgment.

So ordered.

[27] Based on our disposition, we do not address the tenant's claim that the second judge defaulted him in violation of Rule 10 (a) of the Uniform Rules of Summary Process. We also need not decide whether the denials of the tenant's motions were sanctions.