SJC-12712

ALLEN H. DAVIS vs. WILLIAM COMERFORD & another.[1]

Bristol. May 9, 2019. - September 16, 2019.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Summary Process. Landlord and Tenant, Eviction, Tenancy at sufferance, Use of premises, Habitability. Practice, Civil, Counterclaim and cross-claim, Affirmative defense.

Summary process. Complaint filed in the Southeast Division of the Housing Court Department on June 11, 2018.

A motion for use and occupancy payments was heard by Irene H. Bagdoian, J.

An application for leave to prosecute an interlocutory appeal was allowed by Mary T. Sullivan, J., in the Appeals Court, and the appeal was reported by her to a panel of that court. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Arthur D. Hardy-Doubleday for the tenants.
David J. Gormley for the landlord.
Patricia A. Whiting, for Harvard Legal Aid Bureau, amicus curiae, submitted a brief.
Peter Vickery, for MassLandlords, Inc., amicus curiae, submitted a brief.

[1] Gina Comerford.

KAFKER, J. The question presented in this case is whether a judge has authority to issue orders for interim use and occupancy payments during the pendency of a summary process eviction action, and, if so, the circumstances under which it is appropriate to exercise that authority. We conclude that, following motion by a landlord, a court has statutory and equitable authority under G. L. c. 111, § 127F; G. L. c. 239, § 8A (§ 8A); G. L. c. 185C, § 3; and G. L. c. 218, § 19C, to order a tenant at sufferance to make interim use and occupancy payments during the pendency of an eviction action. To exercise that authority, the judge, on motion by the landlord, must hold a use and occupancy hearing where the factors and circumstances described infra are considered, in particular whether the summary process action has been prolonged and whether the tenant is entitled to withhold or abate rent payments due to habitability issues that reduce the fair value of the rental premises or has other counterclaims against the landlord that may result in rent offsets. We further conclude that payment into an escrow account maintained by the court or counsel for one of the parties typically will provide sufficient protection to a landlord, but we clarify that a judge may order payments directly to a landlord if certain additional factors are present, such as where the landlord demonstrates that use and

occupancy payments are necessary for the landlord to pay a mortgage on the premises or meet other pressing financial obligations. In the instant case, we vacate the judge's order for use and occupancy payments and remand the matter for further proceedings consistent with this opinion.[2]

1. Background. In December 2014, the defendants, William and Gina Comerford (tenants), signed a lease agreement to rent a single-family home in Brockton from the plaintiff, Allen H. Davis (landlord), for $1,700 per month.[3] The lease specified that the tenancy would be "AT WILL" and "may be terminated by a written notice given by either party to the other before the first day of any rental period and shall be effective on the last day of the rental period, or thirty days after such notice has been given, whichever is longer."[4] The tenants also gave the landlord two $1,700 checks for use as a security deposit and the last month's rent.

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[2] We acknowledge the amicus brief submitted in support of Gina and William Comerford (tenants) by the Harvard Legal Aid Bureau and the amicus brief in support of Allen H. Davis (landlord) by MassLandlords, Inc.

[3] The parties shortly thereafter signed a lease addendum increasing the monthly rent by fifty dollars for use of a garage.

[4] A tenancy at will "may be terminated at any time by the will of the parties." E. Daher & H. Chopp, Landlord and Tenant Law § 3.7 (3d ed. 2000).

In June 2017, the landlord decided to sell the house and provided the tenants with a handwritten notice to quit stating that he was terminating their tenancy and that they would have to vacate the premises within thirty days. The tenants asked the landlord if they could remain in the house for a few more months and offered to pay a higher rent amount. The landlord agreed to let the tenants stay for a rent of $2,125, and the tenants promised to move out within three months. After discussion with the tenants, the landlord applied the last month's rent deposit towards the rent for August 2017.

Although the tenants did not move out in August 2017, the landlord took no further action until April 14, 2018, when he provided the tenants with a handwritten thirty-day notice to quit stating that he was terminating the tenancy and that they should vacate the premises by May 31, 2018. In early May 2018, the landlord applied the tenants' $1,700 security deposit towards the May rent. The landlord claimed that this left an outstanding balance of $612 for the May rent.

On May 12, 2018, the tenants' counsel sent the landlord a letter requesting all records in connection with the tenancy pursuant to G. L. c. 186, § 15B, and making a "formal demand for the security deposit and interests." The landlord did not respond to this request.

On May 17, 2018, the landlord served the tenants with both a fourteen-day notice to quit for nonpayment of $612 in May rent and a thirty-day notice to quit terminating the tenancy at will.[5] That same day, the tenants asked the board of health of Brockton to conduct an inspection of the premises. After viewing the premises on June 15, the health inspector sent the landlord an inspection report stating that he was in violation of a city ordinance requiring a "certificate of fitness" that the premises complied with the State sanitary code and documenting several specific violations of the code's "minimum standards of fitness for human habitation."[6] The landlord acknowledged receipt of the inspection report.

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[5] As required by G. L. c. 186, § 12, the fourteen-day notice to quit explained that the tenants could pay the full amount of the claimed rent arrearage within ten days after receiving the notice to quit in order to avoid eviction. However, G. L. c. 186, § 12, does not provide a cure period for a thirty-day notice of termination of a tenancy at will.

[6] The inspection report required the landlord to obtain the certificate of fitness and perform the following corrective actions: "[e]xterminate entire building for rodents and pests infestation;" "[l]ocate and repair source of water leak in the foundation" in the basement; and "[r]epair or replace all cracked and/or loose floor tiles" and "[l]ocate and repair source of water leak from the dishwasher" in the kitchen. In addition, the department of public works of Brockton sent the landlord a letter informing him that the premises exceeded the allowed number of trash barrels in violation of a city ordinance, although the record does not reveal the date of this letter.

On May 30, 2018, the tenants' counsel sent the landlord a "[G. L. c.] 93A demand letter." The letter again requested the records concerning the tenancy and the security deposit pursuant to G. L. c. 186, § 15B. In addition to violations of G. L. c. 93A, it also alleged breaches of the warranty of habitability and covenant of quiet enjoyment, and retaliatory eviction based on the tenants' request of the health inspection. The letter claimed that "financial compensation . . . in the amount of $6,375.00 (equal to three months' rent) [was] warranted" in light of the "significant difference in price between the fair market value of the [p]remises in their defective state and the current rent therefor." This letter also enclosed a $612 check purporting to cure the fourteen-day notice to quit, which the landlord deposited.

On June 4, 2018, after the tenants declined to vacate the premises, the landlord served the tenants with a summary process summons and complaint, alleging "failure to pay rent" and itemizing unpaid rent of $612 for May and $2,125 for June. In early June, the tenants sent the landlord a check for the June rent, but, according to the landlord, the check twice was returned for insufficient funds when he attempted to cash it.

On June 15, 2018, the tenants filed an answer in which they raised affirmative defenses and counterclaims alleging breach of the warranty of habitability and the covenant of quiet

enjoyment; retaliatory eviction; and violations of the consumer protection statute, G. L. c. 93A, § 2, and the security deposit statute, G. L. c. 186, § 15B.[7] The answer identified a number of specific defects at the premises, asserted that the tenants had "repeatedly apprised the [l]andlord of the unlawful living conditions," and claimed damages in the amount of the difference between the fair market value and the defective value of the premises.[8] In their answer, the tenants also included a jury demand on all issues.

A judge of the Housing Court held a hearing on July 11, 2018.[9] At the hearing, the tenants confirmed their request for a jury trial. The judge scheduled a pretrial conference for August 29, 2018, to set a trial date. He also ordered that the tenants "pay July use and occupancy, if not already completed," to the landlord and, commencing on August 1, "timely pay into

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[7] The tenants subsequently amended their answer to include the landlord's failure to pay any interest on the security and last month's rent deposits and to provide notice of interest on those deposits, in violation of G. L. c. 186, § 15B (2) (a).

[8] The tenants' answer identified the following issues with the premises: an improperly installed drain line from the dishwasher that caused a leak in the basement; a rodent infestation; holes in the walls and floors; missing portions of the floor in the attic; an unsafe water supply; the presence of toxic mold; and unworkable outlets and ceiling fans.

[9] The hearing originally was scheduled for June 27, 2018; however, the date was changed to July 11 after the tenants filed a request for discovery.

their counsel's [Interest on Lawyers' Trust Account (IOLTA account)] monthly use and occupancy pending further order of the court." Per the order, the tenants paid the landlord the July use and occupancy and thereafter began depositing monthly use and occupancy payments of $2,125 (the last previously agreed-upon rent) into their attorney's IOLTA account.

On August 17, 2018, the tenants filed a motion for partial summary judgment with respect to their allegations of the landlord's violation of G. L. c. 186, § 15B, and G. L. c. 93A, as well as the landlord's claim for eviction. At a subsequent hearing, a different Housing Court judge denied the tenants' motion on the ground that there were material issues of disputed facts.

On October 24, 2018, because a trial date had not yet been scheduled, the landlord filed a one-page motion requesting that the court "tender to the [landlord] the rental payments now in [the tenants'] attorney's IOLTA account and [order the tenants] to pay reasonable use and occupancy each month while this case awaits trial." The motion recited the procedural history of the case and asserted that the landlord "has not been paid any rent for the months of June, August, September or October 2018, and continues to pay his monthly mortgage from his savings." The tenants filed an opposition to the motion for use and occupancy

payments asserting, as is relevant here, that the landlord did not meet the standards for injunctive relief.[10]

On October 31, 2018, a third judge of the Housing Court held a hearing on the landlord's motion. The judge ordered, "Commencing November 1, 2018, the [tenants] shall pay use and occupancy of $2,150.00 per month by the [first] -- no later than the [fifth] -- day of each month through the [landlord's] counsel."[11] The judge further ordered, "This matter shall be scheduled for a pretrial conference on the next available date and jury trial." The order did not address the landlord's request that the judge order payment to the landlord of the use and occupancy amounts for August, September, and October that were being held in the tenants' attorney's IOLTA account.

On November 30, 2018, the tenants filed a petition for interlocutory appeal from the judge's order pursuant to G. L. c. 231, § 118. We transferred the appeal to this court on our own motion.

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[10] The tenants also asserted that the landlord had not complied with Mass. R. Civ. P. 4.1 (h), 365 Mass. 737 (1974), by seeking a prejudgment security without filing an affidavit and that the motion was not timely because the motion hearing was scheduled too soon after service.

[11] It is unclear why the judge set the monthly use and occupancy payments at $2,150 rather than $2,125, the amount of the last previously agreed-upon rent.

2. Discussion. a. Statutory framework. i. Liability of tenant at sufferance for use and occupancy. We begin by setting out the statutory authority for the liability of a tenant at sufferance for use and occupancy.[12] General Laws c. 186, § 3, provides that "[t]enants at sufferance in possession of land or tenements shall be liable to pay rent therefor for such time as they may occupy or detain the same." Rubin v. Prescott, 362 Mass. 281, 285 (1972), quoting G. L. c. 186, § 3. See Ghoti Estates, Inc. v. Freda's Capri Restaurant, Inc., 332 Mass. 17, 26 (1954), citing G. L. (Ter. Ed.) c. 186, § 3 ("tenant at sufferance was liable to pay for use and occupation for such time as it occupied the premises").[13] The payment for use and

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[12] "A tenant at sufferance is the term used for a person who continues in possession of premises after termination of a tenancy . . . ." G. Warshaw, Massachusetts Landlord-Tenant Law § 6:2, at 207 (2d ed. 2001). See Margosian v. Markarian, 288 Mass. 197, 199 (1934) (tenant who remains on premises following lease termination becomes tenant at sufferance).

[13] Although G. L. c. 186, § 3, refers to "rent," the term "use and occupation" or "use and occupancy" is typically used because a landlord's acceptance of "rent" from a tenant at sufferance otherwise might indicate that the parties wished to create a tenancy at will. See Staples v. Collins, 321 Mass. 449, 451 (1947) (distinguishing "mere use and occupation for which a tenant at sufferance is made liable by G. L. [Ter. Ed.] c. 186, § 3, for such time only as he 'may occupy or detain' the land" from "payment and acceptance of rent" that may provide "prima facie proof of the creation of a tenancy at will"). Cf. Rubin v. Prescott, 362 Mass. 281, 285 (1972) (landlord's acceptance of "rent payments" that tenants at sufferance were "obligated to make" pursuant to G. L. c. 186, § 3, did not create tenancy at will).

occupancy imposed by this statute was intended to "prevent any tenant from occupying premises without making compensation to his landlord." Lowell Hous. Auth. v. Save-Mor Furniture Stores, Inc., 346 Mass. 426, 430 (1963), quoting Merrill v. Bullock, 105 Mass. 486, 491 (1870).[14] The tenant owes the landlord the "fair rental value of the premises." Lowell Hous. Auth., supra at 431. Accord Kobayashi v. Orion Ventures, Inc., 42 Mass. App. Ct. 492, 502 (1997) ("correct measure for a use and occupancy charge" owed by tenant at sufferance following lease termination "was the then current fair rental value of the premises"). However, the "liability of a tenant at sufferance is not to be determined arbitrarily by the rent fixed in a lease with the former owner, but rather is the sum which the trier of fact finds the use and occupation were reasonably worth." Lowell Hous. Auth., supra.[15] In particular, conditions-related issues such as breaches of the warranty of habitability or covenant of

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[14] Indeed, the United States Supreme Court has suggested that due process issues might arise if a "tenant remained in possession without paying rent." Lindsey v. Normet, 405 U.S. 56, 67 n.13 (1972).

[15] General Laws c. 186, § 13, contains a limited exception in the case of a tenant at will whose tenancy is terminated without fault: it provides that the tenant "shall be liable to pay rent . . . at the same rate as theretofore payable by him while a tenant at will" during the "period, equal to the interval between the days on which the rent reserved is payable or thirty days, whichever is longer, from the time when the tenant receives notice in writing of such termination."

quiet enjoyment may reduce the fair value of the premises, as discussed infra.

A landlord may recover both rent arrearage and unpaid use and occupancy in a summary process action. General Laws c. 239, § 2, states that a landlord "may bring the action by a writ in the form of an original summons to the defendant to answer to the claim of the plaintiff that the defendant is in possession of the land or tenements in question, describing them, which he holds unlawfully against the right of the plaintiff, and, if rent and use and occupation is claimed, that the defendant owed rent and use and occupation in the amount stated" (emphasis added). In turn, G. L. c. 239, § 3, provides that "if the court finds that the plaintiff is entitled to possession, he shall have judgment and execution for possession and costs, and, if rent is claimed as provided in [§ 2] and found due, the judgment and execution shall include the amount of the award" (emphasis added). A landlord also may amend his or her complaint to claim use and occupancy damages that accrue during the pendency of a summary process action. 33A E.G. Daher & H. Chopp, Landlord and Tenant Law § 17:2, at 469 (3d ed. 2000), citing Mass. R. Civ. P. 15 (d), 365 Mass. 761 (1974) ("The action may be amended from time to time up to the trial date"). Furthermore, a "court should include all rent that has become due up to the time of

the hearing if the tenant is still in possession." Residential Landlord-Tenant Benchbook 71 (W.E. Hartwell ed., 3d ed. 2013).

ii. Tenant's defenses and counterclaims relevant to liability for use and occupancy. We review various statutory or common-law defenses and counterclaims that may reduce or eliminate a tenant's liability for ongoing use and occupancy. In particular, we address provisions in the statutes under discussion specifically directed at use and occupancy payments.

Section 8A provides a "tenant or occupant" with a defense against a landlord's suit for possession based on nonpayment of rent or no-fault termination where the tenant has damages from counterclaims that equal or exceed the landlord's damages. G. L. c. 239, § 8A, first par. Furthermore, even where the landlord's damages exceed the tenant's, the tenant has a mandatory seven-day cure period in which to pay the landlord's damages and retain possession. G. L. c. 239, § 8A, fifth par. Section 8A is the so-called rent withholding statute. It was originally enacted to provide a defense against eviction to a tenant who was not paying all or part of the rent due to uninhabitable premises. See Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 193 (1973) (original purpose of § 8A to "grant[] the tenant the right to withhold rent in order to aid effective enforcement of State Sanitary Code regulations"). The Legislature has amended the statute, however, to "increase the

availability of counterclaims to tenants." Meikle v. Nurse, 474 Mass. 207, 213 (2016). See id. at 213-214 (tenant had defense to possession based on counterclaim that landlord failed to comply with provisions of security deposit statute, G. L. c. 186, § 15B). Section 8A now permits a tenant to raise "[a]ny and all counterclaims . . . to offset the rent" so long as they relate to the rental or tenancy. Residential Landlord-Tenant Benchbook, supra at 75. See Meikle, supra ("steady progression in the availability of tenant defenses, culminating in the elimination of conditions-based restrictions, confirms the Legislature's intent to provide tenants with a broad set of defenses and counterclaims in the summary process action").[16]

[16] General Laws c. 239, § 8A, first par., provides that a "tenant or occupant" facing a summary process action for nonpayment of rent or no-fault termination "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 [G. L. c. 111, § 127L,] and such other damages as may be authorized by any law having as its objective the regulation of residential premises" (emphases added). Potential counterclaims unrelated to the conditions may involve, for example, interference with a tenant's quiet enjoyment of the tenancy; a breach of the security deposit statute, G. L. c. 186, § 15B; a breach of the consumer protection statute, G. L. c. 93A; retaliatory eviction; discrimination; or intentional infliction of emotional distress. See Residential Landlord-Tenant

The tenant must meet certain preconditions to benefit from § 8A. See Rubin, 362 Mass. at 287-288.[17] The tenant need not place the rent in an escrow account, unless he or she voluntarily chooses to do so or is so ordered by the court in the manner discussed infra. See Daher & Chopp, supra at § 16:44, at 373.

With respect to interim use and occupancy payments, § 8A is less than a model of clarity. The statute provides: "The court after hearing the case may require the tenant or occupant claiming under this section to pay to the clerk of the court the fair value of the use and occupation of the premises less the amount awarded the tenant or occupant for any claim under this

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Benchbook 63-70 (W.E. Hartwell ed., 3d ed. 2013). See also Adjartey v. Central Div. of the Hous. Court Dep't, 481 Mass. 830, 853-854 (2019) (Appendix) (listing examples of "[p]otential defenses and counterclaims").

[17] The tenant must meet the following preconditions: "(1) the owner or his agents, servants, or employees, or the person to whom the tenant or occupant customarily paid his rent knew of such conditions before the tenant or occupant was in arrears in his rent; (2) the plaintiff does not show that such conditions were caused by the tenant or occupant or any other person acting under his control; except that the defendant shall have the burden of proving that any violation appearing solely within that portion of the premises under his control and not by its nature reasonably attributable to any action or failure to act of the plaintiff was not so caused; (3) the premises are not situated in a hotel or motel, nor in a lodging house or rooming house wherein the occupant has maintained such occupancy for less than three consecutive months; and (4) the plaintiff does not show that the conditions complained of cannot be remedied without the premises being vacated." G. L. c. 239, § 8A, second par.

section, or to make a deposit with the clerk of such amount or such installments thereof from time to time as the court may direct, for the occupation of the premises." G. L. c. 239, § 8A, fourth par. The application of these provisions before trial is discussed infra.

A particularly important counterclaim is one based on breach of the warranty of habitability.[18] The warranty of habitability typically requires that the physical conditions of the premises conform to the requirements of the State sanitary code. See Boston Hous. Auth., 363 Mass. at 200-201 & n.16. The "tenant's obligation [to pay full rent] abates as soon as the landlord has notice that premises failed to comply with the

[18] Even in circumstances in which § 8A does not apply, i.e., because the tenant did not comply with the statutory preconditions mentioned in note 17, supra, a breach of the warranty of habitability may provide the tenant with a defense to the landlord's claim for unpaid rent. As we explained in Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 202-203 (1973), "if the tenant fails to follow [§ 8A's] procedures, he cannot use the landlord's breach of the habitability warranty as a defence to a notice to quit for nonpayment of rent. However, though the landlord may, in that case, evict the tenant, the tenant may raise the landlord's breach of his warranty of habitability as a partial or complete defence to the landlord's claim for rent owed for the period when the dwelling was in uninhabitable condition and the landlord or his agent had written or oral notice of the defects. The tenant's claim or counterclaim for damages based on this breach would be the difference between the value of the dwelling as warranted (the rent agreed on may be evidence of this value) and the value of the dwelling as it exists in its defective condition" (emphasis added; footnote omitted). See Warshaw, supra at § 9:3, at 300 ("A breach of the warranty of habitability is not a defense to eviction; it is a claim in the nature of abatement or damages").

requirements of the warranty of habitability." Berman & Sons, Inc. v. Jefferson, 379 Mass. 196, 198 (1979). However, the "tenant remains 'liable for the reasonable value, if any, of his use of the premises for the time he remains in possession.'" South Boston Elderly Residences, Inc. v. Moynahan, 91 Mass. App. Ct. 455, 462 (2017), quoting Boston Hous. Auth., supra at 202. Thus, the tenant "may raise the landlord's breach of his warranty of habitability as a partial or complete defence to the landlord's claim for rent owed for the period when the dwelling was in uninhabitable condition and the landlord or his agent had written or oral notice of the defects." Boston Hous. Auth., supra at 202-203. "Damages for breach of the implied warranty of habitability are measured by 'the difference between the value of the dwelling as warranted (the rent agreed on may be evidence of this value) and the value of the dwelling as it exists in its defective condition.'" Cruz Mgt. Co. v. Wideman, 417 Mass. 771, 775 (1994), quoting Boston Hous. Auth., supra at 203.[19]

[19] The warranty of habitability overlaps to some extent with the covenant of quiet enjoyment, which protects the "tenant's right to freedom from serious interferences with his tenancy -- acts or omissions that 'impair the character and value of the leased premises.'" Simon v. Solomon, 385 Mass. 91, 102 (1982), quoting Winchester v. O'Brien, 266 Mass. 33, 36 (1929). "Damages for breach of the covenant of quiet enjoyment" are calculated in a manner that is "quite similar" to those for breach of the warranty of habitability. Darmetko v. Boston

Certain statutes also entitle a tenant to pay a reduced rent because the tenant took affirmative action to correct conditions affecting the habitability of the premises. The so-called "repair and deduct" statute, G. L. c. 111, § 127L, first and second pars., allows a tenant, after written notice to the landlord of violations of the State sanitary code or other conditions-related defects, to deduct "an amount necessary to pay for such repairs . . . from rent due to the owner."[20] Additionally, pursuant to G. L. c. 111, § 127C, a tenant may file a petition to enforce the provisions of the State sanitary

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Hous. Auth., 378 Mass. 758, 761 n.4 (1979). Additionally, under G. L. c. 186, § 14, a landlord of a residential tenant who interferes with the tenant's quiet enjoyment is "liable for actual and consequential damages or three month's rent, whichever is greater, and the costs of the action, including a reasonable attorney's fee, all of which may be applied in setoff to or in recoupment against any claim for rent owed or owing."

[20] General Laws c. 111, § 127L, third par., provides that the "owner may recover from the tenant any excessive amount deducted from the rent." In particular, the statute specifies that the amounts the tenant may deduct for repairs must be reasonable and may not exceed "four months' rent in any twelve-month period, or period of occupancy, whichever is shorter." G. L. c. 111, § 127L, second par. The statute specifies, however, that the landlord may only recover any excessive deductions "in an action in contract . . . not in an action for possession of the rental premises." G. L. c. 111, § 127L, third par. A tenant thus would have a defense to a landlord's claim for possession for nonpayment of rent by showing that he or she spent rent money on repairs to the premises.

code.[21] As under § 8A, G. L. c. 111, § 127F, first par., provides that "[i]f the court finds after hearing that the facts are as alleged in said petition, it may by written order authorize the petitioner . . . to pay to the clerk of the court the fair value of use and occupation of the premises, or such installments thereof from time to time as the court may direct." The statute also provides: "The court may direct the clerk by written order to disburse all or any portion of the rental payments received by him to the [landlord] for the purpose of effectuating the removal of the violation. The court may also direct the clerk to make such other disbursements of the rental payments to the [landlord] . . . as in the judgment of the court will permit the owner to maintain the property." G. L. c. 111, § 127F, first and second pars.

b. Authority and procedure for interim use and occupancy payment. We conclude that, in situations where they apply, § 8A

[21] The State sanitary code provides that "[n]o person shall occupy as owner-occupant or let to another for occupancy any dwelling, dwelling unit, mobile dwelling unit, or rooming unit for the purpose of living, sleeping, cooking or eating therein, which does not comply with the requirements of [105 Code Mass. Regs. §§ 410.000]." 105 Code Mass. Regs. § 410.010 (1997). Pursuant to G. L. c. 111, § 127C, "[i]f the condition of any building or any part thereof used for residential purposes is in violation of the standards of fitness for human habitation established under the state sanitary code," any affected tenant may file a petition in the District Court, Housing Court, or Superior Court.

and G. L. c. 111, § 127F, authorize a court to order use and occupancy payments that become due pending trial to be paid into the court. We further conclude that, under its equitable authority, a judge may order use and occupancy payments into private escrow accounts, and, in certain limited circumstances, directly to the landlord. Such interim use and occupancy payments cannot be ordered unless a motion for such payments is made by the landlord, a hearing is held, and the judge provides reasons for such an award based on the factors discussed infra.[22]

i. Court's authority to order ongoing use and occupancy payments. We conclude that § 8A, the rent withholding statute, grants a court discretionary authority to order interim use and occupancy payments into the court that reflect the "fair value of the use and occupation" of the premises. G. L. c. 239, § 8A, fourth par. The statute is not as clear as it could be: the relevant provision states that the "court after hearing the case

[22] Other statutes require the court to order ongoing use and occupancy payments if there is a delay in execution following entry of a judgment. See G. L. c. 239, § 5 (e) (requiring court to order tenant for whom appeals bond has been waived "to pay in installments as the same becomes due, pending appeal, all or any portion of any rent which shall become due after the date of the waiver"); G. L. c. 239, § 11 (requiring tenant who has received stay of execution of judgment to "make a deposit in court of the entire amount, or such instalments thereof from time to time, as the court may direct, for the occupation of the premises for the period of the stay"). These statutes are not at issue in this case, which involves prejudgment orders of use and occupancy payments.

may require the tenant or occupant claiming under this section to pay to the clerk of the court the fair value of the use and occupation of the premises . . . or such installments thereof from time to time as the court may direct, for the occupation of the premises" (emphasis added). Id. This language could be read as limited to posttrial awards, see, e.g., G. L. c. 239, § 11, but we conclude that a reading that allows for interim payments as well is more consistent with the statutory purposes of protecting both landlord and tenant rights during ongoing summary process proceedings. The reference to installment payments "from time to time as the court may direct" appears to encompass ongoing proceedings and interim payments and not just a final, posttrial resolution. See Anderson v. National Union Fire Ins. Co. of Pittsburgh PA, 476 Mass. 377, 381–382 (2017) ("All the words of a statute are to be given their ordinary and usual meaning, and each clause or phrase is to be construed with reference to every other clause or phrase without giving undue emphasis to any one group of words, so that, if reasonably possible, all parts shall be construed as consistent with each other so as to form a harmonious enactment effectual to accomplish its manifest purpose" [citation omitted]).[23]

[23] The identical phrase "installments thereof from time to time as the court may direct" also appears in G. L. c. 111, § 127F, first par., a related statute enacted at the same time

Moreover, the legislative history of § 8A supports the interpretation that these "installments" refer to use and occupancy payments that become due while the case is pending. In 1967, § 8A was amended to provide that the "court may require the person claiming a defense under this section to pay all or any portion of the rent due or to become due into court or make a deposit in court of the entire amount, or such instalments thereof from time to time, as the court may direct, for the occupation of the premises" (emphases added). St. 1967, c. 420, § 1. In 1975, the passage substantially acquired its current form when it was amended to provide that the "court after hearing the case may require the person claiming a defense under this section to pay to the clerk of the court the fair value of the use and occupation of the premises less the amount awarded a tenant for any counterclaim or make a deposit of such amount or such installments thereof from time to time as the court may direct, for the occupation of the premises" (emphases added).

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as § 8A. Boston Hous. Auth., 363 Mass. at 193 n.7. General Laws c. 111, § 127F, provides that the court may order the payments "after hearing that the facts are as alleged in [the tenant's] petition" to enforce the State sanitary code. In this statute, unlike in § 8A, the hearing requirement does not seem to mean that the court must wait until hearing the entire case before ordering use and occupancy payments. Rather, as discussed infra, the statute contemplates that the court will make a determination whether conditions-related defects are present and may order use and occupancy to be paid into the court until the defective conditions are corrected, at which point any remaining funds will be released to the landlord.

St. 1975, c. 467, § 3. The evolution of the statute supports the interpretation that "instalments" originally referred to "rent due or to become due," i.e., to use and occupancy payments that accrued while the case was ongoing. We thus conclude that § 8A authorizes a judge, following a hearing, to order interim use and occupancy payments to be paid into the court.

The statute authorizing a tenant to bring a petition alleging sanitary code violations, G. L. c. 111, § 127F, first par., is worded similarly to § 8A. It provides: "If the court finds after hearing that the facts are as alleged in said petition, it may by written order authorize the petitioner . . . to pay to the clerk of the court the fair value of the use and occupation of the premises, or such installments thereof from time to time as the court may direct" (emphasis added).[24] This statute further provides that the court may order the clerk of the court to "disburse all or any portion of the rental payments received by him to the respondent for the purpose of effectuating the removal of the violation" or to "make such

[24] To order the payments under G. L. c. 111, § 127F, first par., the statute specifies that the judge must find that the violations "may endanger or materially impair the health, safety, or well-being of such tenant," "such payments are necessary to remedy the condition constituting the violation," and the "tenant is not in arrears on his rent." The statute further states that the court must take into account any rent abatement or counterclaims when determining whether an arrearage exists, as well as the tenant's willingness to pay the arrearage into the court. Id.

other disbursements of the rental payments to the respondent or to any other person as in the judgment of the court will permit the owner to maintain the property." G. L. c. 111, § 127F, second par. Similar to § 8A, the statute also provides that "[w]hen the violation is removed, the court shall direct that the balance of funds, if any, remaining with the clerk be paid to the [landlord]." G. L. c. 111, § 127F, third par. As with § 8A, we conclude that G. L. c. 111, § 127F, encompasses interim use and occupancy awards.

We further conclude that, even in situations not covered by § 8A and G. L. c. 111, § 127F, a court's equitable powers support its discretionary authority to order interim use and occupancy payments. The Housing Court and District Court both have the same equity jurisdiction as the Superior Court with respect to matters within their subject matter jurisdiction such as summary process actions. Compare G. L. c. 185C, § 3 ("[i]n all matters within their jurisdiction, the divisions of the housing court department shall have all the powers of the superior court department"), and G. L. c. 218 § 19C (District Court has "same equitable powers and jurisdiction as is provided for the superior court"), with G. L. c. 214, § 1 (superior court has "general equity jurisdiction"). In particular, the Housing Court has the "power to grant temporary restraining orders and preliminary injunctions as justice and equity may require" and

the "power and authority for enforcing orders, sentences and judgments made or pronounced in the exercise of any jurisdiction vested in them, and for punishing contempts of such orders, sentences and judgments and other contempts of their authority." G. L. c. 185C, § 3. Moreover, Rule 9 of the Uniform Summary Process Rules (1980) provides that, although the "issuance of restraining orders and injunctions shall be governed by applicable statutes and by Rule 65 and 66, respectively, of the Massachusetts Rules of Civil Procedure . . . , the court may modify the time periods and notice requirements of those rules and otherwise fashion the relief as it deems appropriate" (emphasis added).[25]

[25] "We construe G. L. c. 185C, § 3, in light of the purpose for which it was enacted," namely to provide a "specialized, expert and remedial judicial procedure . . . to stimulate better housing maintenance and better relations between property owners and occupants for the well-being of the public at large. " LeBlanc v. Sherwin Williams Co., 406 Mass. 888, 896 (1990), quoting 1971 House Docs. Nos. 956, 4202. Furthermore, with respect to such matters within its jurisdiction, the Housing Court has wide latitude to exercise its equitable authority, as is apparent from various decisions of the Housing Court. See, e.g., Hicks vs. Leisure Woods Estates, Inc., Hous. Ct., No. 09-CV-1769 (Western Div. Mar. 5, 2014), aff'd in part, Clark v. Leisure Woods Estates, Inc., 89 Mass. App. Ct. 87 (2016) (pursuant to "general equity powers of court," court ordered defendants to conduct maintenance work, including marking walking trails and hiring arborists to inspect certain trees); Boston Hous. Auth. vs. Lyons, Hous. Ct., No. 06-SP-00320 (Boston Div. June 16, 2006) (after "balanc[ing] the equities," court "fashion[ed] a remedy under the doctrine of prevention of forfeiture" and allowed public housing tenant who failed to report income as required to retain tenancy subject to paying

Courts from other jurisdictions have concluded that a court's equitable powers include the discretionary authority to issue interim orders for use and occupancy payments: the leading authority is Bell v. Tsintolas Realty Co., 430 F.2d 474, 479 (D.C. Cir. 1970), in which the United States Court of Appeals for the District of Columbia Circuit articulated many of the different factors that we discuss infra.[26]

ii. The requirement of a motion and a use and occupancy hearing. Regardless of whether it is acting pursuant to specific statutory authorization or under its general equitable

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rent owed due to underreporting); Chang vs. Karibian, Hous. Ct., No. 05-SP-03879 (Boston Div. Nov. 30, 2005) (court exercises "equitable authority" to grant brief stay of execution after tenants violated lease provision regarding pets).

[26] For other jurisdictions and commentators that emphasize the equitable, discretionary nature of the court's decision whether to order interim payments, see, e.g., Kohner Props., Inc. v. Johnson, 553 S.W.3d 280, 285 (Mo. 2018) ("Consistent with the prevailing view of a majority of jurisdictions, this Court holds circuit courts may exercise discretion on a case-by-case basis to determine whether an in custodia legis procedure [(i.e., payment into court during pending litigation)] is appropriate in a particular case"). See also Dameron v. Capitol House Assocs. Ltd. Partnership, 431 A.2d 580, 583 (D.C. 1981), overruled on other grounds by McQueen v. Lustine Realty Co., 547 A.2d 172, 174 (D.C. 1988) (use and occupancy order "equitable tool of the court requiring the exercise of sound discretion on a case-by-case basis"); Pugh v. Holmes, 486 Pa. 272, 292 (1979) ("the decision whether a tenant should deposit all or some of the unpaid rents into escrow should lie in the sound discretion of the trial judge or magistrate"); Restatement (Second) of the Law of Property: Landlord and Tenant § 11.3, at 381 (1977) ("The tenant pays rent into escrow at the discretion of the court . . .").

power, a judge should issue an order for interim use and occupancy payments "only on motion of the landlord, and only after notice and opportunity for a hearing on such a motion." Bell, 430 F.2d at 479. The hearing must provide both parties an "adequate opportunity to argue the equities of their case," including presenting evidence. Dameron v. Capitol House Assocs. Ltd. Partnership, 431 A.2d 580, 584 (D.C. 1981), overruled on other grounds by McQueen v. Lustine Realty Co., 547 A.2d 172, 174 (D.C. 1988). See, e.g., G. L. c. 239, § 8A, fourth par. ("In determining said fair value [of the use and occupation of the premises], the court shall consider any evidence relative to the effect of any conditions claimed upon the use and occupation of residential premises"). At the hearing the judge should consider and balance the relevant factors discussed infra in order to determine whether an order for use and occupancy payments is appropriate, and, if so, what the amount should be and where the payments should be directed. The over-all balancing of equities must be left on a "case-by-case basis to the discretion of the trial judge." Bell, supra at 483. We will review such balancing only for an abuse of discretion.

For the purpose of guiding that exercise of discretion, we set out the most relevant factors, albeit recognizing that not all the factors may be applicable in a particular case, and that a full consideration of the applicable factors, individually and

collectively, cannot be made without a trial on the merits. One important set of factors relates to the landlord's statutory entitlement to use and occupancy payments from a tenant at sufferance and the increasing likelihood of harm to the landlord from the prolongation of a summary process. Accordingly, the first factor to be considered from the landlord's perspective is that defined by G. L. c. 186, § 3: "[t]enants at sufferance in possession of land or tenements shall be liable to pay rent therefor for such time as they may occupy or detain the same." The Legislature has recognized that "time lost in regaining [real property] from a party in illegal possession can represent an irreplaceable loss to the owner." Commentary to Rule 1 of the Uniform Rules of Summary Process (1980). The judge should thus consider the time delay expected before final resolution as a factor. "Because summary process is designed 'to secure the just, speedy, and inexpensive determination' of eviction actions, it progresses rapidly through a series of complex steps and deadlines." Adjartey v. Central Div. of the Hous. Court Dep't, 481 Mass. 830, 850 (2019) (Appendix), quoting Rule 1 of the Uniform Summary Process Rules. Jury trials will extend the typical timeframe substantially. See Bell, 430 F.2d at 482 (taking into consideration that "landlord has lost the advantage of the summary proceeding and is instead exposed to a prolonged

period of litigation without rental income" in determining whether interim use and occupancy payments are appropriate).[27]

Other factors to be considered from the landlord's perspective include the "amount of rent alleged to be due, the number of months the landlord has not received even a partial rental payment, . . . the amount of the landlord's monthly obligations for the premises, . . . and whether the landlord faces a substantial threat of foreclosure." Bell, 430 F.2d at 484.

From the tenant's perspective, the most important factors include his or her defenses or counterclaims, including but not limited to those asserting a breach of the warranty of habitability, and the likelihood of success on those defenses or counterclaims. As discussed supra, any and all counterclaims related to the rental premises may justify the withholding of rent under § 8A. Counterclaims asserting a breach of the warranty of habitability also may provide a rent abatement in whole or in part. See Haddad v. Gonzalez, 410 Mass. 855, 872-

[27] Summary process is supposed to proceed rapidly, potentially taking "fewer than seven weeks" from notice to quit to eviction. Adjartey, 481 Mass. at 837. When a jury trial is requested, this time frame may be significantly expanded. In theory, the Housing Court must schedule a jury trial within ninety days of the original trial date. Housing Court Standing Order 1-04, at part VI (2004). This requirement was exceeded in this case.

873 (1991) (discussing warranty of habitability and tenant's right to benefit of bargain); Boston Hous. Auth., 363 Mass. at 198 ("tenant's obligation to pay rent is predicated on the landlord's obligation to deliver and maintain the premises in habitable condition").[28] The judge also should consider whether a tenant had to pay out of pocket for repairs or maintenance to address habitability issues at the premises. See Super, The Rise and Fall of the Implied Warranty of Habitability, 99 Calif. L. Rev. 389, 433 (2011) (tenant living in uninhabitable unit may have to spend money on repairs that otherwise would go to rent). The judge should also consider the requirements set out in § 8A, such as the landlord's knowledge of the conditions prior to the withholding of rent and whether the tenant caused the complained of conditions. As mentioned, the amount of any use and occupancy ordered must not exceed the fair value of the rental premises. Lowell Hous. Auth., 346 Mass. at 431.

Further relevant considerations regarding defenses or counterclaims would be "whether the housing code [or other]

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[28] Conditions of past disrepair that existed when the tenant paid full rent also may entitle the tenant to a rent abatement. C.F. Downing & J.M. McCreight, Termination of Residential Tenancies, in Residential and Commercial Landlord-Tenant Practice in Massachusetts § 11.1, at 11-36 (Mass. Cont. Legal Educ. 3d ed. 2016 & Supp. 2018) ("There is no requirement in G. L. c. 239, § 8A[,] that there be current conditions of disrepair in order to invoke a conditions-related defense").

violations alleged are de minimis or substantial" and whether documentation such as inspection reports or photographs support a preliminary determination regarding such conditions. Bell, 430 F.2d at 484. See Boston Hous. Auth., 363 Mass. at 200 n.15 ("A housing inspection report which certifies that Code violations exist which 'may endanger or materially impair the health or safety, and the well-being of any tenant therein or persons occupying said property' would constitute evidence of a material breach and the landlord's notice of that breach"); Dameron, 431 A.2d at 582 (photographs relevant to determination of interim use and occupancy payments); Pugh v. Holmes, 486 Pa. 272, 293 (1979) (in setting amount of use and occupancy payment, court should consider "seriousness and duration of the alleged defects, and the likelihood that the tenant will be able to successfully demonstrate the breach of warranty"). See also C.F. Downing & J.M. McCreight, Termination of Residential Tenancies, in Residential and Commercial Landlord-Tenant Practice in Massachusetts § 11.1, at 11-38 (Mass. Cont. Legal. Educ. 3d ed. 2016 & Supp. 2018). ("Not every breach of the State Sanitary Code . . . will be deemed sufficient for the court to determine that the value of the apartment has been diminished").

To avoid creating a "monetary barrier" to an impecunious tenant with a potentially meritorious defense who has requested a jury, while also keeping in mind financial hardship to a

landlord, the judge has discretion to consider factors bearing on the financial positions of the parties when deciding on the award of interim use and occupancy payments. Bell, 430 F.2d at 480. A relevant factor is whether the "tenant has been allowed to proceed in forma pauperis." Id. at 482. See CMJ Mgt. Co. v. Wilkerson, 91 Mass App Ct. 276, 284 (2017) ("Striking a jury demand [for failure to comply with pretrial conference order in summary process proceeding] . . . must be approached with caution").

If a judge decides to order interim use and occupancy payments, he or she also must determine whether such payments should be made into an escrow account or directly to the landlord (or some combination of the two).[29] In making this

[29] We note that § 8A does not contain a mandatory rent escrow requirement, and indeed the Legislature has declined to enact legislation proposing to insert one. See, e.g., 2017 Senate Bill No. 778, entitled "An act requiring mandatory rent escrow." Furthermore, § 8A does not provide for private escrow arrangements, only payment to the clerk of the court. The only circumstances in which § 8A specifies that funds can be released from escrow is when the court orders that they "be expended for the repair of the premises by such persons as the court after a hearing may direct, including if appropriate a receiver appointed as provided in [G. L. c. 111, § 127H]." G. L. c. 239, § 8A, fourth par. Additionally, "[w]hen all of the conditions found by the court have been corrected, the court shall direct that the balance of funds, if any, remaining with the clerk be paid to the landlord." Id. It should be noted that although this reference to G. L. c. 111, § 127H, is in the current version of § 8A, fourth par., the Legislature repealed G. L. c. 111, § 127H, in 1992. See St. 1992, c. 407, § 9. The portion of § 127H that provided for appointment of a receiver,

determination the judge should weigh the advantages and disadvantages to both parties of escrow versus direct payment, recognizing that escrow creates an incentive for a landlord to make repairs but still requires a tenant to make ongoing payments that ensure that a landlord temporarily deprived of rent will receive any funds to which he or she is entitled upon judgment in the summary process action, or even sooner if required repairs are made. See Boston Hous. Auth., 363 Mass. at 193 n.8 (escrowed rent "does not permanently deprive a landlord of the rent but only permits the tenant to withhold it until the stated violations are corrected" [citation omitted]); id. at 201 ("If the landlord remedies the defects, he will recover the withheld rent. . . . The landlord's incentive to repair comes from the knowledge that such action taken before trial will guarantee his full recovery of the withheld rent"). See also Kohner Props., Inc. v. Johnson, 553 S.W.3d 280, 284 (Mo. 2018), quoting Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1083 n.67 (D.C. Cir.), cert, denied, 400 U.S. 925 (1970) (describing escrow as "excellent protective procedure"); Phillips & Miller, The Implied Warranty of Habitability: Is Rent Escrow the Solution or the Obstacle to Tenant's Enforcement?, 25 Cardozo J.

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however, has been effectively incorporated into G. L. c. 111, § 127I. At least one other statute erroneously refers to G. L. c. 111, § 127H. See G. L. c. 185C, § 3.

Equal Rts. & Soc. Just. 1, 36 (2018) ("The rent escrow forces a tenant to remain current with her rent payments, protects the landlord's property rights, and provides an incentive for the landlord to expeditiously make repairs"); id. at 39-41 (listing more than twenty States that authorize rent escrow).[30]

In considering whether direct payments should be ordered, the judge should recognize that it may be appropriate to order them so as to maintain the physical condition of the premises, as the judge is already specifically authorized to do by G. L. c. 111, § 127F, second par. See id. (authorizing court to order direct payments to "permit the owner to maintain the property"). Direct payments also may be appropriate when the landlord presents evidence that they are necessary to make mortgage payments on the property or otherwise presents evidence demonstrating a sufficiently pressing need for immediate receipt of the payments. See Fritz v. Warthen, 298 Minn. 54, 61 (1973) ("The court under its inherent powers may order payment of amounts out of [the escrow account] to enable the landlord to meet his obligations on the property or for other appropriate purposes"). Another factor to consider is whether some of the

[30] Where a tenant's rent is paid in full or in part by a government agency or other third-party assistance program, the logistical hurdles of redirecting these payments to an escrow account should be considered when assessing compliance with an escrow requirement.

payments are indisputably due. See Dameron, 431 A.2d. at 584-585 (within court's discretion to "maintain[] only the amount in dispute in the registry and pass[] through to the landlord the undisputed rent"). Cf. Kargman v. Dustin, 5 Mass. App. Ct. 101, 113-114 (1977) (pending appeal, tenant required to pay into escrow, but not directly to landlord, rent due under lease; payment into escrow of disputed rental increase, "the ultimate legality of which [was] the subject of pending litigation," remanded for possible waiver). This is consistent with § 8A, fourth par., which expressly permits a tenant to "voluntarily deposit with the clerk any amount for rent or for use and occupation which may be in dispute" (emphasis added), and with the court's general equitable duty "to maintain the status quo" pending adjudication, French v. Vandkjaer, 14 Mass. App. Ct. 980, 980 (1982).

Finally, on all these questions we recognize that our courts adjudicating summary process cases are confronted with a crushing number of decisions every day and thus must make determinations regarding interim use and occupancy payments expeditiously based on the limited information presented to them by the parties, who are often appearing pro se. In issuing his or her ruling, the judge should identify the factors considered most relevant and explain the over-all balancing of those factors orally on the record or in a written order. The judge

should issue a written order specifying what payments of interim use and occupancy, if any, are due and to whom. Orders requiring direct payment to landlords also should expressly provide the reasons why such direct payment has been ordered, particularly why escrow of such payments does not adequately protect the landlord's interests.

Based on the foregoing, we conclude that the October 31, 2018, order for use and occupancy payments issued by the Housing Court judge was deficient in at least two respects. The tenants raised a number of counterclaims that required the judge to make a preliminary assessment of their validity, in particular whether the tenants might be entitled to withhold or offset rent under § 8A. Here, the judge set the use and occupancy payment in an amount twenty-five dollars higher than the previously agreed-upon rent of $2,125; however, she does not appear to have considered, or at least addressed, the impact of any defective conditions, in particular the sanitary code violations found by the health inspector, on the fair value of the premises. Indeed, neither order providing for interim use and occupancy payments contained any explanations why the payments had been ordered. Although such explanation need not be detailed, it must identify the most important factors considered and provide an over-all balancing of the different interests at stake.

3. Conclusion. For the foregoing reasons, the order for use and occupancy payments is vacated and the case is remanded for further proceedings consistent with this opinion.

So ordered.