



Legal Ease

By: *Kenneth Krems,
Esq.*

WARRANTY OF HABITABILITY: A POTENTIAL NIGHTMARE

Picture this scenario: You think you have a simple eviction case for non-payment of rent. After all, the tenant does owe three months rent for a total of \$1800.00. You bring your case

to court but there is a hitch - the tenant raises a rent withholding defense and a breach of warranty counterclaim. The result of this "simple" case could be that the tenant remains in possession of the apartment, you owe the tenant money, and you have to make repairs. Your case has turned into a nightmare.

Tenants do sometimes raise these type of defenses and counterclaims in eviction cases. Your success as a manager in these cases depends upon your understanding of the law, as well as what actions you took or did not take before the case ever made it into a courtroom.

Many states, including Massachusetts, recognize a warranty of habitability. This means that a landlord must keep the apartment free of significant defects, or in the case of Massachusetts, free from violations of the State Sanitary Code. Under Massachusetts General Laws Chapter 239, section 8A, a tenant can have a valid rent withholding defense if: 1) there are significant defects in the apartment; 2)

the defects were not caused by the tenant or anyone under the tenant's control; and 3) the landlord or the landlord's employees knew of the defects prior to the time the tenant fell behind in the payment of rent. The landlord's knowledge can be as a result of receiving written notice of the defects from the tenant, being told about the defects, receiving notice from the Board of Health, or any other type of notice.

The measure of damages for a breach of the warranty of habitability is the difference between the value of the apartment as warranted and the value of the apartment in its defective condition. The value as warranted is usually the rent being charged for the apartment, and not the smaller portion of the rent paid by a subsidized tenant. To determine the value of the unit in its defective condition, a judge will usually just listen to the tenant's description of the problems, as well as view any pictures that are available.

Under Massachusetts law, if the unpaid rent owed the landlord is less than the amount of the abatement owed the tenant because of the defects, the tenant retains possession of the unit. Moreover, if the rent owed is greater than the abatement, the tenant can still retain possession if she pays the landlord the difference between the two figures within ten days of the Court's order.

In our example, three months rent at \$600.00 per month for a total of \$1800 is owed. After hearing the evidence, the judge decides that the lack of sufficient hot water, roaches, and windows that do not work properly existed over a period of seven months, and reduced the value of the apartment by 50% during that time. The abatement would then be 7 months \$300.00 or \$2100.00. The Court would order that the landlord pay the tenant \$300.00, make the appropriate repairs, and allow the tenant to retain the apartment.

If the Court found that the

defects only reduced the value by 25%, the abatement would be 7 months \$150.00 or \$1050.00. In that situation, the tenant would still be able to retain possession if the tenant had paid \$750.00 to the landlord within ten days of the Court order. Otherwise, the landlord would get possession along with a \$750.00 judgment.

What can a landlord do to avoid some of these problems or, if they arise, improve the chances of success? First, treat a tenant's complaint about defective conditions in the apartment as an important event. Make out a work order or other notation the same day, and have the repairs started as soon as possible. Second, keep good records as to what repairs were made, when they were made, who made them, and how much the repairs cost in materials needed or outside labor. Third, when a problem exists, fix it. It does not do any good to try and make a repair but fail to actually do it. If you attempted to fix the defective windows but at the end of the day the windows still do not work, the defect still exists and the tenant's potential abatement continues to grow. By making timely and effective responses to tenant complaints a priority, you can save yourself a lot of aggravation down the road.