

Landlord-Tenant Law: Protecting the Small Landlord's Rights During Summary Process

A young couple buys a two-family house for \$500,000, \$400,000 of it being secured by a mortgage. They live in one unit and rent the other to offset the many expenses of owning a house. The tenant stops paying rent, and the couple begins the lengthy and expensive summary process. After many months of legal battles, they could eventually regain possession of the property. In the process, they will have lost thousands of dollars in legal costs, court fees, moving fees, and lost rental income. To their dismay and surprise, their American dream could end in foreclosure.

I. INTRODUCTION

In *Lindsey v. Normet*,¹ the United States Supreme Court reaffirmed that housing is not a fundamental right guaranteed by the Constitution of the United States.² More than one-third of the United States population lives in rental housing and may be evicted at any time.³ Homelessness is a serious problem in our society, and therefore, the eviction process must sufficiently balance the property rights of the landlord with the occupancy rights of the tenant.⁴ Summary process laws attempt to offer a speedy and inexpensive solution to the eviction problem by distinguishing eviction cases from other civil lawsuits.⁵ Unfortunately, for some landlords, summary process can still be a lengthy and costly endeavor.⁶

1. 405 U.S. 56 (1972).

2. *Id.* at 74 (stating Constitution does not provide judicial remedies for every social and economic ill). *But see* Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 203-04 (2000) (arguing *Lindsey* holding failed to grant necessary protections to tenants).

3. U.S. CENSUS BUREAU 2001, STATISTICAL ABSTRACT OF THE UNITED STATES No. 950, available at <http://www.census.gov/prod/2002pubs/01statab/construct.pdf> (last visited Apr. 23, 2004). According to the 2000 statistics, 35,664,000 of a total of 105,480,000 occupied units in the United States are rental units. *Id.*

4. Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385, 387 (1995) (noting tenant and landlord interrelationship and impact of eviction). "[L]andlords may respond to increased costs by simply absorbing their costs, by raising rents and reducing maintenance to recover their losses, or by abandoning their units altogether or converting them to other uses." *Id.* at 386.

5. See Randy G. Gerchick, Comment, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 761-62 (1994) (discussing purpose of summary process laws).

6. *Hodge v. Klug*, 604 N.E.2d 1329, 1330 (Mass. App. Ct. 1992) (describing long and expensive delay in returning property to landlord). In *Hodge*, a tenant at will refused to move out, ultimately causing the

In Massachusetts, both the federal Fair Housing Act (FHA) and the Massachusetts Fair Housing Laws prohibit discrimination against particular classes of people who are seeking to rent or buy property.⁷ However, both laws offer an exemption for owner-occupied dwellings and owners of no more than three single-family house rentals.⁸ This Note will identify landlords who are exempt from the FHA and the Massachusetts discrimination statute as “small landlords.”⁹ Small landlords provide approximately seventy-five percent of Massachusetts’ rental housing.¹⁰

Unlike larger landlords and corporations, small landlords generally do not seek to make a significant profit.¹¹ Contrary to popular belief, most property owners are simply trying to earn a reasonable return on their investment.¹² Most landlords, especially owner-occupants, rely heavily on rental income to subsidize mortgage payments, property taxes, and other general expenses necessary to maintain the residence.¹³ A long delay in the summary process could force these small landlords into foreclosure or even homelessness.¹⁴

Small landlords will remain unprotected until Massachusetts’ lawmakers amend the summary process laws to assure that both landlords’ and tenants’ rights are adequately protected.¹⁵ Currently, some tenants are abusing the legislative safeguards protecting them from eviction without due process.¹⁶ For example, a tenant could choose not to pay the rent and then later, in bad faith,

summary process litigation to last about two and one-half years. *Id.* at 1330. The *Hodge* court described the tenant’s conduct as “both an affront to the court’s dignity and a perversion of the court’s purposes as an institution for just resolution of legitimate disputes.” *Id.* at 1337 (Brown, J., concurring) (quoting *Miaskiewicz v. Commonwealth*, 402 N.E.2d 1036, 1039 (Mass. 1980)).

7. See generally Fair Housing Act, 42 U.S.C. §§ 3601-3631 (2000); MASS. GEN. LAWS ch. 151B, § 4 (2001) (stating Massachusetts discrimination statute).

8. See 42 U.S.C. § 3603(b)(1)-(2) (2000) (exempting owner-occupied landlords from Fair Housing Act); MASS. GEN. LAWS ch. 151B, § 4(7) (2001) (explaining sale and rental housing discrimination but exempting owner-occupied landlords).

9. Lenore Schloming, Op-Ed, *Mom and Pop Landlords are at Risk in Bay State*, BOSTON GLOBE, June 25, 1999, at A22.

10. *Id.* (reporting high percentage of small landlords in Massachusetts).

11. Laura L. Westray, Note, *Are Landlords Being Taken by the Good Cause Eviction Requirement?*, 62 S. CAL. L. REV. 321, 321 (1988).

12. *Id.* (providing rationale as to why small landlords rent units).

13. Stacy Milbouer, *Landlords Say They Could Use Some Help*, BOSTON GLOBE, Apr. 11, 1999, at 1 (NH Wkly.) (addressing financial distress of one landlord). A New Hampshire landlord relied on rental income to pay her mortgage bills until she could sell the property. *Id.* When the tenant did not pay rent for months, owing \$3,000, the landlord had to sell some stocks to pay her mortgage and legal bills. *Id.*

14. Emily Sweeney, *Landlord Criticizes State Agency Says He Lost Money Trying to Follow Rules and Help Out Tenant*, BOSTON GLOBE, Jan. 10, 2002, at 1 (Globe W.) (acknowledging risk small landlords face when tenant fails to pay rent).

15. See generally MASS. GEN. LAWS ch. 186, §§ 1-21 (2001) (setting forth Massachusetts summary process laws).

16. Christopher Paul Ferragamo, Note, *Mandatory Rent Escrowing: Putting the “Summary” Back in Summary Process*, 6 SUFFOLK J. TRIAL & APP. ADVOC. 37, 37 (2001) (presenting hypothetical of tenant fabricating violations of implied warranty of habitability); see also Editorial, *Summary Process Safeguards*, MASS. LAW. WKLY., Jan. 25, 1999 [hereinafter *Summary Process Safeguards*] (explaining lack of rent withholding makes it almost impossible for landlord to recover past rent).

claim the landlord breached the implied warranty of habitability.¹⁷

In recent decades, landlords have found it increasingly difficult to evict tenants and regain possession of their property.¹⁸ This Note will examine the Massachusetts summary process laws and contrast them with several alternatives across the country.¹⁹ The Note will also explore the legislative intent behind the FHA and the New Jersey Anti-Eviction Act and explain how these exemptions can be applied to summary process laws.²⁰ Finally, this Note will analyze the effect of summary process laws on small landlords and propose amendments to fix the disparity.²¹

II. HISTORY

A. Rights of Property Owners

The United States Constitution protects all Americans from deprivation of “life, liberty, or property, without due process of law.”²² In this context, the right to “property” includes the right to possess, use, enjoy, and dispose of property.²³ Another recognized fundamental right is the right to exclude non-owners from one’s property.²⁴ Although this is a fundamental right, it is limited in a variety of ways. Many state and federal statutes prohibit discrimination on the basis of race, gender, national origin, religion, and physical disability.²⁵ Often, these statutes offer some protection to small landlords.²⁶

17. Ferragamo, *supra* note 16, at 44 (showing tenant’s ability to take advantage of landlord tenant laws).

18. See Gerchick, *supra* note 5, at 761-62 (explaining extensive changes and modification to common law).

19. See *infra* notes 48-97 and accompanying text (discussing and comparing Massachusetts and California eviction laws).

20. See *infra* notes 22-35, 98-122 and accompanying text (explaining FHA and New Jersey Anti-Eviction Law exemptions).

21. See *infra* Part III (offering analysis and proposed summary process amendments in Massachusetts).

22. U.S. CONST. amend. V (prohibiting federal government from depriving persons of life, liberty, and property); U.S. CONST. amend. XIV (forbidding states from depriving any person of life, liberty, and property).

23. 16 AM. JUR. 2D *Constitutional Law* § 582 (2002) (clarifying use of word “property” in United States Constitution); see also *Buskey v. Town of Hanover*, 577 A.2d 406, 409 (N.H. 1982) (recognizing U.S. Constitution protects fundamental right to use and enjoy one’s property).

24. See JOSEPH W. SINGER, *PROPERTY LAW—RULES, POLICIES, AND PRACTICE* §1.1.1.1 (2d ed. 1997) (listing recognized rights of property owners). More specifically, Singer considers the right to exclude others as the most fundamental property right. *Id.* This right also includes the power to grant access to others and the ability to revoke it. *Id.*

25. See generally Fair Housing Act, 42 U.S.C. § 3601–3619 (2000) (establishing federal housing anti-discrimination act); MASS. GEN. LAWS ch. 151B, § 4 (2001) (banning discrimination in various circumstances including housing).

26. See *Singleton v. Gendason*, 545 F.2d 1224, 1225 (9th Cir. 1976) (noting 42 U.S.C. § 3603(b)(1) and its exemptions for small landlords); *Berback v. Mangum*, 297 N.Y.S.2d 853, 860 (Sup. Ct. 1969) (holding New York owner-occupied exemption constitutional). The New York State Division of Human Rights sued the Berbacks on behalf of a tenant who claimed she was denied housing based on her race. *Berback*, 297 N.Y.S.2d at 854-55. The court held that the Berbacks were immune from the statute because they occupied one unit of

The Federal Fair Housing Act of 1968 states that “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”²⁷ More specifically, the Act makes it illegal for anyone engaged in residential real estate related transactions to discriminate based on race, color, religion, sex, handicap, familial status, or national origin.²⁸ Section 3603, however, specifically exempts owner-occupied landlords from the obligations of abiding by the requirements of the Act.²⁹ The exemption includes owners who occupy at least one unit in the maximum of a four-unit residential building, and owners who own and rent no more than three such single-family homes at one time.³⁰ An owner may only qualify under this exemption by selling or renting his property without the assistance of a broker or the use of advertising.³¹

In addition to the federal Fair Housing Act, Massachusetts has a statute protecting citizens from unlawful discrimination based on race, color, religious creed, national origin, ancestry, sex, sexual orientation, marital status, or age.³² Like the FHA, owner-occupied dwellings are exempt from this anti-discrimination statute.³³ Instead of exempting owners of a four-unit residential building, the Massachusetts statute does not apply to the leasing of a single apartment in a two family dwelling where the other apartment is occupied by the landlord-owner.³⁴ As a result, owners of multiple single-family leased homes do not fall under the exemption of the Massachusetts discrimination

the two-family house. *Id.* at 860. The court also noted “[b]oth the Congress of the United States and the New York State Legislature have thus determined certain applicable exemptions in the respective statutes and thereby included, in varying degrees, the legal assumption that a man’s house is regarded as his castle.” *Id.*

27. 42 U.S.C. § 3601 (2000).

28. 42 U.S.C. § 3604(b) (2000) (limiting type of discrimination necessary to have standing to sue).

29. 42 U.S.C. § 3603(b)(1)-(2) (2000) (establishing Fair Housing Act exemption for owner-occupied landlords).

30. 42 U.S.C. § 3603(b)(1)-(2); *see also Singleton*, 545 F.2d at 1225 (holding exemption only available to actual occupied owner, not occupied lessee); *Lamb v. Sallee*, 417 F. Supp. 282, 285 (E.D. Ky. 1976) (noting duplex does not qualify as single-family house under Fair Housing Act).

31. 42 U.S.C. § 3604(c) (2000) (prohibiting discrimination in advertising). The exemptions of § 3603 do not apply to advertising, making it illegal:

[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

42 U.S.C. § 3604(c); *see also United States v. Hunter*, 459 F.2d 205, 213 (4th Cir. 1972) (indicating owners exempt from Act may not advertise in discriminatory fashion). In *Hunter*, the United States sued a newspaper under the Act to enjoin it from publishing discriminatory advertisements. *Id.* at 209. The advertisement in question described the unit as located in a “white home.” *Id.* The Fourth Circuit held that although the newspaper’s client could discriminate privately under the Act, once he published the notice, the Act was in full effect and both the owner and newspaper were liable. *Id.* at 221.

32. MASS. GEN. LAWS ch. 151B, § 4 (2001) (setting forth anti-discrimination statute).

33. *Id.* § 4(7) (explaining discrimination ban in sale and rental of housing but exempting owner-occupied landlords).

34. *Compare* 42 U.S.C. § 3603(b)(2) (exempting four-unit house with one owner-occupied unit), *with* MASS. GEN. LAWS ch. 151B, § 4(7) (exempting two-family dwelling with one owner-occupied unit).

statute.³⁵

B. Types of Tenancy

A landlord and tenant may enter into a tenancy with or without a lease. When the parties sign a lease, they establish either a tenancy of years or a periodic tenancy.³⁶ A tenancy of years will last for a specific amount of time determined by the parties and indicated in the lease.³⁷ Termination of a tenancy of years occurs only if one of the parties violates a specific condition or some other event triggers termination of the lease.³⁸ In contrast, a periodic tenancy renews automatically at certain intervals unless one of the parties chooses to terminate the tenancy.³⁹

A tenancy at will usually arises by an oral agreement, when a tenant occupies the premises for no specific time period without a written lease.⁴⁰ Either party may terminate the tenancy at any time.⁴¹ The tenancy at will does not terminate upon a transfer of the property by the landlord.⁴² Although there is no written lease, Massachusetts statutes incorporate certain implied warranties, such as the implied warranty of habitability, into the tenancy at will.⁴³

35. MASS. GEN. LAWS ch. 151B, § 4 (2001).

36. See generally SINGER, *supra* note 24 (discussing types of tenancies).

37. See Farris v. Hershfield, 89 N.E.2d 636, 636 (Mass. 1950) (noting vague language in lease creates tenancy at will); Wunsch v. Donnelly, 19 N.E.2d 70, 71 (Mass. 1939) (stressing importance of specific terms of lease, including length of tenancy).

38. See generally GEORGE WARSHAW, MASSACHUSETTS LANDLORD-TENANT LAW § 1:5 (2002) (describing judicial action for breach of lease by either party could terminate tenancy).

39. See Noble v. Brooks, 112 N.E. 649, 649 (Mass. 1916) (finding period tenancy where lease continued tenancy yearly until termination by one party); see also Archambault v. Walton, 191 N.E. 346, 346-47 (Mass. 1934) (offering example of periodic tenancy lease). The lease in *Archambault* stated:

[T]his lease shall continue in full force and effect thereafter from year to year, until one of the parties on or before the first day of October in any year, give to the other party written notice of their intention to terminate this lease, on the first day of the following month, in which case the lease hereby created shall terminate in accordance with such notice.

Archambault, 191 N.E. at 347.

40. MASS. GEN. LAWS ch. 183, § 3 (2001); Rubin v. Prescott, 284 N.E.2d 902, 904 (Mass. 1972) (describing tenancy at will as relationship based on agreement); Ferrigno v. O'Connell, 53 N.E.2d 384, 384-85 (Mass. 1944) (discussing tenancy at will). "An inherent quality of an estate at will is that it is personal so that it is determinable at the will of either party." *Ferrigno*, 54 N.E.2d at 384; see also Crowe v. Bixby, 129 N.E. 433, 434 (Mass. 1921) (holding tenancy at will created when tenant occupies premises under oral lease).

41. See Farson v. Goodale, 90 Mass. 202, 202 (1864) (determining tenancy at will may terminate in any manner to which parties mutually agree). *But see* MASS. GEN. LAWS ch. 186, § 12 (2001) (restricting landlords ability to terminate tenancy at will). Section 12 requires that in order to terminate a tenancy, the landlord must give three months notice unless "if the rent reserved is payable at periods less than three months, the time of such notice shall be sufficient if it is equal to the interval between days of payment or thirty days, whichever is longer." *Id.*

42. MASS. GEN. LAWS ch. 186, § 13 (2001).

43. See MASS. GEN. LAWS ch. 186, § 14 (2001) (requiring landlord to provide essential services to dwelling even without lease). Section 14 states:

Any landlord . . . who willfully or intentionally fails to furnish such water, hot water, heat, light, power, gas, elevator service, telephone service, janitor service or refrigeration service at any time

When a tenant's lease expires, that individual becomes a tenant at sufferance, also known as a holdover tenant, and is then subject to a summary process eviction without notice.⁴⁴ In addition, if a tenant does not vacate the rented premises by the date specified in a notice to quit, the prior tenancy is terminated and it becomes a tenancy at sufferance.⁴⁵ If the landlord continues to accept rent after termination of the tenancy, a tenancy at will is established and the provisions of the prior lease remain effective.⁴⁶ A landlord cannot physically remove a tenant at sufferance, but must evict the tenant through summary process.⁴⁷

C. Summary Process in Massachusetts

To begin the eviction process, a landlord must deliver a notice to quit to the tenant.⁴⁸ A notice to quit alerts the tenant that the landlord is seeking to terminate the tenancy.⁴⁹ Although the notice does not need to contain specific language, it must "be so certain that it cannot be reasonably misunderstood."⁵⁰ Any vague or ambiguous language will invalidate the notice and the landlord must re-serve the notice.⁵¹

when the same is necessary to the proper or customary use of such building . . . shall also be liable for actual and consequential damages or three month's rent, whichever is greater, and the costs of the action.

Id.; see also MASS. GEN. LAWS ch. 239, § 8A (2001) (allowing tenant to raise violation of implied warranty of habitability).

44. See *Ames v. Beal*, 187 N.E. 99, 100 (Mass. 1933) (holding tenancy at sufferance created when tenant possesses premises after lease expires); *Marsylak v. Fox*, 156 N.E. 856, 857 (Mass. 1927) (holding no notice to quit necessary if lessee considered tenant by sufferance); *Benton v. Williams*, 88 N.E. 843, 844 (Mass. 1909) (finding tenant at sufferance has no estate or title, only naked possession).

45. *Hollis v. Pool*, 44 Mass. 350, 350 (1841) (reiterating creation of tenancy at sufferance upon lawful termination of tenancy at will).

46. *Staples v. Collins*, 73 N.E.2d 729, 730 (Mass. 1947) (holding acceptance of rent after termination of tenancy results in tenancy at will). Parties may easily change a tenancy at sufferance into a tenancy at will by express or implied agreement of the parties. *Id.* In *Staples*, the landlord accepted the tenant's rent on December 1, 1945, the regular rent day, although the lease expired on November 10, 1945. *Id.* Payment and acceptance of rent are prima facie proof of the creation of a tenancy at will. *Id.*

47. See *infra* notes 48-79 and accompanying text (explaining Massachusetts Summary Process laws).

48. MASS. GEN. LAWS ch. 186, § 12 (2001) (mandating landlord to deliver notice of termination of tenancy to tenant); see *Oakes v. Munroe*, 62 Mass. (8 Cush.) 282, 287 (1851) (explaining significance of notice to quit). A notice to quit "must indicate to the tenant, with certainty, that he is to quit the premises at a certain fixed period, and if any mistake is made in designating the time at which he is required to leave, the notice will be fatally defective." *Oakes*, 62 Mass. at 287; see also MASS. R. CIV. P. 4 (2002) (regulating service and process). Rule 4 standardizes how a sheriff or constable delivers a notice to quit. MASS. R. CIV. P. 4. The Rule provides: "Service shall be made as follows: Upon an individual by delivering a copy of the summons and of the complaint to him personally; or by leaving copies thereof at his last and usual place of abode." MASS. R. CIV. P. 4(d).

49. *Mescall v. Somerset Sav. Bank*, 26 N.E.2d 609, 610 (Mass. 1940) (holding tenant entitled to reasonable notice to vacate on termination of tenancy at will).

50. *Torrey v. Adams*, 149 N.E. 618, 619 (Mass. 1925) (providing examples of proper notice). Thus, if the notice names a particular day for the termination of the tenancy and that date does not correspond to the actual conclusion of the tenancy, the notice will be considered invalid. *Id.*

51. *Maguire v. Haddad*, 91 N.E.2d 769, 771 (Mass. 1950) (indicating notice must be definite and

When a tenant has not paid rent, the landlord must serve a fourteen-day notice to quit for non-payment of rent.⁵² If the tenant does not pay the rent or move out within the fourteen days, the landlord may initiate court proceedings.⁵³ At the end of a tenancy, the landlord may issue a thirty-day notice to quit to terminate the tenancy before beginning eviction proceedings.⁵⁴ If the tenancy is a tenancy at will, the landlord may issue the notice to quit at any time but must give the tenant at least one month's notice before initiating court proceedings.⁵⁵

If a tenant does not vacate the premises by the date stated on the notice to quit, the landlord may begin summary process proceedings.⁵⁶ The

unequivocal). In *Maguire*, the landlord sent a notice to quit to the tenant stating he must quit and deliver up the property at the end of month or agree to an increase in rent from sixty dollars to eighty-five dollars per month. *Id.* at 770. The court noted that the "landlords could not blow hot and blow cold. They had to choose one position and stick to it." *Id.* at 771. Since the notice was not unequivocal, the court invalidated it. *Id.* at 772.

52. MASS. GEN. LAWS ch. 186, § 12 (2001) (specifying notice required for non-payment of rent). "In case of neglect or refusal to pay the rent due from a tenant at will, fourteen days' notice to quit, given in writing by the landlord to the tenant, shall be sufficient to determine the tenancy." *Id.* As long as tenant had not received another notice within the previous twelve months, then he may pay the rent due within fourteen days. *Id.* But see *Ellis v. Page*, 18 Mass. (1 Pick) 43, 48 (1822) (holding tenant at will not entitled to notice to quit). The *Ellis* court stated that a notice to quit is not the only way to terminate the lease. *Id.* at 48. Any notice that the landlord gives to the tenant must always allow the tenant sufficient time to take away furniture and other property. *Id.*

53. *Bech v. Cuevas*, 534 N.E.2d 1163, 1165 (1989) (requiring notice to quit before commencement of summary process).

54. MASS. GEN. LAWS ch. 186, § 12 (2001) (requiring at least thirty days notice for termination of tenancy). Section 12 states that the amount of notice required depends on how often the rent is due. *Id.* If rent is due less often than every month, the amount of notice must equal that payment interval unless it exceeds three months. *Id.*; *Connors v. Wick*, 59 N.E.2d 277, 278 (Mass. 1945) (specifying amount of notice to tenant). In *Connors*, the court reiterated that a tenant at will must be given notice at least equal to the time between each rent payment. *Connors*, 59 N.E.2d at 278.

55. *Lyon v. Cunningham*, 136 Mass. 532, 534 (1884) (establishing possession of premises under written lease does not create tenancy at will); *Gleason v. Gleason*, 62 Mass. 32, 32 (1851) (holding termination of tenancy at will requires notice to quit); *Brown v. Perkins*, No. 01-9737, 2001 WL 1251694, at *1 (Mass. App. Div. Oct. 11, 2001) (validating notice to quit where notice contained correct termination date). In *Brown*, the landlord gave a tenant at will a notice to quit dated November 30, 2000 stating: "This letter is intended to give you 60 days notice to terminate your Tenancy-At-Will Lease If you fail to vacate the apartment on or before February 1, 2001, I shall take due course of law to evict you." *Brown*, 2001 WL 1251694, at *2. The tenant argued that because he did not receive the notice until December 6, 2000, he did not have the full sixty days notice as stated in the notice to quit and therefore it was invalid. *Id.* The court upheld the eviction, stressing that the notice was valid where it provided a specific date for termination of tenancy, effective at least one day after the full month's rental period, the notice to quit was valid. *Id.*; see also *11 Everett St. Realty Trust v. Hynes*, No. 0052-CV-0864, 2002 WL 63797, at *1 (Mass. App. Div. Jan. 9, 2002) (allowing landlord to serve fourteen day notice to quit when tenant at will failed to pay rent). In *Everett Street*, the landlord notified the tenant at will of a rent increase in the amount of \$200 in July of 1999. *Everett St.*, 2002 WL 63797, at *1. The tenant initially refused to pay the increase, but later paid his normal rent plus \$100 of the increase. *Id.* When the tenant failed to pay rent in March of 2000, the court held that the landlord properly served a fourteen day notice to quit for non-payment of rent. *Id.* The *Everett* court further noted that landlord would have had to serve a thirty day notice for termination of tenancy if tenant had only refused to pay the increase but continued to pay the original rent. *Id.*

56. See *supra* note 48 and accompanying text (discussing notice to quit).

Massachusetts Uniform Process Rules govern all summary process cases.⁵⁷ First, the landlord must obtain and complete a Summary Process Summons and Complaint.⁵⁸ Secondly, the landlord must properly serve the summons and complaint on each tenant no earlier than thirteen days before the entry day and no later than seven days before the entry day.⁵⁹ Once the landlord promptly files the papers with the court by the specified entry day, the court will tentatively set the trial for the second Thursday after the entry date.⁶⁰

Under Rule Three of the Uniform Summary Process Rules, the defendant tenant must file an answer by the Monday following the entry day.⁶¹ If the tenant does not file the answer by this date, he will have defaulted and the court will grant possession to the landlord.⁶² In the answer, the tenant may ordinarily counterclaim on any matter arising out of the rental of the property.⁶³ Potential counter-claims include constructive eviction, retaliatory eviction, breach of covenant of quiet enjoyment, discrimination, infliction of emotional distress, and violation of the implied warranty of habitability.⁶⁴ Additionally, if the tenant includes a discovery request in the answer, the court will automatically postpone and reschedule the trial for two weeks after the original date.⁶⁵

57. MA. UNIF. SUMMARY PROCESS R. 1. The rules "should be construed and applied to secure the just, speedy, and inexpensive determination of every summary process action." *Id.*

58. *Id.* at R. 2a (describing form of summons and complaint). The landlord must acquire a specific blank form of the summons and complaint from any court at which a summary process can be commenced. *Id.*; *see id.* at R. 2c (mandating deadlines for serving summons and complaint). The landlord must return the proof of service and the original complaint to the court by the entry day. *Id.* If the landlord fails to do so, the court will not schedule a trial and he must start the process over. *Id.*

59. *See* MASS. R. CIV. P. 4 (describing service process); *see also* MA. UNIF. SUMMARY PROCESS R. 2 (explaining service in summary process case). Rule 2 states that service of the summons and complaint shall be made in accordance with rule 4(d) of the Massachusetts Rules of Civil Procedure. MA. UNIF. SUMMARY PROCESS R. 2.

60. MA. UNIF. SUMMARY PROCESS R. 2(d) (listing necessary documents needed filed prior to trial date set); *see id.* (specifying second Thursday after entry day as trial date).

61. *Id.* at R. 3 (describing preparation of answer to complaint). The tenant must answer the complaint and state any affirmative defenses or counterclaims allowed under Rule 5. *Id.*

62. *See id.* at R. 10 (stating consequence of failing to answer complaint). If the tenant does file an answer but fails to appear at the trial, he will have defaulted as long as the landlord appears at the trial. *Id.* If the tenant does not file an answer but appears at the trial, the tenant will not default and instead the court will postpone the trial for one week. *Id.*

63. MASS. GEN. LAWS ch. 239, § 8A (2001); *see also* *Jinwala v. Bizzaro*, 505 N.E.2d 904, 907 (Mass. App. Ct. 1987) (allowing landlord to raise claim in separate proceeding when statutorily barred in summary process); *Shea v. Neponset River Marine & Sportfishing, Inc.*, 437 N.E.2d 250, 254 n.7 (Mass. App. Ct. 1982) (noting tenants may counterclaim on any matter arising out of rental of property).

64. MASS. GEN. LAWS ch. 239, § 8A (2001); *see also* *Mulvanity v. Pelletier*, 661 N.E.2d 952, 953 (Mass. App. Ct. 1996) (affirming tenant's right to bring counterclaims). In *Mulvanity*, after a man began eviction proceedings against his grandmother, the grandmother counterclaimed for breach of oral lifetime lease and for intentional infliction of emotional distress. *Mulvanity*, 661 N.E.2d at 953. The court ruled that both counterclaims fell within the scope of section 8A and that the "[p]laintiffs knew or should have known that, as a result of their actions, the defendant [i.e., Pelletier], a [seventy-seven] year old woman, would suffer extreme emotional distress affecting her health." *Id.* at 954.

65. MA UNIF. SUMMARY PROCESS R. 7(b) (allowing two week postponement of trial). The purpose of this postponement is to allow both parties to prepare and produce discovery requests. *Id.*

Defendant tenants frequently use the implied warranty of habitability as the basis for counter-claims alleging that the rented premises is not habitable and the tenant is, therefore, not required to pay rent.⁶⁶ Usually, tenants must demonstrate they gave notice of these conditions to their landlord, but judges do not always enforce this requirement.⁶⁷ Such laxity encourages unscrupulous tenants to set forth frivolous claims.⁶⁸

Once the court files the entry of judgment, the losing party has ten days to appeal the decision.⁶⁹ The appellant party must file a bond, payable to the appellee in the amount set by the district court judge, unless the trial judge waives it.⁷⁰ If the tenant does not appeal the entry of judgment within ten days, the decision becomes final.⁷¹ At that time, the landlord may receive an execution of judgment authorizing a sheriff to physically remove the tenant from the premises, restoring possession to the landlord.⁷² Under the law, however, the sheriff levying the execution must give the tenant forty-eight hour notice that the landlord intends to physically remove the tenant from the premises.⁷³ A tenant evicted for non-payment of rent may still be able to

66. See Ferragamo, *supra* note 16, at 38 (commenting that section 8A allows tenant to use law retroactively). "Since tenants can use the law retroactively, tenants may delay summary process eviction and interfere with repairs while living rent free by simply withholding rent and then after the fact pleading under ch. 239, § 8A." *Id.* at 38.

67. See MASS. GEN. LAWS ch. 239, § 8A (2001). When a tenant raises a defense based on the of implied warranty of habitability, he must show that the landlord knew or should have known about the substandard condition, that the tenant did not cause the condition, that the premises are not in a hotel or motel, and that the conditions complained of can be remedied without having the tenant vacate the premises. *Id.*; see also *Jablonski v. Clemons*, No. 0156E 0159, 2002 WL 1293031, at *1 (Mass. App. Div. June 7, 2002) (reciting rule that landlord's breach of warranty of habitability constitutes defense to landlord's claim). In *Jablonski*, the tenants complained to their landlord about a moisture and sewer odor problem in their bathroom from the beginning of the tenancy, but the problem persisted. *Jablonski*, 2002 WL 1293031, at *1. The court held that because a Board of Health inspection showed that the same problems persisted nine years later after the initial complaint, the landlord was aware of the problem and therefore violated the implied warranty of habitability. *Id.*

68. See Ferragamo, *supra* note 16, at 57 (concluding rent withholding statute would curb fraudulent claims).

69. MASS. GEN. LAWS ch. 239, § 5 (2001); see also *Manzaro v. McCann*, 519 N.E.2d 1337, 1339 (Mass. 1988) (allowing timely appeal when landlord filed motion to amend judgment). In *Manzaro*, the landlord did not appeal the judgment under chapter 239, section 5 of the Massachusetts General Laws, but instead filed a motion to amend the judgment under Rule 59(e) of the Massachusetts Rules of Civil Procedure. *Manzaro*, 519 N.E.2d at 1339. The court ruled that the appeal was timely because the landlord made this motion within ten days of the judgment. *Id.* at 1341.

70. See MASS. GEN. LAWS ch. 239, § 8A (2001); see also WARSHAW, *supra* note 38, § 13:12 (discussing purpose of appeal bond in summary process cases). The bond insures that the landlord will receive rent while the premises is detained. "The appeal is not an artifice to avoid payment of rent owed and owing for the future occupation of the premises by the defendant." WARSHAW, *supra* note 38, § 13:12.

71. See WARSHAW, *supra* note 38, § 13:1 (noting if no appeal taken ten days after judgment, writ of execution issued).

72. MASS. GEN. LAWS ch. 239, § 3 (2001); see also Robert F. Fitzpatrick, Note, *The Development of Massachusetts Law Governing the Disposition of Evicted Tenants' Property*, 25 SUFFOLK U. L. REV. 1109, 1110 (1991) (listing costs associated with eviction and storing tenant's property).

73. MASS. GEN. LAWS ch. 239, § 3 (2001). When the officer receives the writ of execution, he must notify the tenant forty-eight hours in advance. *Id.* The notice must contain the signature, full name of the

prevent eviction by paying all the rent due before the sheriff levies the execution.⁷⁴

Massachusetts law also allows a judge to issue a stay of execution under certain circumstances.⁷⁵ For instance, if a landlord terminates a tenancy based on a tenant's non-payment of rent, the judge can order a stay of execution for six months in most cases, or up to twelve months if an elderly or handicapped person lives on the premises.⁷⁶ When a tenant applies for a stay of execution, the court holds a hearing where the tenant must show he has made a good faith effort to look for a place to stay, cannot find a similar dwelling in the area, will stay current with all use and occupation payments, and follow all terms and provisions the court may prescribe on condition of the stay.⁷⁷ The tenant will also be required to make certain monetary deposits to the court for prior unpaid rent and all use and occupation accrued during the stay of execution.⁷⁸ The landlord and tenant cannot waive this provision in the lease because the issuance of a stay of execution is entirely statutory.⁷⁹

officer, and the name of the court and docket number and must be served in the same way as the summons and complaint. *Id.* The notice must also specify the exact date and time the officer will levy the execution upon the tenant. *Id.* The officer cannot levy the execution for possession before 9 a.m., after 5 p.m., or on weekends and legal holidays. *Id.*

74. MASS. GEN. LAWS ch. 239, § 3 (2001) (permitting tenant to pay back rent owed prior to execution to avoid eviction).

If the underlying money judgment in any summary process action for non payment of rent in premises rented or leased for dwelling purposes has been fully satisfied, together with any use and occupation accruing since the date of judgment, the plaintiff shall be barred from levying on any execution for possession that has issued and shall return the execution fully satisfied.

Id. The landlord, however, can choose to enforce the writ of execution instead of accepting the full satisfaction of the money. *Id.*

75. See generally MASS. GEN LAWS ch. 239, §§ 9-13 (2001) (authorizing judge discretionary stay of execution); *Nat'l Hous. v. W.*, No. 9721, 2001 WL 1018233, at *1 (Mass. App. Div. Aug. 27, 2001) (holding tenant still owes use and occupation even when valid stay ordered). The court discussed the possibility that the district court erred in issuing a stay because the tenant was evicted for non-payment of rent and therefore, was ineligible for a stay. *Nat'l Hous.*, 2001 WL 1018233, at *1. The district court ordered a fifty-six day stay of execution but did not provide a provision for the payment of use and occupancy by the tenant. *Id.* The appeals court ruled that a tenant must still pay for use and occupation during a valid stay of execution. *Id.*

76. MASS. GEN. LAWS ch. 239, § 9 (2001) (limiting length of stay of execution). Section Nine allows the judge to issue a stay even if the landlord evicted the tenant for non-payment of rent up to six months, and twelve months for a handicapped tenant or other handicapped occupant. *Id.* A person is handicapped if he has a physical or mental impairment which substantially limits the person to take care of himself, has a physical or mental impairment which significantly limits appropriate housing or ability to seek new housing, or would be eligible for housing as a handicap person under chapter 121B of the Massachusetts General Laws. *Id.*

77. MASS. GEN. LAWS ch. 239, § 10 (2001). Under a court ordered stay of execution, the landlord cannot receive the writ of execution before the expiration of the period of the stay without bringing a motion to the court to determine if the tenant is in substantial violation of a material term or condition of the agreement for judgment. *Id.*

78. MASS. GEN. LAWS ch. 239, § 11 (2001). The court will keep deposits from the tenant in a separate account, deposited by the clerk of the court, and will pay the money over to the landlord according to the terms of the stay. *Id.*

79. See MASS. GEN. LAWS ch. 239, § 12 (2001). "Any provision of a lease whereby a lessee or tenant waives the benefits of any provision of sections nine to thirteen, inclusive, shall be deemed to be against public policy and void." *Id.*

*D. Summary Process in Other States**1. California*

Every state handles eviction proceedings differently. California legislators attempted to ease the burden on landlords by implementing a swift eviction process.⁸⁰ If the tenant fails to pay the rent, the California eviction process allows a landlord to regain possession of property in as few as seventeen days.⁸¹ In order for the landlord to regain possession in that time, the tenant must first fail to answer the complaint and thus default.⁸² If the tenant does answer the complaint with counter-claims or affirmative defenses, however, then the process takes much longer.⁸³

Instead of a fourteen-day notice to quit, California law allows for a three-day notice for non-payment of rent.⁸⁴ If the tenant does not pay the rent owed or move out within that time, the landlord may begin the summary process.⁸⁵ On the day after the expiration of the notice to quit, the landlord may serve the complaint and summons upon the tenant.⁸⁶ The tenant then has five days to answer.⁸⁷ If the tenant does not answer within five days, the landlord may ask the court for possession due to the default.⁸⁸ The court may then issue a writ of possession to the landlord with a five-day notice to vacate, and if the tenant does not vacate, the court-appointed officer may physically remove the

80. See generally CAL. CIV. PROC. CODE §§ 1166-1179 (West 2000) (setting requirements for eviction process). But see Gerchick, *supra* note 5, at 807-10 (arguing California eviction process costs too much and takes too long).

81. See Gerchick, *supra* note 5, at 807-10 (discussing California eviction time frame). In the best case scenario, the landlord will serve the tenant with a three-day notice, which expires on the fourth day. *Id.* On the fifth day, the landlord will serve the summons and complaint on the tenant. *Id.* If the tenant does not answer within ten days, the landlord may move for the tenant's default and request a writ of execution. *Id.* The five day notice to vacate will expire on the sixteenth day, and the officer may physically remove the tenant on the seventeenth day. *Id.*

82. CAL. CIV. PROC. CODE § 1169 (West 2000) (explaining consequences of tenant defaulting). If a defendant served with a summons does not appear and defend the action, the clerk will enter the default of any tenant and, if requested by the landlord, shall immediately enter judgment for restitution of the premises and shall issue a writ of execution. *Id.*

83. See Stephanie O'Neill, *Tenants from Hell*, L.A. TIMES, Aug. 8, 1993, at K8. "[T]he standard eviction takes at least two to three months to complete. But if a tenant knowledgeable about the system sets out intentionally to scam as much free rent as possible, it can go on for a year and more." *Id.*

84. *Lamanna v. Vognar*, 22 Cal. Rptr. 2d 501, 503 (App. Dep't Super. Ct. 1993) (explaining first day of service not included and notice expires at end of fourth day).

85. CAL. CIV. PROC. CODE § 1162 (West 2000) (discussing methods of service of notice to quit). The notice may be delivered to the tenant personally, by leaving a copy at his residence or business with a person of suitable age and mailing a copy, or affixing a copy at an obvious place on the rental property if neither the tenant nor a person of reasonable age is available. *Id.*

86. *Id.* § 1161.

87. *Id.* § 1167.3 (allowing five days to answer complaint). But see *id.* § 1167.4 (providing extension to answer complaint with good cause shown).

88. See *supra* note 82 (describing consequences of defaulting and not answering complaint).

tenant.⁸⁹

Similar to Massachusetts law, when a landlord wishes to terminate a tenancy at will or when any tenancy expires, the California landlord must issue a thirty-day notice to the tenant before beginning summary process proceedings.⁹⁰ The tenant must then move out within thirty days.⁹¹ If the tenant fails to move out, the landlord may begin summary process as if the tenant was evicted for non-payment of rent.⁹²

Unlike in Massachusetts, a California tenant's appeal of judgment will not automatically stay proceedings upon the judgment.⁹³ The tenant may ask for a stay until the appeals process is over, as long as the court agrees it would be an extreme hardship for the tenant to move out, and that the stay would not do irreparable harm to the landlord.⁹⁴ Within thirty days of the judgment, the tenant can ask the court to reinstate the lease to its original condition.⁹⁵ The reinstatement is contingent upon full payment of past rent due and an agreement to follow all the terms of the lease.⁹⁶ The court may allow restatement of the lease with or without the approval of the landlord.⁹⁷

2. *The New Jersey Anti-Eviction Act*

Unlike Massachusetts and California, New Jersey has a specific statute known as the Anti-Eviction Act.⁹⁸ The statute's purpose is to protect residential tenants who "are frequently unfairly and arbitrarily ousted without reasonable grounds or suitable notice and are placed at a grave disadvantage because of existing critical housing shortages."⁹⁹ Under this Act, landlords may not evict or fail to renew a tenant's tenancy without proving good cause.¹⁰⁰

89. CAL. CIV. PROC. CODE § 1174.3 (West 2000) (explaining procedure of judgment of possession).

90. CAL. CIV. CODE § 789 (West 2000) (requiring landlord to first serve tenant with notice to quit when leasehold has not expired).

91. *Id.* (allowing thirty days for tenant to move out).

92. *See supra* notes 80-82 and accompanying text (explaining criteria necessary to begin summary process).

93. *See* CAL. CIV. PROC. CODE § 1176 (West 2000) (denying tenant automatic stay of proceedings during appeals process).

94. *Id.* (granting tenant request to reinstate lease).

95. *Id.* § 1179 (describing procedure for tenant hardship). A tenant's request to reinstate the lease "must be made upon petition, setting forth the facts upon which the relief is sought, and be verified by the applicant. Notice of the application, with a copy of the petition, must be served on the plaintiff in the judgment, who may appear and contest the application." *Id.*

96. *Id.*

97. CAL. CIV. PROC. CODE § 1179 (West 2000).

98. N.J. STAT. ANN. § 2A:18-61.1 (West 2002) (regulating landlord's ability to evict tenant from property).

99. *See* Surace v. Pappachristou, 581 A.2d 875, 877 (N.J. Super. Ct. App. Div. 1990) (describing legislative intent of Anti-Eviction Act for protecting tenant).

100. *See supra* note 98 and accompanying text (offering owner-occupied exemption to Anti-Eviction Act); *see also* N.J. STAT. ANN. § 2A:18-61.3(a) (West 2002) (noting landlord may not evict except as provided under Anti-Eviction statute).

The statute lists seventeen good cause grounds to evict a tenant.¹⁰¹ The statute specifically exempts owner-occupied landlords from the Anti-Eviction Act.¹⁰²

The statute further states no tenant will be evicted without good cause, other than from an "owner-occupied premises with not more than two rental units or a hotel, motel or other guest house or part thereof rented to a transient guest or seasonal tenant."¹⁰³ The New Jersey Legislature recognized that in addition to protecting blameless tenants from eviction, it also needed to give due consideration to the landlord's interests.¹⁰⁴ More specifically, the legislators understood the possible injustice of forcing owner-occupied landlords to live with unfavorable tenants.¹⁰⁵

In general, New Jersey courts frequently apply the owner-occupied exception to eviction cases.¹⁰⁶ For example, in *McQueen v. Brown*,¹⁰⁷ the landlord sought to evict a tenant without providing a statute-specific cause even though the landlord only occupied a unit on weekends and holidays.¹⁰⁸ The *McQueen* court held that although the landlord was not a permanent resident in

101. See generally N.J. STAT. ANN. § 2A:18-61.1 (West 2002) (listing good cause grounds for landlord to evict tenant). Grounds for good cause evictions include failing to pay rent, destroying the peace and quiet of other tenants, damaging property or others, violating rules, regulations, and covenants of lease, refusing to pay increase in rent after notice, and making terrorist threats against the landlord. *Id.* In addition, if the landlord is violating housing laws and it would be very difficult to fix the problems while the tenant is residing there, he may evict the tenant. *Id.* § 2A:18-61.1(g). The landlord may also evict a tenant if he wishes to permanently retire the residential building. *Id.* § 2A:18-61.1(h). An owner of a three unit or fewer residential building may evict a tenant if he seeks to personally occupy a unit, or he has contracted with a buyer who wishes to personally occupy the unit. *Id.* § 2A:18-61.1(l)3. The statute also calls for the contract for sale to require the unit to be vacant at closing. *Id.*

102. *Id.* § 2A:18-61.1 (exempting owner-occupants of premises with two rental units or less). In addition to owner occupants, the statute also exempts:

(2) a dwelling unit which is held in trust on behalf of a member of the immediate family of the person or persons establishing the trust, provided that the member of the immediate family on whose behalf the trust is established permanently occupies the unit; and (3) a dwelling unit which is permanently occupied by a member of the immediate family of the owner of that unit, provided, however, that [either of these] exceptions shall apply only in cases in which the member of the immediate family has a developmental disability.

Id.

103. *Id.* § 2A:18-61.1. *But see* *Pappas v. Huevo*, 568 A.2d 145, 146 (N.J. Super. Ct. Law Div. 1989) (holding owner-occupant exception does not apply when owner uses unit as office).

104. *Durruthy v. Brunert*, 549 A.2d 456, 457 (N.J. Super. App. Div. 1988) (noting owners also have certain rights to enjoy their property). In *Durruthy*, the court held that the landlord still qualified for the exemption even though he owned both commercial and residential units. *Id.* at 458.

105. *Fresco v. Policastro*, 451 A.2d 1341, 1342 (N.J. Essex County Ct. 1982) (discussing legislative intent behind owner-occupied landlord exception).

106. *McQueen v. Brown*, 775 A.2d 748, 756 (N.J. Super. Ct. App. Div. 2001) (explaining liberal construction of statute to balance landlord and tenant rights).

107. 775 A.2d 748 (N.J. Super. Ct. App. Div. 2001).

108. *Id.* at 750. *McQueen*, the landlord, brought two summary process actions against the tenant. *Id.* *McQueen* brought the first action for non-payment of rent, but the court dismissed it on grounds that she did not obtain an occupancy permit prior to leasing the premises to the tenant. *Id.* at 751. In *McQueen*'s second attempt to evict the tenant, the court dismissed her summary process action under the Anti-Eviction Act because she did not permanently occupy the unit and therefore could not evict the tenant without good cause. *Id.*

the building, occupancy for eight or nine days per month qualified her as an owner-occupier because the statute's intent only requires the owner to live in the unit for some period of time.¹⁰⁹

One New Jersey court found that the owner-occupied exception also applies when the landlord and tenant reside in separate buildings on the same premises.¹¹⁰ In *Fresco v. PolICASTRO*,¹¹¹ the landlord lived in a one-family house located at the front of the property, while the tenant resided in a different building at the back of the property.¹¹² The court interpreted the word "premises" to include "land and its appurtenances."¹¹³ Ruling that the landlord was exempt from the Anti-Eviction Act, the court noted that "[t]he landlord's enjoyment of his home is equally impaired whether he lives above, below, in front of or behind, or alongside an unfavorable tenant."¹¹⁴

Once an owner-occupied landlord proves he is exempt from the New Jersey Anti-Eviction Act or once a non-exempt landlord shows good cause, he may proceed with the eviction according to the statutes provided.¹¹⁵ Like under the Massachusetts and California eviction statutes, under the New Jersey eviction laws, a landlord must notify the tenant of the eviction through a notice to quit.¹¹⁶ Upon receipt of a notice to quit for non-payment of rent, the tenant has only three days to vacate the premises or the landlord may begin the summary process proceedings.¹¹⁷ However, the tenant may stop the proceeding at any time before the entry of final judgment by paying the back-rent to the clerk of the court.¹¹⁸

109. *Id.* at 756 (holding unit qualifies under exemption when owner resides in it part-time in good faith).

110. *Fresco*, 451 A.2d at 1343 (ruling owner-occupied landlord has right to enjoyment of land). *But see* *Reggiori v. Petrone*, 445 A.2d 484, 486 (N.J. Bergen County Ct. 1981) (holding Anti-Eviction Act exemption only applies when landlord and tenant reside under same roof). The *Reggiori* court reasoned that if the Act's intent is to limit evictions, a more narrow meaning, like "building" would be more effective than the word "premises." *Reggiori*, 445 A.2d at 486.

111. 451 A.2d 1341 (N.J. Essex County Ct. 1982)

112. *See Fresco*, 451 A.2d at 1341-42 (discussing layout of leased property).

113. *Id.* (giving word "premises" broad meaning). The court also cited prior case law defining "premises" in a similar fashion. *Id.* at 1343; *see* *Maplewood v. Tannenhaus*, 165 A.2d 300, 303 (N.J. Super. Ct. App. Div. 1960) (stating premises "may mean land alone or land with buildings or appurtenances").

114. *Fresco*, 451 A.2d at 1343 (declaring landlord has right to enjoyment anywhere on his land). "While the legislative intent of N.J.S.A. 2A:18-61.1 was to limit evictions, the 'owner-occupied premises' exception was included to prevent an injustice to resident landlords." *Id.*

115. *See generally* N.J. STAT. ANN. § 2A:18-53 to -59.1 (West 2002) (explaining summary process proceeding). Before beginning the summary process proceedings, the landlord must determine if he can evict a tenant under the Anti-Eviction Act. *Id.* § 2A:18-61.1. If the landlord does not qualify under the exemptions and does not have a good cause grounds to evict, the statute does not allow the landlord to evict the tenant. *Id.*

116. *Id.* § 2A:18-56 (describing proper notice to quit). Under the statute, a tenancy from year to year requires three months notice to quit, while any other tenancy, including a month-to-month tenancy, requires a one month notice to quit. *Id.*

117. *Id.* § 2A:18-53(b) (allowing three day notice to quit for non-payment of rent).

118. *Id.* § 2A:18-55 (providing tenant with opportunity to pay rent prior to judgment and restore tenancy). The statute does not provide the landlord the ability to refuse to accept rent and restore tenancy. *Id.* *But see* MASS. GEN. LAWS ch. 239, § 3 (2001) (requiring landlord to recognize tenant as lawful tenant if full satisfaction paid and accepted).

Three days after the entry of judgment for landlord's possession, the court will issue a warrant for removal to an officer of the court, allowing the use of force if necessary.¹¹⁹ The tenant may qualify for up to a one year stay of execution, subject to reasonable changes in the lease by the landlord.¹²⁰ Unlike the Massachusetts stay of execution statute, the New Jersey statute requires the court to "specifically consider whether the granting of the stay of eviction would cause an undue hardship to the landlord because of the landlord's financial condition or any other factor relating to the landlord's ownership of the premises."¹²¹ Therefore, following the Anti-Eviction Act, the New Jersey courts will likely consider both the landlord's and tenant's rights.¹²²

III. ANALYSIS

In reality, both small landlords and tenants must rely on each other to survive; the tenant must rely on the landlord to provide reasonable housing, while the small landlord must rely on the tenant to pay the rent promptly so the landlord can pay the mortgage, insurance, and property tax bills.¹²³ At the same time, corporate landlords who own and manage hundreds of rental units can simply raise the rent of other tenants and/or reduce maintenance and security costs of the units when one tenant stops paying rent.¹²⁴ Therefore, it is imperative that the Massachusetts Legislature distinguish "mom and pop" landlords from the large landlord and redraft the summary process statutes to make the landlord-tenant system more equitable.¹²⁵

119. N.J. STAT. ANN. § 2A:18-57 to -58. Once the warrant for removal is issued, the officer of the court must give personal notice to the tenant and advise him of his right to apply for a stay of execution. *Id.* § 2A:42-10.16. After three days following the personal notice, the officer can execute the warrant as long as it is done so between the hours of 8 a.m. and 6 p.m. and not on a Saturday, Sunday, or holiday. *Id.*

120. *Id.* § 2A:18-59.1 (specifying tenant eligibility to receive stay of eviction). A hold-over tenant can be eligible to receive a stay of eviction if he fulfills all terms of the lease prior to and after receiving notice to quit, has a terminal illness, has been a tenant of the landlord for two years prior, and there is a substantial likelihood the tenant would be unable to search for and move to a new place without serious medical harm. *Id.*

121. Compare *id.* § 2A:18-59.1, with MASS. GEN LAWS ch. 239, §§ 9-13 (2001).

122. N.J. STAT. ANN. § 2A:18-59.1 (authorizing judge to consider landlord's situation).

123. See Schloming, *supra* note 9, at A13 (discussing predicament of small landlords when rent not paid).

124. See Gunn, *supra* note 4, at 387 (speculating that corporate landlords can adjust costs to compensate for lost rent).

125. See Milbouer, *supra* note 13 (noting financial hardships of many small landlords when tenants fail to pay rent); see also Ferragamo, *supra* note 16, at 54 (indicating unbalanced landlord tenant laws greatly favoring tenants).

A. Summary Process Changes for Small Landlords

Small landlords are put in a difficult situation when they decide to begin an eviction, especially when they live in the same building as the non-paying tenant.¹²⁶ Often, they hesitate to serve a notice to quit for non-payment of rent when the tenant does not pay the rent on the day due, in hopes that the tenant will be grateful for the extra time and will not let it happen again.¹²⁷ When they finally start the process, they incur many expenses such as lost rent, legal fees, constable fees, court fees, and moving and storage fees if the tenant does not willingly move out.¹²⁸ In contrast to federal and state housing discrimination laws, current summary process laws do not distinguish small landlords from large landlords.¹²⁹ Massachusetts could expedite its eviction process by adopting laws similar to those existing in states such as California and New Jersey.¹³⁰

Massachusetts law requires a notice to quit for non-payment of rent to allow a tenant fourteen days to pay back rent owed before a landlord can begin summary process.¹³¹ Compared to California and New Jersey statutory laws, which provide tenants with only three days for payment of back rent, the fourteen-day period that Massachusetts law provides delays the summary process far too long and it must be changed.¹³² In California, a landlord may be able to regain possession of the property in as few as seventeen days if the tenant defaults on the answer and court appearance.¹³³ In contrast, the earliest a Massachusetts landlord can get a trial is thirty-five days, even if the tenant defaults.¹³⁴ Statutory delays, discovery requests, and continuances could delay a trial for many months after the tenant may have stopped paying rent.¹³⁵ The

126. Gerchick, *supra* note 5, at 767 (explaining many landlords file for eviction after giving tenant opportunity to cure default).

127. Gerchick, *supra* note 5, at 767 (finding landlords often spend much time and energy negotiating with tenant to avoid litigation).

128. See Fitzpatrick, *supra* note 72, at 1110 (listing costs associated with eviction and storing tenant's property); *Summary Process Safeguards*, *supra* note 16 (calculating cost to bring eviction proceedings in excess of \$1,000).

129. See *supra* notes 25-35 and accompanying text (discussing small landlord exemptions of various anti-discrimination statutes).

130. See *infra* text accompanying notes 131-41 (proposing statutory changes).

131. See *supra* notes 48-55 and accompanying text (explaining procedural elements of notice to quit in summary process).

132. See *supra* notes 48-55, 84, 117 and accompanying text (comparing length of notice to quit in Massachusetts, California, and New Jersey).

133. See *supra* notes 80-81 and accompanying text (explaining how California landlord can remove tenant in as few as seventeen days).

134. See *generally supra* notes 48, 56-68 and accompanying text (providing overview of Massachusetts summary process procedures).

135. *Supra* note 65 and accompanying text (allowing two week trial postponement when tenant makes discovery request); Ferragamo, *supra* note 16, at 52-53 (explaining how postponements and excessive costs hurts small landlord).

time and expense required to complete an eviction have caused Massachusetts attorneys to advise their landlord clients to actually *pay their tenants* to move out in order to avoid a lengthy litigation period and loss of rental income!¹³⁶

The Massachusetts legislature should consider passing a statute similar to the New Jersey Anti-Eviction statute.¹³⁷ The result would be two-fold: such a statute would offer more protection to tenants from unreasonable evictions and at the same time provide for less stringent eviction laws for small landlords.¹³⁸ Additionally, an anti-eviction statute in Massachusetts would undoubtedly protect blameless tenants from corporate landlord evictions without good cause grounds.¹³⁹ If the Massachusetts legislature includes an owner-occupied exemption similar to that of the New Jersey Anti-Eviction Act, many small landlords would also be protected against living with “undesirable tenants.”¹⁴⁰

Similar to the New Jersey statute, Massachusetts should require the judge to consider the small landlord’s situation when granting a stay of execution.¹⁴¹ Currently, Massachusetts law requires a tenant to abide by certain criteria, including paying all back rent owed, in order for the court to issue a stay of execution, but the judge is not required to consider the impact on the landlord.¹⁴² In contrast, the New Jersey statute states that when reviewing a petition for a stay of eviction, “the court shall specifically consider whether the granting of the stay of eviction would cause an undue hardship to the landlord because of the landlord’s financial condition or any other factor relating to the landlord’s ownership of the premises.”¹⁴³ Inclusion of such a statutory provision in Massachusetts law will clearly force the judge to consider the adverse consequences of compelling an unwanted tenant upon a small landlord.¹⁴⁴

B. Mandatory Rent Withholding

The legislature must amend Massachusetts General Laws Chapter 239, Section 8A, the defense of implied warranty of habitability statute, to include mandatory rent escrowing in order to allow small landlords to recover unpaid

136. See *Summary Process Safeguards*, *supra* note 16 (observing extreme legal advice offered to landlords).

137. New Jersey Anti-Eviction Act, N.J. STAT. ANN. § 2A:18-61.1 (West 2002) (regulating landlord’s ability to evict tenant from property).

138. See *supra* notes 98-114 and accompanying text (offering overview of New Jersey Anti-Eviction Act).

139. *Supra* note 98 and accompanying text (noting grounds for eviction or failure to renew lease covered under Anti-Eviction statute).

140. *Supra* note 114 and accompanying text (discussing legislative intent protecting owner-occupied landlords).

141. *Supra* note 120 and accompanying text (explaining New Jersey stay of execution).

142. MASS. GEN. LAWS ch. 239, § 9 (2001); *supra* notes 75-78 and accompanying text (explaining Massachusetts stay of execution).

143. N.J. STAT. ANN. § 2A:18-59.1 (2002) (mandating judicial consideration of landlord’s hardships with issuance of stay).

144. *Id.*

rents when tenants raise frivolous defenses.¹⁴⁵ Section 8A allows tenants to legally withhold rent from the landlord if the rental property violates state sanitary or building codes.¹⁴⁶ Tenants often raise this defense after receiving a notice to quit for non-payment of rent, however, they are not currently required to put withheld rent into an escrow account as they were prior to 1975.¹⁴⁷ Although a judgment for the landlord may include money damages to cover back rent owed, often the tenant has no assets to attach or is insolvent, making it nearly impossible for the landlord to recover.¹⁴⁸ In recent years, Massachusetts legislators have introduced a number of bills that would require mandatory rent escrowing when a tenant raises the defense of breach of implied warranty of habitability in a summary process proceeding.¹⁴⁹ These proposed amendments would not affect the tenant's due process rights; although the tenant can still raise the defense when facing an eviction, the required rent escrowing enables the landlord to recover lost rental income if the defense fails.¹⁵⁰

The implied warranty of habitability defense can have a devastating effect on small landlords.¹⁵¹ As previously mentioned, tenants facing eviction frequently make frivolous habitability claims to justify withholding rent.¹⁵² Whether the claim is frivolous or valid, it typically takes many months to get a contested case to trial where the judge could then determine there never was a valid code violation under section 8A.¹⁵³ Ultimately, the landlord may lose thousands of dollars in costs to evict a tenant who never had a legitimate

145. MASS. GEN. LAWS ch. 239, § 8A (2001) (setting forth implied warranty of habitability defense); *see also* Ferragamo, *supra* note 16, at 54-55 (explaining how mandatory rent escrowing helps landlords and tenants). A mandatory rent escrow statute would protect landlords from bad faith defenses and provide a resource the tenant can use to pay back rent if he loses the case. *See* Ferragamo, *supra* note 16, at 55.

146. *Supra* notes 63-68 and accompanying text (citing defenses tenant can raise at trial, including violation of implied warranty of habitability).

147. Ferragamo, *supra* note 16, at 55 (recalling prior history of implied warranty of habitability); *see also* MASS. GEN. LAWS ch. 239, § 8A (repealed 1975) (requiring tenant to escrow rent owed before raising defense at trial prior to 1975).

148. *See Summary Process Safeguards*, *supra* note 16 (explaining virtual impossibility of landlord recovering past rent without mandatory rent withholding).

149. H.B. 1399, 181st Gen. Ct., Reg. Sess. (Mass. 1999) (requiring tenants to place rent into escrow during summary process litigation); H.B. 2718, 181st Gen. Ct., Reg. Sess. (Mass. 1999) (compelling tenants to escrow one month's rent in order to raise section 8A defense); H.B. 2091, 184th Gen. Ct., Reg. Sess. (Mass. 2003) (proposing re-instatement of rent withholding statute). State Representative Arthur J. Broadhurst filed House Bill 2091 on January 1, 2003. H.B. 2091, 184th Gen. Ct., Reg. Sess. It was referred to the Judiciary Committee on the same date and the legislature had not voted on it as of April 1, 2004. *Id.*

150. *See* Ferragamo, *supra* note 16, at 47-48 (discussing proposed rent withholding statute).

151. *See* Schloming, *supra* note 9, at A22 (evaluating effects of implied warranty of habitability on small landlords). "The effect devastates small owners. All at once, they are hit by no income, expensive repairs, obstinate tenants, property damage, and high legal bills." *Id.*

152. *See supra* notes 16-17, 66-68 and accompanying text (noting frequency of frivolous section 8A defenses in eviction proceedings).

153. *See Summary Process Safeguards*, *supra* note 16 (discussing consequences of raising defense on time of trial).

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defense.¹⁵⁴ Mandatory rent escrowing will allow landlords to recover back rent when a tenant raises a vain section 8A defense.¹⁵⁵ In addition, a tenant who raises a valid section 8A claim will remain protected because the court will return the escrowed funds to him.¹⁵⁶

IV. CONCLUSION

Massachusetts summary process laws must distinguish the corporate landlord from the small owner-occupant landlord. While the corporate landlord may cover costs by managing hundreds of rental units, the small landlord often relies solely on the monthly rental income to pay the mortgage, property taxes, and repairs. A long and expensive eviction process could also force the small landlord to look for a new place to live if he cannot pay the bills. Without adequate judicial protection, small landlords might need to stop renting to tenants, thereby escalating an already critical housing shortage. Statutory amendments proposed by this Note will ensure that small landlords' rights are protected to the same extent as those of tenants.

Brian J. Delaney

154. *Summary Process Safeguards*, *supra* note 16 (noting financial loss of landlord from contested trial).

155. *See* Ferragamo, *supra* note 16, at 53 (concluding proposed statutes safeguard landlords against monetary losses from frivolous claims).

156. *See* Ferragamo, *supra* note 16, at 55 (reiterating section 8A unchanged except for required rent escrowing).