

Intersection of Landlord/Tenant and Conveyancing: Representing Buyers of Occupied Properties



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Shahria Boston is the principal of the Law Office of Shahria H. Boston. A seasoned attorney with extensive real estate and litigation experience, Shahria specializes in real estate conveyancing and landlord-tenant litigation.

Shahria has a passion for homeownership and housing issues, especially as they affect minority communities. She presents for various non-profit

corporations in Massachusetts on homebuying and landlord/tenant matters. Shahria also assists the Housing Court with difficult *Guardian Ad Litem* appointments, and cases involving elders and individuals with physical and mental health disabilities facing eviction.

In addition, Shahria serves on the Board of Directors for South Coastal Counties Legal Services and the Justice Center of Southeast Massachusetts, which provides *pro bono* legal services to disadvantaged individuals.

Shahria has received numerous awards and accolades, including, but not limited to, *Massachusetts Lawyer's Weekly* Top Women in the Law, First Justices' Award for *Pro Bono Publico* Excellence, National Bar Association Women Lawyer's Division Outstanding Woman Lawyer in a Solo/Small Firm, National Bar Association Top 40 Lawyers Under 40 Nation's Best Advocates, The National Black Attorneys Top 100 Lawyers and Top 40 Under 40, and the National Academy of Personal Injury Attorneys Top 10 Under 40.

Shahria received her J.D. from Northeastern University School of Law, and her B.A., *magna cum laude*, from Seton Hall University.



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Jordana Roubicek Greenman has a solo law practice covering a broad range of real estate-related legal matters, including commercial and residential landlord/tenant disputes on behalf of landlords, petitions to partition, general real estate litigation, and commercial and residential real estate closings, and condominium conversions.

An agent for First American Title Insurance Company, WFG and Westcor, Jordana has a well-respected reputation for aggressively advocating for her clients' goals and ensuring beneficial outcomes at a reasonable cost.

Jordana is a member of both the Real Estate Council for the MBA and REBA, as well as a mentor for landlord/tenant law. She has been awarded in *Super Lawyers* magazine for several years, Top Women in the Law 2024 (Mass Lawyers Weekly) and *Boston Magazine's* Top Lawyers. She is also a columnist for *Massachusetts Lawyers Journal* and has authored articles in *REBA News*. Jordana speaks at seminars held by various organizations, including First Time Homebuyers' seminars and Metropolitan Boston Housing Partnership's landlord/tenant workshop.

Jordana received her J.D. from Suffolk University Law School, and her B.A. from American University.

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Presented By:

Jordana Roubicek Greenman, Esq.
&
Shahria Boston Kidd, Esq.

During this session, we will review the risks of purchasing occupied residential and commercial property. We will cover all stages starting with the “Offer to Purchase,” the P&S negotiation phase all the way through until the closing is complete.

Under Massachusetts law, a landlord has the right to sell property while it is occupied by a tenant but a purchaser takes title to the property subject to all existing leases on the property, and must uphold the terms of the original lease.

Many new buyers of residential and/or commercial properties can find themselves stuck with under-market tenants, non-paying tenants, illegal apartments or units, statutory code and/or building violations, etc.

The audience should consider that the job of representation during the conveyance of a property should not be separate from the risks we outline, and many of the issues we raise can and should be handled at the offer stage.

A diligent conveyancing attorney should become familiar with the rights and responsibilities of being a landlord or engage an eviction/landlord-tenant attorney at a very early stage.

I – Initial Considerations: The “Offer to Purchase” also known as “Contract to Purchase”

In an effort to avoid a *McCarthy v. Tobin* issue¹, it is important that the buyer/client express any contingencies in the initial offer. Basic considerations would indicate the following language may be necessary by way of an addendum to the Offer.

PROPERTY INFORMATION:

Seller has or will make available to Buyer, upon acceptance of the Agreement, copies of the following (“Property Information”);

1. The standard form of residential or office leases or written tenancy-at-will agreements together with all written addenda, modifications, or extensions pertaining to a particular lease used by Seller for the property
2. Copies of the existing Leases in possession of the Seller and/or Property Manager of the Property; or
3. In the event of subsidized housing, all HAP contracts, Sec. 8 or other subsidized leases, rental contracts or approved sub-leases.
4. A list of all unit types, number of each type, square footage of each type and the current market rate or asking rent for a new occupant
5. Information as to monthly rent applicable to each unit, together with a rent ledger reflecting all payments made by the tenant during the term of the tenant’s occupancy, and documentation pertaining third-party rental assistance payments.
6. The most recent copy of all utility bills paid by Seller including gas, electric, water, sewer, and trash if not handled by tenant.
7. A statement as to whether a security deposit has been paid. If so, Seller shall provide all materials reflecting Seller’s compliance with M.G.L. c. 186 s. 15b (“Security Deposit Statute”), including, without limitation:
 - a. Signed Apartment Condition Statement
 - b. Initial receipt for security deposit
 - c. Evidence of placing funds in a separate, interest-bearing account in tenant’s name
 - d. Evidence that name of bank, location of bank and account number information have been provided to each tenant
 - e. Evidence yearly interest statements given to tenant each year and yearly interest paid to Tenant.
 - f. In the event Seller is unable to provide evidence of compliance with the Security Deposit Statute, a copy of the security deposit being returned to tenant with applicable 5% interest and indemnification and undertaking from Seller to Buyer regarding any future lawsuit regarding the security deposit paid.
8. A statement as to whether a last month’s deposit has been paid by the Tenant, the amount and the bank account where it is deposited.
9. Tenant Lead Law Notification Forms executed by the Seller and Tenants.
10. Estoppel Certificate in form provided herein or similar:

¹ *McCarthy v. Tobin*, 44 Mass. App. Ct. 274 (1998) is the famous case in which it was decided by the Appeals Court of Massachusetts that an offer to purchase real estate, signed by both the prospective buyer and the seller, which stated all the terms and conditions material to the contemplated transaction, and which stated on its face that the offer created binding obligations, bound the parties contractually, notwithstanding the language in the offer contemplating the execution of a later, more formal purchase and sale agreement, and the buyer was entitled to entry of summary judgment on his claim.

SAMPLE TENANT ESTOPPEL CERTIFICATE
(Modify provisions if residential vs. commercial tenancy)

PREMISES: _____

Unit No: _____

Name of Tenants: _____

Contact Phone and email for tenants _____

Monthly Rent: \$ _____

Security deposit & accrued interest: \$ _____

Last month's rent paid in advance: \$ _____

If Subsidized housing: _____

Name of Housing authority & tenant representative _____

a. Tenant's share \$ _____

b. subsidized share \$ _____

Lease or TAW: _____

We, the above referenced tenants, warrant and represent the following:

1. The property is being sold to _____ and we have no objection to our tenancy being assigned to the buyer.

2. Our tenancy is: (please select one of the following):

1. Tenant at will with no written agreement;

2. Tenant at will with a written agreement;

3. Lease

If there is a written agreement, please attach a copy hereto.

We represent that our tenancy has not been cancelled, modified, assigned, extended or amended and there are no other agreements, written or oral, relating to our occupancy of the premises.

If agree: initial here _____

If, not the case, please explain here: _____

3. Utilities/Additional Rent: (please indicate the type e.g. gas, electric etc.... and who pays for each and how much)

a. heat:

b. Electric:

c. Water/Sewer:

d. fuel for washer and dryer or any other appliances:

e. Condo Fee

f. Real estate taxes

g. Storage fees

4. All rent/additional rent payments are up to date. Tenant currently has no right to any future rent abatement, rent extension or credit under the lease. No rent or other sum payable under the tenancy has been paid in advance. If agree, initial here: _____. If you don't agree, please explain here: _____

5. If any work was to be performed by the current landlord, it has been performed as required and has been accepted by the tenant. Tenants are currently satisfied with the condition of their unit and there are no conditions in need of repair. If agree, initial here: _____. If you don't agree, then explain here: _____

6. The tenancy is in full force and effect and is free from default and from any event which could become a default. Tenant has no claims against the landlord or offsets or defenses against rent. And tenant has no disputes with the landlord. If agree, initial here: _____. If not the case, please explain here: _____

7. Tenant has not assigned the tenancy or sublet any part of the premises and does not hold the premises under an assignment or sublease. If agree, initial here: _____. If not the case, please explain here: _____

8. Tenant has no options to purchase all or any part of the premises or the property. If agree, initial here: _____. If not the case, please explain here: _____

9. Tenant is not insolvent or bankrupt and is not contemplating seeking relief under any insolvency or bankruptcy statutes. There are no legal actions, whether voluntary or involuntary, pending against Tenant under any insolvency, bankruptcy or other debtor relief laws of the United States or any state thereof, or any other jurisdiction. If agree, initial here: _____. If not the case, please explain here: _____

10. Tenant has not received written notice of any violations or potential violations of any laws or regulations with respect to the premises or its use of the premises which remain uncured as of the date hereof. Tenant is not facing a summary process action in a court of law nor has the Tenant reached a court agreement affecting the occupancy of the premises. If agree, initial here: _____. If not the case, please explain here: _____

11. There are no other occupants other than the tenants listed herein. If agree, initial here: _____. If not the case, please explain here: _____

12. Tenant understands that this Certificate is required in connection with Purchaser's acquisition of the Building, and Tenant agrees that Purchaser and its assigns (including any parties providing financing for the Building) will, and shall be entitled to, rely on the truth of this Certificate. Tenant agrees that such parties will, and shall be entitled to, rely on the representations in this Certificate as being true and correct and continuing to be made, unless Tenant notifies Landlord and Purchaser of a change in this Certificate prior to the closing.

13. If section 8 housing, tenant agrees to cooperate with the appropriate housing authority with regard to getting the benefits paid to the new owner.

14. The unit for the tenancy has not been rented as furnished apartment and no free gas, electricity or other utility is being furnished to any tenant. The following appliances are owned by the tenants:

- _____
- _____
- _____

Any other relevant information regarding the appliances: _____

15. Submit any other information about the tenancy that you would like the new owner to be aware of: _____

The undersigned has executed this Estoppel Certificate with the knowledge and understanding that the buyer is acquiring the property in reliance on this estoppel certificate and that you will be bound by this certificate.

EXECUTED on this _____ day of _____.

Tenant: Print and sign your name: _____

Tenant: Print and sign your name: _____

Tenant: Print and sign your name: _____

The buyer must be aware of the identity of the occupants/tenants occupying the property. Consider including a contingency that the Buyer shall have an opportunity to speak to the tenants and ensure that the occupancy is as Seller has disclosed.

Contingency: Knock, knock, who's in there? Check for evidence of non-tenant residing there]

EXAMPLE CONTINGENCIES TO BE ADDED TO THE PURCHASE AND SALE AGREEMENT:

“If Seller has not provided all necessary information and material requested herein within x days from the Effective Date, this contract shall be considered null and void at the Buyers’ discretion and the Earnest Money shall be considered mutually released by both Buyer and Seller and immediately returned to Buyer. The Property Information and all information furnished to, or obtained through inspection of the property by buyer, its affiliates, or employees or agents relating to the property (other than matter of public record), will be treated by Buyer, its affiliates, employees and agents as confidential and will not be disclosed to anyone other than on a need to know basis to Buyer’s consultants, and will be returned to Seller by Buyer if Closing does not occur. The terms of this section *shall* survive delivery of the deed.”

“Regarding Unit #1, SELLER represents and warrants, effective as of the date hereof, that SELLER is holding last month’s rent in the amount of \$_____, security deposit in the amount of \$_____, and collecting \$_____ as monthly rent. Prior to closing the SELLER and all tenants shall execute an “Estoppel Certificate” confirming said information.”

“The SELLER represents and warrants:

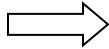
- a. All leases affecting the Premises (hereinafter “the leases”) have previously been delivered to BUYER. The leases constitute all of the leases and tenancies covering or affecting the Premises and are in full force and effect and have not been modified, terminated, extended, renewed or amended, except as explicitly set forth in the leases;
- b. No lessee or tenant of the Premises has been given any concession or consideration for the rental of any space except as otherwise indicated in the leases and no lessees or Tenants are entitled hereafter to any concessions, rebates, allowances or free rent for any period after the delivery of the deed hereunder;
- c. No option to renew a lease or to purchase all or any portion of the premises exists other than as indicated in the leases;
- d. None of the units or apartments have been rented as furnished units or apartments and no free gas, electricity or other utility is being furnished to any tenant;
- e. All work required to be done under the leases or under any agreement with any lessees or tenants has been done or will be done by SELLER prior to the date for delivery of the deed hereunder;
- f. There are no defaults under any of the leases;
- g. SELLER agrees that on the date of delivery of the deed, all security deposits and all amounts paid as last month’s rent, including all undistributed interest accrued thereon as required by law, shall be transferred to BUYER by Bank Check.
- h. The provisions of this Paragraph shall survive delivery of the deed hereunder.”

“SECURITY DEPOSITS, LAST MONTH’S RENT, RENTAL ADJUSTMENTS The SELLER shall account for and transfer any and all security deposits held by any current tenants of the premises (if any), with interest thereon, pursuant to M.G.L. Chapter 186, § 15B, to BUYER on or before the date of closing, and shall provide BUYER with a written certification of compliance with M.G.L. Chapter 186, § 15B and indemnification for any violations thereof, on or before the date of closing. SELLER shall further transfer and account for any last month’s rent held for or paid by any current tenants of the premises. If SELLER holds no such security deposits, SELLER shall provide BUYER with a written certification of such fact, and indemnification against any claims for such security deposits.”

“TENANT’S ESTOPPEL CERTIFICATE Seller shall provide tenant’s estoppel letters signed by Tenants and delivered to Buyer at least three (3) business days prior to Closing Date.”

II – PRIOR CONFIRMATION OF ZONING AND LEGAL USE AS BARGAINED FOR IS IMPORTANT

Buyers must be advised of the importance of confirming any zoning regulations and the legal use of the property, and counsel should include a contingency that the Buyer may terminate the agreement and recover his or her deposit if the property is not properly zoned for the current use i.e. residential, e.g. that in-law apartment, that may NOT be a legal in-law apartment; or commercial use.



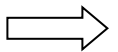
Suggested Contingency Provision:

Title and Possession: Buyer's Condition Precedent; Seller's Condition Precedent

1. (a) It shall be a condition to Buyer's obligation to close hereunder that at the time of closing:

(v) Buyer shall have received confirmation, through the Seller's delivery of documentation from the applicable authority or through Buyer's own research and receipt of written reports by a reputable research firm that the premises are currently zoned in a district designated by the Municipality as _____ for use as a _____ which allows for its use as _____ with parking for _____ vehicles and that all necessary permits and relief if any is necessary, are properly granted and that its current use is conforming under applicable zoning and building codes. *(Reprinted with permission of Attorney Mark Zuroff).*

Is it better to buy vacant? Discussion about buying property vacant, time to give seller to accomplish this; or taking that risk on by the buyer, but at a reduced price to cover that risk of lost rent and protracted litigation with tenants. The below is an addition to the standard language in a Purchase & Sale Agreement noting the requirement the property be delivered vacant. In this case, building a "back up plan" is necessary, especially for those individuals intending to use financing for the purchase.



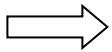
Sample Clause:

The Premises shall be delivered in a fully vacant, "broom clean" condition at the time of delivery of the deed or the time the Buyer takes possession, whichever occurs first. "Broom clean" shall include, but not be limited to, removal of all of the Seller's possessions therefore not being sold to the Buyer and removal of all materials being discarded by Seller. Seller warrants and represents that neither the Seller nor any third party will be residing in the property on the date of the closing. Seller shall maintain the lawn, shrubbery and exterior grounds of the Premises during the term of this Agreement in a manner consistent with that in which they have been kept to date. Seller's inability to vacate the Premises and/or remove all occupants from the Premises shall not be construed as a valid reason to extend as provided for herein and shall be considered a material breach of Seller's obligations."

III – SPECIAL COMMERCIAL TENANCY CONSIDERATIONS:

After reviewing an existing lease, the buyer can choose to present the tenant with a new lease that contains more favorable lease terms, or a different amount of rent, and see if the tenant will agree to sign it. While this type of bargaining is not allowed in the context of a residential tenant, it will be allowed where the tenant is a commercial entity itself. However, if the tenant does not wish to terminate or amend the lease, you must advise client that he or she will have to determine whether or not to proceed with the purchase of the property knowing he or she will be operating under the terms of the original lease.

A favorable commercial lease for a prospective landlord buyer is one that is structured so that the tenant is responsible for paying a portion of or all of the common expenses and real estate taxes related to real estate ownership, in addition to base rent. Real estate related expenses associated with ownership include property taxes, insurance, and maintenance expenses, which are commonly known as the “triple net” expenses. The rent collected under a net lease may be lower than rent charged under a gross lease in which the landlord is responsible for paying all of the triple net real estate expenses.



DUE DILIGENCE PROVISION:

BUYER must give written notice that all due diligence is complete and satisfactory IN HIS SOLE DISCRETION, or BUYER will have no further obligation and is entitled to the return of the earnest money deposit.

Preliminary due diligence checklist:

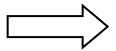
- Financial records: Annual profit and loss statements (P&Ls) past 3 years minimum (5 years preferred)
- At least one-year monthly P&Ls (preferably two years)
- Balance sheet (3 years)
- Rent Roll including term, deposit, and payment history
- Tax returns- 3 years
- Insurance: Insurance Policy; including all riders, risk assessments, and disclosure affidavit for carrier
- All Existing Loan Documents: including notes, deeds of trust, closing statements, title policy, rate riders, etc., and contact names and numbers.
- Deed
- All Leases: entire copies plus any addendum or riders.
- Any service or advertising contracts: (Trash, extermination, maintenance, management, commission agreements, union agreements, vending, billboard, pay telephone, etc. and any instrument or contract to be assumed by Purchaser)
- Copies of all recent appraisals, engineering reports, environmental reports
- Survey (as-built), legal description, architectural and engineering plans and specifications
- Payroll register: List of employees including name, position, wage rate, and entitled benefits
- Business license
- Physical inventory of furniture, fixtures, and equipment, and supplies.
- Utility bills: Water, Sewer, Gas, Electric (at least two years of monthly statements) (or recap report from provider showing usage and cost)
- Bank statements showing deposits for last twelve months (optional)
- Property Tax tickets for the past three years (real estate and personal)
- Litigation History: details of any past or pending litigation (if none, then affidavit from owner)

Comprehensive due diligence: pre-closing

- Financial Audit
- Title Search and policy
- Property tax verification
- Tenant Estoppel Letters
- Mortgagee Estoppel letters
- Legal Verifications: licenses, permits, zoning

Understand the lease provisions: first options on purchase, the right to take over adjacent space, tenant ownership of plumbing fixtures, agreements for new carpet every year, etc.

Examination of rent rolls, payment histories, and credit files of existing tenants can be very enlightening in quantifying the risk quotient of a particular tenant. But much information can be collected just in the normal course of conversation regarding a tenant's business.



Knowing the Tenants & Their Business

It is very important for owners and property managers of any potential rental property to screen potential tenants, such as getting credit reports and financial information to screen the applicant.

Commercial property landlords and property managers need to go the extra mile and research whether the commercial tenant is credit worthy and assess the likelihood of them going bust.

Is the tenant's business plan viable and will it be able to continue to pay the rent throughout the length of the lease?

Would it be a good idea to rent the commercial premises to a new mini mart or local express when there are three other stores within the same few streets? Is it likely this store would be viable and the business could close costing your thousands in potential rent and costs in re-marketing and reletting the property during the vacant periods? How are current businesses doing financially, are there lots of empty space?

Be sure to ask for the Seller's cash flow statements.

Once client and you have taken the time to understand the ins & outs of occupied commercial property investing, it can be extremely rewarding both financially and personally for him or her.

IV – OBTAINING POSSESSION/RAISING RENTS

If your client is purchasing an occupied property, it is important to discuss and advise the client regarding the potential need to evict tenants in the future and specifically, concerns regarding no-fault evictions, defenses and counterclaims that may be raised in connection with an eviction (especially no-fault evictions and/or non-payment of rent evictions) elderly tenants, Sec. 8 tenants, etc.; discussions about how to raise rents in the proper and legal manner, when to raise rents; how to get occupants out to rehab and the possibility of the process taking up several years: buyouts; temp. relocations, when to approach tenants with this? how? costs? deduct from offer price?

Clients purchasing occupied property should be advised to review the history of Code issues or complaints for each tenant or at least 6 years (statute of limitations period), all communications regarding complaints, and major repairs performed in the last 6 years? In the case of a Section 8 tenancy, a buyer should be provided with a copy of all Section 8 housing authority inspections for each year the tenant has occupied the property.

Why is this so important? Answer: It is important, because any lapse of time could mean a loss of rents and an increase in expenses.

Massachusetts General Laws, Chapter 239 “Summary Process for Possession of Land” (“Summary Process Statute”), sets out the rights of tenants to raise certain defenses and counterclaims (and demand a jury trial) in the event of no-fault and non-payment evictions.

CHAPTER 239 SUMMARY PROCESS FOR POSSESSION OF LAND

Section 8A Rent withholding; grounds; amount claimed; presumptions and burden of proof; procedures

Section 8A. In any action under this chapter to recover possession of any premises rented or leased for dwelling purposes, brought pursuant to a notice to quit for nonpayment of rent, or where the tenancy has been terminated without fault of the tenant or occupant, the tenant or occupant shall be entitled to raise, by defense or counterclaim, any claim against the plaintiff relating to or arising out of such property, rental, tenancy, or occupancy for breach of warranty, for a breach of any material provision of the rental agreement, or for a violation of any other law. The amounts which the tenant or occupant may claim hereunder shall include, but shall not be limited to, the difference between the agreed upon rent and the fair value of the use and occupation of the premises, and any amounts reasonably spent by the tenant or occupant pursuant to section one hundred and twenty-seven L of chapter one hundred and eleven and such other damages as may be authorized by any law having as its objective the regulation of residential premises.

Whenever any counterclaim or claim of defense under this section is based on any allegation concerning the condition of the premises or the services or equipment provided therein, the tenant or occupant shall not be entitled to relief under this section unless: (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; provided, however, that nothing in this clause shall be construed to deprive the tenant or occupant of relief under this section when the premises are temporarily vacated for purposes of removal or covering of paint, plaster, soil or other accessible materials containing dangerous levels of lead pursuant to section one hundred and ninety-seven of chapter one hundred and eleven.

Proof that the premises are in violation of the standard of fitness for human habitation established under the state sanitary code, the state building code, or any other ordinance, by-law, rule or regulation establishing such standards and that such conditions may endanger or materially impair the health, safety or well-being of a person occupying the premises shall create a presumption that conditions existed in the premises entitling the tenant or occupant to a counterclaim or defense under this section. Proof of written notice to the owner or his agents, servants, or employees, or to the person to whom the tenant or occupant customarily paid his rent, of an inspection of the premises, issued by the board of health, or in the city of Boston by the commissioner of housing inspection, or by any other agency having like powers of inspection relative to the condition of residential premises, shall create a presumption that on the date such notice was received, such person knew of the conditions revealed by such inspection and mentioned in such notice. A copy of an inspection report issued by any such agency, certified under the penalties of perjury by the official who inspected the premises, shall be admissible in evidence and shall be prima facie evidence of the facts stated therein.

There shall be no recovery of possession pursuant to this chapter pending final disposition of the plaintiff's action if the court finds that the requirements of the second paragraph have been met. 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 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. In determining said fair value, the court shall consider any evidence relative to the effect of any conditions claimed upon the use and occupation of residential premises. Such funds may 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 section one hundred and twenty-seven H of chapter one hundred and eleven. When 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. Any tenant or occupant intending to invoke the provisions of this section may, after commencement of an action under this chapter by the landlord, voluntarily deposit with the clerk any amount for rent or for use and occupation which may be in dispute, and such payments shall be held by the clerk subject to the provisions of this paragraph.

There shall be no recovery of possession under this chapter if the amount found by the court to be due the landlord equals or is less than the amount found to be due the tenant or occupant by reason of any counterclaim or defense under this section. If the amount found

to be due the landlord exceeds the amount found to be due the tenant or occupant, there shall be no recovery of possession if the tenant or occupant, within one week after having received written notice from the court of the balance due, pays to the clerk the balance due the landlord, together with interest and costs of suit, less any credit due the tenant or occupant for funds already paid by him to the clerk under this section. In such event, no judgment shall enter until after the expiration of the time for such payment and the tenant has failed to make such payment. Any such payment received by the clerk shall be held by him subject to the provisions of the preceding paragraph.

Any provision of any rental agreement purporting to waive the provisions of this section shall be deemed to be against public policy and void. The provisions of section two A and of section eighteen of chapter one hundred and eighty-six shall apply to any tenant or occupant who invokes the provisions of this section.

⇒ *NOTE: The Summary Process Statute also addresses the right of an elderly or disabled tenant to seek a stay of the proceedings of up to a year, further preventing the property owner from exercising full dominion or control over his or her property.*

§ 9. Stay of Proceedings.

In an action of summary process to recover possession of premises occupied for dwelling purposes, other than a room in a hotel, or a dwelling unit in a lodging house or rooming house wherein the occupant has maintained such occupancy for less than three consecutive months, where a tenancy has been terminated without fault of the tenant, either by operation of law or by act of the landlord, except by a notice to quit for nonpayment of rent as provided in section twelve of chapter one hundred and eighty-six, a stay or stays of judgment and execution may be granted, as hereinafter provided, for a period not exceeding six months or for periods not exceeding six months in the aggregate, or, for a period not exceeding twelve months or for periods not exceeding twelve months in the aggregate in the case of premises occupied by a handicapped person or an individual sixty years of age or older, as the court may deem just and reasonable, upon application of the tenant or the surviving spouse, parent or child of a deceased tenant if such spouse, parent or child occupied said premises for dwelling purposes at the time when said tenancy was terminated and such occupancy was not in violation of the terms of the tenancy; provided, however, that a stay or stays of judgment and execution in the case of premises occupied by an employee of a farmer conditioned upon his employment by such farmer and which employment has been legally terminated shall not be granted for a period exceeding two months or for periods exceeding two months in the aggregate. For the purpose of this section, the words handicapped person shall mean a person who:

(a) has a physical or mental impairment which substantially limits such person's ability to care for himself, perform manual tasks, walk, see, hear, speak, breathe, learn or work; or

(b) has a physical or mental impairment which significantly limits the housing appropriate for such person or which significantly limits such person's ability to seek new housing; or

(c) would be eligible for housing for handicapped people under the provisions of chapter one hundred and twenty-one B.

§ 10. Stay of Proceedings; Hearing.

Upon application for such a stay of proceedings, the court shall hear the parties, and if upon the hearing it appears that the premises of which possession is sought to be recovered are used for dwelling purposes; that the applicant cannot secure suitable premises for himself and his family elsewhere within the city or town in a neighborhood similar to that in which the premises occupied by him are situated; that he has used due and reasonable effort to secure such other premises; that his application is made in good faith and that he will abide by and comply with such terms and provisions as the court may prescribe; or that by reason of other facts such action will be warranted, the court may grant a stay as provided in the preceding section, on condition that the terms upon which such stay is granted be complied with.

In any action to recover possession of premises occupied for dwelling purposes brought pursuant to this chapter in which a stay or stays of execution have been granted, by the court or by agreement of the parties, or in any such action where there is an agreement for judgment that grants the tenant a right to reinstate the tenancy, no execution shall issue prior to the expiration of the period of such stay or stays or such reinstatement period unless the plaintiff shall first bring a motion for the issuance of the execution and the court after a hearing shall determine that the tenant or occupant is in substantial violation of a material term or condition of the stay or a material term of the agreement for judgment.

§ 11. Stay of Proceedings; Deposit by Applicant.

Such stay shall be granted and continue effective only upon the condition that the applicant shall 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, at the rate to which he was liable as rent for the month immediately prior to the expiration of his term or tenancy plus such additional amount, if any, as the court may determine to be reasonable. The deposit shall also include all rent unpaid prior to the period of the stay. The amount of the deposit shall be determined by the court at the hearing upon the application for the stay, and such determination shall be final and conclusive in respect only to the amount of the deposit, and the amount thereof shall be paid into court, in such manner and in such instalments, if any, as the court may direct. A separate account shall be kept of the amount to the credit of each proceeding, and all such payments shall be deposited by the clerk of the court, and paid over to the landlord or his duly authorized agent, in accordance with the terms of the stay or the further order of the court.

§ 12. Stay of Proceedings; Waiver in Lease Void.

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.

Without knowledge of the various statutes, rule and regulations, a new buyer intending to move into his or her property may be faced with a far bigger hurdle than expected.

⇒ *A similar concern arises in connection with the ability of a tenant to allege that an eviction was brought in "retaliation" for a legal right exercised by the tenant. M.G.L. c. 186 s. 18 addresses this:*

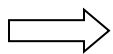
M.G.L. c. 186

Section 18 Reprisal for reporting violations of law or for tenant's union activity; damages and costs; notice of termination, presumption; waiver in leases or other rental agreements prohibited.

Any person or agent thereof who threatens to or takes reprisals against any tenant of residential premises for the tenant's act of, commencing, proceeding with, or obtaining relief in any judicial or administrative action the purpose of which action is to obtain damages under, or otherwise enforce, any federal, state or local law, regulation, by-law or ordinance, which has as its objective the regulation of residential premises; or exercising the tenant's rights pursuant to section one hundred and twenty-four D of chapter one hundred and sixty-four; or reporting to the board of health or, in the city of Boston to the commissioner of housing inspection or to any other board having as its objective the regulation of residential premises a violation or a suspected violation of any health or building code or of any other municipal by-law or ordinance, or state or federal law or regulation which has as its objective the regulation of residential premises; or reporting or complaining of such violation or suspected violation in writing to the landlord or to the agent of the landlord; or for organizing or joining a tenants' union or similar organization, or for making or expressing an intention to make, a payment of rent to an organization of unit owners pursuant to paragraph (c) of section six of chapter one hundred and eighty-three A shall be liable for damages which shall not be less than one month's rent or more than three month's rent, or the actual damages sustained by the tenant, whichever is greater, and the costs of the suit, including a reasonable attorney's fee.

The receipt of any notice of termination of tenancy, except for nonpayment of rent, or, of increase in rent, or, of any substantial alteration in the terms of tenancy within six months after the tenant has commenced, proceeded with, or obtained relief in such action, exercised such rights, made such report or complaint, or organized or joined such tenants' union or within six months after any other person has taken such action or actions on behalf of the tenant or in, or relating to, the building in which the tenant resides, shall create a rebuttable presumption that such notice or other action is a reprisal against the tenant for engaging in such activities. Such presumption shall be rebutted only by clear and convincing evidence that such person's action was not a reprisal against the tenant and that such person had sufficient independent justification for taking such action, and would have in fact taken such action, in the same manner and at the same time the action was taken, regardless of tenants engaging in, or the belief that tenants had engaged in, activities protected under this section.

Any waiver of this provision in any lease or other rental agreement shall be void and unenforceable.

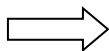


The practitioner should also be aware of the Retaliation Affirmative Defense Statute, M.G.L. c. 239, sec. 2A below which can delay recovery of possession if found in violation of the statute.

§ 2A. Reprisal Against Tenant for Reporting Violations of Law or for Joining Tenant's Union as Defense.

It shall be a defense to an action for summary process that such action or the preceding action of terminating the tenant's tenancy, was taken against the tenant for the tenant's act of commencing, proceeding with, or obtaining relief in any judicial or administrative action the purpose of which action was to obtain damages under or otherwise enforce, any federal, state or local law, regulation, by-law, or ordinance, which has as its objective the regulation of residential premises, or exercising rights pursuant to section one hundred and twenty-four D of chapter one hundred and sixty-four, or reporting a violation or suspected violation of law as provided in section eighteen of chapter one hundred and eighty-six, or organizing or joining a tenants' union or similar organization or making, or expressing an intention to make, a payment of rent to an organization of unit owners pursuant to paragraph (c) of section six of chapter one hundred and 83A, or a tenant, co-tenant or a member of the household taking action under section 3 of chapter 209A or section 3 of chapter 258E, seeking relief under sections 23 to 29, inclusive, of chapter 186, reporting to any police officer or law enforcement professional an incident of domestic violence, rape, sexual assault or stalking, as defined in said section 23 of said chapter 186, against a tenant, co-tenant or member of the household, or reporting to any police officer or law enforcement professional a violation of an order issued under said section 3 of said chapter 209A or said section 3 of said chapter 258E or any act of abuse as defined in section 1 of said chapter 209A or any act of harassment as defined in chapter 258E directed against the tenant, co-tenant or member of the household. The commencement of such action against a tenant, or the sending of a notice to quit upon which the summary process action is based, or the sending of a notice, or performing any act, the purpose of which is to materially alter the terms of the tenancy, within six months after the tenant has commenced, proceeded with or obtained relief in such action, exercised such rights, made such report, organized or joined such tenants' union, or made or expressed an intention to make a payment of rent to an organization of unit owners, or within six months after any other person has taken such action or actions on behalf of the tenant or relating to the building in which such tenant resides, shall create a rebuttable presumption that such summary process action is a reprisal against the tenant for engaging in such activities or was taken in the belief that the tenant had engaged in such activities. Such presumption may be rebutted only by clear and convincing evidence that such action was not a reprisal against the tenant and that the plaintiff had sufficient independent justification for taking such action, and would have in fact taken such action, in the same manner and at the same time the action was taken, even if the tenant had not commenced any legal action, made such report or engaged in such activity.

Additionally, with respect to the so-called Warranty of Habitability, a buyer will buy any issues that exist in the property when the buyer purchases the property and, with the exception of post-foreclosure property, may be held responsible for any such issues whether or not the buyer is specifically apprised of said issues by the seller. This is one reason why the Estoppel Certificate is so important.



Consider advising the Buyer to perform his or her own due diligence. For example, it is advisable for the Buyer to engage a licensed electrician to determine whether any "cross-metering" is present in the property.

During the time period between the Offer/Contract/Purchase & Sale Agreement to the closing and especially after, the Buyer will be viewed as an extension of the Seller with respect to expected treatment of occupants in the property.

V – POST-FORECLOSURE EVICTIONS

The practitioner should be aware of how difficult these evictions can be. A contingency should be put in the offer to purchase that if the seller cannot evict the post-foreclosure tenant within a set period, perhaps 90 days, the buyer may opt out of the purchase and receive all of his/her deposit back. In the alternative, buyer's attorney might craft provisions that allows the buyer to take title to the property at a discount which would compensate the buyer for the time and expense of doing the eviction.

The practitioner should also take note of the fact that on occasion a post-foreclosure buyer might want to keep the tenants in place. On the other hand, a buyer and buyer's attorney should think carefully and decide whether or not the tenants who remain after the foreclosure might have played a part in precipitating the foreclosure. Language to cover that event should be added to the offer.

In many and/or most cases, there is no opportunity for negotiation when it comes to the purchase of foreclosed properties, whether at the foreclosure sale as the highest bidder or as an REO purchaser. Both the Memorandum of Sale at a foreclosure sale and the Purchase & Sale Agreement with a bank who has purchased at the previous foreclosure sale ("REO Sale"), the contracts are not negotiable and it is therefore important to counsel your clients about the risks inherent in these deals, including without limitation:

- Inability to obtain title insurance: in light of the risk of a former owner attempting to try title, title insurance companies do not insure occupied properties after foreclosure. A potential exception to this is to have the foreclosed owner and/or tenant execute an Affidavit and Release so that the title company will not need to defend a suit
- Buyer may have difficulty gaining access depending on whether the foreclosed owner is willing to be cooperative
 - This issue may result in the cancellation of your liability or homeowner's insurance if the insurance company is unable to inspect
 - Without gaining entry, it is impossible to assess the condition of the property the buyer is responsible for (including responsibility
- The buyer should have ample reserve to negotiate in the event the foreclosed owner/tenant is willing to agree to a "cash for keys" arrangement.

The above considerations are especially important in light of the Supreme Judicial Court ruling in the case of *Bank of America v. Rosa*, SJC-11330 (Dec. 18, 2013). In *Rosa*, the Court ruled that a foreclosed owner may challenge a bank's title and foreclosure sale irregularities through counterclaims in a post-foreclosure eviction in the Housing Court — rather than being forced to file a separate equity lawsuit in the Superior Court. The SJC also held that the Housing Court has jurisdiction to hear other counterclaims against foreclosing lenders, including fair housing, consumer protection (Chapter 93A), and HAMP related claims.