

LANDLORD'S DUTY TO MAKE REPAIRS DURING THE TENANCY

WARRANTY OF HABITABILITY



Once the tenant has moved in, the landlord has the duty to maintain the premises in a safe and decent manner during the term of the tenancy. The landlord warrants that the property is fit for habitation at the beginning of the tenancy and will remain habitable during the term of the tenancy. This is referred to as the "warranty of habitability".¹

While isolated defects or minor code violations might not breach the landlord's warranty of habitability, it is clear that a landlord is responsible to maintain the premises in a safe, habitable condition at all times.² Common areas must also be maintained in a safe condition. If the landlord breaches this obligation, the tenant is entitled to damages. Damages take the form of a rent abatement and are measured by the difference between the fair market value of the premises as warranted (in compliance with the State Sanitary Code and State Building Code) and the fair market value of the premises in the defective condition.

During the tenancy, the landlord is responsible for maintenance of all systems, structural elements, and landlord installed appliances in the building. Major violations of the State Sanitary Code and State Building Code are usually violations of the warranty of habitability. In addition, there may be instances where conditions not covered by the codes make the property uninhabitable.³

The landlord must maintain the land and the common areas of the building free from garbage and rubbish.⁴ The tenant must maintain his/her own unit free from garbage and rubbish.⁵ The landlord must provide the tenant with trash barrels and is responsible for the collection and disposal of garbage and rubbish in dwellings containing three or more units. The tenant is responsible for providing his/her own trash barrels and for the collection and disposal of garbage and rubbish in single family houses and two family dwellings.⁶

During the tenancy, the landlord is responsible for extermination of insects and rodents in buildings containing two or more units and in rooming houses.

If pesticides must be used inside the dwelling, the landlord must notify the tenant at least 48 hours in advance.⁷ Upon reasonable notice, the tenant must give the landlord access to the property for exterminating. The tenant is responsible for extermination in single family houses.⁸

A violation of the warranty of habitability only exists when there is a material breach by the landlord. It is within a judge's discretion to decide whether the condition rises to the level of a material breach.⁹ Factors to be considered include the seriousness of the defect, the length of time the defect has existed, and whether the defect affects the habitability of the property.

For example: In a recent Massachusetts case, a judge found that defective ventilation and an ant infestation that had gone untreated for over a year were both a material breach.¹⁰ In a different case, the court found that a landlord did not violate the warranty of habitability when he failed to include window stops in a unit where a child fell from the window.¹¹ The court reasoned that a window stop was not essential to the habitability of the apartment and therefore not covered under the warranty of habitability.

The warranty of habitability applies only to defects in vital physical facilities. There have been no appellate cases in Massachusetts where a landlord has been found to have breached the warranty as a result of a non-physical defect.¹² Other states, such as New Jersey, include security measures in the warranty of habitability. The Supreme Judicial Court of Massachusetts chose not to adopt this standard, determining that the warranty does not require the landlord to provide security guards or other security services because these services do not relate to the maintenance of physical facilities.¹³ However, when a landlord voluntarily provides such security measures, the landlord has a duty of due care to maintain the security.¹⁴ Therefore, if the landlord elects to employ a security guard at the beginning of a tenancy, the tenant will rely on that level of security when he/she signs the lease and the landlord cannot take away this security measure in the middle of the tenancy.¹⁵

Even though a Massachusetts landlord is not held accountable for non-physical defects under the warranty of habitability, liability may be imposed

under other theories. The State Sanitary Code requires that a residence be "capable of being reasonably secured against unlawful entry."¹⁶ Every entry door of the building and of each unit and every openable exterior window must be fitted with a lock. For buildings with more than three units, the main entry door must be able to close and lock automatically.¹⁷ If the landlord is not careful to secure the property and a tenant is injured or gets property stolen by an intruder, the landlord may be held liable for negligence for breach of a duty to provide protection. The landlord may also be subject to liability under the "quiet enjoyment" statute.¹⁸

At all times during the tenancy, the tenant is required to exercise reasonable care in the use and care of the property.¹⁹ If damage is caused to the property, or a bad condition has arisen, the tenant should notify the landlord. The landlord must then make the appropriate repairs to the property within a reasonable period of time. A reasonable period of time depends on the nature and circumstances of each case but a landlord should understand that damages accrue to the tenant from the time the landlord first has notice of the damage or bad condition and therefore, remedies are available to the tenant during the landlord's time to repair.²⁰

Only in cases where the damages or bad conditions are so extensive that they would require the tenant to vacate the premises to make repairs may the landlord choose to terminate the tenancy in order to accomplish repairs, provided he/she does so in good faith. In such cases, the tenant may not use the remedies that would normally be available to him/her, including rent withholding, and may not use the damages or bad conditions to defeat a later eviction.²¹

Once bad conditions or damages to the property have occurred, problems may arise under the following circumstances:

1. The landlord is notified of damage not caused by the tenant or his/her guests but does not make repairs.

If the landlord does not repair damage not caused by the tenant or his/her guests within a reasonable period of time after receiving notice, the tenant may report the conditions to the health authority. The health authority will inspect the property and order the landlord to make required repairs. If the landlord does not make repairs of which he/she has notice, does not comply with the order of the health authority, or does not repair bad conditions that have been identified by the Court, the tenant may choose one or more of the following options:

- a. Repair the condition and deduct the expense from the next month's rent, up to a maximum of four month's rent.²² The tenant may exercise this option if the landlord has been notified in writing of the violation and has failed to contract with someone to do the repairs within five days of receiving notice, or has failed to substantially complete the repairs within fourteen days of receiving notice.²³ Only if the amount deducted exceeds four months' rent or the repairs were unreasonable will the landlord be allowed to recover the amount spent. Repair and deduct is not allowed where the tenant or his/her guest caused the bad condition or the tenant has refused to allow the landlord to make repairs.
- b. Withhold rent from the landlord.²⁴ Rent withholding is not allowed where the tenant or his/her guest caused the bad condition or damage, the tenant has refused to allow the landlord to make repairs, or the damages or bad conditions are so extensive that the tenant must vacate the premises in order for the landlord to make repairs.
- c. Treat the lease or rental agreement as terminated and move out without giving proper notice to the landlord.²⁵
- d. Go directly to court for relief. The law provides that tenants may file a tenant's petition to ask that the judge order the landlord to make repairs.²⁶ The petition must state that the bad condition was not caused by the tenant or his/her guest. The tenant may also decide to file an action for money damages against the landlord for breaching the warranty of habitability or the tenant's right to quiet enjoyment of his/her home.²⁷ If successful, a tenant may recover up to \$2,000.00 in a small claims action or more in regular civil action, and, in certain cases, may ask the Court to triple the recovery plus costs and attorney's fees. The tenant may also have a claim for damages under the Consumer Protection Act.²⁸



See Chapter 22, Consumer Protection Act

- e. File criminal charges against the landlord who fails to comply with the State Sanitary Code.



See Chapter 8, Tenant Remedies and Chapter 9, Wrongful Acts of the Landlord

While not every condition that results in physical injury automatically falls within the warranty of habitability,²⁹ the landlord may still be held liable for the damages caused by the injuries. If a tenant or any other person is injured on a rental property, except owner occupied two and three family properties, due to the landlord's failure to correct unsafe conditions not caused by the tenant or his/her guests, within a reasonable time after being notified by the tenant or the health authority, that person would be able to file an action in tort against the landlord for injuries.³⁰ In general, while a landlord is not the guarantor of safety of persons in the building, he/she may not ignore foreseeable risks of harm to tenants or others.³¹

In any event, a tenant may use the landlord's refusal to make repairs as both a defense and a counterclaim in a later eviction.



See Chapter 13, Eviction Process

The landlord's breach of the warranty also constitutes a total or partial defense to the landlord's claim for rent owed during the period of the breach.³²

2. The landlord is notified of damage caused by the tenant or his/her guests.

The landlord must repair the damage caused by the tenant or his/her guests within a reasonable period of time after receiving notice but may bill the tenant for the cost of the repairs. If damage is caused by the tenant or his/her guests, the tenant may not use the remedies that would normally be available to him/her including repair and deduct,³³ withholding rent,³⁴ and, using the bad conditions as a defense or counterclaim in an eviction action.³⁵

3. The tenant knows of damage but does not notify the landlord.

The landlord is only required to make repairs of which he/she has "actual" or "constructive" notice. Actual notice occurs when the tenant has notified the landlord orally or in writing of the damage or bad condition or the landlord has received a report from the health authority. Constructive notice occurs when the landlord should have known about the damage or bad condition, perhaps because it is in a common area or was present at the start of the tenancy. In constructive notice cases, the landlord will be charged with notice of the damage or bad condition even if he/she did not know of the bad condition or damage.³⁶

If the landlord has no notice of bad conditions, actual or constructive, the landlord is under no duty

to make repairs and the tenant may not use the remedies that would normally be available to him/her including repair and deduct,³⁷ withholding rent,³⁸ and using the bad conditions as a defense or counterclaim in an eviction action.³⁹

4. The landlord wants to repair damage but the tenant will not allow the landlord access to make repairs.

Leases may contain terms that allow a landlord to enter a unit to inspect the premises, to make repairs, or to show the unit to prospective tenants or purchasers. Otherwise, the law provides that a landlord may enter the tenant's unit only under the following conditions:

- a. in accordance with a court order,
- b. if the premises appear to be abandoned, or
- c. to inspect the unit for damage within thirty days of the end of a tenancy.⁴⁰



In all cases other than those involving a court order, abandonment, or an emergency, a landlord should not enter the tenant's unit without the permission of the tenant.

This includes cases where the landlord wants to make repairs to the property. If the landlord has been put on notice of any damage or bad condition by the tenant or by the health authority, the landlord must get the tenant's permission to enter the unit to make required repairs. The tenant has the duty to allow the landlord or his/her agent access to his/her unit, with proper notice, for the purpose of making repairs to bring the property into compliance with the Code.⁴¹ Proper notice varies according to the circumstances, but generally a twenty-four hour written notice is appropriate. If the tenant is unwilling to give the landlord permission to enter to make repairs, the landlord may go to court and apply for a Temporary Restraining Order. The application would state that the tenant is not willing to let the landlord make repairs and request that the Court order the tenant to comply.

A tenant who refuses to allow the landlord to make repairs may not repair the damage and deduct the cost of the repair from the rent,⁴² and probably may not use the bad condition as a defense or counterclaim in a later eviction.

CODE INSPECTIONS

In the event that a tenant or other person contacts the health authority to complain of damage or bad conditions, the health authority will inspect the property to determine whether there are any violations of the Code. A violation is a condition which does not meet the requirements of the Code.⁴³ If violations are found, the landlord and the tenant will receive a notice describing the violations and ordering the landlord to make repairs. The notice of violations of the Code creates a presumption that the conditions exist.⁴⁴ That is, the violations noted in the notice will be assumed to exist unless the landlord proves otherwise.

The notice containing the orders to the landlord must be served upon the landlord in one of the following ways:

- a. in person,
- b. leaving it at the landlord's residence, or
- c. sending it by registered or certified mail.⁴⁵

If the landlord's address is unknown or the landlord resides outside of Massachusetts, the notice must be posted on the property and advertised in the local newspaper. Proof of written notice to the landlord or his/her agent creates a presumption of proper notice.⁴⁶

The notice will tell the landlord the period of time that he/she has to make the required repairs.⁴⁷ Even though the landlord is given time to make repairs before fines are assessed by the health authority, damages accrue to the tenant from the time the landlord first had actual or constructive notice of the damage or bad condition and therefore, remedies are available to the tenant during the landlord's time to repair.⁴⁸

The landlord will be given twenty-four hours to repair the following violations:

- failure to maintain a supply of water;
- failure to provide heat or heating facilities;
- failure to provide light in hallways and stairways;
- failure to maintain a sanitary drainage system;
- failure to maintain facility fixtures and systems;
- termination, or failure to restore, water, hot water, heat, electricity, or gas;
- failure to maintain unobstructed exits;
- failure to maintain locks and doors;

- failure to prevent leaks;
- failure to maintain porch, balcony, roof, or stairway; and
- failure to prevent infestation.

The landlord will be given seven days to repair the following violations:

- failure to maintain owner installed appliances;
- failure to prevent build up of rubbish and garbage;
- defects in asbestos material;
- failure to provide a smoke detector;
- lack of a proper kitchen sink or stove and oven;
- failure to provide a washbasin and tub or shower; and
- failure to maintain a safe handrail.

The landlord will be given up to thirty days to repair all other violations.

In order to comply with the Code, all repairs must be performed in a workperson-like fashion, and, where licenses and permits are required, the appropriate official must certify that the work is done according to the law.⁴⁹

If a landlord does not comply with an order to make repairs, he/she may face civil sanctions, or criminal sanctions in cases where the violations are willful, intentional, reckless, or repeated, including fines of not less than ten dollars and not more than five hundred dollars per day. Each day that the landlord does not comply is considered a separate violation of the order.⁵⁰ While repairs may be extensive and therefore, expensive, lack of funds to repair is not a valid defense for non-compliance with an order.⁵¹



See Chapter 23, Rehabilitation Programs for Rental Properties

In cases where the failure to make repairs results in the endangering of the health or well-being of the tenant or the public, the health authority may cause the repairs to be done and bill the landlord for the cost of the repairs.⁵²

A landlord who has been served with an order to make repairs may request a hearing with the health authority within seven days of the date of service, if he/she believes that the order should be withdrawn or modified.⁵³ If the landlord is aggrieved by this final decision of the health authority, he/she may file an action in court.⁵⁴

The health authority may vary the application of the Code in any particular case where enforcement would do injustice as long as the variation does not conflict with the spirit of the Code.⁵⁵ In extreme cases where an emergency exists, the health authority may take such action as it deems necessary to meet the emergency.⁵⁶

ENDNOTES

- ¹ *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973)
- ² *Butts v. Boudreau*, 1986 Mass.App.Div. 167 (1986); *Young v. Patukonis*, 24 Mass.App.Ct. 954, 506 N.E.2d 1164 (1987)
- ³ 33 Mass.Prac. Landlord and Tenant Law §11.10 (3d ed., 2003)
- ⁴ 105 CMR 410.602
- ⁵ 105 CMR 410.602
- ⁶ 105 CMR 410.600; 105 CMR 410.601
- ⁷ 333 CMR 13.00; 105 CMR 410.550
- ⁸ 105 CMR 410.550
- ⁹ *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973)
- ¹⁰ *Jablonski v. Clemons*, 60 Mass.App.Ct. 473, 803 N.E.2d 730 (2004)
- ¹¹ *Lynch v. James*, 44 Mass.App.Ct. 448, 692 N.E.2d 81 (1998)
- ¹² 33 Mass.Prac. Landlord and Tenant Law §11.10 (3d ed., 2003)
- ¹³ *Doe v. New Bedford Housing Authority*, 417 Mass. 273, 630 N.E.2d 248 (1994)
- ¹⁴ *Mullins v. Pine Manor College*, 389 Mass. 47, 51, 449 N.E.2d 331, 335 (1983)
- ¹⁵ See *Kline v. 1500 Mass. Ave. Apartment Corp.*, 141 U.S. App. D.C. 370, 439 F.2d 477 (D.C.Cir. 1970)
- ¹⁶ 105 CMR 410.480(B)
- ¹⁷ 105 CMR 410.480(C)
- ¹⁸ G.L. c. 186, §14
- ¹⁹ 105 CMR 410.351; 105 CMR 410.352; 105 CMR 410.505
- ²⁰ *Berman & Sons, Inc. v. Jefferson*, 379 Mass. 196 N.E.2d 981 (1979)
- ²¹ G.L. c. 239 §8A; *Knott v. Laythe*, 42 Mass.App.Ct. 908, 674 N.E.2d 660 (1997)
- ²² G.L. c. 111 §127L
- ²³ G.L. c. 111 §127L
- ²⁴ G.L. c. 239 §8A
- ²⁵ G.L. c. 111 §127L
- ²⁶ G.L. c. 111 §127C
- ²⁷ G.L. c. 218 §21
- ²⁸ G.L. c. 93A; 940 CMR 3.17(1)
- ²⁹ 33 Mass. Prac. Landlord and Tenant Law §11.10 (3d ed., 2003); *Lynch v. James*, 44 Mass.App.Ct. 448, 692 N.E.2d 81 (1998) (Court denied violation of the warranty of habitability for failure to provide window guards after a three year old child fell out of the window of her third floor apartment.)
- ³⁰ G.L. c. 186 §19
- ³¹ *Whittaker v. Saraceno*, 418 Mass. 196, 635 N.E.2d 1185 (1994)
- ³² G.L. c. 239 §8A; *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 186-187 293 N.E.2d 831 (1973)
- ³³ G.L. c. 111 §127L
- ³⁴ G.L. c. 239 §8A
- ³⁵ G.L. c. 239 §8A
- ³⁶ *Montanez v. Bagg*, 24 Mass.App.Ct. 954, 510 N.E.2d 298 (1987); *McKenna v. Begin*, 3 Mass.App.Ct. 168, 325 N.E.2d 587 (1975)
- ³⁷ G.L. c. 111 §127L
- ³⁸ G.L. c. 239 §8A
- ³⁹ G.L. c. 239 §8A
- ⁴⁰ G.L. c. 186 §15B
- ⁴¹ 105 CMR 410.810
- ⁴² G.L. c. 111 §127L
- ⁴³ 105 CMR 410.044
- ⁴⁴ G.L. c. 239 §8A; G.L. c. 185C §21
- ⁴⁵ 105 CMR 400.400
- ⁴⁶ G.L. c. 239 §8A
- ⁴⁷ 105 CMR 410.830
- ⁴⁸ *Berman & Sons, Inc. v. Jefferson*, 379 Mass. 196, 396 N.E.2d 981 (1979)
- ⁴⁹ 105 CMR 410.021
- ⁵⁰ 105 CMR 400.700; 105 CMR 410.910
- ⁵¹ *City of Worcester v. Sigel*, 37 Mass.App.Ct. 764, 644 N.E.2d 238 (1994); *Lowery v. Robinson*, 13 Mass.App.Ct. 982, 432 N.E.2d 543 (1982)
- ⁵² 105 CMR 410.960
- ⁵³ 105 CMR 400.500
- ⁵⁴ 105 CMR 400.600
- ⁵⁵ 105 CMR 400.800
- ⁵⁶ 105 CMR 400.200(B)

TENANT REMEDIES FOR BAD CONDITIONS

A tenant has many remedies in cases where the landlord does not repair damages or bad conditions of which he/she has actual notice from the health authority or from the tenant, or of which he/she has constructive notice (the landlord should have known about the damage or bad condition), and the conditions endanger or materially impair the health or safety of the tenant.



The tenant may withhold rent, repair the unit and deduct the amount of repairs from his/her rent, file a tenant's petition, sue for damages, rescind the tenancy agreement, or file criminal charges against the landlord for failure to comply with the State Sanitary Code.

The Code specifically states that the following conditions endanger or materially impair the health or safety of the tenant:

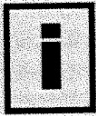
- a. failure to provide a supply of water in quantity, pressure, and temperature, both hot and cold, to meet the ordinary needs of the tenant;
- b. failure to provide heat or heating facilities, or improper venting or use of a space heater or water heater;
- c. shutoff and/or failure to restore electricity or gas;
- d. failure to provide electrical facilities and lighting in common areas;
- e. failure to provide a safe supply of water;
- f. failure to provide a toilet and maintain a sewage disposal system in operable condition;
- g. failure to provide adequate exits or the obstruction of any exit, passageway of common area, caused by any object including trash;
- h. failure to maintain locks and doors;
- i. failure to prevent build up of rubbish and garbage which may lead to infestation;
- j. allowing the presence of lead paint in violation of the law;
- k. failure to maintain roof, foundation, or allowing structural defects which impair health or safety;
- l. failure to install electrical, plumbing, heating, and gasburning facilities in accordance with accepted standards which impair health or safety;
- m. allowing a defect in asbestos in violation of the law;
- n. failure to provide a smoke detector; and
- o. any of the following conditions which remain uncorrected for five or more days after notice to or knowledge of the landlord:
 - 1. lack of a proper kitchen sink or stove and oven;
 - 2. failure to provide a washbasin and tub or shower;
 - 3. failure to install electrical, plumbing, heating, and gasburning facilities in accordance with accepted standards which do not create an immediate hazard;
 - 4. failure to maintain a safe handrail;
 - 5. failure to exterminate infestation; and
 - 6. any other violations which remain uncorrected within the time so ordered by the health authority.¹

While these conditions are deemed to always have the potential to endanger or materially impair the health or safety of the tenant, any other violation of the Code may be deemed by the Court or health authority to endanger or materially impair the health or safety of the tenant in any particular case, and therefore, may provide the basis for the tenant to legally withhold rent, repair and deduct, or file a tenant's petition.

RENT WITHHOLDING

The law provides tenants with a complete defense to eviction where there has been a breach of the warranty of habitability (the duty of the landlord to keep the property in a condition fit for habitation), a breach of any material provision of the rental

agreement or lease, or a violation of any other law relating to the tenancy where the eviction is based on non-payment of rent or no fault of the tenant.² This defense is not available in cases of eviction for fault. Eviction for fault occurs when the tenant has violated an obligation or duty or violated the rental agreement or lease, other than non-payment of rent.



If a landlord does not make repairs after being notified or does not make repairs of which he/she has constructive notice, the tenant may decide to stop paying rent and the landlord will not be able to evict the tenant for non-payment of rent.

In cases where the damages or bad conditions are so extensive that to repair them would require that the tenant vacate the premises, the landlord may choose to terminate the tenancy in order to accomplish repairs, provided he/she does so in good faith. In such cases, the tenant may not use the remedies that would normally be available to him/her, including rent withholding, and may not use the damages or bad conditions to defeat a later eviction.³

Rent withholding is only legal under the following circumstances:

- a. conditions exist that may endanger the health, safety, or well-being of the tenant;
- b. the landlord or his agent knew of the condition before the tenant was behind in paying rent, either because the tenant notified the landlord, the landlord received a report from the health authority, or the landlord had constructive notice;
- c. the landlord cannot prove that the tenant or his/her guests caused the conditions, except for areas under complete control of the tenant because there the tenant has the burden of proving he/she or his/her guests did not cause the damage; and
- d. the landlord cannot prove that the repairs require the tenant to vacate the premises.⁴

Thus, if the landlord had no notice of the bad condition, actual or constructive; or the tenant caused the bad condition; or the tenant was behind in paying rent before the landlord knew of the bad condition; or the repairs require the tenant to vacate the premises; the tenant will not be able to use rent withholding and will not be able to use the bad

conditions as a defense or counterclaim against the landlord in an eviction action.

While the tenant may be willing to continue paying rent in cases where the landlord is in the process of making repairs, the tenant has the right to withhold rent without regard to whether the landlord is at fault or is taking reasonable steps to repair.⁵ Similarly, in cases where the health authority allows the landlord a specific period of time to make repairs, the tenant has the right to withhold rent during this period of time without regard to whether the landlord is within this time frame. Damages accrue to the tenant from the time the landlord first has notice of the damage or bad condition, and therefore, remedies are available to the tenant during the landlord's time to repair.⁶

While proposed legislation could require tenants to put withheld rent in escrow in the future, the law currently does not require the tenant to put the withheld rent in escrow or meet any requirements other than notifying the landlord of the bad condition and not causing the bad condition. The law also does not state the amount of rent that the tenant may legally withhold nor does it state how long the tenant may withhold the rent. While the law is unclear on these issues, the Court has made it very clear that a tenant is legally justified in withholding rent in cases where the condition endangers or materially impairs the health or safety of the tenant.⁷

A question arises in cases where the tenant has withheld a large sum of rent and refuses to pay the landlord a fair portion of it once the repairs are completed. In deciding the amount of withheld rent a tenant should pay the landlord for the period of time that the premises were defective, the Court has made a determination of value by considering the nature, duration, and seriousness of the defects, and the extent to which they may endanger or impair the health, safety, or well-being of the tenants.⁸

The landlord should attempt to negotiate with the tenant for a resolution that compensates the tenant for the period of time that the defective condition existed while compensating the landlord for the value of the defective premises. If the tenant refuses to pay a reasonable sum after repairs are completed, the landlord should be cautious in attempts to recoup any part of the withheld rent through an eviction proceeding because there is a presumption that an eviction which is commenced within six months of a legal rent withholding is retaliatory.⁹ If the amount that the landlord is owed or will accept is \$2,000.00 or less, the landlord might consider an action in small claims against the tenant.



See Chapter 19, Small Claims Procedure

If the amount that the landlord is seeking is over \$2,000.00, the landlord should contact an attorney for assistance.

Regardless of the resolution of the rent issue for the period of time that the tenant lived in the defective premises, once the landlord has corrected the bad condition, the tenant should resume paying rent for the current period. If the tenant refuses to commence paying the full current rent after repairs are completed, the landlord may then begin an eviction for non-payment of rent.



While it is illegal for a landlord to evict a tenant because he/she has legally withheld rent, it is legal to evict a tenant because he/she has refused to commence paying current rent once the repairs are completed.

REPAIR AND DEDUCT

If a landlord does not make repairs after the health authority has certified that bad conditions may endanger the health, safety, or well-being of the tenant and after being notified in writing, the tenant may decide to repair the conditions and deduct that amount from the rent. Only if the amount deducted exceeds four months' rent, or the repairs were unreasonable, will the landlord be allowed to recover the amount spent.

Repair and deduct is only legal under the following circumstances:

- a. the health authority has certified that the conditions may endanger the health, safety, or well-being of the tenant;
- b. the landlord has been notified in writing of the violations;
- c. the landlord has not begun the necessary repairs within five days of the notice or has not completed the necessary repairs within fourteen days of the notice, or shorter time period if ordered by the Court or the health authority;
- d. the tenant or his/her guests have not caused the conditions; and
- e. the tenant has given the landlord reasonable access to make the repairs.¹⁰

Notice that the requirements to repair and deduct are different than the requirements to withhold rent. Rent withholding does not require a certification from the health authority that the conditions may endanger the tenant and does not require that the landlord receive written notice of the bad conditions, thereby allowing a tenant to begin withholding rent prior to any inspection by the health authority. Also, a tenant who is behind in rent when the bad condition arises may not withhold rent but may still legally repair and deduct.

TENANT'S PETITION

The law provides that a tenant or a health authority may file a tenant's petition to ask that the judge order the landlord to make repairs; determine the fair market value of the unit in its defective condition and allow the tenant to pay the fair market value in lieu of rent to the clerk of the court to be used for repairs; and appoint a receiver. The petition must state that:

- a. the premises have been inspected by the health authority;
- b. that violations have been found;
- c. that the violations may endanger the health, safety, or well-being of the tenant; and
- d. that the condition was not caused by the tenant or his/her guest.

The petition may be filed without the inspection in cases where an inspection was requested at least twenty-four hours before the filing, no inspection has been conducted, the tenant can show the condition is likely to be a violation which may endanger the health, safety, or well-being of the tenant, and that the condition was not caused by the tenant or his/her guest.¹¹

Notice that the requirements to file a tenant's petition are different than the requirements to withhold rent and repair and deduct. A tenant may file a tenant's petition with or without certification from the health authority that the conditions exist and may endanger the tenant and without proof that the landlord received written notice of the bad conditions. Also, a tenant may be behind in rent and still be able to file a tenant's petition. The requirements that the condition may endanger the health, safety, or well-being of the tenant and that the tenant or his/her guest did not cause the condition are common to all cases involving rent withholding, repair and deduct, and tenant's petition.

ACTION FOR DAMAGES

The tenant may decide to file an action for money damages against the landlord for breaching the warranty of habitability or the tenant's right to quiet enjoyment of his/her home. Damages for breaching the warranty of habitability take the form of a rent abatement, which the judge measures by assessing the major code violations and determining the percentage by which the tenant's use and enjoyment of the property was diminished by the violations. The rent is then reduced by this amount.¹² Damages for breaching the tenant's right to quiet enjoyment of his/her home include a fine of up to \$300.00 or imprisonment of up to six months. The landlord may also be liable for actual damages (including emotional distress) or three months' rent, whichever is greater, plus costs and attorney's fees.¹³ The tenant may choose which remedy to seek but may not recover under both theories for the same offense.¹⁴ If successful, a tenant may recover up to \$2,000.00 in a small claims action or more in regular civil action. The tenant may also have a claim for damages under the Consumer Protection Act.¹⁵



See Chapter 22, Consumer Protection Act

In addition, if the tenant is injured on a rental property, except owner occupied two and three family properties, due to the landlord's failure to correct unsafe conditions not caused by the tenant or his/her guests, within a reasonable time after being notified by the tenant or the health authority, the tenant would be able to file an action in tort against the landlord for injuries.¹⁶ In general, while a landlord is not the guarantor of safety of persons in the building, he/she may not ignore foreseeable risks of harm to tenants or others.¹⁷

RESCIND THE TENANCY AGREEMENT

The tenancy may rescind the tenancy agreement before it has expired, stop paying rent, and vacate the premises.

CRIMINAL CHARGES

The tenant, in addition to employing the remedies listed above, at the same time may file criminal charges against the landlord for failure to comply with an order issued pursuant to the Code or any other violation of the Code. Criminal sanctions are appropriate in cases where the violations are willful, intentional, reckless, or repeated. If convicted, the landlord will face fines of not less than ten dollars and not more than five hundred dollars per day. Each day that the landlord does not comply is considered a separate violation of the order.¹⁸

ENDNOTES

- ¹ 105 CMR 410.750
- ² G.L. c. 239, §8A
- ³ G.L. c. 239, §8A; *Knott v. Laythe*, 42 Mass.App.Ct. 908, 674 N.E.2d 660 (1997)
- ⁴ G.L. c. 239, §8A
- ⁵ *Berman & Sons, Inc. v. Jefferson*, 379 Mass. 196, 396 N.E.2d 981 (1979)
- ⁶ *Berman & Sons, Inc. v. Jefferson*, 379 Mass. 196, 396 N.E.2d 981 (1979)
- ⁷ *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973); *McKenna v. Begin*, 3 Mass.App.Ct. 168, 325 N.E.2d 587 (1975)
- ⁸ *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973); *McKenna v. Begin*, 3 Mass.App.Ct. 168, 325 N.E.2d 587 (1975)
- ⁹ G.L. c. 186, §18; G.L. c. 239, §2A
- ¹⁰ G.L. c. 111, §127L
- ¹¹ G.L. c. 111, §127C
- ¹² *McKenna v. Begin*, 5 Mass.App.Ct. 304, 362 N.E.2d 548 (1977)
- ¹³ G.L. c. 186, §14
- ¹⁴ *Wolfberg v. Hunter*, 385 Mass. 390, 432 N.E.2d 467 (1981)
- ¹⁵ G.L. c. 93A; 940 CMR 3.17(1)
- ¹⁶ G.L. c. 186 §19
- ¹⁷ *Whittaker v. Saraceno*, 418 Mass. 196, 635 N.E.2d 1185 (1994)
- ¹⁸ 105 CMR 400.700; 410.910