COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

SUFFOLK, SS

HOUSING COURT DEPARTMENT
EASTERN DIVISION
DOCKET NO. 17H84SP003188

**89 BEACON STREET, LLC**
**C/O LERINK PARTNERS, LLC,**

Plaintiff

**v.**

**REBECCA YANG and ADAM CAPER,**

Defendants

**MEMORANDUM OF DECISION ON PLAINTIFFS' MOTION TO SEVER AND FOR SUMMARY JUDGMENT**

This is a summary process action brought pursuant to G.L. c. 239, § 1A in which the plaintiff-owner is seeking to recover possession of the premises from the defendants-tenants upon the expiration of a residential lease. The defendants filed an answer in which they have alleged as affirmative defenses to the claim for possession and counterclaims that (1) the plaintiff failed to comply with the provisions of the City of Boston condominium conversion eviction ordinance, (2) the plaintiff's effort to evict the defendants constitutes an act of reprisal in violation of G.L. c. 239, § 2A and c. 186, § 18, (3) the plaintiff failed to pay interest on the defendants' last month rent deposit in violation of G.L. c. 186, §15B, and (4) the plaintiff's actions constituted unfair or deceptive acts in violation of G.L. c. 93A. The defendants' answer included a jury demand.[1]

This matter is before the Court on two motions presented by the plaintiff. The first is a motion to sever the defendants' counterclaims from the summary process case. The second is a motion for summary judgment pertaining to (1) the plaintiff's claim for possession, (2) the affirmative defense and counterclaims (reprisal and unfair trade practice) asserted by the defendants based upon the condominium conversion eviction

[1] The jury trial is scheduled to commence on December 11, 2017.

ordinance, (3) last month's rent deposit counterclaim (pertaining to interest), (4) the derivative Chapter 93A counterclaim, and (5) the affirmative defense to possession based on the counterclaim provision of G.L. c. 239, § 8A.

**Severance Motion**

The plaintiff's motion to sever the defendants' counterclaims is **DENIED.** The defendants have a right to have their counterclaims tried as part of the summary process action. Even if the defendants do not prevail on their condominium conversion defense they can establish an affirmative defense to the plaintiff's claim for possession pursuant to G.L. c. 239, § 8A if they prevail on one or more of their counterclaims. See *Meikle v. Nurse*, 474 Mass. 207, 208 (2016).

**Summary Judgment Motion**

The issue to be decided on summary judgment is (1) whether the plaintiff's act of commencing this summary process action against the defendants constitutes a "condominium . . . conversion eviction" in accordance with Section 10-2.10 (a) (1) of the City of Boston condominium conversion eviction ordinance, (2) whether the plaintiff is entitled to judgment as a matter of law on the defendants' last month's rent deposit, retaliation and Chapter 93A counterclaims, (3) whether the plaintiff is entitled to judgment as a matter of law on the defendants' affirmative defenses based on retaliation (G.L. c. 239, § 2A) and the counterclaim provision of G.L. c. 239, § 8A, and (4) whether the plaintiff is entitled to judgment as a matter of law on its claim for possession based upon the expiration of the defendants' second lease.

For the reasons set forth in this memorandum of decision the plaintiff's motion for summary judgment is **ALLOWED** and judgment shall enter for the plaintiff on its claim for possession and on the defendants' counterclaims.

**Facts**

The seven (7) unit four story residential brick apartment building at issue in this action is located at 89 Beacon Street, in Boston (the "building").

Defendants Rebecca Yang and Adam Caper (collectively the "tenants") reside at Apartment 7. The apartment is located on the fourth floor of the building. The tenants

entered into a written lease with the former owner, 89 Beacon Street Realty Trust, on September 23, 2015. The first lease was for a term of eleven (11) months commencing on October 1, 2015 and terminating on August 31, 2016. The monthly rent was $4,500.00. The tenants gave the former owner a $4,500.00 last month's rent deposit. The first lease did not include a clause that provided for automatic renewal or extension of the lease.

The tenants and the former owner executed a new second lease on July 12, 2016 with a different term and a different rent from the first lease. The second lease was for a term of one (1) year (rather than eleven months) that commenced on September 1, 2016 and terminated on August 31, 2017. The monthly rent increased to $4,600.00 (from $4,500.00). The tenants gave the former owner a last month rent deposit in the increased amount of $4,600.00 (from $4,500.00). The second lease did not include a clause that provided for automatic renewal or extension of the lease.

Plaintiff 89 Beacon Street, LLC (the "plaintiff") purchased 89 Beacon Street on January 5, 2017.[2] As of January 5, 2017 the plaintiff became the tenants' landlord and assumed all the obligations under terms of the second lease, including responsibility for the $4,600.00 last month's rent deposit.

In a letter dated January 5, 2017 the plaintiff notified the tenants of the change in ownership. The letter further stated, "[t]o help you plan, we want to let you know now that we will not be renewing the current lease. As a courtesy, we have enlisted Cabot & Company to assist with your relocation." Accordingly, it is undisputed that the plaintiff notified the tenants in writing on January 5, 2017 that their tenancy would terminate upon the expiration of their lease term effective September 1, 2017. The plaintiff provided the tenants with approximately seven months advance notice of its intention to recover possession of the premises.

A similar letter was given to each of the other six leaseholders on January 5, 2017. With the exception of the defendants, the occupants of the other six apartments have vacated their units and surrendered possession.

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[2] As is set forth in the deed the consideration paid by the plaintiff was $9,600,000.00.

In a letter to the tenants dated February 8, 2017 the plaintiff notified them that the former owner had transferred the tenants' last month's rent deposit ($4,600.00 under the terms of the second lease) to the plaintiff.

In a letter dated August 28, 2017 (three days before the second lease expired) the plaintiff tendered payment to the tenants in the amount of $460.00 (in the form of a check payable to the tenants). A portion of this payment represented the amount of interest that had accrued on the tenants' last month's rent deposit during the second lease term at the rate of 5% per annum through August 31, 2017 ($230.00). The plaintiff's letter states that it did not know whether the prior owner had paid interest to the tenants on the last month's rent deposit that accrued during the first lease term (or whether the tenants had deducted the accrued interest from their rent during the first lease term). While under no contractual or legal obligation to do so the plaintiff included in its tender an amount that it had calculated would be the interest that accrued during the first lease term ($230.00).

The tenants were current in their rent and were in compliance with their lease through August 2017.

On July 27, 2017, in response to an inquiry from the plaintiff seeking confirmation that the tenants would be leaving Unit 7 when their lease ended, the tenants informed the plaintiff via email that they would not be vacating Unit 7 by August 31, 2017 upon the expiration of the lease term. The tenants notified the plaintiff that they had "decided to exercise our rights under the Condominium Conversion law, and so we will be continuing our tenancy." They told the plaintiffs that they had no intention of voluntarily vacating Unit 7.

It was for this reason that on August 2, 2017 the plaintiff notified the tenants in a letter sent by certified mail that it would initiate a summary process action against them pursuant to G.L. c 239, § 1A.[3] The letter states that based on the tenants' July 27, 2017

[3] Section 1A states in relevant part that a lessor may commence a summary process action before the termination date set forth in a lease provided the lessor has provided the lessee with written notice of its intent to proceed and has "substantial grounds upon which the court could reasonably conclude that the defendant is likely to continue in possession of the premises at issue without right after the designated termination date, which grounds shall be set forth in the writ."

communication "Landlord has good and sufficient reason to believe that you do not intend to vacate the Premises on August 31, 2017."

The plaintiff commenced this summary process action on August 2, 2017 by serving the tenants with a summons and complaint. The compliant states as the ground for termination that "Your Lease expires on August 31, 2017 and you have been given notice pursuant to G.L Chapter 239, Section 1A." The plaintiff entered this summary process action in the Eastern Division of the Housing Court Department on August 9, 2017.

The tenants filed a written answer that included as affirmative defenses to the claim for possession and counterclaims that (1) the plaintiff commenced this summary process action without first complying with the pre-termination notice provisions of the City of Boston condominium conversion eviction ordinance, (2) the plaintiff's effort to evict the defendants constitutes an act of reprisal in violation of G.L. c. 239, § 2A and c. 186, § 18, (3) the plaintiff failed to pay interest on the defendants' last month rent deposit in violation of G.L. c. 186B, (4) the plaintiff's actions constituted unfair or deceptive acts in violation of G.L. c.93A, and (5) the tenants are entitled to retain possession under the counterclaim provisions of G.L. c. 239, § 8A, ¶1.

The plaintiff had two alternative development plans under consideration at the time it purchased 89 Beacon Street on January 5, 2017. Both plans required the demolition of the interior of the building including the seven existing apartments. The first proposed development plan provided for the renovation of the building and the creation of two new luxury condominium units. The second proposed development plan provided for the renovation of the building and the creation of one new luxury single-family dwelling. In the summary judgment record are two architectural renderings that show the dwellings that would be created under the two development plan options. One rendering shows the building configured as two luxury condominium residences (Unit 1: a unit including the ground floor and first floor, and Unit 2: a penthouse unit including floors 2, 3, 4 and mezzanine level). The other rendering shows the building configured as one single-family residence. Under either development option Unit 7 would no longer exist as a separate

distinct residential unit. The physical space would be incorporated into either the proposed single-family residence or the penthouse condominium.

The plaintiff engaged the services of a real estate broker to market the property pre-construction simultaneously as two luxury condominium units and as a single-family dwelling.[4] During the summer of 2017 the real estate broker communicated with prospective buyers; however those communications did not result in an offer to purchase any of the prospective units and the plaintiff has not entered into a purchase and sale agreement with any prospective buyer.

The plaintiff claims that at the time it commenced this summary process action against the tenants in August 2017 it had not made a final decision whether it would develop the building as two condominium units or one single-family residence.

After the plaintiff filed its summary judgment motion, it submitted a supplemental affidavit dated October 25, 2017 from Kenneth J. Novack, acting in his capacity as a manager of the plaintiff LLC. In his affidavit Novack states that as of October 20, 2017 the plaintiff LLC had made a "definitive decision" to market and develop the property as a single-family residence "and to forego the option of developing and the marketing the property for sale as a two-unit condominium." The affidavit states that on October 21, 2017 the plaintiff directed its real estate brokers to revise the marketing material for the property and change the multiple listing service ("MLS") listing to reflect that the property was for sale exclusively as a single-family residence. The affidavit states that the plaintiff has "never engaged an architect or other professional to measure or inspect the Premises in order to sell the Premises as a one or more condominium units."

The plaintiff has never intended to convert the existing Unit 7 into a condominium. The plaintiff has not converted the building into a condominium form of ownership in the manner required under G.L. c 183A, § 8(f). It has not prepared or recorded a condominium master deed, certified "as built" plans, unit deeds, articles of organization or bylaws at the Suffolk County Registry of Deeds.

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[4] The single-family residence was offered for sale at $18,000,000.00. The penthouse condominium was offered for sale at $15,995,000.00. The first floor condominium was offered for sale at $4,195,000.00.

The plaintiff has not filed for or secured a building permit to demolish the existing apartments and construct two new condominium units, and has not commenced any building renovations.

The tenants are the only occupants who refused to voluntarily vacate their apartment at the end of their lease term. The tenants remain in possession of Unit 7. The other six rental units are vacant. The tenants are the sole remaining occupants at 89 Beacon Street.

**Discussion**

The standard of review on summary judgment "is whether, viewing the evidence in the light most favorable to the non-moving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991). See Mass. R. Civ. P. 56 (c). The moving party must demonstrate with admissible documents, based upon the pleading depositions, answers to interrogatories, admissions documents, and affidavits, that there are no genuine issues as to any material facts, and that the moving party is entitled to a judgment as a matter of law. *Community National Bank v. Dawes*, 369 Mass. 550, 553-56 (1976). All evidentiary inferences must be resolved in favor of the non-moving party. See *Simplex Techs, Inc. v. Liberty Mut. Ins. Co.*, 429 Mass. 196, 197 (1999). Once the moving party meets its initial burden of proof, the burden shifts to the non-moving party "to show with admissible evidence the existence of a dispute as to material facts." *Godbout v. Cousens*, 396 Mass. 254, 261 (1985). The non-moving party cannot meet this burden solely with "vague and general allegations of expected proof." *Community National Bank*, 369 Mass. at 554; *Ng Brothers Construction, Inc. v Cranney*, 436 Mass. 638, 648 (2002) ("[a]n adverse party may not manufacture disputes by conclusory factual assertions; such attempts to establish issues of fact are not sufficient to defeat summary judgment").

The plaintiff presents three related arguments pertaining to the applicability of the City of Boston's condominium conversion ordinance in support of its motion for summary judgment. First, it contends that that the tenants are not entitled to protection under the terms of the condominium conversion ordinance because at the time the eviction action

was commenced (and as of the date of this order) the building had not been converted into a condominium form of ownership. Second, it contends that the tenants are not entitled to protection under the terms of the condominium conversion ordinance because the plaintiff did not at the time it commenced this summary process action and does not now intend to convert Unit 7 (the unit occupied by the tenants) into a condominium unit. The plaintiff argues that Unit 7 will no longer exist as a separate residential unit if it renovates the building in accordance with its condominium development plan option (that will require the complete demolition of the existing apartments and common area), making it impossible for the plaintiff to ever comply with the notice of termination and right to purchase provisions of the condominium conversion ordinance. Third, it contends that that the tenants are not entitled to protection under the terms of the condominium conversion ordinance because it has now made a 'definitive" decision to develop and market the property for sale, not as condominiums, but solely as one single-family residence.

The plaintiff argues that its efforts to recover possession of the tenants' apartment, Unit 7, does not constitute a "*condominium conversion . . . eviction*" under the provisions of the condominium conversion ordinance because based on its condominium development plan option (the demolition of the interior of the building and the construction of two new condominium units) the plaintiff does not have and has done nothing to manifest an "*intent to convert*" the tenants' apartment (Unit 7) into a condominium unit. The plaintiff argues that the ordinance extends protection to a tenant only if that tenants' existing rental unit is converted into a condominium. The plaintiff argues that this is the only reasonable reading of the ordinance because it is only under those circumstances that the owner would ever be able to comply with the notice and option to purchase provisions of the ordinance.[5]

The plaintiff reasons that under the ordinance, Section 10-2.10 (b) (1) (a), the required *notice of intent to convert/notice of termination* (that would provide the tenant

[5] For purposes of ruling on this summary judgment motion I shall assume, without deciding, that there exists a disputed issue of fact as to whether the plaintiff had manifest an *intent to convert* 89 Beacon Street into two luxury condominium units. However, even if that factual issue was resolved in favor of the tenants, for the reasons set forth in this memorandum of decision this summary process action would not be a "*condominium . . . conversion eviction*" under the provision of the condominium conversion ordinance.

with from 1 to 5 years before the owner could commence an eviction action, depending on the tenant's income and age) can only be sent to the tenant after the existing rental unit has be converted to the condominium form of ownership by filing a master deed with the Suffolk Registry of Deeds. Thus, if the owner does not intend to convert the existing unit occupied by the tenant into a condominium, but rather intends to demolish the existing unit as part of a development plan to renovate the building to create distinct new units that it intends to market as condominiums, the owner will never be able to give the tenants an ordinance compliant *notice of intent to convert/notice of termination* (because Section 10-2.10 (b) (1) (a) of the ordinance makes it clear that the *notice of intent to convert/notice of termination* cannot be sent to the tenant until after "*the premises have been converted to the condominium . . . form of ownership*), and for that reason the owner would never be able commence a summary process action to recover possession of Unit 7 from the tenant and would never be able to renovate the building (because demolition and construction cannot begin until after the building is vacant).

Similarly, if the owner's development plan does not call for the conversion of the existing rental unit into a condominium, the owner could never comply with the *option to purchase* provision of the ordinance. This is so because Section 10-2.10 (f) requires the owner to give the tenant a notice that the tenant has the *option to purchase* "the housing accommodation [i.e. the existing rental unit] he or she occupied at the time such notice is delivered" as a condominium. If the existing rental unit is not converted into a condominium the owner could never give the tenant the *option to purchase* and thus could never give the tenant an ordinance compliant notice.

The plaintiff makes a corollary argument. The plaintiff argues that any action it may have taken prior to the commencement of this summary process action to market the two proposed unit identified in its condominium development option does not manifest an "*intent to convert*" as that term is defined in the ordinance. The definitions of "*convert*" and "*intent to convert*" requires proof that the owner's actions will result in the "*sale and transfer [or intent thereof] of title to any residential unit as **one or more** condominium . . . units.*" The plaintiff argues that its condominium development plan option is

"mathematically unambiguous." Its development plan does not include the conversion of the existing Unit 7 into one condominium unit or into two condominium units (within the same footprint as the existing Unit 7). Under the plaintiff's condominium development plan option Unit 7 would be demolished and cease to exist as an individual apartment or unit. The physical space of Unit 7 would be incorporated into one much larger condominium unit (the penthouse condominium), meaning that the space formerly associated with Unit 7 would constitute only a fraction of a condominium unit ("less than one" unit).

With respect to its claim for possession the plaintiff claims that as a matter of law it is entitled to recover possession from the tenant upon the expiration of the second lease term, August 31, 2017.

The tenants argue that they are entitled to summary judgment on the plaintiff's claim for possession based on these arguments: (1) the landlord's summary process action constitutes a "*condominium conversion . . . eviction*" under the provisions of the condominium conversion ordinance because when it commenced the action the landlord had the "*intent to convert*" the tenants' unit into a condominium, (2) even if the plaintiff's development plan is to demolish Unit 7 (with the tenants' existing apartment being incorporated into one of the proposed new condominium units), the tenants are still entitled to protection under the condominium conversion ordinance and the landlord's summary process action constitutes a "*condominium conversion . . . eviction,*" and (3) prior to the commencement of the summary process action the plaintiff failed to give the tenants a *notice of intent to convert/notice of termination* that complied with the notice requirements set forth in the condominium conversion ordinance. The tenants argue that they are entitled to such protections even if at the time the plaintiff commenced this summary process action the plaintiff had not placed the property into the condominium form of ownership by recording the master deed and related documents with the Suffolk County Registry of Deeds.

The tenants argue that even if the tenant's apartment will no longer exist in its present form after the plaintiff converts the building into condominiums, and even though

the building had not been converted into a condominium form of ownership at the time this summary process action was commenced, they were entitled to the protections set forth in the condominium ordinance because the plaintiff manifested its "*intent to convert*" the building and construct two new condominiums as shown in the plaintiff's condominium development plan option (by preparing renderings of the proposed units and marketing the as yet unbuilt condominium units to the public). The tenants argue that they are entitled to judgment on the plaintiff's claim for possession because the plaintiff was without authority to commence an eviction action against them without first complying with the notice provisions of the condominium conversion ordinance.

The tenants argue that, in addition to their condominium conversion ordinance defense, they have established an affirmative defense to the plaintiff's claim for possession pursuant to the counterclaim provision of G.L. c. 239, § 8A, ¶ 1. They argue that in accordance with the holding set forth in *Meikle v. Nurse*, 474 Mass. 207, 208 (2016) they are entitled to retain possession if they prevail on one or more of their counterclaims. The tenants contend that they are entitled to summary judgment on their counterclaims (alleging that the plaintiff violated the last month's rent deposit provisions of G.L. c. 186, § 15B, engaged in acts of reprisal in violation of G.L c. 186, § 18, and engaged in unfair or deceptive acts or practices in violation of G.L. c. 93A).

Finally, the tenants argue that they are entitled to summary judgment on the plaintiff's claim for possession based upon the affirmative defense of retaliation pursuant to G.L. c. 239, § 2A. The tenants contend that the undisputed evidence in the summary judgment record establishes that the plaintiff commenced this summary process action in reprisal for the tenants' action of giving the plaintiff written notice of their intent to exercise rights they believed they held under the terms of the condominium conversion ordinance.

Tenants' Condominium Conversion Ordinance Defense. With respect to the competing arguments pertaining to the applicability of the condominium conversion ordinance I must determine if the plaintiff's effort to recover possession of Unit 7 from the tenants through this summary process action constitutes a "*condominium . . . conversion eviction*" as that term is used in the City of Boston condominium conversion eviction

ordinance and the state enabling statute. I must identify the rights and obligations of the parties from the interplay between the definitions, notice and eviction provisions set forth in the condominium conversion ordinance read together with the provisions of the state enabling statute. It is from the interrelated language and definitions contained in the enabling statute and city ordinance that I must ascertain whether *prior to the commencement of this eviction action* the plaintiff was obligated to give the tenants *a notice of intent to convert/notice of termination* that complied with the condominium conversion ordinance based upon the plaintiff's development-related actions taken between January 5 and August 2, 2017.

Statutory interpretation is "guided by the familiar principle that 'a statute must be interpreted according to the intent of the Legislature ascertained from all of its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Drummer Boy Home Assoc. v. Britton*, 474 Mass. 17, 23-24 (2016) *quoting Hanlon v. Rollins*, 286 Mass. 444, 447 (1934). "Courts must ascertain the intent of a statute from all its parts and from the subject matter to which it relates, and must interpret the statute so as to render the legislation effective, consonant with sound reason and common sense." *Twomey v. Middleborough*, 468 Mass. 260, 268 (2014). When the meaning of the language is plain and unambiguous, we enforce the statute according to its plain wording "unless a literal construction would yield an absurd or unworkable result." *Adoption of Daisy*, 460 Mass. 72, 76 (2011), quoting *Boston Hous. Auth. v. National Conference of Firemen & Oilers, Local 3*, 458 Mass. 155, 162 (2010). We "endeavor to interpret a statute to give effect 'to all its provisions, so that no part will be inoperative or superfluous.'" *Connors v. Annino*, 460 Mass. 790, 796 (2011), quoting *Wheatley v. Massachusetts Insurers Insolvency Fund*, 456 Mass. 594, 601 (2010).

Prior to November 1994 the City of Boston regulated condominium conversions through a removal permit regulatory process enacted pursuant to St. 1987, c. 45. Condominium related evictions were regulated through the city's comprehensive rent

control ordinance. See *Greater Boston Real Estate Board v. City of Boston*, 397 Mass. 870 (1986); *Perry v. Boston Rent Equity Board*, 404 Mass. 780 (1989).

In November 1994, the electorate approved by referendum vote *The Massachusetts Rent Control Prohibition Act*. The substance of the referendum vote to abolish rent control was enacted into law effective January 1, 1995, as St. 1994, c. 368, codified at G.L. c. 40O. Chapter 40O was re-designated as G.L. c. 40P pursuant to St. 1997, c. 19, § 10. Chapter 40P "broadly prohibits any regulatory scheme based upon or implementing rent control . . ." *Greater Boston Real Estate Board v. City of Boston*, 428 Mass. 797, 799 (1999). Chapter 40P effectively repealed existing rent control enabling statutes, including St. 1969, c. 797, St. 1970, c. 683 and St. 1987, c. 45. Chapter 40P also effectively repealed all city ordinances and regulations that implemented, maintained, administered or enforced a regulatory scheme of rent control. See, *Zuker v. Clerk-Magistrate of Brookline Division of the District Court Department*, 423 Mass. 856, 859 (1996). Chapter 40P, § 3 defined rent control to include regulation of condominium conversion to the extent such regulation was authorized by the explicitly repealed enabling statutes.[6]

With the repeal of the state rent control enabling statutes the sole source of authority by which the City of Boston could regulate condominium conversion evictions came from the state condominium conversion enabling act, Chapter 527 of the Acts of 1983 (St. 1983, c. 527), as amended, by Chapter 709 of the Acts of 1989 (St. 1989, c. 709).

Chapter 527, as amended, authorizes any city or town to enact an ordinance to provide certain protections to a tenant who occupies an apartment when the owner manifests an intent to convert to a condominium, the owner in fact converts that unit to a condominium form of ownership, and the owner decides to evict the tenant in furtherance of the owners intent to sell the tenant's apartment as a condominium unit. Chapter 527, §

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[6] Five days after Chapter 40P became law, the legislature enacted St. 1994, c. 282, "a limited transitional statute" to "establish a uniform statewide policy for ending rent control . . ." Chapter 282 placed limits on the rights of owners to evict certain protected tenants. Such tenants could only be evicted for "just cause." Of relevance to this summary judgment motion is the provision set forth in c. 282, § 6 (a) providing that there is "*just cause*" to evict a protected tenant where "*the landlord seeks to recover possession in good faith of a unit . . . for his or her own use and occupancy . . .*." Chapter 282, § 8 included a sunset provision by which the statute expired on December 31, 1996.

4 (a - e) provides in relevant part that *after* a residential building has been "submitted to the provisions of [G.L. c. 183A] . . ." the owner must give each tenant *a notice of intent to convert* that includes an extended tenancy termination date (at least one year), a right to purchase the unit "*he or she occupied at the time such notice is delivered*" on terms and conditions which are substantially the same as or more favorable than those which the owner extends to the public generally (but only if the unit occupied by the tenant is offered for sale to the public generally), and a relocation assistance payment if the tenant does not purchase the unit and is required to vacate. The section provides that "[n]o person shall bring any action seeking a condominium . . . eviction until the expiration of the periods of time for notice to tenants specified in this act."

Under the provisions of the 1989 amendment to Chapter 527, the eviction protection rights specified in Section 4 (a - e) "*shall vest with such tenants at the time the owner converts any unit in such property to the condominium . . . form of ownership.*"

Chapter 527, § 2 authorizes a city or town to provide tenants with protections from "*condominium . . . conversion evictions*" that differ from those provided by the enabling statute. Nonetheless, the ordinance cannot stray so far from the provisions of the state enabling statute so as to exceed the scope of authority granted by the legislature to the municipality.

In the declaration of emergency set forth in Chapter 527, Section 1, the legislature determined that lack of sufficient rental housing has created a serious public emergency, and that the effect of conversion of rental housing into condominiums "reduces the stock of rental housing otherwise available . . .," and that [a] substantial and increasing shortage of rental housing accommodations, *especially for the elderly, the handicapped, and person and families of law and moderate income*, has been and will continue to be the result of this emergency." The "mischief" that Chapter 527 was enacted to address and remedy was the risk that once an owner of a residential property forms the *intent to convert* existing apartments into condominiums the tenants residing in those apartments will be displaced (eviction) from their homes without the opportunity to either buy their apartment as a condominium or be given adequate time to find suitable and affordable alternative housing.

The initial efforts made by the City of Boston to regulate condominium conversions and evictions in the aftermath of the repeal of rent control were struck down on appeal. See, *Greater Boston Real Estate Board v. City of Boston*, 428 Mass. 797, 799 (1999). In response to this ruling the city enacted Chapter 8 of the Ordinances of 1999, acting pursuant to Chapter 527, as amended.[7] The ordinance, which had a five-year term, was extended for additional terms of five years (with minor revisions) by Chapter 12 of the Ordinances of 2004, Chapter 9 of the Ordinances of 2009, and Chapter 16 of the Ordinances of 2014. The ordinance is entitled the *Rental Housing Equity Ordinance* and is codified in the City of Boston Code, Chapter X, Section 10 (the "ordinance").

Section 10-2.10 (a) (1) of the ordinance provides that "[n]o person shall bring an action to recover possession of a housing accommodation *for the purposes of a condominium . . . conversion eviction* in any building or structure *converted to a condominium* . . . until the later of the expiration of the rental housing agreement or one year has elapsed after the date the tenant . . . has received written notice of termination of his tenancy which conforms to the requirements of this Ordinance."[8] Section 10-2.10 (b) (1) (a) of the ordinance makes it clear that the *notice of intent to convert/notice of termination* cannot be sent to the tenant until **after** "*the premises have been converted to the condominium . . . form of ownership and that the master deed has been filed at the registry of deeds for Suffolk County . . .*" This is consistent with Chapter 527, § 4 of the state enabling statute, as amended.

In relevant part Section 10-2.10 (d) (2) of the ordinance provides that "*an eviction shall be presumed to be a condominium . . . eviction if the landlord has the intent to convert,* as defined herein."

Section 10-2.1 of the ordinance defines "*convert*" to mean the definition set forth in Chapter 527, as amended. The term "*convert*" is defined in the 1989 enabling act

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[7] Entitled "An Ordinance Providing Protections for Tenants Facing Displacement by Condominium or Cooperative Conversion and Regulating Future Condominium or Cooperative Conversion Pursuant to the City's Authority Under St. 1983, c. 527.

[8] As to the form of the required notice see Section 10-2.10 (b).

amendment, Section 2, to include, "*the initial offer, in any manner, for sale and transfer of title to any residential unit as one or more condominium units* pursuant to an individual unit deed or deeds . . ."

Section 10-2.1 of the ordinance defines "*condominium . . . conversion eviction*" to mean the definition set forth in Chapter 527, as amended. Chapter 527, § 3 defines "*condominium . . . conversion eviction*" as:

> "*an eviction of a tenant* for the purpose of removing such tenant from a housing accommodation *in order to facilitate the initial sale and transfer of legal title to* ***that housing accommodation as a condominium*** . . . to a prospective purchaser . . . ." (emphasis added.)

The term "*housing accommodation*" as used in Section 3 refers to the existing apartment occupied by the tenant. The 1989 amendment to the statute added the following language to the definition of "condominium . . . conversation eviction:"

> "*An eviction shall be presumed to be a condominium . . . eviction if the owner has the intent to convert*, as defined herein."

Section 10-2.1 (l) of the ordinance defines "*intent to convert*" to mean the definition set forth in Chapter 527, §3, as amended. The term "*intent to convert*" is defined in the 1989 amendment to mean:

> "*The intent to make the initial sale and transfer of title to* ***a residential unit as one or more condominium . . . units*** pursuant to an individual unit deed or deeds . . . *Factors which shall be considered in determining whether an owner has the intent to convert are*:
>
> (i) a master deed or articles of organization for the housing accommodation has been prepared or recorded;
>
> (ii) the owner of the housing accommodation has prepared or is in the process of preparing a purchase and sale agreement for the sale of any unit as a condominium . . .;
>
> (iii) the owner has advertised for sale any unit in the housing accommodation as a condominium . . . unit;
>
> (iv) the owner has shown any prospective purchaser a unit in the housing accommodation for the sale of such unit as a condominium . . . unit;
>
> (v) the owner has made any communication, written or oral, to any person residing in the housing accommodation expressly indicating an intent to sell any unit as a condominium . . .;

(vi) the owner has had any unit in the housing accommodation measured or inspected to facilitate the sale of the unit as a condominium . . . unit;

(vii) the owner has had the land surveyed, an engineering study performed or architectural plans prepared for the purpose of converting such housing accommodation into one or more condominium . . . units" (emphasis added).

These seven factors (i – vii) encompass three different possible time periods where the owner may have engaged in actions related to condominium conversion: (1) post-conversion: the owner *has already converted* the unit into a condominium (i.e. that a condominium master deed and supporting documents have been recorded at the registry of deeds), (2) pre-conversion: actions an owner would normally take *before the unit is converted* into a condominium form of ownership (i.e. measuring the unit, obtaining a land survey, obtaining an engineering study, preparing architectural plans), and (3) pre-conversion and post-conversion: actions that an owner could take *either before or after the unit has been converted* into a condominium (i.e. advertising the unit for sale or showing the unit or unit plans to a prospective purchaser).

As a matter of statutory construction all of these factors must be given consideration to determine whether and when the commencement of a summary process action constitutes a "*condominium . . . conversion eviction.*" Therefore, the ordinance reasonably construed provides that once the owner is determined to have manifest an "*intent to convert*" - even if this *intent* is manifest before the building has been formerly converted to the condominium form of ownership which requires the filing of a master deed and supporting documents at the registry of deeds (G.L. c. 183A, § 8) - the owner cannot commence a summary process action against the tenant to recover possession of the tenant's apartment without first complying with the notice provision of the ordinance.

The only right afforded to the tenant *pre-conversion* (where it is shown that the owner has manifest an *intent to convert*) is the right to time, meaning not having to defend against an eviction action until the owner has first complied with the *notice of intent/notice of termination* provisions of the condominium conversion ordinance. The substantive rights afforded to a tenant under the provisions of the condominium conversion ordinance

– the right to given an *option to purchase* his unit or the right to receive a *relocation assistance* payment - do not vest until the tenant's unit has been converted to a condominium and is offered for sale to the public.

As is made clear from the precise language of the enabling statute and the ordinance, the owner cannot send the tenant a *notice of intent to convert/notice of termination* until the building and apartment has been converted to the condominium form of ownership by filing of the master deed and related documents at the registry of deeds in compliance with G.L. c. 183A, § 8. See, Section 10-2.10 (b) (1) (a) of the ordinance; Chapter 527, § 4 of the enabling statute.

However, the enabling statute and ordinance contain explicit language that place limits on the type of rental property that can be made subject to condominium conversion regulation. Simply stated there must be nexus (a connection) between the proposed or actual condominium conversion on the one hand and the apartment occupied by the tenant on the other. This is a core element of the statutory/ordinance scheme. It is the owner's manifestation of an *intent to convert the apartment occupied by the tenant* into a condominium (and the likelihood that the owner would thereafter sell the existing apartment as a newly created condominium) that would trigger the ordinance-based protections afforded to a tenant facing the risk of losing his apartment to make way for the new condominium owner or a new tenant (who would ostensibly pay the new owner a higher rent to reflect the increased value of the existing apartment as a condominium).

The notice and substantive provisions set forth in the enabling statute and ordinance are intended to afford a tenant under these circumstances some protection from the adverse effects the tenant would likely experience from displacement (eviction) that could be expected to follow the sale of the existing apartment as a newly converted unit.

That the legislative protections afforded to an existing tenant are tied to the existing apartment is obvious. The ordinance requires the owner to give the tenant an *option to purchase* his apartment after it is converted to a condominium and offered for sale to the public. It would be impossible for the owner to comply with the *option to purchase*

provision of the ordinance if the existing apartment was not in fact going to be converted into a condominium within its existing footprint.[9]

An example will illustrate the "impossibility to comply problem" that would result if the ordinance is read to afford protection to a tenant upon a showing that the building will be converted to a condominium form of ownership without an intention to convert the existing apartment into a condominium. Assume that the owner intends to renovate and merge two existing rental apartments (occupied by two different tenants) to create one new condominium. The two apartments would no longer exist as separate distinct dwelling units once the conversion is completed. Under these circumstances the owner could never comply with the *option to purchase* requirement of the ordinance because it would be impossible for the owner to offer both tenants with an option to purchase the one newly created condominium unit. If the owner cannot comply with that provision he can never send the tenants a *notice of intent to convert/notice of termination* that would comply with the notice requirements set forth in the ordinance. There is no language in the enabling statute or ordinance that would support an interpretation that the legislature or city council intended to prevent an owner from recovering possession of rental units as part of a development plan to renovate the building to create new condominium units under these circumstances.

I cannot ignore (or read out of existence) an important provision of the integrated statutory scheme set forth in the condominium conversion ordinance. There is nothing that can be gleaned from the structure of the enabling statute or ordinance that would support an interpretation that the legislature or city council contemplated or considered providing protection to a tenant whose apartment would not remain intact within its existing footprint after the building is converted into the condominium form of ownership.

While it may be a worthy legislative goal to preserve the stock of existing rental apartments from demolition (leading to the construction of new condominium units with

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[9] If the owner intended to subdivide the tenant's apartment into two smaller condominium units (carved from the existing footprint of the apartment) it is at least possible to read the ordinance in a way that would allow the owner to comply with the *option to purchase* provision. The owner could be required to offer the tenant with an option to buy one or both of the newly created condominium units.

different footprint configurations from the existing apartments), that is not how the state condominium conversion enabling statute and the city condominium conversion ordinance are structured. The enabling statute and ordinance are structured to regulate evictions of tenants from a rental apartment only when that existing rental unit is converted into a condominium or there is an intent to convert that existing rental unit into a condominium. The enabling statute and ordinance afford protection to tenants residing in apartments from hardships that may flow from displacement by providing those tenants an *option to purchase* their existing apartment as a condominium (avoiding displacement) or *time* to find another affordable apartment together with relocation assistance (to mitigate any hardship that might flow from the removal of the apartment from the rental housing stock). It is for the legislature and the city council to amend the existing enabling statute and ordinance if they want to impose obligations on the owner (that they can actually comply with) and protections to the tenants under the circumstances at issue in this case involving the proposed development of the 89 Beacon Street property.

Accordingly, I rule as matter of law that there exists a presumption that a summary process action constitutes a "*condominium . . . conversion eviction*" as the term is used in the enabling statute and ordinance, reasonably construed, only if it is shown that the owner has manifest an "intent to convert" an existing rental apartment occupied by a tenant to a condominium and thereafter take steps to offer that apartment for sale to the public after it has been converted to the condominium form of ownership.

If the plaintiff intended (and otherwise manifested an intent) to convert the existing seven rental units at 89 Beacon Street into seven condominiums (each with the same footprint as the existing apartment) then the conversion plan would have been subject to the condominium conversation ordinance. And the tenants residing in each of the seven apartments would have been entitled to procedural protection (at least one year notice of termination before a summary process action is commenced) and substantive rights (the option to purchase their apartment as a condominium and relocation assistance if they chose not to exercise the option) once the property was converted to the condominium form of ownership and the individual unit deeds were recorded in the registry of deeds.

However, based on the undisputed evidence in the summary judgment record the plaintiff does not intend (and has not otherwise manifest an intent) to convert the existing seven rental units at 89 Beacon Street into seven condominiums (each with the same footprint as the existing apartment). The plaintiff's condominium development plan option calls for the demolition of the existing rental units and renovation of the interior space to create two new condominium units. As a matter of law the plaintiff cannot file the master deed and related documents (including the "as built" individual unit plans and deeds) converting the building into a condominium form of ownership until after those renovations are completed. See G.L. c. 183A, § 8. And the plaintiff cannot commence the demolition of the existing units and the renovation of the building while the tenants remain in possession of Unit 7.

It "would yield an absurd or unworkable result," *Adoption of Daisy*, supra. at 76, if given these factual realities the condominium conversion ordinance was interpreted such that the plaintiff's pre-construction marketing of the two proposed condominium units shown in the plaintiff's condominium development plan option was sufficient to manifest its "*intent to convert*" within the meaning of the ordinance. The inevitable sequence that would flow from this interpretation is that so long as the plaintiff manifests an intent to pursue its condominium development plan option it could not commence a summary process action to recover possession of Unit 7 until it sent a *notice of intent to convert/notice of termination* to the tenants that complied with the requirements set forth in the condominium conversation ordinance. However, unless and until the plaintiff completed the renovation project it could not in compliance with state law (G.L. c. 183A, § 8) file a master deed (with the "as built" plans for the units) creating the condominium at the registry of deeds. And for that reason the plaintiff could never send the tenants an ordinance compliant *notice of intent to convert/notice of termination* because the notice could only be sent after the master deed creating the condominium is recorded.[10] If the

[10] The 1983 iteration of Chapter 527, Section 4 (i) (a) provided that the owner could send the tenant a notice of termination if "the owner has filed *or intends to file*" a master deed at the registry of deeds. However, the 1989 amendment to Chapter 527 struck the phrase "*or intends to file*" from Section 4 (i) (a). Accordingly, since the 1989 amendment an owner cannot send the notice of termination until after the master deed is filed

plaintiff cannot terminate the tenants' tenancy with an ordinance compliant *notice of intent to convert/notice of termination*, it can never commence a summary process action to recover possession. If the plaintiff is unable to recover possession of Unit 7 it can never proceed with the demolition and renovation of the building in furtherance of its condominium development plan option. The plaintiff is correct that, if the tenants' interpretation of the ordinance is correct, it would be placed in an impossible position. If it did not withdraw its condominium development plan option it would never be able recover possession of Unit 7 in a summary process action, leaving the tenants with potentially a permanent tenancy.

I believe that the state legislature and the city council could not have envisioned or intended this result, and did not unknowingly incorporate "Catch 22" as a provision of the condominium conversion enabling statute and ordinance.[11]

In summation, I construe the condominium conversion ordinance read together with the state enabling statute in a manner "consonant with sound reason and common sense," *Twomey v. Middleborough, supra. at 268,* to mean that a tenant is entitled to protection from eviction only where the owner "*converts*" or has the "*intent to convert*" to a condominium form of ownership the existing rental apartment occupied by the tenant. The state enabling statute and city ordinance affords a tenant with a presumption that an action to recover possession of a rental unit is a "*condominium conversion . . . eviction*" only after the owner has *converted* or has manifest its *intent to convert* the existing rental apartment occupied by the tenant into a condominium unit. If the owner manifests its "*intent to convert*" the existing apartment into a condominium before the master deed is filed at the registry of deeds, the owner cannot commence an action against the tenant to recover possession of the apartment without first complying with the notice provisions of

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at the registry of deeds. It is the language of this amendment that gives additional weight to the plaintiff's argument that the ordinance was not intended by the legislature to apply to major rehabilitation projects such as the development plan the plaintiff has proposed for 89 Beacon Street.

[11] The definition of "Catch-22," immortalized in Joseph Heller's novel of the same name, is a paradoxical situation from which an individual cannot escape because of contradictory rules. An example would be: To get your first job, you need to have a few years' experience. But in order to gain experience, you need to get a job first.

the condominium conversion ordinance. The owner cannot send the tenant a *notice of intent to convert/notice of termination* compliant with the provisions of Section 10.2.10 (a) (1) and (b) of the ordinance until after the owner records a master deed converting the tenant's apartment into a condominium unit.[12] Finally, to be entitled to protection under the statute and ordinance the tenant must occupy the unit "*at the time of conversion of the property to the condominium . . . form of ownership.*" Section 10-2.10 (d) of the ordinance. The condominium is created (and thus the rental unit is converted) only when the master deed and "as built" plans are recorded at the registry of deeds. See G.L. c. 183A, § 8.

Applying the law to the facts of this case, I find and rule that at the time the plaintiff commenced this summary process action against the tenants it did not have the "*intent to convert*" Unit 7 into one condominium unit (or into two or more smaller units within the same footprint) within the meaning of Chapter 527, Section 3, as amended, and Section 10-2.1 (c) (l) of the ordinance. Specifically, the plaintiff had not prepared or filed a master deed and an "as built" plan showing Unit 7 as a condominium unit. The plaintiff had not prepared and was not in the process of preparing a purchase and sale agreement for the sale Unit 7 as a condominium. The plaintiff has not advertised Unit 7 or any existing unit for sale as a condominium. The plaintiff had not shown any prospective purchaser an existing apartment in the building that was offered for sale as a condominium. The plaintiff had not engaged in any communication directed to the tenants (or the other former occupants of 89 Beacon Street) expressly indicating an intent to convert and sell any existing apartment as a condominium unit. The plaintiff had not measured or inspected any existing apartment to facilitate the sale of that apartment as a condominium. The plaintiff had not prepared architectural plans for the purpose of converting Unit 7 (or the other six apartments) into "one or more" condominium units within the existing footprint of each apartment.

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[12] Typically, if an owner is converting an existing apartment to the condominium form of ownership this is done relatively quickly as it is essentially a paper transaction (preparing and recording a master deed and "as built" plans for the existing apartment). Under these circumstances, the time period between when the owner first manifests an intent to convert and when the owner completes the conversion should not be lengthy. This allows the owner to serve an ordinance compliant notice of intent to covert/notice of termination without undue delay.

The undisputed evidence in the summary judgment record establishes at the time it purchased 89 Beacon Street in January 2017 the plaintiff intended to recover possession of Unit 7 from the tenants at the end of the lease term so that the unit could be demolished (along the other six units and common areas) as part of a planned major renovation of the interior of the building that would transform the building into either two new luxury condominiums or one new single-family residence. The renovation of the building can commence only after the building is vacant. Once the work begins the renovation project will require approximately 18 months to complete. I rule that because the plaintiff did not and does not intend to convert Unit 7 into a condominium unit (within the existing footprint) as part of its condominium development project option, the plaintiff's pre-construction efforts to market the two proposed luxury condominium units did not implicate or trigger obligations owed by the plaintiff or rights conferred upon the tenants under the condominium conversion ordinance.

Accordingly, I rule as a matter of law that the plaintiff's commencement of this summary process action against the tenants to recover possession of Apartment 7 upon the expiration of the second lease term did not constitute a "*condominium conversion . . . eviction*" as defined in Chapter 527, Section 1, as amended; Section 10-2.1 (c) of the ordinance.[13] I rule that since the plaintiff did not manifest an *intent to convert* Unit 7 into

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[13] Since I have determined that the plaintiff's commencement of this summary process action against the tenants does not constitute a condominium conversion eviction within the meaning of the ordinance, I do not need to consider what if any legal consequences flow from the plaintiff's assertion that on October 20, 2017 it decided to proceed with the development of 89 Beacon Street solely as a single-family residence.

In response to the plaintiff's affidavit stating that on October 20, 2017 it decided to develop the property solely as a single-family residence, the tenants' attorney questions whether the plaintiff is acting in good faith. The tenants' attorney writes in his opposition to the plaintiff's amended summary judgment motion that, "[h]aving been caught with its hand in the cookie jar and knowing that it violated the Condominium Conversion laws, Landlord now claims that it has 'definitively' decided not to sell the building as a condominium – despite the fact that its consultants have determined it is the most economically viable use of the building – hoping to unring the bell. Just as a bank robber cannot avoid the implications of his actions by putting the money back, Landlord's 'pinkie promise' not to sell the building as a condominium is irrelevant."

I comment briefly on the tenants' argument. If at the time it commenced this summary process action the plaintiff had two development plans - one that included the conversion of Unit 7 into a condominium and the other that involved development of a single-family residence - I believe that the plaintiff's decision reached

a condominium, it is not subject to the provisions of the condominium conversion ordinance.

Since the plaintiff's proposed development plan for 89 Beacon Street is not subject to the provisions of the condominium ordinance, I rule that the plaintiff's failure to send the tenants a *notice of intent to convert/notice of termination* that complied with the provisions of Section 10-2.10 (a) and (b) does not constitute a defense to the plaintiff's claim to recover possession of Unit 7 in this summary process action.[14]

*Tenants' Retaliation Counterclaim/Defense.* A tenant is entitled to a defense to possession under G.L. c. 239, § 2A and may recover damages under G.L. c. 186, § 18 if the landlord's act of commencing a summary process action (or serving the tenant with a notice of termination upon which the action is based) was in retaliation for, among other things, the tenant's notifying the landlord of a violation or suspected violation of law "which has as its objective the regulation of residential premises." Under Section 2A (in

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on October 20, 2017 (assuming it was made in good faith) would not have rendered moot of the tenants' condominium conversion defense in this summary process action. The relevant time to determine whether the condominium conversion statute applies is the period immediately preceding the commencement of the summary process action. The fact finder would have to determine whether or not based on the evidence relating to the seven factors set forth in the ordinance (including the plaintiff's October 20, 2017 decision to develop the property as a single-family residence) the plaintiff intended to convert Unit 7 into a condominium when it commenced this summary process action in August 2017.

However, it seems obvious to me that if the plaintiff had dismissed this summary process action and commenced a new action after October 20, 2017, the relevant inquiry to determine whether the condominium conversion statute applies would be to determine what the plaintiff intended to do with the building immediately prior to the commence of the new action. Unless the tenants could show that the plaintiff was being deceptive and untruthful, the answer to the question would be that the plaintiff intended to renovate and market the property as a single-family residence, in which case the condominium conversion ordinance would not apply.

[14] It is difficult to reconcile the emergency that led to the enactment of the condominium conversion legislation with the circumstances presented in this case. This litigation does not involve the emergency identified by the legislature flowing from the increased number of condominium conversions that would impact adversely elderly, moderate-income or low-income tenants facing displacement from their affordable rental housing as a result of those conversions. This litigation involves the efforts of tenants (who can afford to pay $4,600.00 per month for their apartment) to prevent or delay the planned renovation and conversion of a residential building (or obtain a sizeable financial incentive from the owner to surrender possession) notwithstanding the fact that there can be little doubt that these tenants would have no difficulty securing alternative comparable rental housing accommodations.

all cases) and Section 18 (except in cases of non-payment of rent), the commencement of a summary process action against a tenant, (or the sending of a notice to quit upon which the summary process action is based) within six months after the tenant has engaged in such protected activity shall create a rebuttable presumption that the termination notice was served as an act of reprisal against the tenant for engaging in such protected activity. The burden then shifts to the landlord to rebut the presumption of retaliation by presenting clear and convincing evidence that such actions were not taken in reprisal for the tenant's protected activities, that the landlord had sufficient independent justification for taking such action, and that the landlord would have taken such action in any event, even if the tenant had not taken the actions protected by the statute.[15]

The tenants' retaliation counterclaim/defense is based on the fact that they sent the plaintiff an e-mail notice on July 27 2017 in which they stated that they had "decided to exercise our rights under the Condominium Conversion law, and so we will be continuing our tenancy." The tenants argue that their sending of this e-mail notice constituted protected activity under the retaliation statutes. They further argue that because the plaintiff commenced this summary process action within six months of that protected activity the tenants are entitled to a rebuttable presumption that the plaintiff's action constituted an act of reprisal against them for engaging in such protected activity. The tenants are correct as a matter of law.

However, the undisputed evidence in the summary judgment record includes clear and convincing evidence sufficient to rebut the presumption of retaliation.

In a letter dated January 5, 2017 (more than six months before the tenants' July 27 e-mail) the plaintiff notified the tenants that it would not be renewing their tenancy upon the expiration of their lease term (August 31, 2017). The plaintiff provided the tenants with approximately seven months advance notice of its intention to recover possession of

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[15]"Clear and convincing" proof means evidence which "induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." *Callahan v. Westinghouse Broadcasting Co., Inc.*, 372 Mass. 582 (1977), quoting, *Dacey v. Connecticut Bar Assoc.*, 170 Conn. 520, 537, n. 5 (1976); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 871 (1975).

the premises when the lease term ended. A similar letter was given to the occupants of the occupants of the other apartments. With the exception of the tenants, the occupants of the other six apartments vacated their units and surrendered possession by the end of their lease terms. The plaintiff commenced this eviction action only when the tenants informed the plaintiff that they would not would not surrender possession when the lease term ended as they were obligated to do under clear and unambiguous terms of the lease.

I find that the clear and convincing undisputed evidence in the summary judgment record establishes that the plaintiff did not engage in any acts of reprisal directed against the tenants. The plaintiff had an independent justification for commencing this summary process action. The sole reason the plaintiff commenced this summary process action was because the tenants refused to vacate Unit 7 at the expiration of the second lease term as they were requested to do by the plaintiff on January 5, 2017 and as they were obligated to do under the terms of the second lease. Based upon the January 5, 2017 notice, the clear and convincing evidence establishes that the plaintiff would have commenced this summary process action against the tenants even if the tenants had not sent the July 27, 2017 e-mail to the plaintiff.

Without the benefit of the presumption there is no evidence in the summary judgment record that would allow a reasonable fact finder to conclude that the plaintiff engaged in any acts of reprisal directed against the tenants.

Accordingly, I rule as a matter of law that the tenants have not established a counterclaim for damages pursuant to G.L. c. 186, § 18 or an affirmative defense to possession pursuant to G.L. c. 239, § 2A.

Tenants' Last Month's Rent Deposit Counterclaim. The tenants allege that, in violation of G.L. c. 186, § 15B (7A), the plaintiff failed to pay interest on the tenants' pre-paid last month rent deposit they had given to the former owner at the inception of their tenancy.

G.L. c. 186, § 2 provides that a lessor must pay interest on a last month's rent deposit "at the rate of five per cent per year or other such lesser amount of interest as has been received from the bank . . . . Such interest shall be paid over to the tenant each year

as provided in this clause." The payment date is the anniversary date of the lease. Section 15B (7A) provides that after the rental property is sold the new owner assumes responsibility for the tenants' pre-paid rent deposit and is required to pay the tenant all interest in accordance with the statute. This obligation exists whether or not the lessor (the former owner) credits the tenants' pre-paid rent deposit to the lessor's successor in interest (the plaintiff). The statute provides that if the lessor fails to pay the accrued interest within thirty days after the termination of the tenancy, the tenant shall be awarded damages equal to three times the amount of accrued interest together with costs and a reasonable attorney's fee.

The undisputed facts set forth in the summary judgment record establish that the tenants entered into a written lease with the former owner, 89 Beacon Street Realty Trust, on September 23, 2015. The first lease was for a term of eleven (11) months commencing on October 1, 2015 and terminating on August 31, 2016. The monthly rent was $4,500.00. The tenants gave the former owner a $4,500.00 last month's rent deposit. The first lease did not include a clause that provided for automatic renewal or extension of the lease.

The tenants and the former owner executed a new second lease on July 12, 2016 with a different term and a different rent from the first lease. The second lease was for a term of one (1) year (rather than eleven months) that commenced on September 1, 2016 and terminated on August 31, 2017. The monthly rent increased to $4,600.00 (from $4,500.00). The tenants gave the former owner a last month rent deposit in the increased amount of $4,600.00 (from $4,500.00). The second lease did not include a clause that provided for automatic renewal or extension of the lease.

After the plaintiff purchased 89 Beacon Street on January 5, 2017, it became the tenants' landlord and assumed all obligations as the lessor under the terms of the *second lease*. The former owner transferred the tenants' $4,600.00 last month's rent deposit to the plaintiff.

The terms "extension" and "renewal" as applied to leasehold interests have clear meaning under the common law.

The term "extension" is used where what is contemplated by the parties is not the giving of a new lease "but a simple prolongation of the original lease for a further term." *Shannon v. Jacobson*, 262 Mass. 463 (1928). With a lease extension a claim based upon an alleged breach of lease (including statutory claims arising from the landlord/tenant relationship) may be based upon conduct or events that occurred during the prior lease term.

The term "renewal" is used where a new lease is given which incorporates the same terms and conditions as existed in the old lease. *Mutual Paper Co. v. Hoague-Sprague Corp.*, 297 Mass. 294, 299 (1937). With a lease renewal, in the absence of an express reservation set forth in the new lease pertaining to conduct that occurred during the prior lease term, a claim based upon an alleged breach of lease (including statutory claims arising from the landlord/tenant relationship) must be based upon conduct or events which occur during the new lease term.

I rule as a matter of law that the *second lease* executed by the former owner and the tenants' constituted a lease "renewal" rather than a lease "extension." Accordingly, the plaintiff assumed responsibility for the former owner's obligations under the terms of the *second lease*. The plaintiff did not assume responsibility for the former owner's failure to comply with lease or statutory obligations that occurred during the *first lease*.

Accordingly, I rule that the plaintiff owed a statutory duty to the tenants to pay interest on the last month's rent deposit in compliance with G.L. c 186, § 15B only with respect to interest that accrued during *the second lease term.*

In a letter dated August 28, 2017 (three days before the second lease expired) the plaintiff tendered payment to the tenants in the amount of $460.00 (in the form of a check payable to the tenants). This payment was tendered before the anniversary date of the second lease. A portion of this payment represented the amount of interest that had accrued on the tenants' last month's rent deposit during the second lease term at the rate of 5% per annum through August 31, 2017 ($230.00).[16]

[16] The plaintiff did not know whether the prior owner had paid interest to the tenants on the last month's rent deposit that accrued during the first lease term (or whether the tenants had deducted the accrued interest from their rent during the first lease term). Exercising caution the plaintiff included in its August 2017 tender of

I rule as a matter of law that plaintiff complied fully with its obligation to pay the tenants interest that had accrued on the $4,600.00 last month's rent deposit during the second lease term in compliance with G.L. c. 186, § 15B.

Accordingly, the plaintiff is entitled to summary judgment on the tenants' G.L. c. 186, § 15B counterclaim.

Consumer Protection Act Counterclaims. The tenants' G.L. c. 93A counterclaims are derivative, in that they are based upon the same factual allegations asserted as the basis for their condominium conversion ordinance claims, their retaliation claims and their last-month rent deposit claim. Since these claims/defenses have not survived summary judgment, there is no evidence in the summary judgment record that would allow a reasonable fact finder to conclude that the plaintiff engaged in any unfair acts or practices with respect to the tenants' occupancy of Unit 7.

Accordingly, I rule as a matter of law that the tenants have not established a counterclaim for damages pursuant to G.L. c. 93A.

Tenants G.L. c. 239, § 8A Defense. Because the tenants have not prevailed on any of the counterclaims they asserted against the plaintiff in this summary process action I rule as a matter of law that the tenants have not established an affirmative defense to the plaintiff's claim for possession pursuant to the counterclaim provision of G.L. c. 239, § 8A, ¶ 1. See, *Meikle v. Nurse*, 474 Mass. 207, 208 (2016).

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payment an amount that it had calculated would be the interest that accrued during the first lease term ($230.00). The plaintiff was under not statutory or contractual obligation to pay the tenants interest that accrued during the first lease term and which the former owner may not have paid. The fact that the plaintiff made this voluntary payment does not constitute an assumption of a duty or an admission of liability under G.L. c. 186, § 15B with respect to interest that may have accrued during the first lease term.

Further even if I were to assume, arguendo, that the plaintiff was responsible for paying interest that accrued during the first lease term, there are no facts set forth in the summary judgment record that would suggest that the former owner failed to pay accrued interest during the first lease term or that the tenants did not deduct the accrued interest from their monthly rent. Defendant Adam Caper states in his affidavit, ¶s 4 and 7, only that he paid a $4,600.00 last month's rent deposit at the "inception of his tenancy" and that he has not received payment of the accrued interest. Caper does not state whether or not he received payment of accrued interest (or deducted the interest from his monthly rent) on the $4,500.00 last month rent deposit associated with his first lease. The deposit amount associated with the second lease was $4,600.00, the amount referenced by Caper in his affidavit.

Plaintiff's Claim for Possession. It is undisputed that that the tenants failed to surrender possession of Unit 7 by August 31, 2017 as they were obligated to do under the terms of the second lease. The tenants notified the plaintiff by e-mail on July 27, 2017 that they had no intention of vacating Unit 7. It is for this reason the plaintiff gave the tenants notice pursuant to G.L Chapter 239, Section 1A, and commenced this summary process action on August 2, 2017 by serving the tenants with a summons and complaint.

The undisputed evidence in the summary judgment record establishes that at the time the plaintiff commenced this action on August 2, 2017 the tenants had communicated with clarity that they intended to remain in possession of Unit 7 after their lease terminated on August 31, 2017. Before commencing this summary process action the plaintiff complied with the procedural requirements set forth in G.L. c. 239, § 1A.

I rule as a matter of law that the plaintiff has established its claim for possession based upon the failure of the tenants to surrender possession of Unit 7 upon the expiration of the second lease term.

Accordingly, summary judgment shall enter in favor of the plaintiff on its claim for possession against the tenants.

## ORDER FOR JUDGMENT

Based upon all the credible evidence submitted as part of the summary judgment record in light of the governing law, it is **ORDERED** that:

1. Judgment shall enter in favor of Plaintiff 89 Beacon Street, LLC on its claim for possession against Defendants Rebecca Yang and Adam Caper;

2. Judgment shall enter in favor of Plaintiff 89 Beacon Street, LLC dismissing Defendants Rebecca Yang and Adam Capper's counterclaims for retaliation

(G.L. c. 186, § 18), failure to pay interest on last month's rent deposit (G.L. c. 186, § 15B) and unfair or deceptive practices (G.L. c. 93A).

**SO ORDERED.**

**JEFFREY M. WINIK**
**FIRST JUSTICE**

**November 29, 2017**

**Cc: Stephen A. Greenbaum, Esq.**
**Martin M. Fantozzi, Esq.**
**Edward Rice, Esq.**
**Christopher Marino, Esq.**