COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

HOUSING COURT DEPARTMENT
CITY OF BOSTON DIVISION
CIVIL ACTION
NO. **00-H84-CV-000149**

BETTE WALKER,
Plaintiff

VS.

BOSTON HOUSING AUTHORITY,
Defendant

FINDINGS OF FACT, RULINGS OF LAW AND INTERIM ORDER FOR JUDGMENT

Introduction

This matter is a civil action for damages in which Plaintiff has asserted claims arising out of the alleged presence of adverse conditions in the public housing unit which she formerly occupied with her six children.

Procedural History

This action was related to and grew out of an earlier summary process action in which Defendant herein sought to evict Plaintiff herein for nonpayment of rent and Plaintiff herein answered and counterclaimed for damages (Exhibit 7). That action and its counterclaims were dismissed. However, at least some of the counterclaims were reasserted in this action which began its protracted procedural history by the filing of the complaint in February 2000 when Plaintiff was still a tenant of Defendant in the public housing unit in question. (She moved out several years later.)

Defendant answered the complaint and demanded a jury trial (which was later waived). Several claims, subject to a motion to dismiss, were resolved by stipulations. In 2002, it appears

that the matter went "off the list" until 2004 during which year the action was subject to a scheduling order to resolve discovery disputes and set a trial date in March 2005, which was later continued by agreement of the parties.

The jury-waived trial took place over part or all of five days and on the following dates: June 6, 7 and 8, 2005, October 5, 2005 and January 13, 2006. At the beginning of trial on June 6, 2005, Plaintiff stipulated that she was pressing only two of her claims: breach of the statutory covenant of quiet enjoyment (including damages for emotional distress) and breach of the warranty of habitability. The Court took into evidence 50 exhibits during the course of the trial. Exhibit 5 consists of individual work orders related to this matter and numbered as separate pages. [1]

Following the trial, the parties requested an opportunity to obtain the tapes and have them transcribed. That request was made in March 2006, the tapes were received in July and were picked up in September of that year.

A transcript not having been prepared or filed, a status hearing was held in April 2007. The parties attempted mediation to resolve the matter in May 2007 but were unsuccessful. The parties appear to have withdrawn their request to prepare a transcript of the trial and instead submitted post-trial requests for findings of fact and rulings of law along with certain other submissions, including Plaintiff's pretrial deposition (Exhibit 50). The parties made arguments before the Court at hearings in May and July 2007 and made their last post-trial submissions in August 2007.

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[1] Defendant moved for a directed verdict at the close of Plaintiff's case and again at the close of all evidence. The Court reserved ruling on the motion. As this case proceeded jury-waived, the Court shall treat the motion as one for involuntary dismissal of the action pursuant to Mass. R. Civ. P. 41(b)(2). The Motion is hereby formally **DENIED** because the Court finds that Plaintiff's evidence, with all reasonable inferences drawn in her favor, was sufficient to support a judgment for her on her claims. See Addis v. Steele, 38 Mass.App.Ct. 433, 436 (1995).

Stipulated Facts

Plaintiff, Bette Walker, and her six children ("the Walkers") resided at Apartment #262 at 15 Franklin Hill Avenue in the Dorchester neighborhood of Boston ("the premises") from approximately February 1997 to June 2002.[2] Plaintiff leased the premises from Defendant, Boston Housing Authority ("BHA"). The premises consisted of four bedrooms, one bathroom, a kitchen and living room. The premises were located in a federally-funded public housing development known as Franklin Hill, which at all times material to this action was owned, operated and managed by Defendant. The development was built in 1952, consists of nine three-story buildings and contains 364 one to five bedroom apartments. During her entire tenancy at the premises, the amount of Plaintiff's rent was calculated at 30 percent of her household income.[3]

Prior to moving to the premises, the Walkers lived at another public housing development in East Boston owned, operated and managed by Defendant. In October 1996, Plaintiff requested that her family be transferred from the East Boston development to another development because of safety concerns (Exhibit 12). In November 1996, Defendant notified Plaintiff that the premises were available (Exhibit 10). Plaintiff agreed to transfer to the premises. In December 1996, Plaintiff signed a lease for the premises that stated her tenancy was to begin on December 16, 1996 (Exhibit 1). However, Plaintiff and her family did not begin residing at the premises until some time in the first half of February 1997.

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[2] The names and birth dates of Plaintiff's children are as follows: (1) Heyward Holman – March 22, 1984; (2) Lamont Holman – June 14, 1985; (3) Leon Holman – August 6, 1986; (4) Bettina Holman – September 21, 1987; (5) Easton Holman – April 3, 1992; and (6) Khadiejah Holman – February 8, 1994.

[3] Plaintiff's monthly rent during the tenancy was as follows: February 1997 through May 1997 - $200; June 1997 through May 1998 - $193; June 1998 through May 1999 - $323; June 1999 through May 2000 - $331; June 2000 through March 2001 - $469; April 2001 through May 2001 - $460; June 2001 through February 2002 - $492; and March 2002 through July 2002 - $479 (Exhibit 27).

Findings of Fact

Viewed as a whole, this case presents several defining and somewhat unusual characteristics. The period for which allegations are made about substandard conditions is quite lengthy, being some 5 years and 3 months, the entire period of the tenancy. However, the number of different conditions complained of is relatively limited, some more serious and others less so, which will be discussed more fully hereafter.

Especially notable, in view of the length of the tenancy and the trial, the number of witnesses from whom testimony was taken was only three: Plaintiff herself, an inspector from the City of Boston's Inspectional Services Department ("ISD") who made one visit to the premises in each of the first three calendar years in which the Walkers resided in the premises (1997-1999) but not in any of the last three (2000-2002), and an employee of Defendant who served as property manager for the Franklin Hill development but only for a period of time which began after Plaintiff had moved out.

The Court is asked, particularly by Defendant, to draw certain inferences from this pattern. The limited (at least in terms of the length of the tenancy) number of visits by ISD is said by Defendant to suggest conditions not nearly as severe as claimed by Plaintiff. And the absence of any other corroborating testimony regarding Plaintiff's allegations from any of her children who lived with her at all relevant times or from any friends or neighbors is said by Defendant to suggest a significant omission that should lead the Court to devalue the credibility of Plaintiff's testimony. Defendant also suggests that such testimony is weakened by vagueness in her testimony as well as an admittedly faulty recollection, particularly of dates, and by inconsistencies between her testimony at trial and that given in her deposition (Exhibit 50).

But, in considering the inferences to be drawn by an analysis of who did and who did not testify, the Court could also not help but note that no property manager of Franklin Hill development who served in that capacity during Plaintiff's period of residency there was called as a witness (although reference was made during testimony to at least two of them by name) nor were any maintenance supervisors or workers who served at that development called.[4] This observation is especially important given the more than 80 work orders for Plaintiff's unit which were put in evidence (Exhibit 5); each of those work orders involved a visit to the unit by one or more of Defendant's employees or an outside contractor. In view of Plaintiff's claims that many of the efforts at repair were ineffectual and Defendant's competing claim that Plaintiff or her children may have caused or contributed to at least some of the adverse conditions, this absence of direct testimony by any employee of Defendant seems unusual.

Another significant area of contention between the parties where the Court is asked to draw an inference (or not) concerns Plaintiff's history of and knowledge about transfers from one BHA development to another and the various available grounds for such transfers. Defendant wants the Court to assess Plaintiff's considerable previous experience at seeking and obtaining transfers against her refusal of several possible transfers from the premises and the absence of any request for transfer from the premises on the grounds of serious deficient conditions, which she had done once before in 1992 with respect to a different development (Exhibit 11).

Francine Lattimore was called as a witness by Plaintiff and was, at the time of her testimony, serving as the property manager of the Franklin Hill development, having started in that position in November 2003, some 17 months after Plaintiff had moved out. Her testimony, under examination by both parties, primarily served to set forth the methods used by Defendant

[4] The BHA employee who was called as a witness was called by Plaintiff. Defendant called no witnesses during the trial.

in processing requests for transfers by tenants as well as the operation of the system of placing, recording and acting upon work orders. She testified essentially as a keeper of Defendant's records but, while familiar with the development and the unit in which Plaintiff had lived, could offer no direct testimony about the conditions there during the relevant time.

Inspector James Holmes of ISD testified as to his three visits to the premises on October 30, 1997, March 9, 1998 and March 29, 1999 and the records he created after each visit (Exhibits 2, 3 and 4 respectively).[5] He had 35 years of experience with ISD so that his knowledge of the relevant codes and applicable laws and procedures is considerable. He expressed a favorable opinion of Defendant's property managers who served at Franklin Hill during the relevant period (identified as "McCarthy" and "Hayes") and seemed comfortable in working with BHA on conditions issues relating to its properties. Nevertheless, he acknowledged the accuracy of the conditions he noted in his three reports, all of which found "cause for action." The Court credits the testimony of Inspector Holmes.

The most important witness was Plaintiff who testified over parts of three days of the trial and who had also given a deposition. Plaintiff had been a tenant of Defendant (at various developments) since 1985 and had some experience in dealing with Defendant's procedures regarding both transfer and maintenance requests.

The Court accepts Plaintiff's testimony that, upon getting approval for a transfer to the premises in November 1996, she accompanied Ruth Santiago (an employee of Defendant whose name appeared on the approval which is Exhibit 10) to view the premises. She spent about 20 minutes there and viewed the entire vacant unit while Ms. Santiago remained in the living room.

[5] His records were his field notes and not the actual notice of violations that would have been prepared and sent to the appropriate parties shortly thereafter; he stated that these could not be located due to the passage of time. Based on his testimony as to his regular practice, the Court finds that Defendant did receive notice of these violations.

She found the unit to be in a state of disrepair: baseboards were not fully attached, both the medicine cabinet in the bathroom and the kitchen cabinets were very dirty, the toilet lacked a seat and the kitchen lacked a stove. Plaintiff complained to Ms. Santiago who told her that the unit would be properly prepared prior to her move-in but that if she did not accept it she would go to the bottom of the list for transfers.

She did accept the unit and called Ms. Santiago on several occasions to inquire about its readiness. She signed the lease in December but the unit was still not ready. She finally spoke to a secretary at the Franklin Hill development who said that the unit was ready and she could pick up the keys and move in.

Plaintiff could not precisely recollect the date of her move-in but recalled that it was a Friday night in February 1997. While the unit had been cleaned of the debris that she had seen in November and the kitchen had a stove, many of the conditions which she had seen remained. In particular, it appeared that Defendant's staff had not addressed the bathroom: the toilet still lacked a seat, there was no rod for a shower curtain and there was no bathroom sink, it having either fallen off or been removed. It was too late to call that evening but she called the next day and Defendant's staff responded over the next several days as related elsewhere herein.

The Court concludes that Defendant's staff had performed some, but not all, of the work needed to properly prepare the unit, and Defendant either failed to inspect the unit prior to the Walker's move to the premises or a miscommunication occurred between the staff performing that work and the secretary who told Plaintiff that she could pick up the keys and move in.

The remainder of Plaintiff's testimony related to other conditions with which she dealt during the remainder of her tenancy, the steps she took to deal with them and her history of and

experience with seeking transfers between BHA developments, both before her move to the premises and during her last several years there.

The Court will discuss her testimony as to other conditions later herein. It is enough to say for now that, despite imperfect recollection and some inconsistencies brought out on cross-examination, Plaintiff's testimony was generally consistent and credible as to the conditions throughout the period of her tenancy at the premises. Her testimony was also supported in important particulars by the testimony of Inspector Holmes, his field notes and the work orders.

I find that Plaintiff moved into the premises on Friday, February 7, 1997 and that the unit was not ready for occupancy by her and her children despite the representations made by Ruth Santiago, Defendant's employee, several months before and Plaintiff's signing of the lease in December 1996. Further, I find that Plaintiff began almost immediately to notify Defendant of the faulty conditions in the unit, particularly (and most urgently) those related to the bathroom to be used by the seven people who were to occupy the unit.

Defendant makes much of the fact that the complaint in this case (Exhibit 6) and the presentment letter (Exhibit 8) state the date of her initial occupancy as February 13, 1997.[6] Defendant sought to show that the bathroom problems which Plaintiff claims to have confronted upon moving in had in fact been remedied prior to her move-in (and that Defendant had no notice of any deficient conditions in the unit until October 1997). However, the Court accepts the contention of Plaintiff that the dates in the complaint and presentment letter were in error and will conform the pleadings to the facts as shown by the evidence at trial.

[6] Both the complaint and presentment letter were filed in the first half of 2000, some three years after the tenancy began. The presentment letter sought to advance tort claims for personal injury to Plaintiff and her children, but these were not pursued.

The several work orders relating to the "sink off the wall" and other bathroom issues are dated February 9, 1997 and February 10, 1997 (Exhibit 5, pp. 44, 45, 46 and 47). The first of these states that it was "initiated by Tenant" on February 9, 1997. It also bears Plaintiff's signature on a "Work Order Ticket" and that of an employee of Defendant and seems to indicate a one-hour visit. The next three work orders (pp. 45-47) appear somewhat duplicative in describing follow-up work done on February 10 and 11 for a total of some 4.5 hours. The "materials used" description relates to replacement of a sink and its related fixtures.

When Ms. Santiago showed the unit to Plaintiff in November 1996, the unit was vacant and in a defective condition. The Court will not find (and does not understand Defendant to even contend) that a different "tenant" occupied the unit on the dates of the work orders. It is far more likely, based on the evidence before the Court (which included not one witness who worked for Defendant at the relevant times), that the unit was not properly prepared in advance of Plaintiff's move-in.[7]

It is true that Defendant responded within several days and addressed the most egregious of the bathroom complaints. However, the Court finds that the evidence shows that such repairs were not properly made and that problems later developed as a result (such as leaky pipes beneath the sink causing water on the bathroom floor) (Exhibit 5, pp. 77 and 85).

Most importantly, the Court finds that Defendant knew or should have known of the existence of the defects in the premises at the outset of the tenancy. Defendant certainly responded many times and generally promptly to the complaints over the next several years, discovered some of the problems itself during periodic inspections which it conducted (shown on

[7] The move-in date which the Court has found is also consistent with the rent ledger for Plaintiff in Defendant's records where rent for February was allocated between the premises and the East Boston unit. Plaintiff was leaving and a "move-out" date of February 4 was noted (Exhibit 27, p. 8). Ms. Lattimore testified that tenants involved in a transfer would generally have about one week to effect the move.

the work orders as having been identified by "management" as opposed to "tenant") and may not be fully responsible for some of them as being minor or caused by excessive wear and tear. However, where repairs were delayed for an exceedingly long time (as with the kitchen cabinets) or were ineffectively performed (as with the pest infestation and the bathroom sink repairs). Plaintiff and her children lived with conditions that did not meet the legal standard.

The cabinets in the kitchen, both upper and lower, were in disrepair. This was a condition of which the Court will find that Defendant had constructive notice at the outset of the tenancy in February, 1997 and actual notice on the several occasions when Plaintiff complained or when its maintenance person made a comment.[8] The bottom shelf of the bottom cabinets was soft and deteriorating; Plaintiff could not store any kitchen utensils there. When Defendant's workers did first address that particular problem, they simply placed new plywood over the deteriorating wood (Exhibit 31). The kitchen cabinets were not properly replaced until October 1999.

The poor condition of the cabinets reflected or was related to the defective condition of the baseboards and walls in the stove area and the rest of the kitchen. Holes and gaps allowed mice and other pests to infest the kitchen area (Exhibit 34; Exhibit 5, p. 91). Plaintiff made some efforts to close these holes herself and received little effective assistance, at least for a substantial period of time, from Defendant's staff.

Similarly and not surprisingly, the kitchen counters were also in a deteriorated condition and had become loose and difficult to keep clean and therefore use in food preparation (Exhibits 35 and 36).

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[8] The first work order relating to kitchen cabinets is from March 14, 1997 (just one month after the inception of the tenancy) and was "initiated by management" (Exhibit 5, p. 49). Given the persistent and unmet problems relating to the cabinets, as shown in the various later work orders and the photographic evidence, it is a fair inference that the cabinets were also in disrepair when the tenancy began. See also Exhibit 5, pp. 66, 73, 82 and 83.

Pest infestation was a chronic problem in the premises relating to both mice and cockroaches. Plaintiff produced a number of pictures of mice caught on traps in her unit (Exhibits 38 through 42 inclusive and Exhibit 45) and made numerous complaints beginning in November 1997, as indicated on the work orders (Exhibit 5, pp. 55, 60, 67, 68, 91, 92, 105, 118 and 122). All three ISD reports from Inspector Holmes (over a period spanning 18 months) noted the infestation problem. (Exhibits 2, 3 and 4). Defendant performed exterminations at regular intervals but these were only partially successful (in part due to the structural shortcomings in the unit such as the holes detailed earlier). The Court accepts Plaintiff's testimony that mice were found in various rooms within the unit and that they were numerous and persistent, so much so that they ate holes in her living room couch (Exhibits 43 and 44).

Defendant attempts to undercut Ms. Walker's testimony by pointing to the fact that she testified that she estimated that she saw four mice per day in the unit. Defendant characterizes this as an unsupportable and wild allegation of over 6000 mouse sightings in a 20-month period and suggests that that level of infestation would have resulted in more calls to maintenance and/or to ISD. The Court interprets Plaintiff's testimony differently: she did have faulty recall regarding dates and the precise sequence of events. She also, under cross-examination, became somewhat defensive and prone to imprecision and possibly exaggeration. Her testimony is taken to mean that she may have seen up to four mice per day and not four on each and every day. Her overall credibility and the documentary evidence from both Defendant's records and those of ISD provide ample support for her assertion that sightings of mice and cockroaches were regular and persistent.

Several other conditions were regularly complained of as well: defects with radiator shut-off valves, missing window screens or screens that were in disrepair and an entry door to

the unit that was not operating properly and that on one occasion caused Plaintiff to be locked in her apartment. These conditions, while not as serious on the whole as the ones relating to the kitchen, the bathroom and the pest infestation, nevertheless added to a unit wherein Plaintiff and her children lived in conditions that did not meet the standards of the Sanitary Code and many of them persisted, albeit in sporadic fashion, through the end of Plaintiff's residence in the premises (Exhibit 5, pp. 110, 119, 123, 124 and 128 [dealing with leaking radiators, broken light fixtures and the absence of screens in 2001 and 2002]).

Several weeks after Plaintiff moved in, a fire occurred in a nearby unit and Plaintiff had to evacuate for a short time with her children. A report of the Boston Fire Department shows that the premises experienced some smoke and water damage (Exhibit 47). While the Boston Fire Department removed water that had entered Plaintiff's unit, the Court accepts Plaintiff's testimony that Defendant never fully cleaned the premises after the fire and that the residual effects contributed to the overall deteriorated condition.

For reasons which are not entirely clear, during the last several years of Plaintiff's tenancy at the premises, the conditions improved and Plaintiff has conceded as much. The kitchen cabinets were replaced in October 1999, there were no further visits by ISD after March 1999 and the number of work orders dropped off significantly.[9]

As is frequently the case, the claims of both parties seek too much. The Court finds that Plaintiff, while generally credible, had faulty recollection and exaggerated, in some instances, the frequency and severity of the conditions about which she complained. Defendant made regular and generally prompt efforts to address Plaintiff's concerns regarding both the conditions in the

[9] The number of work orders for the premises by calendar year is as follows: 1997-19; 1998-19; 1999-16; 2000-9; 2001-10; 2002-8.

unit as well as the transfer requests but must be responsible for the lack of success of those efforts in properly remediating the conditions under which Plaintiff and her children lived.

The Court finds that the conditions in the premises taken together during the period from February 1997 through and including the month of October 1999 (a period of 33 months) reduced the value of the unit by 40 percent. Thereafter, from November 1999 through Plaintiff's vacating the premises in June 2002 (a period of 32 months) the conditions were such that the value of the premises was reduced by 10 percent.

Defendant sought, through cross-examination of Plaintiff, to suggest that she was responsible for the occurrence (or reoccurrence) of some the conditions through either poor housekeeping or improper supervision of her six children, which resulted in unreasonable amounts of wear and tear in the unit. The Court, in its review of the work orders that constitute Exhibit 5, takes note that some of the items, such as the toilet stoppages and the replacement of bedroom light fixtures, reoccurred and seemed to be readily addressed by Defendant. These were also not conditions that in their duration or their nature represented a materially adverse impact on the living conditions for Plaintiff or her family and they may have resulted from the number of children, from small ones to teenagers, living and playing in a relatively small (and one-bathroom) apartment unit. They, therefore, are not weighted heavily by the Court in its analysis of the diminution of the value of the unit.

Nevertheless, on the whole, Defendant's effort to cast responsibility for the more serious conditions (the pest infestation and the problems in the bathroom and the kitchen) on Plaintiff is unavailing. There is no direct evidence, either testimonially or in the numerous documents, that

the children or Plaintiff caused any of the conditions or damage to any part of the unit.[10] If at any time during this long tenancy, Defendant or its workers believed that that was the case, they did not appear to allege or note it in any of the work orders or elsewhere. Moreover, it is instructive to note that Defendant's own evaluation of Plaintiff for purposes of the 1992 transfer request due to alleged maintenance problems indicated that her housekeeping habits were "good" (Exhibit 11, part 2).

The Court recognizes the considerable age of the Franklin Hill development (constructed in 1952) and that the units therein, despite considerable efforts by Defendant over the years, are not going to be pristine in every respect. Nonetheless, it appears that Plaintiff's unit did not, during the period of its vacancy prior to the inception of Plaintiff's tenancy nor for a considerable period thereafter receive the effective attention that it should have in bringing some of its basic structural elements and appurtenances up to the requisite standard.

Defendant also sought in the introduction of documentary evidence, its cross-examination of Plaintiff and in its post-trial argument to convince the Court that Plaintiff's rejection of several offers in response to her request for transfer from the premises casts doubt on her testimony regarding the adverse conditions in the unit.[11] The Court has considered all of such evidence and argument and is not convinced. First, the initial transfer request made while Plaintiff was residing at the premises occurred in February 2000 (Exhibit 13) on the basis of security concerns regarding her children and the request was renewed over the next several years (Exhibits 14 and

[10] Plaintiff did concede that small children might create crumbs when eating. This was an honest (and even obvious) admission, but it was followed by a strong and credible assertion that Plaintiff would regularly clean the kitchen and other parts of the unit with at least her older children assisting her.

[11] Defendant framed some of its argument in this regard in terms of "mitigation of damages," suggesting that Plaintiff had a duty to vacate the unit due to the conditions. Being very doubtful of the applicability of such doctrine in the context of landlord-tenant law in Massachusetts, the Court will analyze such suggestion only in terms of the credibility of her testimony.

18). This, however, was the very period when Plaintiff conceded (and the Court finds) that the conditions had improved.

Second, Plaintiff's rejections of the transfers were for reasons that were understandable, having to do with her need of a large unit and the medical needs of one of her children (Exhibits 19 and 22). The Court's conclusion in this regard is supported by the circumstance that, after Defendant withdrew her application from consideration for allegedly unreasonable refusal of offers of housing (Exhibit 23), she prevailed in her appeal to a BHA grievance panel (Exhibit 28).

Finally, Plaintiff did accept an offer of transfer to the Bromley-Heath development, (which she occupied at the time of trial) thus supporting the legitimacy of her original transfer request and her rejections of subsequent offers of units (Exhibits 25 and 26). Her request for transfer based only on security concerns and her need for a particular type and location of unit are not inconsistent with her separate concerns and complaints regarding conditions, many of which had already been addressed by that time.

Judicial Notice of the State Sanitary Code

Defendant contends that the Court must find in its favor on all of Plaintiff's claims because Plaintiff neither sought to introduce the State Sanitary Code at trial nor requested the Court take judicial notice of it and, therefore, is unable to prove her prima facie case. As it is required to take judicial notice of the contents of the State Sanitary Code, the Court disagrees.

The general rule in Massachusetts is that courts do not take judicial notice of regulations. Passanessi v. C. J. Maney Co., 340 Mass. 599, 604 (1960). However, "[t]his rule has been overridden in part by G.L. c. 30A, § 6, which requires judicial notice of regulations published in the Code of Massachusetts Regulations [("CMR")]." Shafnacker v. Raymond James &

Associates, Inc., 425 Mass. 724, 730 n. 7 (1997) (citing Saxon Coffee Shop, Inc. v. Boston Licensing Board, 380 Mass. 919, 926 (1980)). Judicial notice of the contents of the CMR is mandatory; a party need not request that the court take judicial notice of them or otherwise bring them to the court's attention. See Mass. G. Evid. § 202 (2008-2009).

Chapter II of the State Sanitary Code (Minimum Standards of Fitness for Human Habitation) is codified in the CMR at 105 CMR 410.000. As such, the Court is obligated to take judicial notice of the minimum standards of fitness for human habitation as set forth in the State Sanitary Code and the Court has done so in making its findings herein.

Fair Market Rental Value of a Public Housing Unit

For the purpose of ruling on Plaintiff's warranty of habitability claim, the Court will first determine the best method of establishing the fair market rental value of a public housing unit, a difficult question not frequently addressed and remaining unsettled. Cf. Cruz Management Co., Inc. v. Wideman, 417 Mass. 771, 776 (1994); Darmetko v. Boston Housing Authority, 378 Mass. 758, 759-760 (1979); Boston Housing Authority v. Hemingway, 363 Mass. 184, 203 (1973).

The parties have proposed four methods for establishing the fair market rental value of a public housing unit: (1) equate the fair market rental value with the tenant's subsidized contract rent; (2) equate the fair market rental value with the fair market rental value of comparable market rate units; (3) equate the fair market rental value with the public housing authority's ("PHA") operating costs or (4) equate the fair market rental value with the "flat rent" or, formerly, the "ceiling rent" established for the unit.[12]

[12] The parties submitted the following information relating to these four methods as part of their Stipulation of Facts: (1) the relevant U.S. Department of Housing and Urban Development's ("HUD") published fair market rents ("FMR") for the Section 8 Housing Assistance Payments Program from 1997 through 2002; (2) median advertised rents published in the Boston Sunday Globe newspaper from 1998 through 2002; (3) the BHA's operating costs for the Franklin Hill Development; and (4) the relevant flat rent established in 2000.

In Boston Housing Authority v. Williams, Boston Housing Court Docket Nos. 98-SP-002641, 97-CV-001005 (Winik, J. Oct. 31, 2000), this Court analyzed the first three of the four methods proposed by the parties for establishing the fair market rental value of a public housing unit. The Court's analysis of each method is summarized below.

The Court in Williams determined that the amount of a public housing tenant's monthly rent did not bear on the fair market value of the unit. The Court noted that because the amount of a tenant's contract rent in public housing is based on household income and is adjusted up or down based on changes in such income, the rent paid for similar units in the same development can vary substantially. The Court therefore concluded that a public housing tenant's monthly rent "bear[s] no meaningful relationship to the fair rental value of [the unit] ... ."

The Court further stated that it was not satisfied that the fair market value of comparable market rate units provides an accurate measure of value in the context of public housing.[13] The Court noted that "[t]here exist many differing variables (cost of construction, taxes, insurance, maintenance, eligibility requirements, return on investment, economic risk, governmental control or regulations, etc.) that make it difficult, if not impossible, to allow for a meaningful comparison of public and private housing values." For this reason, the Court did not accept the use of the HUD FMR as an accurate measure of the fair market value of a public housing unit because it concluded that the HUD FMR, which reflect the rental values of private housing units, bears no reasonable relation to the value of public housing units. Similarly and for other reasons, the Court also rejected the use of the private market apartment rental advertisements as a measure of the value of public housing units.

[13] The tenant in Williams introduced private market apartment rental advertisements listed in the Boston Globe as well as the HUD FMR.

The Court ultimately concluded that the operating cost of a public housing unit, while imperfect, constitutes the most accurate basis for establishing the fair rental value of a public housing unit. The per-unit operating cost represents the amount of funds that the PHA receives for each unit. Although the per-unit operating cost is not unit-specific and represents the average operating cost for all units in a particular development, the Court found that it provides a reasonable equivalent of the fair market rent received by a private landlord or a Section 8 subsidized landlord. The Court reasoned that establishing the fair market value of a unit at the operating cost for the unit avoids the arbitrariness associated with relying on a public tenant's contract rent as well as the risk that the PHA would be assessed an unjust penalty by using the fair market rental value of comparable market rate units.

I agree with the Court's analysis in Williams to the extent that it did not consider the use of a public housing unit's "flat" or, formerly, "ceiling" rent in establishing the fair market rental value of a public housing unit.

Flat rents were established as part of the Quality Housing and Work Responsibility Act of 1998 ("QHWRA"). Due to the passage of QHWRA and implementation of subsequent HUD regulations, public housing tenants now choose to pay as rent either the flat rent established for a unit or rent based on a percentage of the tenant's income. 24 CFR § 960.253(a)(1). A unit's flat rent is determined by the PHA, based on the market rents of comparable private market units, and approximates the rent for which a PHA could promptly lease the unit. 24 CFR § 960.253(b)(1). In establishing a unit's flat rent, the PHA must consider the location, quality, size, and age of the unit as well as any amenities, services and utilities provided by the PHA. 24 CFR § 960.253(b)(2)(i) and (ii).

When flat rents were implemented, ceiling rents were phased out. Similar to flat rents, ceiling rents provided a cap on the amount of a rent a public housing tenant would have to pay for a unit. However, the methods for establishing ceiling rents, which changed over the years, were not necessarily tied to or representative of the actual fair market value of the unit. After eliminating ceiling rents from public housing in 1981, Congress restored PHAs' authority to set ceiling rents in 1987. National Housing Law Project, *PHAs, Rents and the Working Poor* <http://www.nhlp.org/html/hlb/698/698phas.htm> (accessed May 21, 2009). The 1987 legislation required that ceiling rents had to cover the debt service and operating costs of the unit. Id. Ceiling rents were later required to cover a unit's operating costs, but not the debt service, and were permitted to be set in accordance with the HUD FMR or set at the 95th percentile of rents being paid for comparable units in the same development. Id. With the passage of QHWRA, a method of establishing transitional ceiling rents was put into place. PHAs that had elected to set ceiling rents prior to October 1, 1999 were permitted to retain those ceiling rents for a period of three years; after that time, such ceiling rents were to be adjusted to flat rent levels. 24 CFR § 960.253(d).

I find that flat rents best approximate the fair market value of a public housing unit. As noted above, they are established after consideration by the PHA of particular aspects of the unit including its size and the amount is set at a level that allows an existing tenant to pay less than an amount calculated on income but high enough (and presumably closer to a market level) to provide a financial benefit to the PHA.

However, the flat rent as set by the BHA for a four-bedroom apartment of $967.00 was only established beginning in 2000. Stipulation of Facts, Paragraph 11 and Exhibit D thereto. The Court is reluctant to use that amount for any period prior to 2000. Therefore, the value of

Plaintiff's unit for purposes of ruling on the warranty of habitability claim will be $967.00 for 2000 through the end of her tenancy.

Prior to that year, I rule that the operating costs are the best measure of the value of the unit. These amounts vary over the earlier period of Plaintiff's tenancy and are also set forth in the Stipulation of Facts as follows: February and March 1997 - $485.00; April 1997 through March 1998 - $479.00; April 1998 through March 1999 - $528.00; April 1999 through December 1999 - $559.00. Stipulation of Facts, Paragraph 9 and Exhibit C thereto.

Warranty of Habitability

There exists with respect to every residential tenancy, an implied warranty of habitability that the premises are fit for human habitation. A landlord is in breach of this warranty where there exist defects that may materially affect the health and safety of occupants. Hemingway, 363 Mass. at 199. A tenant is not entitled to receive damages for minor defects and not every defect gives rise to a diminution in rental value. Isolated violations do not necessarily constitute a breach of the warranty. McKenna v. Begin, 5 Mass.App.Ct. 304, 308 (1977). A breach of the implied warranty of habitability occurs from the point in time when a landlord had notice or should have known of a substantial defect or substantial Sanitary Code violation in the apartment. The breach continues until the defect or violation is remedied. See Berman & Sons, Inc. v. Jefferson, 379 Mass. 196 (1979) (landlord in breach of warranty from first notice of substantial Sanitary Code violations that recurred over time despite the landlord's efforts to repair). When a breach of the implied warranty of habitability occurs, a tenant is entitled to damages equal to the difference between the fair market value of the premises as warranted and the fair market value of the premises in their defective condition, even if the contract rent is less than that fair market value. Haddad v. Gonzalez, 410 Mass. 855, 872-873 (1991).

The Court rules that the presence of the adverse conditions at the premises testified to by Walker and Holmes and contained in the ISD inspection reports, specifically the deficient conditions found in the kitchen and bathroom, the chronic pest infestation and the aggregate of the more minor conditions such as the defective radiator shut-off valves and missing window screens, materially affected the health and safety of the Walkers and constituted a breach of the implied warranty of habitability. The Court finds that many of these conditions were present when Plaintiff moved into the premises on February 7, 1997 and therefore that Defendant was or should have been on notice of these conditions at least as of that date. Further, Defendant's employees and/or Plaintiff at various times provided Defendant with actual notice of those relevant adverse conditions which developed during the Walker's tenancy at the premises.

Having established Defendant's breach of the implied warranty of habitability, Plaintiff is entitled to damages equal to the difference between the fair market value of the premises as warranted and the fair market value of the premises in their defective condition. The Court finds that the fair rental value of the premises in good repair was $485.00 from February 1997 through March 1997, $479.00 from April 1997 through March 1998, $528.00 from April 1998 through March 1999, $559.00 from April 1999 through December 1999, and $967.00 from January 2000 through June 2002. Further, based on the Court's determination of when Defendant had actual or constructive notice of the various relevant conditions, when such conditions were abated, and the aggregate effect of such conditions as described above on the habitability of the premises, the Court finds that the fair rental value was reduced on average by 40% for the period running from February 1997 through October 1999 and reduced on average by 10% for the period running from November 1999 through June 2002. Therefore, Plaintiff is entitled to a rent abatement as follows: $388.00 for February through March 1997, $2,299.20 for April 1997 through March

1998, $2,534.40 for April 1998 through March 1999, $1,565.20 for April 1999 through October 1999, $111.80 for November 1999 through December 1999, and $2,901.00 for January 2000 through June 2002. Accordingly, the amount due Plaintiff on her counterclaim for breach of the implied warranty of habitability is $9,799.60.

Quiet Enjoyment

G.L. c. 186, §14 provides that a landlord who directly or indirectly interferes with a tenant's quiet enjoyment of the premises shall be liable for the greater of actual and consequential damages or three month's rent, plus costs and reasonable attorney's fees. While the statute does not require the landlord's conduct be intentional, Simon v. Solomon, 385 Mass. 91 (1982), it does require proof that the landlord's conduct caused a serious interference with the tenant's quiet enjoyment of the premises. A serious interference with the tenant's quiet enjoyment is an act or omission that impairs the character and value of the leased premises. Doe v. New Bedford Housing Authority, 417 Mass. 273, 284-85 (1994); Lowry v. Robinson, 13 Mass.App.Ct. 982 (1982). A landlord violates G.L. c. 186, s.14 where it had notice or reason to know of a serious condition adversely affecting the tenant's use of the apartment and failed to take appropriate corrective measures. Al Ziab v. Mourgis, 424 Mass. 847, 850-851 (1997); Cruz Management Co., Inc. v. Thomas, 417 Mass. 782, 789 (1994). A tenant is entitled to a separate awards of damages for each factually distinguishable breach of G.L. c. 186, § 14. See e.g. Locke v. Austin, 1999 Mass.App.Div. 257 (citing Ianello v. Court Management Corp., 400 Mass. 321 (1987)).

The Court finds that Defendant committed two factually distinguishable breaches of Plaintiff's right to quiet enjoyment of the premises. First, Defendant's failure to have the premises timely prepared for the agreed upon commencement of the tenancy in December 1996

such that the Walkers were unable to inhabit the premises until two months later in February 1997 and then, due to the state of the bathroom in particular, in a nearly unlivable condition, constitutes a serious interference with the Walker's quiet enjoyment of the premises. As no actual damages were proven, Plaintiff is entitled to recover three month's rent ($600.00) plus costs and reasonable attorney's fees for this breach.[14] Second, Defendant's failure to adequately correct the conditions that the Court has found to have existed at the premises from February 1997 through October 1999 in a timely manner after receiving notice of such conditions constitutes a separate breach of the statutory covenant of quiet enjoyment. Negligence to this degree and over this period of time goes to the character and essential value of the tenancy so as to breach this statutory covenant. For this separate breach, Plaintiff is entitled to recover as actual damages the amount the Court has determined the fair market rental value of the premises were diminished between February 1997 and October 1999 ($6,786.80) (plus costs and reasonable attorney's fees), that amount being greater than three month's rent.[15]

Double Recovery

Plaintiff is entitled to rely on whatever theory of recovery grants her the greatest measure of damages, but she may not recover duplicative damages for the same injury. Wolfberg v. Hunter, 385 Mass. 390, 401 (1982). Plaintiff may not recover the damages assessed against Defendant for breach of the warranty of habitability as well as the damages assessed against it

[14] Under the doctrine of the warranty of habitability, damages are assessed in terms of the fair market rental value of a unit. G.L. c. 186, § 14, however, provides that a tenant, in the absence of actual damages, is entitled to recover "three month's rent" for breach of quiet enjoyment. Accordingly, the Court has calculated Plaintiff's damages using the contract rent paid by Plaintiff during the inception of her tenancy at the premises (when the breach occurred).

[15] At the hearing held on July 25, 2007, Plaintiff conceded that proper presentment under G.L. c. 258, § 4 of her emotional distress claims was required but not made in this case and therefore she is unable to recover damages for emotional distress, including under a theory of breach of quiet enjoyment. Incidentally, the Court notes that even if presentment was not required here, the Court did not find Plaintiff's evidence on the issue of emotional distress particularly compelling.

for the second breach of the statutory covenant of quiet enjoyment, as both damages compensate Plaintiff for the same injury. Accordingly, the Court will award Plaintiff only the greater of the two damages (those assessed under the warranty of habitability). However, Plaintiff is entitled to recover costs and attorney's fees associated with the prosecution of both quiet enjoyment claims.

INTERIM ORDER FOR JUDGMENT

Based upon all the credible testimony and evidence presented at trial in light of the governing law, it is **ORDERED** that:

1. Judgment enters for Plaintiff on her claim for breach of the warranty of habitability in the amount of $9,799.60;
2. Judgment enters for Plaintiff on her first claim for breach of quiet enjoyment in the amount of $600.00 plus costs and attorney's fees to be determined by the Court;
3. Judgment enters for Plaintiff on her second claim for breach of quiet enjoyment in the amount of $0.00 plus costs and attorney's fees to be determined by the Court;
4. Plaintiff shall file a Motion for Attorney's Fees and Costs, with supporting affidavits, within 30 days from the date of this Interim Order for Judgment. Defendant shall have 20 days from its receipt of such motion to respond to it. Final judgment shall enter after a hearing on the Motion.

STEVEN D. PIERCE
CHIEF JUSTICE

Date: June 9, 2009

cc: **Constance A. Brown, Esq.**
Jay Scott Koplove, Esq.

Guillermo Garza, Assistant Clerk-Magistrate