NOTICE: THIS IS AN UNPUBLISHED OPINION.

Appeals Court of Massachusetts.
Leon KACHADORIAN
v.
Michael **LARSON**.

No. 13–P–1323.
March 23, 2015.

By the Court (RAPOZA, CJ. BROWN & BERRY, JJ.[FN6]).

FN6. The panelists are listed in order of seniority.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** The plaintiff landlord, Leon Kachadorian (landlord), appeals from a Housing Court judgment for possession in favor of the defendant tenant, Michael **Larson**, as well as the award of $27,760 in damages for the tenant. The primary issue in this appeal concerns the judge's award of $10,000 in compensatory damages to **Larson** and the judge's decision to treble that amount for the landlord's wilful and knowing violation of G.L. c. 93A. We affirm the award of $10,000 in compensatory damages for the violation of State and Federal fair housing laws, G.L. c. 151B, § 4(7B),[FN1] and 42 U.S.C. § 3604(c) (2012).[FN2] However, because we conclude, on this record, that there was not a G.L. c. 93A violation, we vacate the trebling of the damages under G.L. c. 93A.

FN1. General Laws c. 151B, § 4(7B), inserted by St.1989, c. 722, § 18, forbids:

> "[A]ny person to make[,] print, or publish, or cause to be made, printed, or published any notice, statement or advertisement, with respect to the sale or rental of multiple dwelling ... housing accommodations that indicates any preference, limitation, or discrimination based on ... handicap or an intention to make any such preference, limitation or discrimination except where otherwise legally permitted."

FN2. 42 U.S.C. § 3604(c) provides, in relevant part:

> "[I]t shall be unlawful ... to make, print, or publish ... any ... statement ... with respect to the ... rental of a dwelling that indicates any preference, limitation, or discrimination based on ... handicap ... or an intention to make any such preference, limitation, or discrimination."

1. *Factual and procedural background.* The following is a summary of the trial evidence. **Larson**, who had a history of late rental payments, paid only $400 of the $800 rent due on February 1, 2013. The landlord sent a legally sufficient notice to quit for nonpayment of rent, and when the balance remained unpaid, he commenced the summary process action on February 20, 2013. **Larson** asserted an affirmative defense for breach of the implied warranty of habitability and a counterclaim for violation of State and Federal fair housing laws. As to the affirmative defense of breach of the warranty of habitability, the Housing Court judge found that the landlord knew of a mice infestation in August, 2012, prior to **Larson's** breach for nonpayment. The judge further found that the breach of warranty reduced the fair rental value of the unit by ten percent, to $720 per month, setting the arrears owed by **Larson**, who had not paid rent since the partial February, 2013, payment, at $2,240.

As to **Larson's** counterclaim, the judge found that at the inception of the tenancy, the landlord did not know that **Larson** was HIV positive and that he discovered this fact when he saw **Larson's** case manager emerge from an AIDS Project Worcester (APW) office in October, 2012. The landlord then immediately drove to **Larson's** apartment and angrily confronted him, asking if he had AIDS, expressing regret that he had ever signed verification documents with APW for **Larson**, and telling **Larson** that he wanted **Larson** to move. The landlord made similar statements to **Larson** in a confrontation on February 27, 2013, while the summary process action was proceeding, in front of a friend of **Larson's**, and refused **Larson's** and APW's tender of payment for the arrears at that time. [FN3]

FN3. It is not disputed in this appeal that the landlord violated G.L. c. 151B, § 4(7B), and 42 U.S.C. § 3604(c).

The Housing Court judge's findings of violation of the State and Federal fair housing laws, and the award of compensatory damages of $10,000, as well as the G.L. c. 93A trebling of damages, were based on the landlord's confrontational encounter and statements vilifying **Larson** as HIV positive, refusing to accept the tendered rent payment because **Larson** was HIV positive, and pursuit of eviction of **Larson**.

The judge then entered judgment for **Larson** in the amount of $27,760, representing the $30,000 award minus the $2,240 due to the landlord in rent, reduced for the breach of habitability finding.

***2** "When reviewing the trial judge's decision, we accept his findings of fact as true unless they are clearly erroneous, and we give due regard to the judge's assessment of the witnesses' credibility." *Andover Hous. Authy. v. Shkolnik*, 443 Mass. 300, 306 (2005). See Mass.R.Civ.P. 52(a), as amended, 423 Mass. 1402 (1996). "On the other hand, to ensure that the ultimate findings and conclusions are consistent with the law, we scrutinize without deference the legal standard which the judge applied to the facts." *Kendall v. Selvaggio*, 413 Mass. 619, 621 (1992).

2. *Compensatory damages.* On appeal, the landlord argues that the $10,000 award of compensatory damages to **Larson** cannot stand because the judge stated that **Larson** was not entitled to monetary damages for emotional distress. We disagree, and conclude that emotional distress damages are supportable in this case—even absent proof of an actual injury separate from the emotional distress component.

At the outset, it is clear that the landlord violated State and Federal fair housing laws, because the landlord's statements, coupled with his refusal to accept the rent payments from APW, indicated a discriminatory preference on the basis of handicap. See 42 U.S.C. § 3604(c); G.L. c. 151B, § 4(7B). See also *Sy v. Massachusetts Commn. Against Discrimination*, 79 Mass.App.Ct. 760, 766 n. 9 (2011).

Second, given the landlord's actions and the resultant effects on **Larson**, compensatory damages for emotional distress were warranted. *Boston Pub. Health Commn. v. Massachusetts Commn. Against Discrimination*, 67 Mass.App.Ct. 404, 410 (2006). Such damages have been awarded in fair housing cases. Cf. *Massachusetts Commn. Against Discrimination v. Franzaroli*, 357 Mass. 112, 115–116 (1970) (commission's award of emotional distress damages upheld in housing discrimination case). Our analysis must be guided, moreover, by the legislative directive that "[t]his chapter shall be construed liberally for the accomplishment of its purposes." G.L. c. 151B, § 9, as amended by St.2002, c. 223, § 2.

Third, the standards for the award of compensatory damages were established in this case. The emotional stress caused by the landlord's actions manifested in physical symptoms. **Larson** lost sleep for a

period of two weeks and experienced vomiting and tightness in his chest. **Larson** also experienced "panic attacks," including when approaching the steps of his apartment, and "his nerves were constantly shot." He suffered from depression and anxiety and was prescribed medications to treat these symptoms. **Larson** testified that while his home had once been a "sanctuary," and a "place of peace," the landlord's discriminatory conduct changed that— **Larson's** home was "no longer a place of peace or any type of solitude."

"Emotional distress damage awards, when made, should be fair and reasonable, and proportionate to the distress suffered." *Stonehill College v. Massachusetts Commn. Against Discrimination*, 441 Mass. 549, 576 (2004) (concerning emotional distress damages arising out of violations of G.L. c. 151B). Factors to be considered include: "(1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm." *Ibid.* The $10,000 in compensatory damages in this case falls within these parameters.[FN4]

FN4. We acknowledge that the Housing Court judge did not base the award of monetary damages on emotional distress. However, as discussed above, the trial evidence supports such an award. We can affirm the damages award, so long as warranted, on a basis other than that articulated by the judge. See *Vaughan v. Eastern Edison Co.*, 48 Mass.App.Ct. 225, 226 (1999).

***3** 4. *Multiple damages under G.L. c. 93A.* The landlord further argues that the damages were not properly subject to trebling under G.L. c. 93A. We agree with the landlord on this point. The Housing Court judge observed only that the landlord's discriminatory conduct, refusal to accept rent, and pursuit of eviction of **Larson** "clearly indicate a discriminatory preference in violation of state and federal law." The judge seemingly found that, because there had been a violation of G.L. c. 151B, § 4(7B), there had also been a violation of G.L. c. 93A. The judge then concluded that because the "plaintiff's discriminatory conduct was intentional and willful," **Larson** was entitled to treble damages under G.L. c. 93A. That is incorrect. Such a violation does not constitute an automatic violation of G.L. c. 93A. Cf. *Klairmont v. Gainsboro Restaurant, Inc.*, 465 Mass. 165, 174–175 (2013). See also *McDermott v. Marcus, Errico, Emmer & Brooks, P.C.*, 775 F.3d 109 (1st Cir.2014). We see no tenable basis in the record, and the judge made no finding to the effect, that the complained-of conduct was "unfair or deceptive" within the meaning of G.L. c. 93A. Therefore, because we conclude that there was insufficient evidence to demonstrate a violation of G.L. c. 93A, we vacate the trebling of the damages under G.L. c. 93A.[FN5]

FN5. Given our determination that the record provides insufficient evidence to support a violation of G.L. c. 93A, we need not go any further in determining whether, in law or in the abstract, the particular facts at issue in this case could in theory give rise to a violation of G.L. c. 93A.

5. *Conclusion.* Accordingly, **Larson's** damages, when recalculated, result in a reduction of the award from $27,760 ($30,000, minus $2,240 due to the landlord in rent, reduced for the breach of habitability finding) to $7,760 ($10,000, minus $2,240 due to the landlord in rent, reduced for the breach of habitability finding). The present judgment therefore is to be modified to provide for an award to **Larson** of $7,760. Based on this calculation, **Larson** is entitled to possession of the apartment. See G.L. c. 239, § 8A, as amended through St.1981, c. 133 ("There shall be no recovery of possession under this chapter if the amount found by the court to be due the landlord equals or is less than the amount found to be due the tenant or occupant by reason of any counterclaim or

defense under this section"). The judgement, as so modified, is affirmed.

So ordered.

Mass.App.Ct.,2015.
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87 Mass.App.Ct. 1111, 26 N.E.3d 1141, 2015 WL 1280791 (Mass.App.Ct.)

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