

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SJC-10692

APPEALS COURT

2009-P-2095

HELEN HERMAN and
CHRISTIAN LANGLOIS

Plaintiffs – Appellants

vs.

JOHN SULLIVAN, KEVIN SULLIVAN
and MARGARET SULLIVAN

Defendants – Appellees

Appeal from the Judgment and Order of the Northeast Housing Court

**BRIEF OF AMICUS CURIAE
CITY LIFE/VIDA URBANA**

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INTERESTS OF AMICUS CURIAE

City Life/Vida Urbana

City Life Vida Urbana "City Life") is a 501(c)(3) non-profit grassroots community organization. Our headquarters are in the Jamaica Plain neighborhood of Boston. We work primarily with tenants in efforts to assure that they are aware of, and able to enforce, their rights. By organizing, informing, and empowering tenants, we seek to remedy the unfair practices that our members often encounter in the rental housing market.

Despite our best efforts, our constituents still encounter many obstacles while searching for and occupying rental housing. Tenants are often subjected to unfair and deceptive treatment by landlords and property managers because they are frequently unaware of their rights. Even when knowledgeable of their rights, tenants often lack the means to enforce the law. Our members have experienced these unfair and deceptive practices in a variety of ways. For example, landlords discriminate in the application process, evict unlawfully, allow unsafe and unhealthy housing

conditions to exist, harass, fail to reasonably accommodate, and arbitrarily increase rent.

While these types of unfair and deceptive practices are still widespread, G.L. c. 93A has helped tenants in a variety of ways: (1) The multiple damages and attorney's fees available under c. 93A often deter landlords from utilizing unfair and deceptive practices, and (2) if landlords are not deterred, tenants who are subjected to such behaviors are then entitled to damages at levels that are more likely to enable them to secure legal counsel. These benefits of c. 93A have proven invaluable to tenants in receiving fair treatment from landlords.

Because the case on appeal here involves unfair and deceptive practices by a landlord and property manager, we have a great interest in the outcome. We do not merely support the tenant/Cross-Appellants, who are not members, nor constituents, but also understand and are concerned with the impact a decision in this case would have on the tenant community as a whole. Because our organization works so closely with tenants, we believe our *amicus* brief could be a helpful extrinsic source in "drawing the [C]ourt's attention to broader

legal or policy implications that might otherwise escape the Court's consideration." 4 Am. Jur. 2d Amicus Curiae §1.

City Life's mission and dedication to advocate for the rights of tenants are what lead it to appear as *amicus* on behalf of Helen Herman *et al.* in this action.

STATEMENT OF THE CASE

Amicus adopts the statement of the case and the facts as presented by the tenant/Cross-Appellants.

SUMMARY OF ARGUMENT

The defendant John Sullivan was the manager of the property occupied by the tenant/Cross-Appellants, which was owned by the other two defendants, Kevin and Margaret Sullivan, husband and wife. The court below held that jury found in their advisory verdict that the defendants' amounted to the following:

[A]n unfair or deceptive act or practice by John Sullivan and Kevin Sullivan, who actively performed and authorized the renovations without the benefit of building permit or certificate of occupancy and without the preliminary, interval, and final inspections by building officials as required by the State Building Code, was a willful and knowing violation of Chapter 93A. However, there was not a willful or knowing violation on the part of Margaret Sullivan, who insofar as appears from the evidence was not similarly involved with the renovations or

actively involved with the family real estate business.

Findings Rulings and Order. A. 81-82

Pursuant to Chapter 93A, the trial court judge awarded double damages because of the "willful and knowing" employment of unfair and deceptive practices with regards to the dwelling occupied by Herman and Langolis. The double, or penalty portion of the damages, was awarded jointly and severally, thus allowing both defendants to share the burden of the penalty. In awarding the damages in this manner, we believe that the trial court erred.

The legislative intent of c. 93A was to create a statute that assesses penalties according to the degree of culpability of defendants. International Fidelity Insurance Company v. Wilson et al., 387 Mass 841, 853 (1983). Multiple damages, between double and treble, can be awarded under c. 93A when the culpable conduct of a defendant reaches a "willful and knowing" level. Ibid.

In addition to being assessed according to the culpability of the defendant, "[t]he multiple damage provisions of c.93A are designed to impose a penalty."

Id. at 888. These penalties reflect "the Legislature's displeasure with the proscribed conduct and its desire to deter such conduct." McGrath v. Mishara, 386 Mass. 74, 88 (1981).

Because multiple damages under c. 93A are considered to be penalties, the Supreme Judicial Court of Massachusetts has ruled that these penalties must be assessed independently against multiple defendants. International, 387 Mass. at 856. This decision was based on, among other things, the majority rule in most states that punitive damages be awarded independently against joint tortfeasors. Id. at 856.

The ruling in International has been supported by numerous subsequent decisions by both the Massachusetts Appeals Court and the Supreme Judicial Court of Massachusetts. These decisions almost universally refer to the deterrent power of independent multiple damages. The power to deter unfair and deceptive conduct, as well as the power to encourage reasonable settlements, are important elements of c. 93A that are provided by the independent multiple damages provision. See Id. at 857-858.

If the current precedent was to be overturned, the protections provided to tenants and all consumers by c. 93A would be lessened. Not only would tenants be at a greater risk of being exposed to unfair and deceptive practices, their ability to settle suits involving such behavior quickly and fairly would be compromised as well.

ARGUMENT

I. THE COURT BELOW ERRED IN AWARDING MULTIPLE DAMAGES UNDER G.L. c. 93A ON A JOINT AND SEVERAL BASIS AS OPPOSED TO AN INDEPENDENT AND SEVERAL BASIS.

a. To Provide Adequate Protection and Fully Achieve Its Goals, Damages Assessed Against Multiple Defendants Under G.L. c. 93A Must Be Assessed on an Individual and Several Basis.

G.L. c. 93A (hereinafter "c. 93A") is a statute "whose basic policy is to ensure an equitable relationship between consumers and persons engaged in business." Heller v. Silverbranch Constr. Corp., 376 Mass. 621, 624 (1978). Ch. 93A specifically outlaws "unfair or deceptive acts or practices in the conduct of any trade or commerce. G.L. c. 93A, § 2 a . By providing recoveries in the form of multiple damages, costs, and attorney's fees, c. 93A is a "punishment and deterrence" to such behavior. International Fidelity

Insurance Company v. Wilson et al., 387 Mass. 841, 858 (1983).

Recoveries under c. 93A are linked to the degree of culpability of the defendant(s). Linthicum v. Archambault, 379 Mass. 381, 388 (1979). The judge or fact finder is given discretion to determine if the defendant(s) have "committed relatively innocent violations of the statute's substantive provisions[,]" Id. at 388, or if they have committed "willful and knowing violations." Mass. Gen. Laws Ann. Ch. 93A § 9. The latter classification makes the defendant(s) liable for multiple damages which are either double or treble.

When unfair or deceptive conduct by a defendant(s) reaches a willful or knowing level, "the multiple damage provisions of c. 93A are designed to impose a penalty[.]" Heller, 376 Mass. at 627-628. These penalties reflect "the Legislature's displeasure with the proscribed conduct and its desire to deter such conduct" McGrath v. Mishara, 386 Mass. 74, 85 (1982) and "also seek to promote reasonable settlements." Nader v. Citron, 372 Mass. 96, 100 (1977).

Because litigation can be costly, time-consuming, and emotionally draining, the promotion of reasonable

settlement offers as a prime goal of c. 93A[.]”
International, 387 Mass. at 487. Because plaintiffs in
c. 93A claims have undoubtedly suffered enough prior to
bringing their claims, multiple damages are considered
“the appropriate punishment” for forcing plaintiffs to
see through the lengthy, and at times painful,
litigation process. Heller, 376 Mass. at 628.

These goals of c. 93A have long been invaluable to
tenants and other consumers. Not only are landlords and
all others providing goods and/or services in the
context of a trade or commerce deterred from acting
unfairly or deceptively, if they do act in this manner,
the victims of such treatment have recourse. This
recourse comes in the form of costs, attorney’s fees,
and multiple damages awarded under c. 93A, which all
translate into an increased ability to secure legal
counsel, particularly for indigent tenants.

**b. The Massachusetts Appellate Courts Have
Consistently Affirmed the Precedent That
Damages Under c. 93A are to be Assessed
Independently and Severally Where There are
Multiple Defendants.**

In a case involving more than one defendant, such
as the case on appeal, “defendants who violate c. 93A
are independently liable for the ensuing damage.” Saud

v. East Fishery Inc., 43 Mass. App. Ct. 207, 209 (1997). Because defendants who commit violations of Chapter 93A are individually liable, a plaintiff is generally not limited to a single award of multiple damages." D'Alcorno, Joanne, Chapter 93A Rights and Remedies, Massachusetts Continuing Legal Education (2007). Likewise, International states that "[r]estricting a plaintiff to a single award of multiple damages will seriously compromise the goals of punishment and deterrence in cases where several defendants have participated through their own individual acts in a single wrong."

International has been reaffirmed by numerous decisions of the Massachusetts Supreme Judicial Court and Massachusetts Appeals Court. See e.g., Scotfield v. Berman, 393 Mass. 95, 115 (1984) (contrasting M.G.L. c. 186, a statute in which multiple damages are assessed jointly and severally, with M.G.L. c. 93A, where multiple damages are assessed independently against more than one defendant); Rita v. Carella, 394 Mass. 822, 829 (1985) (holding that International is the proper authority to look to for guidance on how multiple damages under 93A should be assessed); Augat

Inc. v. Aegis Inc., 417 Mass. 484, 486-487 (1994) (agreeing that independent and several damages are appropriate, but holding that where a corporate defendant acts wrongly only through its agent, independent liability is not appropriate); Saud, 43 Mass. App. Ct. at 209 (holding that defendants who violate c.93A are independently liable for the damages assessed); Kattar v. DeMoulas, 433 Mass. App. Ct. 1, 15-16 (2000) (holding that judges have the discretion to assess different levels of multiple damages individually, based on the degree of egregiousness of each defendant's conduct).

c. The Legislative Intent of c. 93A Calls for Damages Against Multiple Defendants to be Assessed Individually and Severally.

The precedent-setting decision in International was a result of the Supreme Judicial Court interpreting the legislative intent of 93A, as well as analyzing their own decisions in previous cases with regards to similar statutes. Through this analysis, the Court came to the conclusion that "the Legislature intended that defendants would be independently liable for multiple damages under [c. 93A] § 11." International, 387 Mass. at 856.

The statutory interpretation in International focused primarily on comparisons to former G.L. (Ter.Ed. c. 119, § 5, a wrongful death statute. The court found that the decision in Porter v. Sorell, 280 Mass. 457 (1932), which hinged on the interpretation of the wrongful death statute, was sufficiently analogous to the issue at hand. The court in Porter held that "the execution in full of a judgment against one defendant did not release a concurrent wrongdoer." International, 387 Mass. at 856, (citing Porter, 280 Mass. at 463-464.)

Similar reasoning regarding multiple damages assessed independently against more than one defendant can also be found in the majority rule in most states that punitive damages are to be assessed independently against joint tortfeasors. See e.g., Hotel Rivera, Inc. v. Short, 80 Nev. 505, 520-521 (1964) (holding that punitive damages are to be assessed independently against multiple defendants according to their level of culpability); Kim v. Chinn, 56 Cal.App.2d 857, 860-861 (1943) ("Punitive damages, if allowed against both defendants, should be assessed against them separately.")

In addition to these rules, analogous reasoning can also be deduced from the criminal statutes of Massachusetts, as well as the Model Penal Code. Criminal statutes in Massachusetts do not allow for the release from liability of an accomplice whose partner in crime has already been punished. In Arnold v. Jacobs, 316 Mass. 81, 84 (1944), the Court held that "in the criminal law, each wrongdoer may be made to suffer the maximum penalty, no matter how many are guilty." More simply put, if two people participate equally in the murder of another person, it would go against all sense of logic and justice if they were allowed to share one sentence. This reasoning would affectively allow each man to serve twenty-five years of a fifty year sentence.

d. Allowing Damages Under c. 93A to be Assessed Jointly and Severally Against Multiple Defendants is in Direct Conflict With the Language of c. 93A Itself.

If this Court were to overturn the precedent set in International, the practical implication in this case would be that the two defendants would be allowed to share the burden of the multiple portion of the damages. Logically this makes little sense, as well as

being in direct opposition of the legislative intent of c. 93A, which is designed to assess penalties against defendants based on the degree of their culpability.

Not only would this decision be in opposition of the legislative intent of c. 93A, it would also be in direct conflict with its language. Ch. 93A states that:

if the court finds for the petitioner, recovery shall be in the amount of actual damages or twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the court finds that the use or employment of the act or practice was a willful or knowing violation of said section two.

G.L. c. 93A, § 9.

The language of the statute clearly states that if unfair or deceptive practices are used, the Court must award at least double damages. That is to say that the multiple, or penalty portion of the damages, must be at least equal to, if not double the actual damages. In the case on appeal, the Court below awarded double damages jointly and severally against two defendants. Effectively, this means that each defendant's penalty portion of the damages was exactly half of the actual damages, an assessment of damages not allowed by the statute.

Had the Court followed the precedent set in International, as well as c. 93A § 9 itself, it would have assessed the multiple portion of the damages independently against both Defendants. Such an assessment still would have allowed both Defendants to share the burden of the actual damages equally, but required them each to bear the burden of their respective penalty, in this case the equivalent of one time the actual damages.

II. THE TRIAL COURT RELIED ON UNSUBSTANTIATED BELIEFS IN AWARDING DAMAGES ON A JOINT AND SEVERAL BASIS.

In its Order on Post-Judgment Motions, the trial court reconsiders its decision that multiple damages against the two defendants in this matter should have been assessed jointly and severally. The trial court acknowledges that the rule in International regarding the assessment of multiple damages is the precedent. However, in denying the motion for reconsideration the trial court relies on a general and unsubstantiated belief that "the appellate courts would approve an exception to the general rule." Decision and Order on Post-Judgment Motions, A. 117. In arriving at this conclusion, the trial court considered multiple

appellate cases. Two of these cases were Saud v. East Forward, Inc., 43 Mass.App. 207 (1997), and Augat, Inc. v. Aegis, Inc., 417 Mass. 484 (1994). The trial court interpreted the decisions in these cases to mean that the issue of independent liability in the case of multiple defendants was unsettled. While it is true that the two cases cited above appear to have come to different conclusions regarding multiple damages, they both in fact support the rule of International, that multiple damages against more than one defendant are to be assessed independently.

Upon quick review of Saud, and Augat, it is easy to see how the trial court came to its erroneous decision. In Saud, the court cited International, and held that "defendants who violate c. 93A are independently liable for the ensuing damage." Saud, 43 Mass.App. at 209. The court held that because the defendant corporation and its president participated concurrently, but independently in the perpetration of the wrong, that both were independently liable. See Id. at 208. This decision specifically affirms the rule set forth in International.

The decision in Augat seems to be where the trial court's confusion arose. While the court in Augat, does in fact rule that the multiple damages should be awarded jointly, it still upholds the general rule of International. The decision in Augat is based on the fact that the court determined the defendant corporation, Aegis acted only through its agent. The court held that independent liability is appropriate when "multiple defendants have participated through their own individual acts in a single wrong[.]" See Augat, 417 Mass. at 486, (citing International, 387 Mass. at 858). However, the trial court had already ruled that "Scherer and Aegis did not act individually. Aegis acted wrongfully only through its agent Scherer." Augat, 417 Mass. at 486. Because the agent and corporation are considered one entity, independent liability against both the corporation and its agent is not appropriate. This case can also be distinguished from that appeal, because in the present case, no corporation was involved, thus the finding that the property manager and property owner acted independently was appropriate. The court below found independent

although identical actions by both John and Kevin Sullivan. A. 15

Absent an in-depth reading of the two cases, it is easy to see how the trial court in the case on appeal came to its erroneous belief that the issue of independent, multiple damage is unsettled. However, if the facts of the cases are reviewed more closely, it becomes clear that the issue at hand is not unsettled at all. In fact, the two cases referred to by the trial court not only affirm International, but also strengthen the rule it set forth.

In addition to the confusion provided by the Saud, and Augat, cases, the trial court's original Findings, Rulings and Order of the case at appeal cites the cases of Scotfield v. Berman & Sons, Inc., 393 Mass. 95 (1984), Dorgan v. Loukas, 19 Mass.App. 959 (1985), Rita v. Carella, 394 Mass. 822 (1985), and Wheilhan v. Markowski, 37 Mass.App. 209 (1994). The trial court interprets these cases as being instances in which the appellate courts have awarded multiple damages on a joint and several basis against more than one defendant.

Interpreting these cases in this manner was erroneous. In fact, in its Decision and Order on Post-Judgment Motions, the trial court specifically admits that it is no longer sure of its original interpretation.

Upon reconsideration, I am less certain than I earlier was that the Judgments involved in the Scofield, Dorgan, Rita, and Whelihan cases were in fact entered on a joint and several rather than an independent and several basis. The case reports seem to so indicate, but do not expressly so state, and I have not examined the trial or appellate court records. Whether or not the facts of those cases support my conclusion is hardly free from doubt.

Decisions and Order on Post-Judgment Motions. (A. 107)

The trial court's doubt turns out to be well-founded. The first case cited by the trial court is Scofield. The court in Scofield did not award any damages under c. 93A, stating the following:

Scofield could not recover damages under G.L. c. 93A, since the statute, as it read prior to the 1979 amendment, required the consumer to show a loss of tangible real or personal property resulting from the unfair or deceptive act or practice...the judge found that Scofield had suffered no damages under G.L. c. 93A[.]

Scofield, 393 Mass. at 107-108.

Because the court in Scofield did not award damages under G.L. c. 93A, the fact that damages were awarded on a joint and several basis based on another claim against the defendants has no bearing on the case on appeal.

In Rita, also cited by the trial court as a case in which damages under c. 93 were awarded jointly and severally, damages were only awarded against one defendant, the claims against the other being dismissed. "The judge found that no written demand letter was served upon Marie Carella, and he properly dismissed the plaintiff's claims under G.L. c. 93A against her." Rita, 394 Mass. at 825 n.3. Because there was only one defendant upon which to assess the damages, they could not have been assessed jointly and severally.

The trial court also cited Whelihan. The Appeals Court opinion has no reference as to whether or not the damages were awarded separately against the two defendants, a husband and wife, nor is the issue of independent liability raised on appeal. Upon review of the trial court opinion, it appears that the damages were awarded jointly against the two defendants. The

defendants' property manager negligently installed glass that caused harm to the plaintiff, but in contrast with the case at appeal in which the property manager and property owner were found to have acted independently, "[t]he parties stipulated prior to trial that all the actions of [the property manager] were to be considered binding upon the defendants for the purposes of this action." Because of this, the property manager was not named as a defendant, leaving only the husband and wife property owners as defendants.

Although the trial court in Whelihan does not so expressly state it, we know that for multiple damages under c. 93A to be assessed independently, the fact-finder must decide that "several defendants have participated through their own individual acts in a single wrong." International, 387 Mass. at 858. The trial court makes no such assertion that the defendants acted individually and given the nature of their relationship, being husband and wife, it is unlikely that any judge would. Absent an assertion that the husband and wife acted independently, we can only assume that this case involved a similar situation to that on appeal, in which one of the marital partners

was considered to be inactive in managing the property and thus absent from liability.

Another case cited by the trial court, Dorgan, makes no reference as to whether the damages were awarded jointly and severally or independently and severally, nor does it indicate whether or not the defendants, who were husband and wife, acted independently in the wrong perpetrated against the plaintiff. Because the issue of independent liability was not raised on appeal, we can only assume that there was not multiple defendants upon which to impose liability, again referring to the case on appeal in which the wife was considered to be an inactive partner. Because Dorgan does not address the issue of how damages were assessed, it was improper for the trial court in the case at appeal to refer to Dorgan as an action in which damages are awarded jointly and severally.

CONCLUSION

For the reasons stated above, the Court should rule in favor of the tenant/Cross-Appellants.

Respectfully submitted,

ROXAN MCKINNON

Executive Director

City Life/Vida Urbana

By her attorney,

A handwritten signature in cursive script, appearing to read "Maureen M. McDonagh". The signature is written in black ink and is positioned above the typed name.

Maureen McDonagh

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