COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss. SUPERIOR COURT
CIVIL ACTION
NO. 11-014

BAY STATE HOSPITALITY GROUP, INC.

v.

NORTH ADAMS REDEVELOPMENT AUTHORITY & another[1]

FINDINGS OF FACT, RULINGS OF LAW, AND ORDER AFTER JURY WAIVED TRIAL

This action is a contract dispute involving a landlord and tenant. The plaintiff, Bay State Hospitality Group, Inc. ("Bay State"), a Massachusetts corporation, filed a complaint asserting that the defendant, the North Adams Redevelopment Authority (the "NARA"), breached its contract with the plaintiff by interfering with its parking spaces.[2] The NARA filed counterclaims for breach of lease and summary process. Based upon the evidence presented at trial, the Court makes the following findings of fact and rulings of law.

PRIOR PROCEEDINGS AND BACKGROUND

The complaint was filed in January 2011, with the plaintiff asserting claims in breach of contract (Count II), unjust enrichment/quantum meruit (Count III), constructive eviction (Count IV), negligent misrepresentation (Count V), breach of the implied covenant of good faith and fair dealing (Count VI), and a consumer protection violation pursuant to G. L. c. 93A, §11 (Count VII).[3] The NARA filed counterclaims in breach of contract (Count I, alleging failure to pay rent) and a summary process action seeking to evict the plaintiff from its present location (Count II).

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[1] Massachusetts Highway Department.

[2] The claim against Massachusetts Highway Department (Count I, based upon an eminent domain taking) was dismissed prior to trial.

[3] The claim for unjust enrichment/quantum meruit was dismissed by agreement prior to trial, and the claim for negligent misrepresentation was dismissed prior to jury deliberations.

A jury trial was commenced on October 30, 2013, and the jury returned its verdict on November 5, 2013. The jury found for the plaintiff with respect to the implied covenant of good faith and fair dealing and awarded damages in the amount of $300,000.00. The jury found for the defendant on the breach of contract claim. The jury also found that the plaintiff had failed to pay $83,215.00 in rent.

By agreement of the parties, the claims for constructive eviction, Chapter 93A violation, and summary process eviction were reserved for the court. On November 12 and 26, 2013, the Court took evidence regarding the jury waived claims. The parties submitted post-trial submissions, and arguments were held on March 31, 2014.

FINDINGS OF FACT

A. General Background

The NARA is an independent "public body politic and corporate" authorized pursuant to G. L. c. 121B, §4. That statute provides comprehensive and detailed statutory schemes for redevelopment projects. Municipalities, such as North Adams, acting through their redevelopment authorities, are authorized to redevelop substandard, decadent or blighted open areas for industrial, commercial, business, residential, recreational, educational, hospital, or other purposes.

Redevelopment authorities have broad powers to plan and implement activities needed to redevelop underutilized, deteriorated, or blighted open areas, and to encourage new development and promote sound growth.[4] Urban renewal projects help municipalities revitalize deteriorated and underutilized areas by providing the economic climate needed to attract and support private investment. The Massachusetts Department of Housing and Community Development is charged with the responsibility for the operation and administration of the urban renewal program as defined under G. L. c 121B.[5]

The broad powers granted to urban renewal agencies under G. L. c. 121B include eminent domain, and urban renewal plans may include public or privately-sponsored property construction and development, subject to the authority of both the urban renewal agency and local zoning bylaws. The plans are generally expected to take many years to

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[4] In general, a redevelopment authority, as an independent body politic and corporate, is not an agency of a municipality and, therefore, does not answer directly to the chief executive. This affords the redevelopment authority more autonomy in planning and implementing revitalization and redevelopment projects.

[5] There are two types of urban renewal programs in Massachusetts: G. L. c. 121A for private developers and G. L. c. 121B for municipalities. Both are designed to eliminate conditions that cannot be alleviated by the ordinary operation of the real estate market. G. L. c. 121A encourages private developers to foster urban redevelopment projects. A developer initiates and designs the project before applying for approval from the appropriate government agencies. Under G. L. c. 121A, § 10, a developer is exempt from ordinary real estate and property taxes under G. L. c. 59, but instead pays a statutory excise. Pursuant to G. L. c. 121A, § 6A, the developer of a redevelopment project must enter into a written contract with the city or town, agreeing to be bound by the provisions of the statute.

complete, and, in part because of this long project life, urban renewal plans have provisions which provide for modification of the plans after their initial approval to address changes in economic realities and urban conditions. See *St. Botolph Citizens Committee* v. *Boston Redev. Auth.*, 429 Mass. 1, 3-4 (1999).

In September 1981, the city of North Adams, through its City Council, established an Urban Renewal Plan (the "Plan") for the Western Gateway Urban Heritage Park (the "Park"), under the authority and designated powers of the NARA. The Plan was pursuant to G. L. c. 121B, and the NARA is the urban renewal agency for the city of North Adams. The Park was expected to be a major tourist attraction, creating 125-175 jobs and substantially enhancing the appearance of the downtown area. The Plan also stated,

> "[w]ith the wide range of financial incentives and alternatives available, an optimistic market feasibility report and imaginative and progressive marketing plan, coupled with an administration that has a demonstrated ability to secure wide-ranging development funds and program, the Western Gateway Urban Heritage Park should be expeditiously developed and quickly meet the community's and state's goals for it."

As noted under the section "Development Guidelines" in the Plan, "[w]ithin the confines and guidelines of an urban renewal project, funded in part by both the City of North Adams and the Commonwealth of Massachusetts and having somewhat varying goals (see Chapter 11), it is the intent of the development guidelines to be as flexible as possible so as to elicit maximum developer interest and ultimate maximum and best reuse."

The Plan was referred to the Massachusetts Executive Office of Communities and Development ("EOCD") for review, pursuant to G. L. c. 121B, § 48. Of particular significance, the EOCD made certain findings in support of the Plan, including that: (1) the project area would not, by private enterprise alone and without either government subsidy or the exercise of governmental powers, be made available for urban renewal; (2) the financial plan was sound, and it was noted that DEM bond issue funds were committed to the project; and (3) the project area was a decadent and blighted open area. On November 18, 1981, the EOCD approved the Plan.

The office of the mayor was designated as the city's urban renewal agency. In essence, the city of North Adams provided the land and in-kind staff investment and the EOCD provided funding. The total cost of the project was expected to be $7,560,000.00, of which the private developer and tenants would contribute $3,250,000.00.[6] Western Gateway Associates ("Western Gateway"), a private developer, was selected to develop

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[6] The public funds were intended for the acquisition of properties, relocation expenses, extensive design, construction of bridges, site work, interpretive design facilities, a visitors' center, and some exterior façade renovations. The private developer was expected to provide funds for the purchase of properties, renovation of the internal space, leasehold improvements, some exterior renovations, and possible site work.

and manage the Park. A ground lease between Western Gateway and NARA was executed on October 5, 1983.

According to the Plan,

> "The concept for the Western Gateway Urban Heritage Park consists of a theme center based on the heritage of the North Adams Hoosac Tunnel and related railroad history, in addition to regional crafts and attractions, the park will feature a select variety of restaurant and retail uses strategically placed to provide the greatest draw. The anchor will be the collection of eateries; and the park's unique combination of uses will appeal as an entity to residents and tourists alike."

The Park is located in the western section of downtown North Adams, adjacent to railroad tracks and the Hoosic[7] River. Spanning over the river, tracks, and the Park is a massive bridge called the "Hadley Overpass." This overpass allows U.S. Route 8 to traverse the tracks and river. The bridge is a 14-span, 940 foot long overpass that spans the Hoosic River, the Boston and Maine Railroad tracks, and the Freight Yard Historic District. The Historic District consists of six wood-framed railroad freight buildings constructed in the 1860s through 1890s. These buildings were to be rehabilitated and converted into shops, restaurants, offices, and museums.

In 1984, John Barrett became mayor of North Adams, and by virtue of that position became the Executive Secretary of the NARA. The NARA's only responsibility, at that point, was to collect the rent payments from Western Gateway.

During the time that Western Gateway was operating the Park, it brought in a number of tenants, including a restaurant identified as Freight Yard Pub. In 1992, Freight Yard Pub was purchased by the plaintiff, Bay State, which has continuously operated the restaurant up to the present. Bay State is a for-profit Massachusetts corporation, pursuant to G. L. c. 156D. Freight Yard Pub was by far the most successful business in the Park and generates substantial revenue for the NARA.

Bay State entered into a standard commercial lease (the "Lease") with Western Gateway on May 1, 1992. The leased property is designated as "Building No. 3," and the term of the Lease was ten years. The Lease identifies the parking lots as "common areas" and allows Bay State "non-exclusive right to use portions of the common areas . . . subject to such restrictions, rules and regulations as may be adopted by Landlord from time to time." The Landlord has the right to change the size, location, nature, and use of the common areas in its sole discretion as it deems appropriate. Specifically, the "Landlord may prohibit parking or passage of motor vehicles in areas previously designated for parking or passage."

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[7] The word "Hoosac" is spelled two different ways for apparently historical reasons, with either an "a" or an "i." For example, the valley is known as the "Hoosac Valley" but the major river is called the "Hoosic River."

Relevant to this litigation, the Landlord has the right to construct other buildings or make alterations, "provided that the size of the Premises, reasonable access to the Premises, and the parking facilities, shall not be substantially or materially altered."

In 1995, the operator of the park, Western Gateway, defaulted on its obligations and the NARA assumed control of the Park. Within its control and authority was the Lease with Bay State, among other leases of Park tenants.

In 1999, Bay State and NARA entered into a subsequent lease, which essentially incorporated the terms and conditions of the prior Lease. Again, the landlord, NARA, was required to provide "that reasonable access to the Premises and reasonable access to and use of the parking facilities by Tenant and Tenant's customers shall not be substantially or materially altered." In December 2009, a third lease was executed by the parties with no material changes regarding the relevant provisions from the first two leases.[8]

The common area parking spaces were allocated in three lots: (1) the "south" lot, containing approximately twelve open air parking spaces (the "south lot"); (2) the "center" lot underneath the Hadley Overpass, containing approximately thirty-six spaces (the "center lot"), and (3) the "north" lot, containing approximately nine spaces (the "north lot").

The Hadley Overpass structure had been in desperate need of repair for a lengthy period of time. Eventually, the Commonwealth developed construction plans, retained contractors and appropriated money for its repair (the "Project"). The nature of the Project and the amount of work necessary to replace a bridge while minimizing disruption to traffic and train travel was daunting.

As a preliminary matter, the Commonwealth through the Massachusetts Highway Department ("Mass Highway") issued an order of taking under G. L. c. 81, § 7 (allowing eminent domain taking under G. L. c. 79). In January 2008, certain properties were taken permanently or temporarily (for five years) to facilitate the construction. Among the properties taken were the common areas of the Park that allowed for parking. The owners of the properties were entitled to damages pursuant to G. L. c. 79, however, the NARA declined any compensation.

The Project commenced on or about October 2008. In December 2008, the contractor installed a fence shutting off the center lot from parking until January 2012. Parking in the south lot was also disrupted by the construction activities. Work on the bridge is still underway at this time.

B. Parking Dispute

When it became apparent that the Project was going forward and that disruptions were inevitable, the owner of Bay State, Colleen Taylor ("Taylor"), attempted to address

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[8] The 1995, 1999, and 2009 leases

her concerns. She acquired a former restaurant and re-opened it as "Taylor's" in downtown North Adams. She also retained counsel to evaluate her legal rights regarding the project. However, the mayor was not receptive to the appearance of counsel regarding this parking issue and informed Taylor that if she wanted to have any restaurant in North Adams, the attorneys must have no involvement.

Taylor terminated counsel and wrote correspondence to the mayor discussing her concerns and offering suggestions. Within a month after the letter, Taylor was summoned to the mayor's office resulting in unproductive discussions. Of significance, Taylor was advised that her parking would not be significantly impacted, she would only suffer intermittent disruptions, and she should not move her business to Taylor's. These sentiments were reiterated by the mayor at a subsequent meeting in July 2008. However, the plaintiff was unaware of the eminent domain taking by Mass Highway and that compensation was waived.

In correspondence from Mass Highway to the State Historic Preservation Officer, dated November 14, 2007, it had been communicated that the thirty-six parking spaces in the center lot under the bridge would be "inaccessible to the public during the overpass rehabilitation project." This information was not shared with the plaintiff.

This correspondence also indicated that three trees and all existing shrubs would be removed south of the restaurant to provide additional area for parking until the Project was completed. Mass Highway also agreed to provide a "second temporary parking area with spaces for eleven vehicles" at the southerly end of the Park, and three ash trees would be removed to accommodate these spaces. The mayor requested that Mass Highway leave the trees and reconfigure the parking, ultimately eliminating two parking spaces.

Finally, Mass Highway had planned weekly or biweekly meetings with the tenants at the Park for the purpose of discussing their concerns about the Project. The mayor indicated that these meetings were unnecessary, and that if any tenant had a problem, they could talk with him. Since the meetings were to be held in City Hall and the mayor refused to allow the use of that space, the meetings were never held. However, Taylor had frequent discussions with Mass Highway during the project.

After construction commenced, the plaintiff suffered a loss of customers, and gross receipts went from $1,360,390.00 in 2008 to $800,010.00 in 2011. Expert testimony was presented that the damages due to the loss of parking were either $761,000.00 or $666,236.00, depending on the accounting method used.

Bay State attributed the losses to the lack of parking and filed suit against the defendant asserting claims against NARA in breach of contract, breach of the implied covenant of good faith and fair dealing, constructive eviction, and G. L. c. 93A, §11.[9]

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[9] As noted previously, the claim for unjust enrichment/quantum meruit was dismissed prior to trial, and the claim for negligent misrepresentation was dismissed prior to jury deliberations.

NARA responded by filing counterclaims in breach of contract and a summary process action to evict the plaintiff.

There is no question that the NARA can regulate and change the parking available to the plaintiff so long as it is not "substantially or materially altered." It was the plaintiff's position that the NARA, through mayor Barrett, breached the Lease by interfering with Bay State's contractual rights regarding parking at the Park by substantially altering the parking.

The case was called for trial before a jury on October 30, 2013, and the jury returned its verdict on November 5, 2013. In responses to special questions, the jury found in favor of the plaintiff on the claim for breach of the implied covenant of good faith and fair dealing and awarded Bay State $300,000.00. The jury found in favor of the NARA on the breach of contract claim. The jury also determined that the rent owed by Bay State to NARA was $83,215.00. A second evidentiary hearing was held on the jury waived claims of c. 93A, constructive eviction, and the defendant's claim of summary process eviction.

RULINGS OF LAW

PLAINTIFF'S CLAIMS

A major issue before the court is the availability of a 93A claim to the plaintiff. This breaks down to: (1) whether a governmental entity is subject to 93A exposure and, if so, (2) under what circumstances 93A liability will result.

A. Whether the NARA is Subject to Chapter 93A Liability as a Matter of Law

As noted by the parties, the question of whether a governmental entity is amenable to suit under c. 93A has not been specifically addressed. See *M. O'Connor Contracting, Inc.* v. *Brockton*, 61 Mass. App. Ct. 278, 284 n.8 (2004).[10] The issue of whether a municipality is a "person" for 93A purposes is still to be resolved.

There have been numerous cases of potential 93A exposure for governmental entities. In these cases, the courts have not raised or discussed the question of whether municipalities are precluded from 93A exposure as a matter of law. Instead, the cases have focused on whether the governmental entity is engaged in governmental activity or "trade or commerce." See *M. O'Connor Contracting, Inc.*, 61 Mass. App. Ct. at 284 ("it

[10] "Whether a governmental entity is ever amenable to suit under c. 93A remains an open issue. . . . The question is controversial because c. 93A contains no explicit indication that governmental entities are to be liable under its provisions. . . . Both § 11 and § 9 of c. 93A require that the defendant be a 'person' engaged in trade or commerce. 'Person' is defined in the statute as including 'natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.' G. L. c. 93A, § 1 (a). Although the term 'person' ordinarily is not construed as including the State or its political subdivisions, *Bretton* v. *State Lottery Commn.*, [41 Mass. App. Ct. 736 , 738 (1996)], uncertainty exists because only a 'person' may bring suit under c. 93A and governmental entities have been considered to have standing to do so." *M. O'Connor Contracting, Inc.*, 61 Mass. App. Ct. at 284 n. 8 (citations omitted).

is well established that governmental entities are not amenable to suit under c. 93A when they have engaged in governmental activity rather than trade or commerce."). Given the number of cases that have discussed 93A exposure regarding a governmental entity without considering the "person" issue, I am persuaded that the appellate courts will permit 93A exposure against a municipality in the appropriate circumstances.

B. *Whether the NARA was Engaged in Governmental Activity*

As a general principle, a municipality is not liable under c. 93A when it is engaged in governmental activity, rather than acting in a business context, that is, when it is not engaged in trade or commerce. *Park Drive Towing, Inc.* v. *Revere*, 442 Mass. 80, 86 (2004), quoting *All Seasons Servs., Inc.* v. *Commissioner of Health & Hosps. of Boston*, 416 Mass. 269, 271 (1993). "Whether a municipality is acting in a business context depends on 'the nature of the transaction, the character of the parties involved and [their] activities . . . and whether the transaction [was] motivated by business . . . reasons.'" *Park Drive Towing, Inc.*, 442 Mass. at 86, quoting *Boston Hous. Auth.* v. *Howard*, 427 Mass. 537, 538 (1998).

Furthermore, a party is not engaging in trade or commerce as defined by G. L. c. 93A when its actions are motivated by legislative mandate. *Lafayette Place Assocs.* v. *Boston Redevelopment Auth.*, 427 Mass. 509, 535 (1998), cert. denied, 525 U.S. 1177 (1999), quoting *Peabody N.E., Inc.* v. *Marshfield*, 426 Mass. 436, 439-440 (1998).[11] The fact that a "governmental entity . . . engage[s] in dishonest or unscrupulous behavior as it pursues its legislatively mandated ends" does not bring such conduct into the realm of business. *Lafayette Place Assocs.*, 427 Mass. at 535.

The gravamen of Bay State's 93A claim against the NARA is that it lost a contractual benefit (parking) due to the unfair and deceptive conduct of the defendant. Whether the defendant acted inappropriately or even dishonestly does not necessarily mean that the NARA was engaged in trade of commerce. The fact that parking spaces were taken away does not mean that the city was engaged in trade or commerce, nor do the actions of which Bay State now complains. It is not unusual for a governmental entity to engage in commercially questionable behavior as it pursues its legislatively mandated ends.

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[11] See *Park Drive Towing, Inc.*, 442 Mass. at 86 (suspending plaintiff from city towing business not subject to 93A liability); *M. O'Connor Contracting, Inc.*, 61 Mass. App. Ct. at 284-285 (city not engaged in "trade or commerce" for construction contract for municipal building); *Boston Hous. Auth.* v. *Howard*, 427 Mass. at 538-540 (defendant authority, which administers public housing and is landlord of premises leased to tenant, not engaged in "trade or commerce"); *Peabody N.E., Inc.*, 426 Mass. at 439-441 (town not engaged in "trade or commerce" where it contracted with plaintiff pursuant to administrative order regarding waste treatment and where town's waste treatment facility was not "profit-making operation"); *Morton* v. *Hanover*, 43 Mass. App. Ct. 197, 205-206 (1997) (neither town nor its board of public works was engaged in "trade or commerce" with respect to surcharge that board assessed to water users in area of new water main for cost of main); *All Seasons Servs., Inc.*, 416 Mass. at 271 (hospital operated by municipal board not engaged in "trade or commerce" in soliciting bids and awarding contracts for food and vending services at its facility).

permanent and comprehensive elimination of existing slums and substandard . . ." The parties' dealings took place in the context of the pursuit of the urban renewal and redevelopment goals of c. 121B. The NARA was not acting as an independent business enterprise in operating the Park and collecting rents. Any surplus revenue was recycled back into the Park in the hopes of achieving a successful venture.

In a similar situation, a public housing authority operating pursuant to its legislative directive of providing housing to low-income individuals, does not act in a business context. *Boston Hous. Auth.* v. *Howard*, 427 Mass. at 539-540. Equally so, a redevelopment authority acting pursuant to its legislative directive to redevelop a blighted area of a city does not act in a business context. The broad scope of its mandate and corresponding authority permitted the defendant to manage the Park and address the issues related to its operation. See *Peabody N.E., Inc.*, 426 Mass. at 440-441 (town not engaged in "trade or commerce" where it contracted with plaintiff pursuant to administrative order, and not to benefit "profit-making operation"). See also *Linkage Corp.* v. *Trustees of Boston Univ.*, 425 Mass. 1, 25, cert. denied, 522 U.S. 1015 (1997) (defendant university engaged in trade or commerce in part because it "did not operate under any legislative constraints").[12]

Furthermore, the Park is not a profit-making operation in a sense that money was spun-off to investors or even the general fund of the city. Instead, any excess revenue was put back into the Park. It merely sustains itself financially through the collection of rent. These fees are designed not to generate profits, but only to defray the cost of operating and maintaining the Park. It would be a different situation if the NARA were operating a restaurant in the Park and engaging in nefarious conduct with its suppliers or competitors. Instead, the NARA was simply managing a Park that had commercial components.

Given the predominantly public motivation for both the construction of the Park and the charging of fees, the city was not acting in a business context when it interacted with the plaintiff and thus was not engaged in "trade or commerce" as required by G. L. c. 93A.

C. Constructive Eviction of Bay State

The plaintiff has also raised the claim of constructive eviction. Constructive eviction is "any act of a permanent character, done by the landlord, or by his procurement, with the intention and effect of depriving the tenant of the enjoyment of the

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[12] "Cases such as *Boston* v. *Aetna Life Ins. Co.*, 399 Mass. 569, 575 (1987), in which the public entity may act as a plaintiff in a c. 93A action, are not apposite. One who deals with a public entity, as for instance in providing it with goods or services, may very well be engaged in trade or commerce without the entity being so engaged as well." *Lafayette Place Assocs.* v. *Boston Redev. Auth.*, 427 Mass. 509, 536 n. 29 (1998), cert. denied, 525 U.S. 1177 (1999).

premises demised, or of a part thereof, to which he yields and abandons possession," within a reasonable time. *Wesson* v. *Leone Enters., Inc.*, 437 Mass. 708, 713 (2002) (citations omitted; internal quotation marks omitted), quoting *Shindler* v. *Milden*, 282 Mass. 32, 33 (1933). See also *Wesson*, 437 Mass. at 714 n.15 (providing examples of constructive eviction). In determining whether there has been a constructive eviction, the landlord's subjective intention is not controlling, as it is presumed that a landlord intends the natural and probable consequence of what it did, what it failed to do, or what it permitted to be done. *Id.* at 714.

However, the requirement that the property be abandoned for constructive eviction to occur has been modified. In *Charles E. Burt, Inc.* v. *Seven Grand Corp.*, 340 Mass. 124 (1959), the Supreme Judicial Court stated:

> "At law the tenant's abandonment of the leased premises must take place within a reasonable time . . . after the acts alleged to constitute constructive eviction . . . , but 'abandonment of the [leased] premises is not essential to seeking equitable relief.' . . . In the case of material breaches of a lease by a lessor, where the injury is sufficiently serious, equitable relief by way of injunction or specific performance may be granted. . . . We perceive no reason why equitable relief, in appropriate circumstances, should not be given by way of (1) a declaration under G. L. c. 231A that the wrongful acts of the lessor justify treating those acts as a constructive eviction, (2) appropriate consequential relief, and (3) assessment of damages." *Id.* at 128-129 (citations omitted).

In *Boston Hous. Auth.* v. *Hemingway*, 363 Mass. 184 (1973), the court stated in furtherance of the *Charles E. Burt, Inc.* decision:

> "This judicial willingness to expand the number of exceptions to the independent covenants rule in appropriate cases by treating the lease more as a contract than as a property conveyance was supported by our decision in *Charles E. Burt, Inc.* v. *Seven Grand Corp.* 340 Mass. 124. We held in the *Burt* case that the tenant may get damages in a suit for equitable relief *despite its failure to abandon the premises.* We noted that damages without abandonment are possible in those cases where the breach of the covenant of quiet enjoyment 'goes to the essence' of the contract. p. 129. We decided that the tenant was entitled to damages in the *Burt* case because '[s]uch relief is more nearly adequate than the incomplete and hazardous remedy at law which requires that the lessee (a) determine at its peril that the circumstances amount to a constructive eviction, and (b) vacate the demised premises, possibly at some expense, while remaining subject to the risk that a court may decide that the lessor's breaches do not go to the essence of the lessor's obligation.' The *Burt* case, *supra*, 129-130." *Boston Hous. Auth.* v. *Hemingway*, 363 Mass. at 196-197.

Consistent with the evolving trend of landlord-tenant law, constructive eviction does not necessarily require abandonment of the premises. As noted, in equitable actions, a breach of the covenant of quiet enjoyment that goes to the essence of the contract will

of constructive eviction. The landlord's act must "have 'some degree of substance and permanence of character.'" *Wesson*, 437 Mass. at 714, quoting *Tracy v. Long*, 295 Mass. 201, 204 (1936). "[C]onduct that does 'not make the premises untenantable for the purposes for which they were used' will not constitute constructive eviction." *Wesson*, 437 Mass. at 714, quoting *A.W. Banister Co. v. P.J.W. Moodie Lumber Corp.*, 286 Mass. 424, 426 (1934).

As an example, *Wesson*, 437 Mass. at 708, involved a situation in which the landlord failed to prevent rainwater from entering the building and failed to provide heat. In holding that there had not been a constructive eviction, the court observed that evidence the tenants' equipment got wet and had to be covered with plastic sheeting and that wet ceiling tiles had fallen out, was insufficient to constitute constructive eviction where there was "no evidence that the leaks caused work stoppages, resulted in missed or delayed customer deliveries, or otherwise prevented the tenant from carrying on business. The tenant continued to conduct business from the time it first complained of the leaks in April, 1991, through the time the tenant moved out sometime after November 4, 1991." *Id.* at 715. The court held that there was no constructive eviction. *Id.* See also *A.W. Banister Co.*, 286 Mass. at 426 (landlord's breach of express covenant to supply steam to dry lumber "simply made the use [of the leased premises] less convenient and more expensive" and "[d]amages for breach of covenant . . . afforded an adequate remedy").

In the case at bar, the interference with customer parking at the restaurant would not make the premises untenantable. It certainly makes it more inconvenient for customers and, according to the jury, caused a loss of income, but it did not prevent the plaintiff from continuing to conduct business at a substantial level. Employees came to work, patrons were served and the restaurant continued to offer its full complement of services. There was no evidence that the business was shut down for any period of time or that its business hours were curtailed. This was not a constructive eviction.

Accordingly, the plaintiff has not presented sufficient evidence to satisfy the elements of the claim of constructive eviction.

DEFENDANT'S COUNTERCLAIM

A. Summary Process Eviction of Bay State Hospitality, Inc.

The defendant has filed a claim for a summary process eviction. The NARA contends that the plaintiff has failed to pay rent for a lengthy period of time and, in addition to recovery of the outstanding rent, the NARA is entitled to evict the plaintiff from the premises.

The evidence is undisputed that from 1994 until April 2009, Bay State was current on its rental obligations. Commencing in May 2009, the plaintiff began to fall behind as it made desultory payments until it completely stopped paying rent and related charges on September 1, 2010. It did not make any further payments until some point

after October 1, 2013. The jury determined that the amount of the rental payments owed to the NARA by the plaintiff at the time of trial was $83,215.00.

On April 20, 2012, Bay State established an account with Hoosac Bank and deposited $63,000.00 in the account. By correspondence dated April 24, 2012, counsel for the plaintiff notified the NARA of this account and indicated that the "Tenant will continue to deposit rental payments into this escrow account until this matter is resolved in the Litigation." The account presently has $77,274.62.

The issue before the court is whether the NARA's breach of the implied covenant of good faith and fair dealing is an affirmative defense to the non-payment of rent and the eviction. If so, the NARA would be entitled to only a setoff for unpaid rent out of the damages awarded by the jury. If not, Bay State must be evicted.

Traditionally, a commercial tenant could not withhold rent and expect to retain possession of the rented premises. Covenants in leases were generally considered "independent, in the absence of clear indications to the contrary, and the lessee [was] relieved from performance of his covenants only by actual or constructive eviction." *Barry* v. *Frankini*, 287 Mass. 196, 201 (1934). In 2002, the Supreme Judicial Court "abandon[ed] the common-law rule of independent covenants in commercial leases in favor of the modern rule of mutually dependent covenants as reflected in the Restatement (Second) of Property (Landlord and Tenant) § 7.1 (1977)." *Wesson*, 437 Mass. at 709.

In *Wesson*, three years into a five-year lease, the tenant printing company complained of "significant leaks in the roof" adversely affecting its operations. *Id.* The landlord made efforts at repair, but leaks recurred. *Id.* The tenant terminated the lease and vacated the premises, and the landlord sued for the unpaid rent for the remainder of the lease term. *Id.* at 710-712.

The court in *Wesson* stated,

> "We conclude that the better rule is the rule of mutually dependent covenants set forth in the Restatement (Second) of Property (Landlord and Tenant) § 7.1 (1977), the principles of which we adopt to the extent necessary to resolve the issues in this case. Specifically, we adopt so much of the Restatement that provides as follows:
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> "'Except to the extent the parties to a lease validly agree otherwise, if the landlord fails to perform a valid promise contained in the lease to do, or to refrain from doing, something . . . and as a consequence thereof, the tenant is deprived of a significant inducement to the making of the lease, and if the landlord does not perform his promise within a reasonable period of time after being requested to do so, the tenant may (1) terminate the lease . . . .'" *Wesson*, 437 Mass. at 720.

Massachusetts cases subsequent to *Wesson* have acknowledged the adoption of the mutually dependent covenants rule in this state. See *Fafard* v. *Lincoln Pharmacy of*

Milford, 439 Mass. 512, 516 (2003); *Shawmut-Canton LLC* v. *Great Spring Waters of Am., Inc.*, 62 Mass. App. Ct. 330, 338-39 (2004).

As argued by the NARA, the Supreme Judicial Court in Wesson did not adopt the provision in the Restatement that allows a tenant to withhold rent.[13] By failing to adopt all of the provisions of the Restatement, the defendant contends that the court specifically limited the rule of dependent covenants in commercial leases to allow only termination of the lease, not rent withholding, and that only where the breach rises to the level of actual or constructive eviction is the tenant entitled to withhold rent. In essence, the defendant argues that, regardless of its own performance, the tenant had no right under the lease to withhold rent and should be evicted. The defendant cites a Superior Court case for support. See *Apple D'OR Tree, Inc.* v. *Webster-Dudley Sand & Gravel, Inc.*, 24 Mass. L. Rptr. 49 (Mass. Super. 2008).

In response, the plaintiff cites to *In Re Tiny's Cafe, Inc.*, 322 B.R. 224 (Bankr. D. Mass. 2005), to support its contention that the withholding of rent is an available remedy when a tenant is deprived of a significant inducement to the making of the lease.[14] In *Tiny's Café*, the landlord repeatedly failed to fulfill his requirement to repair the roof despite numerous requests. *Id.* at 226-227.[15] The tenant allegedly spent in excess of $14,000.00 on repairs directly necessitated by the landlord's refusal to repair the roof, an amount which far exceeded the $2,000.00 it withheld on rent. *Id.* at 226. For these reasons, the tenant argued that it was entitled to withhold rent and that termination of the lease by the landlord was not lawful. *Id.* Although the lease expressly provided that the landlord's failure to maintain the roof "shall not be grounds for the tenant to stop paying rent," the bankruptcy court held that the tenant was entitled to withhold rent where the condition of the roof interfered with the tenant's business. *Id.* at 228.

The court in *Tiny's Cafe* stated:

> "In *Wesson* the Massachusetts Supreme Judicial Court held that under Massachusetts law, a commercial tenant may be excused from a lease in which the landlord breaches his duty to maintain the roof after receiving adequate notice. *Wesson*, 437 Mass. at 722, 774 N.E.2d at 622. Similarly, this Court finds that [the

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[13] Providing that, as an alternative to terminating the lease, the tenant may "(2) continue the lease and obtain appropriate equitable and legal relief, including . . . (d) the withholding of the rent in the manner and to the extent prescribed in §11.3 until the landlord performs his promise." Restatement (Second) of Property (Landlord and Tenant) § 7.1 (1977).

[14] In *Fafard* v. *Lincoln Pharmacy of Milford*, 439 Mass. at 516, the Supreme Judicial Court stated, "[t]he tenant did not terminate the lease or withhold rent in response to any failure by the landlord, after notice, to perform a promise significant to the lease." This seems to imply that withholding of rent is an option for the tenant.

[15] The lease in *Tiny's Cafe*, provided that "[t]he Landlord will be responsible for the roof repair and painting of the exterior of the building. If the landlord, for whatever reason, fails, to the tenant's satisfaction, to repair the roof, or paint the exterior of the building, such failure shall not be grounds for the tenant to stop paying rent. Tenant's sole remedy shall be via an independent action to enforce landlord's obligations, to repair the roof and/or pay the rent. Under all such circumstances, tenant will remain obligated to continue to timely pay the rent." *Tiny's Cafe*, 322 B.R. at 225. The lease in the case at bar does not have such language.

> landlord's] failure to perform his covenant to maintain the roof entitled Debtor to withhold her July, 2004 rental payment. Although the Lease provides that the Debtor is to continue paying rent if [the landlord] fails to repair and maintain the roof to its satisfaction, the Lease is silent with respect to Debtor's obligation to pay rent should [the landlord] fail to repair and maintain the roof so that the Debtor cannot operate its business. Enforcing Debtor's obligation to pay rent in this situation would offend both the rule of mutually dependent covenants and fundamental notions of fairness." *Tiny's Cafe*, 322 B.R. at 228.

The court also observed:

> "To interpret the language of Section 4(J) of the Lease to mean that Debtor must continue to pay rent even when [the landlord's] failure to repair leaves the Premises unfit for the purposes in which the contract was entered is fundamentally unfair. The Court will not permit [the landlord] to reap an unfair benefit from a clause of the Lease that requires Debtor to pay rent, indefinitely, while he refuses to fulfill his bargained for duty. As such, the Court finds that [the landlord] breached the covenant of good faith and fair dealing implicit in every contract in this jurisdiction and will not reward such behavior. See M.G.L. ch. 93A § 11; See also *Anthony's Pier Four, Inc.* v. *HBC Associates*, 411 Mass. 451, 471-76, 583 N.E.2d 806, 820-22 (1991) (Conduct in disregard of known contractual arrangements and intended to secure benefits for the breaching party is a breach of the covenant of good faith and fair dealing implicit in every contract between parties)." *Tiny's Cafe*, 322 B.R. at 228.

I agree with the bankruptcy court's analysis. Allowing the NARA to evict Bay State for failing to pay rent would conflict with "fundamental notions of fairness." As found by the jury, the defendant violated the covenant of good faith and fair dealing and caused $300,000.00 of damages to the plaintiff. To allow the NARA to evict Bay State for withholding $83,215.00 in rent, given NARA's transgressions, would be contrary to the spirit of *Wesson*. Given the evolving nature of the law related to commercial tenancies, I believe that the Supreme Judicial Court, if presented with the opportunity to address this issue, will conclude that the withholding of rent is an appropriate remedy for the failure of landlords to satisfy their obligations.[16]

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[16] Not all breaches of covenants by a landlord, however, justify a tenant in withholding rent. Only a significant breach of a covenant material to the purpose for which the lease was consummated justifies a tenant in abating rent. Temporary or minor breaches of routine covenants by a landlord do not. Thus, if a breach has little effect on the essential objectives of the tenant in entering into the lease, the tenant may not withhold rent. Restatement (Second) of Property (Landlord and Tenant) § 7.1, comment c (1977), indicates that a covenant is not a significant inducement if "the landlord's failure to perform his promise has only a peripheral effect on the use of the leased property by the tenant." "The performance of the promise must have a significant impact on the benefits the tenant anticipated he would receive under the lease." Restatement (Second) of Property (Landlord and Tenant) § 7.1, comment c. Thus, in assessing whether a landlord's breach is sufficient to justify the withholding of rent, a tenant first and a court later, if necessary, must gauge the materiality of the breach in light of the tenant's purpose in leasing the premises.

I conclude that Bay State had the right to withhold rent as the landlord failed to perform its obligation to maintain available parking as described in the Lease, and as a consequence, Bay State was deprived of a significant inducement to the making of the Lease. There is no genuine dispute that the parking was a significant inducement to the making of the Lease. The terms of the Lease are clear that parking was critical, a condition that is hardly surprising in light of the nature of the business and its location.

Assuming that the counterclaim filed by the defendant on November 30, 2012, constituted a notice to quit for nonpayment of rent, which is a prerequisite to a summary process claim pursuant to G. L. c. 186, §11, the notice of withholding of the rent (April 24, 2012) pre-dated this claim. Parenthetically, I have serious doubts that the counterclaim for summary process would be sufficient to satisfy the requirements of § 11 as it fails to inform the tenant of its opportunity to correct the problem by making the payment within fourteen days.

Consequently, the NARA is not entitled to evict the plaintiff from the property and the summary process claim is dismissed. The defendant is entitled to an offset for the rent owed.

The defendant is also seeking attorney's fees pursuant to Section 9.4 of the Lease under the heading, "Indemnification." The section indicates that the tenant shall indemnify the landlord for all losses, including attorney's fees, for any breach or default by the tenant, unless caused by the landlord. As the jury found, it was the landlord that was in breach of the lease causing the damages it now claims. Accordingly, the NARA is not entitled to indemnification by Bay State.

ORDER

In consideration of the jury verdict and the above findings, judgment is entered as follows with respect to the claims tried to a jury or jury-waived:

IT IS HEREBY ORDERED:

(1) That judgment enters for the defendant on Count II of the complaint, breach of contract, and the claim is dismissed with prejudice.

(2) That judgment enters for the defendant on Count IV of the complaint, constructive eviction, and the claim is dismissed with prejudice.

(3) That judgment enters for the plaintiff on Count VI of the complaint, breach of the implied covenant of good faith and fair dealing, in the amount of $216,785.00, with interest and costs thereon. ($300,000.00 less $83,215.00) See paragraph 5

(4) That judgment enters for the defendant on Count VII of the complaint, violation of G. L. c. 93A, and the claim is dismissed with prejudice.

(5) That judgment enter for the defendant on Count I of the defendant's counterclaim, breach of contract, in the amount of $[illegible]5.00. Such judgment to offset the plaintiff's judgment under Count VI. See paragraph 3.

(6) That judgment enter for the plaintiff on Count II the defendant's counterclaim, summary process eviction, and the counterclaim is dismissed with prejudice.

SO ORDERED

[illegible] Agostini
Associate Justice, Superior Court

Dated: June 30th, 2014