COMMONWEALTH OF MASSACHUSETTS
APPELLATE DIVISION OF THE DISTRICT COURT DEPARTMENT
NORTHERN DISTRICT

GAETANO CIRIELLO

V.

LINDA FORTIN

NO. 15-ADMS-10023

In the MALDEN DIVISION:

Justice: Paratore, J.
Docket No. 1350SU0754
Date of Decision Appealed: December 20, 2013
Date of Entry in the Appellate Division: July 21, 2015

In the APPELLATE DIVISION:

Justices: Swan, P.J., Coven & Crane, JJ.
Sitting in: Boston, Massachusetts
Date of Hearing: October 30, 2015
Date Opinion Certified: February 25, 2016

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OPINION

CRANE, J. The defendant ("tenant") appeals from a judgment for possession awarded against her

following trial by a jury in a summary process action.

The tenant claims error in four instances. First, the trial court denied her motion to dismiss or for

summary judgment that asserted that a new tenancy was created by acceptance of a payment following a second notice to quit for nonpayment by the plaintiff ("landlord"). Second, she claims that she was prejudiced by the landlord's failure to disclose the identification of a witness in answers to interrogatories and the admission of evidence of fire department concerns about the condition of her apartment. Third, the tenant claims the trial judge did not instruct the jury correctly on whether the tenant violated the terms of her lease by harassing other tenants, the basis for her alleged breach of her tenancy. Fourth, the tenant also claims that the instructions to the jury on whether the summary process action was brought in retaliation for reporting alleged code violations to city enforcement officials were inadequate.

1. *Factual background.* The tenant has lived at 148 Elm Street, in Everett, since November 1, 2007. She and the landlord had a written lease from year to year that was self-renewing unless either party gave notice of termination one full rental period (monthly) before October 31.

On April 29, 2013, the tenant complained about conditions of the apartment to the Everett inspectional services department. On May 2, 2013, the inspector found the following violations and notified the landlord in writing of them: "1. [s]moke and [c]arbon [*sic*] not working in bedroom; 2. [w]ater leaking from [k]itchen faucet; 3. [o]utlet in [k]itchen needs to be a GFI; and 4. [t]ile [c]racked in [b]athroom floor and seal around tub." By May 7, 2013, the landlord completed all of the repairs to the satisfaction of the inspector. However, the inspector reported other conditions that he found in the apartment to the Everett fire department. They involved the volume of contents that the tenant appeared to be storing in her apartment.

On September 30, 2013, the landlord delivered a combined notice of termination of the lease effective November 1, 2013, and notice to quit for harassment of other tenants ("first notice"). On November 18, 2013,

the landlord served a notice to quit for nonpayment of rent ("second notice"). It contained the following provision: "[A]ll monies paid to the landlord after your receipt of this notice will

be accepted as use and occupancy and not as rent, without waiving any right to possession of the premises, and without any intention of reinstating your tenancy or establishing a new tenancy."

The lease provided for a monthly rent to the landlord in the amount of $1,250.00 due on the first day of each month, of which the tenant's rent was $78.00 and the balance was a housing assistance payment from Metropolitan Boston Housing Partnership ("MBHP"). The tenant was current in her rent through October 31, 2013. In early December, 2013, MBHP made a payment of $2,344 to the landlord, representing the housing assistance payment for the months of November and December, 2013. The landlord refused to accept any payments that the tenant directly offered to him after October 31, 2013.

When the matter was tried to a jury, the landlord went forward seeking possession only on the ground that the tenant had violated paragraph 8(c)(3) of the lease by engaging in criminal conduct at the leased premises by harassing other tenants. The pertinent provision of the lease states:

> "The owner may terminate the tenancy for criminal activity by a household member in accordance with this section if the owner determines that the household member has committed the criminal activity, regardless of whether the household member has been arrested or convicted for such activity."

The tenant denied any such conduct and claimed that the landlord terminated her tenancy and sought to evict her in retaliation for complaining to local code enforcement officials. Because the termination and summary process complaint were brought within six months of the complaint to code enforcement officials, the tenant was entitled to a presumption that any change in tenancy was in retaliation. See G.L. c. 186, § 18; *Scofield v. Berman & Sons, Inc.*, 393 Mass. 95, 108-115 (1984). This required the landlord to prove it was not retaliation by clear and convincing evidence. The tenant also claimed that a new tenancy was established with

the landlord because the landlord received payments from MBHP.

2. *Dispositive motions*. The tenant asserts that the denial of her motion to dismiss or for summary judgment was error. She presented the motion to the court on the morning of the original trial date, December 5, 2013. She did not furnish the landlord or his counsel with a copy of the motion,

memorandum, or supporting affidavit before that morning. Furthermore, she did not notify the landlord that she requested a hearing on it before December 5. The trial judge orally denied the motion without stating any grounds on December 5.

Because the motion was supported by an affidavit, the court could consider the affidavit only if it treated the motion as one for summary judgment. *Bell v. Zoning Bd. of Appeals of Gloucester*, 429 Mass. 551, 555 (1999). The Massachusetts Rules of Civil Procedure apply to any procedural aspect of a summary process proceeding not addressed by the Uniform Summary Process Rules. Rule 1 of the Uniform Summary Process Rules. Rule 56(c) of the Mass. R. Civ. P. requires any party seeking summary judgment to furnish the nonmoving party with the motion and any supporting materials at least ten days before a hearing. This gives a nonmoving party, such as the landlord here, time to prepare and submit any affidavit or materials that it wishes. Because the tenant did not furnish the landlord with the motion and supporting materials in a timely manner, the court was not required to consider them or treat the tenant's motion as one for summary judgment. As a motion to dismiss, the complaint was adequate to withstand that motion. See *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 635-636 (2008).

Even if the court were to have considered the motion as one for summary judgment, the trial judge would have been correct in denying it. The ground that the tenant asserted in the motion was that a new tenancy was created by the deposit of funds to the landlord's account by MBHP.

"Although it has long been the general rule that, if, after the effective date of a

> valid notice to terminate a tenancy, the tenant tenders, and the landlord accepts, a payment as rent in advance for a period after the termination of the tenancy, such payment and acceptance are prima facie evidence of the landlord's waiver of his right to recover possession unless he gives a new notice, it has also long been a part of the general rule that certain acts or conduct may prevent or negate the inference or presumption of such a waiver by the landlord."

Corcoran Mgt. Co. v. Withers, 24 Mass. App. Ct. 736, 744 (1987).

A factual dispute clearly existed concerning whether a new tenancy was created and, if so, its terms. The

payment may have been a continuation of the same payment MBHP had made under the lease. The second notice to quit, which the tenant claims offered a new tenancy, contained a provision that any money paid would be for use and occupancy and not create a new tenancy. Based upon the tenant's materials alone, without any opposition from the landlord, we conclude that the tenant was not entitled to summary judgment, and the trial judge did not commit error in denying the motion if that standard were applied. The parties then presented their evidence of whether a new tenancy had been created to the jury when the case was tried on December 19 and 20. We reach this conclusion without considering any of the arguments in the landlord's brief concerning the manner and method of any payments, since they are unsupported by affidavit.[1]

3. *Discovery*. Next, the tenant argues that the denial of her motion to compel discovery was error. A trial court's ruling on a discovery motion will be set aside only for abuse of discretion. See *Sinnott v. Boston*

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[1] The landlord has submitted argument concerning checks and correspondence that are not authenticated by affidavits or other testimony. Any materials submitted in opposition to a motion for summary judgment must be under oath or authenticated by testimony. The record does not indicate that the trial judge considered any of these materials in ruling on the motion to dismiss. Where the trial court ruled on the motion as a motion to dismiss and did not consider these materials, we do not consider any argument to us based upon these materials. Dist./Mun. Cts. R. A. D. A. 18(a). See Mass. R. A. P. 8(a), as amended, 378 Mass. 932 (1979); *Brennan v. The Governor*, 405 Mass. 390, 399 n.5 (1989). We also "do not rely on factual statements contained in any party's brief that are not properly supported in the record appendix." *Marnerakis v. Phillips, Silver, Talman, Aframe & Sinrich, P.C.*, 445 Mass. 1027, 1028 n.5 (2006).

Retirement Bd., 402 Mass. 581, 585 (1988); *Matter of Roche*, 381 Mass. 624, 638 (1980). The tenant claims that she did not receive additional documents and answers to interrogatories. The landlord produced a report from the Everett police department concerning events that supported the allegation of criminal harassment. The tenant has not pointed to any other documents that were not produced or that prevented her from presenting her case at trial. There was no error in denying her motion for documents.

The tenant also claims that she did not have enough information to prepare adequately to cross-examine the Everett code enforcement director, Frank Nuzzo ("Nuzzo"), because he was not identified as a witness in answers to interrogatories. The tenant knew that the landlord planned to call the keeper of

records of the Everett inspectional services department because she raised the defense of retaliation from her complaint to his agency. The tenant knew this because the landlord furnished her with a copy of a keeper of records subpoena directed to the Everett inspectional services department. Nuzzo was the witness designated to testify as its keeper by the Everett inspectional services department. His name appears as the code enforcement director on various notices to the landlord, copies of which were furnished to the tenant. The tenant has not directed this Division to, and after review of his testimony we have not found, any part of his testimony that would indicate she was prejudiced in any way in cross-examining him at trial. The trial court did not abuse its discretion in denying these discovery motions.

4. *Evidence of conditions.* The tenant also urges that it was error for the trial judge to admit Nuzzo's testimony concerning the condition of the premises and notification to the Everett fire department. Where the tenant was asserting the defense of retaliation, this evidence was admissible because it was relevant to determining the landlord's motivation for seeking to evict the tenant and to refute the presumption of retaliation. The trial judge did not abuse his discretion in admitting this evidence.

5. *Jury instructions.* Last, the tenant claims error in the jury instructions on criminal harassment and

retaliation. We do not reach this issue because the tenant failed to preserve it with a timely objection to the jury instructions before the jury retired to deliberate. In order to appeal from a trial judge's failure to give a particular instruction, the appealing party must object to the instruction before the jury retires to consider its verdict. Mass. R. Civ. P. 51(b). See also *Composto v. Massachusetts Bay Transp. Auth.*, 48 Mass. App. Ct. 477, 480 (2000). In making such an objection, a party must state "distinctly the matter to which he objects and the grounds of his objection." Mass. R. Civ. P. 51(b). See also *Composto*, *supra*; *Miller v. Boston & Me. Corp.*, 8 Mass. App. Ct. 770, 773 (1979). The tenant made no objection before the jury retired to deliberate. Parties may not appeal from jury instructions if they have remained silent when the trial judge could have corrected any error by a timely objection with a statement of grounds to

the trial judge who could have revised instructions before the jury began to deliberate.

Judgment affirmed.

HON. ALLEN G. SWAN, Presiding Justice
HON. MARK S. COVEN, Justice
HON. DANIEL C. CRANE, Justice

This certifies that this is the Opinion
of the Appellate Division in this case.
A True Copy, Attest:

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Brien M. Cooper, Clerk