

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, SS

HOUSING COURT DEPARTMENT
WESTERN DIVISION

DOCKET NO. [REDACTED]

WORTHY APARTMENTS C/O
CARABETTA MANAGEMENT
COMPANY,

Plaintiff

v.

[REDACTED]

Defendant

ORDER APPOINTING
GUARDIAN AD LITEM

1. **Background:** The above-captioned matter came before the court for trial on September, 6, 2017, at which time the plaintiff (landlord) appeared through counsel, and the defendant (tenant) appeared without counsel. After testimony by the landlord's property manager and a detective with the narcotics bureau of the Springfield Police Department, the court suspended the trial in order to consider and rule upon the tenant's right to counsel in these proceedings. For the reasons set forth herein, the court concludes that the tenant has the right to effective assistance, which in this case I determine requires the assistance of counsel. I am therefore appointing a guardian ad litem.

2. The record thus far establishes that the tenant receives Supplemental Security Income (SSI) in the amount of \$840 per month, based on disability that he credibly testified is related to severe social anxiety and post traumatic stress disorder [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

The tenancy includes a project-based subsidy, meaning that the subsidy is limited to the unit in question; it is not transferable to another apartment. The tenant's rent is currently \$209 per month. He had not paid rent since approximately the time he received the notice to quit dated June 27, 2016, and is in arrears in the amount of approximately \$3,348.

3. The notice to quit and summary process complaint that followed alleged that the tenancy was terminated for lease violations. Specifically, the notice to quit stated as follows:

...[O]n or about April 13, 2016, you were arrested on or in the immediate vicinity of the premises for distribution of a Class E substance, drug violation near a school and/or park, and distribution of a Class A substance. Said actions are in violation of the subsidy rules and regulations and/or your Occupancy Agreement.

4. As a result of the events that allegedly occurred on or about April 13, 2016, the tenant has been charged criminally, and is awaiting trial in the District Court department. The record establishes that the tenant was originally represented in the criminal case by John W. Nolen III, Esq., a staff attorney with the Committee for Public Counsel Services. In December, 2016, Attorney Nolen moved to stay these proceedings pending resolution of the District Court case. That motion was allowed in part, and a stay was ordered on behavioral conditions, through a then-pending hearing in the District Court on the tenant's motion to suppress. Thereafter, Attorney Nolen withdrew as the tenant's criminal defense lawyer, and the tenant retained private counsel, who has declined on the record to represent the tenant in this related eviction case.

5. As indicated above, the stays that were previously ordered in this case were conditioned

upon certain behavior by the tenant. Specifically, on February 21, 2017 the court (Fields, J.) issued an order that provided as follows: "If there are any allegations that the tenant is involved in dangerous or criminal behavior, or allowing same to occur at his unit, the landlord may bring a motion for further court order prior to the next hearing." Although counsel indicated when trial was convened on September 6, 2017 that the tenant was arrested again approximately a month ago, the case was not previously brought forward on motion, and trial scheduled for June 28, 2017 was continued at the request of both parties.¹

6. When the trial was convened on September 6, 2017, the tenant requested a continuance pending the trial of his criminal case, which he indicated was scheduled sometime in October, 2017. The landlord objected, based on the fact of previous continuances as well as the presence under subpoena of the arresting detective. The tenant also expressed concern about his ability to cross-examine the detective without risking self-incrimination. Having heard from both parties, I ruled that the trial would be convened in order for the landlord to put on its case, at which time I would determine whether to proceed or suspend the balance of the trial.

7. After testimony by the property manager, the landlord called Detective Michael Goggin of the Springfield Police Department. Detective Goggin testified to events that occurred in the area of Stearns Square, Bridge Street and Worthington Street on April 13, 2016, which lead to the arrest of the tenant. After the direct examination of the detective, the tenant "objected," and attempted to support his objection by arguing that the detective had not observed directly the

¹ Counsel for the landlord indicated that the trial was continued in June because neither police officer appeared pursuant to subpoena.

events in question.² At approximately that point, the court discontinued further examination of the witness, and engaged the parties in extensive colloquy about the tenant's history of representation in this case and the related criminal case, as well as the issues surrounding his right to representation in this case, if any. Thereafter, the court suspended the trial, over objection by the landlord, and with conditions as set forth below.

8. Upon consideration of the various issues raised in this case, the court has determined that the appropriate course of action is to appoint a guardian ad litem (GAL) for the tenant. The GAL is authorized and requested to do the following: confer with the tenant's criminal defense lawyer so as to ensure a coordinated approach to the two cases; investigate the tenant's right to counsel in this case as a matter of law; preserve the issue of the tenant's right to counsel for purposes of appeal, if any; and otherwise advocate for the best interests of the tenant.

9. The court's decision to appoint a GAL is based on several considerations. As was indicated on the record before the trial was suspended, this case implicates important rights, as well as administration of justice issues. The tenant's liberty interest is at issue in the criminal case, and hence his right to appointed counsel therein. *Gideon v. Wainwright*, 372 U.S. 335 (1963).³ The tenant correctly observed that his conduct in this case has consequences for his liberty interest in the criminal case, including the risk of self-incrimination if he testifies at trial

² The tenant had previously expressed concern about whether, in cross-examining the detective, he could be risking self-incrimination. The court attempted to explain the difference between asking a question, and offering testimony - a line that is difficult to draw in the context of self-representation.

³ Although the tenant has recently retained private counsel, apparently at his own expense, there is no dispute that he is indigent, and was originally represented by counsel at CPCS.

in this case.⁴ The tenant questioned whether his cross-examination of the detective in itself risks self-incrimination. My experience in presiding for many years over cases involving self-represented litigants teaches that they often have difficulty cross-examining a witness without sliding into telling their own version of events, i.e. testifying in a way that fairly raises a risk of self-incrimination. Absent the assistance of counsel, it would fall to the court to monitor that line closely so as to protect the tenant's right not to self-incriminate, giving rise to the possibility of providing inappropriate assistance to the tenant on the one hand, or insufficiently protecting his inchoate liberty interest on the other.

10. In addition, the tenant has a constitutionally protected property interest in his rental subsidy. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Madera v. Sec't of the Executive Office of Communities and Development* 418 Mass. 452 (1994).

11. Furthermore, the tenant has testified credibly as to his disabilities, and the landlord does not dispute that the tenant is disabled; it is by virtue of his disability, in fact, that the tenant has the right to reside at Worthy Apartments, and is eligible for the rental subsidy attached to those units.

12. Finally, apart from any rights and protections to which the tenant is entitled, the court has its own interest in counsel appearing on the tenant's behalf, as the court has a responsibility for ensuring the sound administration of justice. In July 2015, the national Conference of Chief

⁴ The landlord's argument that it does not intend to call the tenant to testify, and that he need not testify, begs the underlying question. If the tenant does not testify, the landlord's case may well go uncontested. The tenant hinted at an underlying defense before the court suspended the trial, when he attempted to argue that the arresting detective had not directly observed the events that gave rise to the arrest. Without counsel, the tenant may be required to craft this argument without offering factual testimony in support of it and/or without saying anything that could be interpreted as testimony, unrealistically circumscribing that which a self-represented litigant can reasonably be expected to navigate.

Justices issued “Resolution 5: Reaffirming the Commitment to Meaningful Access to Justice for All,”⁵ calling for “100 percent access to effective assistance for essential civil legal needs and urg[ing] their members to provide leadership in achieving that goal...”.⁶ Among its many efforts to ensure access to justice, Massachusetts has adopted Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants.⁷ Guideline 3.2 provides as follows:

3.2 **Evidence.** Judges shall adhere to the applicable rules of evidence, but may use their discretion, when permissible, to provide self-represented litigants the opportunity to meaningfully present their cases. Judges may ask questions to elicit general information and to obtain clarification. Judges should explain why the questions are being asked and that they should not be taken as any indication of the judge's opinion of the case.

13. Absent counsel, the proper exercise of a judge’s discretion pursuant to Guideline 3.2 in a civil case such as this, by, for example, obtaining clarification with respect to aspects of the arresting detective’s testimony, could have consequences for the prosecution and defense of the related criminal case. As a judge in the Housing Court, which does not routinely deal with criminal cases, I am concerned about the possibility of exercising my discretion reasonably in a civil proceeding, but in such a way as unwittingly to impact a criminal proceeding. The adversary process, in which all interested parties - the landlord, the tenant, and the Commonwealth - are represented, is better able to ensure that the rights of those parties are appropriately protected.

⁵ http://www.ncsc.org/~media/microsites/files/access/5%20meaningful%20access%20to%20justice%20for%20all_final.ashx

⁶ The undersigned, in her role as Special Advisor for Access to Justice and a member of the Massachusetts Access to Justice Commission, serves on the project management team for the Massachusetts Justice for All project, operating under the auspices of the Supreme Judicial Court.

⁷ <http://www.mass.gov/courts/court-info/trial-court/exec-office/ocm/jud-institute/jg-self-rep.html>

14. For the reasons set forth herein, the court is appointing a GAL to represent the interests of the tenant for the balance of these proceedings. Specifically, the court hereby appoints Attorney Christa Douaihy to serve as the tenant's GAL. I am appointing Attorney Douaihy based on her professional background, which should enable her to step into the case and identify any significant issues quickly, avoiding unnecessary delay. Specifically, in addition to her current practice representing tenants before this court, Attorney Douaihy previously served as a supervising attorney at the Bronx Defenders, where she represented clients with respect to the civil consequences of criminal cases, as indicated on her firm's website.⁸ The Clerk's office is requested to notify Attorney Douaihy of this appointment, and verify that she meets the minimum requirements for serving as a GAL in the Housing Court. Attorney Douaihy is obviously free to decline appointment, in which case the court will review the GAL list in an effort to identify another attorney with experience in the intersection between criminal and civil cases. Should the landlord wish to be heard in opposition to the court's appointment of a GAL, counsel may mark a motion for hearing forthwith.

15. **Conditions:** As indicated when trial was suspended on September 6, 2017, the balance of the trial is continued, on the following conditions:

- A. The tenant is ordered to pay \$800 towards arrears, on or before September 8, 2017.
- B. Beginning in October 2017 and continuing until such time as trial is reconvened, the tenant shall pay current rent plus \$100 towards the rent arrears.
- C. The tenant shall not be present at Stearns Square, nor in the alley along side the

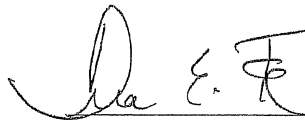
⁸ <https://www.hfmgpc.com/joel-feldman/>

Worthy Apartments.

D. The tenant shall not engage in any criminal activity, anywhere, at anytime.

16. **Case Management:** The Clerk's office is requested to convene this case for case management.

So entered this _____ day of September, 2017.

A handwritten signature in black ink, appearing to read 'Dina E. Fein', written over a horizontal line.

Dina E. Fein
First Justice

cc: Clerk's Office
Christa Douiah, Esq.