# NEW BEDFORD HOUSING AUTHORITY VS. K.R. & ANOTHER[1]

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| **Docket:** | 18-P-1628 |
| **Dates:** | November 6, 2019 - May 28, 2020 |
| **Present:** | Milkey, Singh, & Hand, JJ. |
| **County:** | Bristol |
| **Keywords:** | Summary Process. Housing Authority. Municipal Corporations, Housing authority. Landlord and Tenant, Eviction. Violence Against Women Act. Practice, Civil, Summary process. |

Summary Process. Complaint filed in the Southeast Division of the Housing Court Department on September 5, 2017.

The case was heard by Wilbur P. Edwards, Jr., J., and a motion to alter or amend the judgment was heard by him.

Laura F. Camara (Stephanie Herron Rice & Richard M.W. Bauer also present) for S.R.

Paul J. Santos for the plaintiff.

Brian P. Dunphy, Patrick E. McDonough, & Katharine K. Foote, for Massachusetts Domestic Violence and Housing Advocates & others, amici curiae, submitted a brief.

MILKEY, J. The New Bedford Housing Authority (NBHA or authority) brought a summary process action in Housing Court that sought to evict defendants K.R. and S.R., and their disabled daughter from their public housing apartment.[2] The grounds for the eviction were that K.R. (S.R.'s physically abusive boyfriend) had violated the terms of the lease by engaging in off-site narcotics offenses. Among her defenses to the summary process action, S.R. sought to raise the authority's noncompliance with the Violence Against Women Act (VAWA or act), as amended and reauthorized in 2013. 34 U.S.C. § 12491 (2017). After a bench trial, a Housing Court judge rejected S.R.'s defenses and issued a judgment in the NBHA's

favor. S.R. timely appealed from the judgment awarding possession to the NBHA. For the reasons that follow, we reverse.[3]

Background. 1. VAWA. Although we ultimately rely on State law grounds, an appreciation of the statutory framework provided by VAWA is necessary for a full understanding of this case. We therefore begin by summarizing its relevant provisions.

Congress enacted VAWA in 1994, to provide various protections for, inter alia, victims of domestic violence. One of its central provisions prohibits public housing providers from evicting tenants who are victims of such violence based on lease violations that are the direct result of that violence. See Beacon Residential Mgt., LP v. R.P., 477 Mass. 749, 757 (2017). The Housing Court judge ultimately found that prohibition inapplicable here, concluding as he did that the NBHA was evicting S.R. because of an unrelated lease violation, not because of domestic violence. However, lost in the discussion were a number of other VAWA provisions that also seek to protect victims' housing. For example, VAWA provides housing authorities tools to enable them to protect victims of domestic abuse, including one known as "bifurcation." See 34 U.S.C. § 12491(b)(3)(B).[4] In short, bifurcation allows housing authorities and other landlords to sever an abuser from an existing lease while allowing the victim to stay.

In addition, VAWA seeks to assist victims with regard to their dealings with housing authorities and other landlords receiving Federal funding. First, the act establishes a low substantive threshold for what victims of domestic abuse must do to demonstrate their entitlement to protection under the act. VAWA does not identify any particular words that a tenant must invoke; it states only that when a tenant "represents to a public housing agency . . . that the individual is entitled to protection," the housing authority may make a written request for supporting documentation. 34 U.S.C. § ?12491(c)(1). Second, once a tenant asserts rights under VAWA and the housing authority is on notice that one of its tenants may be a victim of domestic violence, VAWA places certain obligations and constraints on the authority's dealings with the tenant, e.g., with regard to information requests the authority can make of the tenant. See 34 U.S.C. § 12491(c). These provisions seek to empower victims of domestic violence to invoke their rights. Further specificity regarding the terms of VAWA is reserved for later discussion.

2. Facts. The factual recitation that follows is drawn from the judge's subsidiary findings of fact, none of which S.R. has demonstrated to be clearly erroneous.[5] See South Boston Elderly Residences, Inc. v. Moynahan, 91 Mass. App. Ct. 455, 464 (2017) (findings of fact must stand unless clearly erroneous). We supplement the judge's findings only by relaying what certain documentary evidence in the record stated, or by noting the arguments that the parties made in the trial court proceedings.

This case involves three tenants of a New Bedford public housing unit: S.R., K.R., and their disabled minor daughter. On March 28, 2016, the NBHA entered into a lease agreement with K.R.[6] It is undisputed that a few days later, on April 3, 2016, K.R. was arrested for physically abusing S.R. at their new apartment. The police report described the incident, in part, as follows:

"[S.R.] said she and her boyfriend of approximately 1 year [K.R.] got into a heated verbal argument when she refused to have sex with him because he had been drinking alcohol and was intoxicated. [S.R.] said during the argument [K.R] slapped her in the face several times with an open hand. [S.R] said [K.R] then grabbed her by the shoulders and threw her down on their bed. [S.R.] said once on the bed [K.R.] punched her in the face area 2-3 times with a closed fist. [S.R.] said she fought with [K.R.] and was able to get away from him. [S.R.] said . . . she ran out of their apartment and started knocking on neighbor[s'] doors for help. . . . [S.R.] was crying hysterically, her face was red and swollen, and her hair was also disheveled."[7]

According to the police report, the neighbor who ultimately gave S.R. refuge informed the police that S.R. arrived at her door completely unclothed. K.R. was arrested and charged with assault and battery on a family member in violation of G. L. c. 265, § 13M (a). The New Bedford Police Department informed the NBHA of the arrest, thus putting it on notice that its obligations under VAWA were triggered. See 34 U.S.C. § 12491(b)(1).

After the incident, the NBHA discussed the situation with both K.R. and S.R. K.R.'s assault of S.R. violated several terms of the lease under which they and their daughter occupied the unit.[8] The NBHA had a self-described "Zero

Tolerance Policy" regarding such violations.[9] Despite this policy, the NBHA decided not to evict K.R. based on his abuse of S.R. during their first week in the apartment. S.R. subsequently had at least three conversations with NBHA employees in May and June of 2016 about what was needed to get K.R. off the lease (that is to say, the "bifurcation" process outlined above). Bifurcation would have entailed evicting K.R., terminating his status as the formal leaseholder (in the parlance employed by the NBHA, the "resident" on the lease), and substituting S.R. in his place (so long as she independently was eligible to receive public housing assistance under 34 U.S.C. § 12491[b][3][B][ii]). Up to that point, S.R. and her daughter -- while legally recognized tenants on the lease -- had been listed there only as "authorized" members of K.R.'s household.

In responding to S.R.'s inquiries, the NBHA orally advised her about what documentation she needed to provide to get K.R. off the lease. Specifically, the NBHA led S.R. to believe that if K.R. did not voluntarily agree to take himself off the lease, she would have to marshal additional evidence to pursue bifurcation, such as a restraining order.[10] At trial, S.R. did not expressly state that her reliance on the NBHA's misinformation was the reason she failed to pursue bifurcation. However, she did testify that "[o]n many occasions I went [to the housing authority], but they told me it was a court matter to have [K.R.] removed from the lease." She also testified that "I never had a chance to go [to] the court because of issues of transportation."[11] On appeal, the NBHA concedes that it orally "explained to [S.R.] that she could request a . . . restraining order against [K.R.] and that would allow the Lease in effect at that time to be bifurcated."

The judge found that after receiving this advice from the NBHA, S.R. "did not follow-through with any of the [NBHA]'s requests for documentation." He specifically credited testimony from a NBHA employee that S.R. had indicated that "she didn't want to do anything at the moment because [she and K.R.] were going to couple's counseling and that they were reconciling." This finding lies somewhat in tension with the judge's finding specifically crediting testimony from S.R. that the reason she no longer lives with K.R. is because "[a]fter the incident with [K.R.], I just wanted to be with my daughter." In any event, whether K.R. needed to be evicted from the couple's apartment largely became moot in the summer of 2016 when he moved out of the apartment. As the judge expressly found, although K.R. renewed the lease in June of 2016,[12] he moved out shortly thereafter and has not

in fact lived at the apartment since his departure. S.R. became the sole rent payer and paid her rent on time.

A half a year after K.R. moved out of the apartment, he was arrested for drug dealing far from the premises. The police report reflects that K.R. was residing at his mother's apartment at the time of that arrest. There is nothing in the record to suggest that S.R. participated in or had any knowledge of K.R.'s conduct. Nor was there any evidence that K.R. ever conducted any drug dealing at the NBHA apartment. Nevertheless, because K.R. remained the formal leaseholder, the NBHA pursued an eviction action not only against K.R., but also against S.R. At the eviction trial, S.R. argued, inter alia, that she was entitled to protections under VAWA. In response, the NBHA minimized K.R.'s assault of S.R. and made much of S.R.'s failure to get a restraining order, arguing in closing:

"[W]hatever the incident was, it looked like it was an incident where both parties were struck, both parties were injured minimally. . . . And then on top of that, the statements of the tenant aren't believable. (Inaudible) she said he moved out. Two months later, nobody did anything. Well, why don't you get a restraining order at this time? I mean, how significant were the injuries that she didn't have time to get a restraining order?"

The Housing Court judge ruled in the NBHA's favor.

On appeal, S.R. concedes that K.R.'s drug dealing was not criminal activity directly relating to domestic violence. Instead she contends that "the Housing Authority's failure to comply with VAWA 2013 led to [K.R.'s] continued presence on the lease long after he had vacated the premises." Additionally, she argues that the judge erred in ruling that the NBHA made out a lease violation by a tenant in light of his finding that K.R. did not live in the premises at the time of his arrest.

Discussion. 1. The NBHA's compliance with VAWA. As noted, the judge focused principally on the narrow question whether the NBHA had violated the specific provision in VAWA that prohibits housing authorities from evicting victims of domestic violence for lease violations caused by that violence. The judge found no violation of that provision, because he concluded that the NBHA was evicting S.R. for an unrelated lease violation (K.R.'s drug dealing). In addition, the judge found

the NBHA's "employees credible in their testimony that they attempted to provide [S.R.] an opportunity to bifurcate," and that S.R. chose to pursue potential reconciliation instead. The judge did not address whether in "attempt[ing]" to provide S.R. an opportunity to bifurcate, the NBHA satisfied its procedural obligations under VAWA.

In our view, it is indisputable that by providing erroneous advice to S.R. about what she needed to show to pursue bifurcation, the NBHA failed to live up to its procedural obligations under VAWA; indeed, the NBHA conceded as much at oral argument, while contending nonetheless that it was "following the spirit of the law."[13] Under VAWA, housing authorities are not entitled to specify the kind of documentation that tenants seeking protections under the act need to provide. Rather, a housing authority is required to accept any one of the enumerated forms of documentation that the tenant chooses to provide. Included among these are police reports. 34 U.S.C. § 12491(c)(3)(C).[14] In the case before us, the NBHA was already in possession of a detailed police report documenting the severe domestic abuse that S.R. had faced by the time she raised the issue of bifurcation. By suggesting to her that it could proceed with bifurcation only if she took the further step of obtaining a restraining order, the NBHA failed to comply with the terms of VAWA.[15] Finally, it bears noting that the NBHA's actions were at odds not only with VAWA itself, but also with a provision in the lease included in a section titled "NBHA obligations." Specifically, the NBHA promised "[t]o provide assistance which the NBHA may determine to be reasonable and appropriate to a household member who is a victim of domestic violence and to follow NBHA policy established by [VAWA]."[16]

Instead of addressing the NBHA's noncompliance with VAWA, the judge focused on the fact that while S.R. could have pursued bifurcation under VAWA, she voluntarily sat on those rights in the hope of reconciliation. There is also a suggestion that -- even after K.R. moved out -- S.R. should have pursued bifurcation in order to remove the possibility of the kind of eventuality that in fact occurred. But had the NBHA accurately informed S.R. about what she needed to do in order to pursue bifurcation and remove K.R. from the lease, she might have done so.[17] As a result, it is possible that the NBHA's noncompliance with VAWA led to S.R.'s eviction. The judge did not address the impact that the NBHA's noncompliance with VAWA might have had on S.R.'s subsequent actions.[18] Nor

did he explain why S.R's reported interest in reconciliation was incompatible with bifurcation.[19] In fairness to the judge, we note that S.R. did not squarely raise these issues. Accordingly, we neither fault the judge for failing to get to the bottom of the factual question of how the NBHA's noncompliance with VAWA may have affected whether S.R. pursued bifurcation, nor rely on his not doing so in resolving this appeal.[20]

2. S.R.'s responsibility for K.R.'s lease violation. To succeed in its eviction action, the NBHA had to prove a lease violation by a "tenant." It is undisputed that the eviction of S.R. was based on the off-site conduct of a cotenant who had moved out six months earlier. In our view, S.R.'s position is closely comparable to that faced by the tenant in Boston Hous. Auth. v. Bruno, 58 Mass. App. Ct. 486 (2003). There, as here, a housing authority was seeking to evict a tenant based on a criminal violation by another family member (the tenant's son) who had moved away. A Housing Court judge ruled against the housing authority after finding that the son, although still listed on the lease as an authorized member of the tenant's household, was not in fact a household member at the time of the criminal violation. We affirmed. Id. at 486-488.

Like the parent in Bruno, S.R. was a recognized tenant on the lease and faced eviction based solely on a criminal offense committed by a former tenant who had moved away. The judge distinguished Bruno on the grounds that the tenant at issue there was the formal leaseholder and the criminal offender was a listed household member, while here the opposite is true. We conclude that, at least under the facts of this case, that distinction is immaterial. In fact, the argument for evicting S.R. for K.R.'s criminal activity is weaker here than it was in Bruno in two respects. First, the criminal activity that gave rise to the lease violation in Bruno actually took place on the housing authority's property, unlike K.R.'s drug-related criminal activity in this case. Bruno, 58 Mass. App. Ct. at 487. Second, the parent in Bruno testified at trial that he wanted his son to remain on the lease in case he returned to the home. Id. at 488-489. In this case, in the two months immediately after K.R. assaulted S.R., S.R. spoke to the NBHA about removing K.R. from the lease on at least four occasions.[21]

S.R.'s position is also significantly strengthened by the backdrop supplied by VAWA, which the NBHA agreed to follow in the operative lease. As noted, the NBHA declined to evict K.R. after his violent attack on S.R. despite its espoused "Zero

Tolerance Policy." Had the authority sought to evict K.R. for that violation, then it sua sponte would have bifurcated the lease pursuant to VAWA, or -- if the NBHA nonetheless had sought to evict S.R. based on that incident of domestic abuse -- she could have raised VAWA as a direct defense to the eviction of her and her daughter. Either way, the NBHA would have had to bifurcate the lease if it wanted to remove K.R. from its property. See, e.g., Boston Hous. Auth. v. Y.A., 482 Mass. 240, 245 (2019).

Moreover, as noted, in the face of S.R.'s inquiries about bifurcation, the NBHA provided S.R. with inaccurate advice about what she needed to do to achieve that end. This inaccurate advice, at a minimum, undercuts NBHA's arguments in defense of evicting S.R. based on her failure to seek bifurcation. Cf. Boston Hous. Auth. v. Bridgewaters, 452 Mass. 833, 849 (2009) (Boston Housing Authority's failure to follow its reasonable accommodation policy and notify tenant of need for additional information to confirm disability status before denying reasonable accommodation request "foreclose[d] it from denying that there [wa]s a causal link between [the tenant's] disability and his acts that triggered the eviction proceedings").

The NBHA did not decide to evict K.R. until -- six months after he moved out of NBHA property -- he committed a criminal violation away from the property that had nothing to do with S.R. The NBHA followed this course of action even though it originally had indicated that it was amenable to bifurcation if S.R. obtained a restraining order, and even in the face of its adoption of the goals served by VAWA.[22] In our view, the NBHA is unable to provide any rational justification for evicting S.R. and her daughter.[23] Under the circumstances of this case, we conclude that the NBHA's summary process case against S.R. fails as a matter of law. Where NBHA had to prove that K.R.'s off-premises drug activity six months after leaving the unit constituted a lease violation by a "tenant," and where the NBHA did not meet its preexisting VAWA obligations (as required not only by the act but also by the lease itself), the NBHA cannot rely on K.R.'s drug activity as a basis for evicting S.R.

Disposition. So much of the judgment as pertains to K.R. is affirmed. The remainder of the judgment, pertaining to S.R., is vacated, and a new judgment shall enter in her favor.

So ordered.

***footnotes***

[1]S.R. K.R. failed to appear at trial, and has not participated in this appeal.

[2]Because this case involves domestic violence, we use the parties' initials.

[3]We acknowledge the amicus brief submitted by Massachusetts Domestic Violence and Housing Advocates; Asian Task Force Against Domestic Violence; Community Legal Aid, Inc.; De Novo Center for Justice and Healing; Family and Community Resources, Inc.; Greater Boston Legal Services, Inc.; Harvard Legal Aid Bureau; Healing Abuse Working for Change; Jane Doe Inc.; Jewish Family & Children's Service Journey to Safety; Massachusetts Law Reform Institute; MetroWest Legal Services; Northeast Legal Aid, Inc.; Second Step; Victim Rights Law Center; Volunteer Lawyers Project of the Boston Bar Association, Inc.; and Women's Bar Association of Massachusetts. The amicus brief was also later joined by DOVE, Inc., with the approval of the panel.

[4]That section states as follows:

"[A] public housing agency or owner or manager of housing assisted under a covered housing program may bifurcate a lease for the housing in order to evict, remove, or terminate assistance to any individual who is a tenant or lawful occupant of the housing and who engages in criminal activity directly relating to domestic violence, dating violence, sexual assault, or stalking against an affiliated individual or other individual, without evicting, removing, terminating assistance to, or otherwise penalizing a victim of such criminal activity who is also a tenant or lawful occupant of the housing."

34 U.S.C. § 12491(b)(3)(B)(i).

[5]On appeal, S.R. challenges the judge's findings as to the timing of her conversations with the NBHA and as to the duration of her relationship with K.R. We agree with the NBHA that there is sufficient support for the judge's findings. We therefore do not rely on S.R.'s version of events in concluding that the judge's decision should be reversed as to her.

[6]The NBHA is a covered housing provider for purposes of VAWA. See Boston Hous. Auth. v. Y.A., 482 Mass. 240, 241 n.4 (2019).

[7]The police report was entered in evidence at the eviction trial and the police officer who responded to the incident testified.

[8]For example, Section XI(C)(4) of the lease states: "Commission of a serious crime involving violence against another person by Resident or by a household member" may be cause for termination.

[9]The NBHA's "Zero Tolerance Policy," which appears in bold and set apart from the other provisions of the lease, applies to any lease violation "that threatens the health, safety, or right to peaceful enjoyment of the premises by other Residents."

[10]At trial, two NBHA employees testified: a property manager and a management aide. The property manager testified that she informed S.R. during two conversations in May 2016 that if K.R. did not agree to remove himself from the lease, S.R. would need to present the NBHA with a restraining order. The management aide testified that she had "two or three" conversations with S.R., at least one of which was in June 2016. During these conversations she informed S.R. that if K.R. did not remove himself from the lease, S.R. would need to file a police report or provide other "supporting documents" in order to bifurcate. Both testified that, at the time they spoke to S.R., they were aware of the police report from the April assault.

[11]Although the judge did not note whether he was crediting these specific statements, he did state generally that "[t]he Court credits [S.R.'s] testimony."

[12]K.R. was the only signatory to the renewed lease. S.R. testified at trial that she "never found out" that K.R. had signed for the lease renewal. The judge did not specifically address whether he credited this testimony.

[13]NBHA argues that S.R. never formally asserted her rights under VAWA because she "did not follow through with any of NBHA's requests." As noted above, however, VAWA requires only that a tenant "represent[] to a public housing agency . . . that [she] is entitled to protection," in order to invoke her rights under the act, at which point the housing authority may request supporting

documentation of the tenant's victim status. 34 U.S.C. § ?12491(c)(1). The NBHA evidently took S.R. to be asserting her rights under VAWA, as NBHA staff asked for such additional documentation, albeit improperly.

[14]In addition to setting forth the documentation that housing authorities are required to accept, VAWA makes it clear that housing authorities are not required to demand any such documentation. See 34 U.S.C. § 12491(c)(5). It also expressly allows housing authorities to accept any "statement or other evidence provided by an applicant or tenant." 34 U.S.C. § 12491(c)(3)(D).

[15]The NBHA was also not in compliance with VAWA when it failed to put its request for information in writing. See 34 U.S.C. § 12491(c)(1). The importance of this provision is made clear in this case: had the NBHA put its request for additional documentation in writing, it would have initiated a fourteen-day window in which S.R. could have affirmatively sought protection under VAWA or declined to provide the requested documentation, thus definitively resolving what additional documentation the NBHA needed and whether S.R. wanted the bifurcation or not. See 34 U.S.C. § 12491(c)(2).

[16]While we recognize that, under 34 U.S.C. § 12491(b)(3)(B), covered housing authorities retain discretion to pursue bifurcation, in this case the NBHA indicated a willingness to bifurcate so long as S.R. provided the requested documentation. In any event, the permissive language used in 34 U.S.C. § 12491(b)(3)(B) does not otherwise relieve the NBHA of its responsibility to follow the mandatory procedures outlined elsewhere in the act.

[17]We do not mean to suggest that in a case where the housing authority has followed the provisions of VAWA and a victim who had previously requested a bifurcation subsequently withdraws that request the housing authority is under any obligation to nevertheless pursue bifurcation.

[18]For example, the judge did not consider whether the NBHA employee's testimony that "[S.R.] didn't want to do anything at the moment because [she and K.R.] were going to couple's counseling" could be understood differently if S.R. was in fact under the impression that the only means of achieving bifurcation was by securing a restraining order.

[19]Whether or not S.R. and K.R. reconciled, S.R.'s status as a victim -- which is undisputed in this case -- is not undone by any continued involvement with the father of her child, and VAWA's protections do not disappear simply because a victim and abuser reconcile. Given the well-documented cyclical nature of domestic violence, it is not inconceivable that a victim may seek separate living quarters as a way to navigate an ongoing relationship with her abuser.

It bears noting that in its final rule implementing VAWA, the Department of Housing and Urban Development has stated as follows: "a tenant or family may invoke VAWA protections on more than one occasion . . . . Individuals and families may be subject to abuse or violence on multiple occasions and it would be contrary to the intent of VAWA to say that the protections no longer apply after a certain point, even if violence or abuse continues . . . ." 81 Fed. Reg. 80,724 at 80,731 (2016).

[20]We do note that S.R.'s failure to press forward with bifurcation -- including once K.R. moved out of the apartment -- should be viewed in the context of the practical realities that someone in S.R.'s position faces. Notably, despite her being a victim of domestic abuse, her documented language difficulties, and her having to be the primary caretaker of a disabled child, S.R. nevertheless approached the NBHA on several occasions to inquire about bifurcation in the months after her assault.

[21]Boston Hous. Auth. v. Garcia, 449 Mass. 727, 729 (2007), is not to the contrary. That case held that in some circumstances, the "innocent tenant defense" was preempted by Federal law. There are three reasons why Garcia does not stand as an obstacle to S.R.'s prevailing. First, our decision in Bruno did not rest on such a defense. See Bruno 58 Mass. App. Ct. at 491 n.10. Bruno therefore remains good law. Second, to the extent that 42 U.S.C. § 1437d(l)(6) (2017), allows housing authorities to evict tenants for drug-related criminal activity off the premises, it does not require it. See 24 C.F.R. § 5.852 (2001). Finally, 42 U.S.C. § 1437d(l)(6) must be read in light of VAWA, which creates strong protections for victims of domestic violence at risk of losing their housing.

[22]The regulatory guidance interpreting VAWA expresses a strong preference against evicting victims of domestic violence. See 24 C.F.R. § 5.2009 (2016) ("Covered housing providers are encouraged to undertake whatever actions

permissible and feasible under their respective programs to assist individuals residing in their units who are victims of domestic violence, dating violence, sexual assault, or stalking to remain in their units or other units under the covered housing program or other covered housing providers, and for the covered housing provider to bear the costs of any transfer, where permissible").

[23]As the Supreme Judicial Court warned housing authorities in Garcia, "[t]o ensure both humane results and success in court, [public housing authorities] should undertake a case-by-case analysis before proceeding with eviction. If they do seek eviction, [public housing authorities] should be prepared to persuade a court that eviction is justified" (citations and quotations omitted). Garcia, 449 Mass. at 735 n.14. At oral argument, the NBHA acknowledged that it retained discretion to bifurcate the lease nunc pro tunc, but was unable to articulate why it had not done so.