

# Commercial landlord liable under Ch. 93A after ceiling collapses

## Chinatown tenants' complaints of leaks, rats left unaddressed

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By Eric T. Berkman [Massachusetts Lawyers Weekly](#)



A commercial landlord could be held liable under Chapter 93A for his failure to prevent a ceiling collapse that destroyed the businesses of three tenants, a Superior Court judge has ruled.

The defendant landlord owned and operated a restaurant on the second floor of his commercial building in Boston. The plaintiffs, who ran small businesses on the first floor — and had, under the terms of the lease, renovated their spaces at their own expense — claimed they had fruitlessly asked the landlord for a decade to repair leaks in the ceiling stemming from his restaurant operations and to address pest infestations, mold and foul odors.

The plaintiffs argued that the landlord's actions constituted “willful” behavior in the context of a business relationship and thus violated Chapter 93A.

Judge Christine M. Roach agreed.

“[The defendants] committed unfair acts in their business relationship with the plaintiffs. The evidence of these acts on the trial record is legion,” Roach said, awarding multiple damages and attorneys’ fees.

“They had a legal duty to deliver a premises that provided quiet enjoyment to their commercial tenants under all those circumstances, in return for rental payments,” she added. “This included a duty fairly and diligently to investigate and cure conditions which compromised that enjoyment.”

The 17-page decision is *Kuong, et al. v. Wong, et al.*, Lawyers Weekly No. 12-040-13. [The full text of the ruling can be ordered by clicking here.](#)

### **Uninhabitable premises**

Plaintiffs' counsel Kevin T. Peters of Arrowood Peters in Boston said he knew of no prior case in Massachusetts in which a landlord was held liable under Chapter 93A for what, in a residential context, would constitute a breach of the covenant of habitability.

"This isn't to imply that there's actually a covenant of habitability in the commercial context; that's still an open question in the law," he said.

Still, Peters' associate and co-counsel, Elizabeth A. Kayatta, said Roach's ruling presents a good opportunity for other commercial tenants to seek 93A remedies for unscrupulous behavior.

"That's important because a lot of times in commercial tenancies there are such large upfront costs to tenants in building up the space — or such large costs in leaving the space — that this creates built-in barriers that commercial landlords can use to hold the tenants in spaces even where the tenant knows the landlord isn't living up to its obligations under a lease, the building code, the sanitary code or anything else," she said.

**Daniel P. Dain of Boston, who practices commercial leasing law, said the case is a warning to commercial landlords to pay attention to complaints about unit damage caused by conditions originating in common areas.**

**That said, Dain continued, the conditions in *Kuong* appeared to be unusually egregious.**

**"This case should not lead to the risk of Chapter 93A liability every time a landlord fails to make a timely repair," he said.**

Amherst landlord-tenant attorney Lawrence J. Farber said the ruling could cause the consumer protection statute to be more actively litigated in a commercial context.

"In the consumer context, it's always been a very active form," he said. "In a commercial context, this will likely embolden the inclusion of a Chapter 93A portion [because], unlike in a consumer context, you don't have to send a demand letter. You can just add it as part of your complaint."

John A. Donovan III of Sloane & Walsh in Boston represented the defendants. He could not be reached for comment prior to deadline.

### **Unsanitary and unsafe**

Defendant K&W Realty, a family real estate business headed by defendant David Wong, owned a commercial building in the Chinatown section of Boston.

Wong was the proprietor of a restaurant, Empire Garden, that occupied the second floor of the building, and he rented space to commercial tenants on the first floor.

In early 1999, a fire damaged large portions of the first floor. The defendants chose to rebuild by providing only a “shell” for the first floor and entering into leases that required the new tenants to do their own build-outs.

One of the tenants, plaintiff Peter Kuong, opened a hair salon. Plaintiff Kim Pham operated a dressmaking/seamstress shop in a space that she subleased from Kuong. A third tenant, plaintiff MaryMauit Nguyen, operated a Vietnamese restaurant on the first floor.

The plaintiffs, who were all refugees from communist Vietnam, did the necessary build-outs at their own expense, investing significant money between them, despite the fact that under their leases, any “improvements” were to become property of the defendants.

On multiple occasions between 1999 and 2009, each of the plaintiffs complained to Empire Garden employees, to Wong or to his son, defendant Peter Wong, about water leaks into their respective spaces, which they feared were coming from the restaurant.

Plaintiffs collected the water, which often contained other debris and emanated sewer-like and fish-like smells, in buckets that they situated throughout their units. They often had to empty multiple buckets a day.

Many of the leaks entered from several feet of common space between the restaurant and the shops. The space was infested with rats and mice.

Wong had a longstanding relationship with a pest control company that visited the building regularly, but the plaintiffs claimed they still constantly heard rats running through the common space over their ceilings, smelled dead rats, and found evidence of the rodents in their units. These complaints apparently fell on deaf ears.

In April 2009, ceilings in two of the three units came crashing down, bringing with them rat carcasses, food debris, moldy plaster and other building materials. The city closed the shops. Subsequent inspections revealed saturation of the first-floor ceilings and the Empire Garden floor.

The plaintiffs sued the defendants in Superior Court, alleging a variety of tort and contract claims. They also brought claims of unfair business practices under Chapter 93A.

A jury found the defendants liable on the contract and tort claims, awarding several hundred thousand dollars in damages. The judge reserved the 93A issue for herself.

### **Unfair practices**

Roach found the defendants’ conduct amounted to willful and reckless behavior as defined by the statute.

Roach said she agreed with the jury that the defendants breached the common-law duty to deliver a premises that provided quiet enjoyment to commercial tenants and that the defendants' breach proximately caused harm to the plaintiffs.

"Defendants did so thoroughly and consistently, all the while demonstrating utter indifference to the plight of their tenants and to the wellbeing of the consuming public," she said.

While the jury's findings on two counts of intentional tort did not alone prove a 93A violation, its determination that Kuong's own negligence contributed to some of the losses reduced the defendants' level of recklessness, the judge continued.

"The documented code violations in this case merely corroborate the pattern of behavior which I find to be unethical, unfair, and unscrupulous, culminating in the abject state of the shop units ... and the undisputed loss to the plaintiffs of their business," Roach said. "I have carefully considered the question of willfulness, and can only rule on this record that the behavior of Wong, and through him, K & W, qualifies as reckless in the extreme."

For all those reasons, Roach concluded, each plaintiff was entitled to double the amount of damages awarded by the jury on the common-law claims as well as statutory attorneys' fees and costs.

Nonetheless, describing the plaintiffs as experienced businesspeople with significant family resources who exercised conscious business judgment in investing their resources to develop their units, Roach denied their request for additional statutory damages based on the value of the improvements they made.

"I am not persuaded by the 'David vs. Goliath' characterization of [the landlord-tenant] relationships argued by counsel," she said "I cannot find [the plaintiffs] to be nearly so helpless, naïve or resourceless as claimed. ... While I find the plaintiffs credible on the fundamentals of their claim ... I am not persuaded [that the] defendants should be required to compensate [the plaintiffs] for all of the business choices these experienced adults made over the decade."

**CASE:** *Kuong, et al. v. Wong, et al.*, Lawyers Weekly No. 12-040-13

**COURT:** Superior Court

**ISSUE:** Could commercial landlords be held liable under Chapter 93A for their failure to prevent a ceiling collapse that destroyed the businesses of three commercial tenants?

**DECISION:** Yes, because their failure to investigate and address the leaks, rats, odors and mold the tenants constantly complained about and which caused the collapse constituted willful and unfair business practices in violation of the statute