

Minnesota Anti-Retaliation Law
after *Central Housing Associates v. Olson*

Paul Birnberg
3439 Eleventh Avenue
Minneapolis, MN 55407
612/722-1993, paulrainerbirnberg@gmail.com
Blog: <https://birnberglegalwebsite.net>

To State the Obvious

- Am I now or have I ever been a member of
 - The judiciary? – No
 - A legislature? – No
- Read the actual law yourself

Retaliation

- Tenant asserts a right

Landlord

gives a notice to quit without cause

gives a notice of non renewal without cause

terminates a lease or files eviction for cause

raises rent or fees, or reduces services

Landlord's motivation is tenant's assertion of right

Focus of Talk

- Law of residential tenancies unless otherwise noted with ★

Law in 1858

- Tough luck
- Read the lease or other contract

Sources of Help

- First Amendment
- Fair Housing Act & Minnesota Human Rights Act
- Minn. Stat. Chap. 504B & city ordinances
- Common law

Affirmative Defense

- *Mac-Du v. LaBresh*, 392 N.W.2d 315 (Minn. App. 1986) (plaintiff must plead and prove facts which show the defendant is in unlawful possession of property)
- *Berryhill v. Healey*, 89 Minn. 444,447 (1903) ("when the defendant desires simply to deny the allegations of the complaint, the verbal plea of not guilty is sufficient, but if he proposes to go farther, and defend by setting up new matter by way of excuse, justification, or avoidance, then he must proceed as in other civil actions, and file and serve an answer, in order that the opposing party may have notice of the issues presented")
- Does modern practice allow an oral Answer on all issues? *See* Minn. Stat. § 504B.335 (has no excuse/justification/avoidance language); Minn.R.Gen.P. 610 (motions may be oral in Housing Ct). Filing fee in 1903 was 5¢, G.S. 1894 §5538, ≅ \$1.44 today.

First Amendment, #1 ★

- Is landlord a state actor?
 - Gov't is landlord (e.g. Public Housing) → Yes.
 - Private unsubsidized landlord → No.
 - Otherwise (e.g. project-based Section 8) → Maybe
 - E. g. *Joy v. Daniels*, 479 F.2d 1236,1238 (4th Cir. 1973) (a leading pro-tenant eviction case)
 - E.g. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (a leading case limiting state-actor doctrine)

First Amendment, #2 ★

- **Some eviction cases won by tenant**
- *Cuban Museum of Arts and Culture, Inc. v. City of Miami*, 766 F.Supp. 1121 (S.D. Fla. 1991) (injunction against a UD, showing pro-Castro art)
- *Brooklyn Institute of Arts v. City of New York*, 64 F.Supp. 2d 184 (E.D. New York 1999) (injunction against a UD, showing “sick” art)
- *Rudder v. United States*, 226 F.2d 51 (D.C. Cir. 1955) (UD, not signing loyalty oath)
- *City of Rivera Beach v. Fane Lozman*, File No. 50-2006-CA-014054-XXXX-MB* (Palm Beach Cty, FL, verdict 3/2/2007) (discussed in 649 F.3d 1259,1263)
- *most of the case documents are available at <https://applications.mypalmbeachclerk.com/eCaseView/search.aspx>

First Amendment, #3

Minn. Constitution no extra help

- *State v. Wicklund*, 589 N.W.2d 793 (Minn. 1999)
(Minnesota Constitution's free-speech provision is equivalent to the First Amendment)

Civil Rights Law of Reprisal

- *Schuett Inv. Co. v. Anderson* 386 N.W.2d 249 (Minn. App. 1986) (tenant can defend a UD using civil rights law)
- 35 Hamline L. Rev. 1,16-17 (2012) (good collection of cases following *Schuett* principle)
- Minn. Stat. § 363A.15 (reprisal violates MHRA ★); 42 U.S.C. § 3617 (retaliation violates FHA)
- *Neudecker v. Boisclair Corp*, 351 F.3d 361 (8th Cir. 2003) (tenant can assert an FHA claim based on retaliation)

Minn. Stat. § 504B.205

- A landlord may not:
 - (1) bar or limit a residential tenant's right to call for police or emergency assistance in response to domestic abuse or any other conduct; or
 - (2) impose a penalty on a residential tenant for calling for police or emergency assistance in response to domestic abuse or any other conduct.
- \$250 + attorney fees

Minn. Stat. § 504B.285, subd. 2, #1 ★

- Applies to a “notice to quit”, *Cloverdale Foods v. Pioneer Snacks*, 580 N.W.2d 46 (Minn. App. 1998), meaning a “termination of a tenancy at will [without cause]” as opposed to a termination based on breach of lease. *Cent. Hous. Assocs. v. Olson*, 910 N.W.2d 485,489 (Minn. App. 2018).
 - *Barnes v. Weis Mgmt*, 347 N.W.2d 519 (Minn. App. 1974) extension to a breach case is toast after id.
- Defense to “action for recovery of premises”
- Unlike other defenses, applies to all tenants, residential AND commercial, *Cloverdale*

Minn. Stat. § 504B.285, subd. 2, #2 ★

- Protects against a termination intended in whole **or part** as a penalty for
 - (1) defendant's good faith attempt to secure or enforce rights under a **lease or contract**, oral or written, under the laws of the state or any of its governmental subdivisions, or of the United States;
- or
- (2) defendant's good faith report to a governmental authority of the plaintiff's violation of a health, safety, housing, or building code or ordinance.

Minn. Stat. § 504B.285, subd. 2, #3 ★

- *Cloverdale*:
- Dicta: “retaliatory eviction defense does not apply to this case because the assertion of contractual rights ... was unrelated to the landlord-tenant relationship”
- Holding: “We, therefore, construe the term contract to mean a contract governing the landlord-tenant relationship.”
- Facts in *Cloverdale*: Pioneer’s retaliation claim was based entirely on a lawsuit only about meat production (see the \$64 pleadings provided)

Minn. Stat. § 504B.285, subd. 2, #4, 90-day rule ★

- *Parlin v. Fitzgerald*, 307 Minn. 423 (1976), 90-day window presumption
- Landlord must establish by a fair preponderance of the evidence a substantial nonretaliatory reason for the eviction, arising at or within a reasonably short time before service of the notice to quit
- A nonretaliatory reason is a reason **wholly** unrelated to and unmotivated by any good-faith activity on the part of the tenant protected by the statute

Minn. Stat. § 504B.285, subd. 3 ★

- Defense to non payment of rent or decrease in services
- No 90-day window presumption
- Protects tenants for same lawful acts as in subdivision 2
- Tenant must tender to court or landlord the pre-increase rent

Minn. Stat. § 504B.441, #1

- A **residential** tenant may not be evicted, nor may the residential tenant's obligations under a lease be increased or the services decreased, if the **eviction** or increase of obligations or decrease of services is intended as a penalty for the residential tenant's or housing-related neighborhood organization's **complaint** of a **violation**. The burden of proving otherwise is on the landlord if the eviction or increase of obligations or decrease of services occurs within 90 days after filing the complaint, unless the court finds that the complaint was not made in good faith. After 90 days the burden of proof is on the residential tenant.

Minn. Stat. § 504B.441, #2

- "**Violation**" means a violation of:
 - (1) a state, county or city health, safety, housing, building, fire prevention, or housing maintenance code applicable to the building;
 - (2) the covenants of habitability in Minn. Stat. § 504B.161; or
 - (3) the lease.
- → Minn. Stat. § 504B.001, subd. 14

Minn. Stat. § 504B.441, #3

- “**Complaint**” means complaint of a violation to a government entity, such as a housing inspector, or commencement of a formal legal proceeding.
- Not an expression of dissatisfaction to the landlord
- → *Cent. Hous. Assocs. v. Olson*, 929 N.W.2d 398,408 (Minn. 2019)

Common Law

- Protects tenant complaints, including to the landlord, about material violations by the landlord of state or local law, residential covenants, or the lease.
- The tenant has the burden to assert the defense and to prove it by a preponderance of the evidence (no 90-day presumption).
- Commercial tenants as well as residential tenants? ★
- → *Cent. Hous. Assocs. v. Olson*, 929 N.W.2d 398,409 (**Minn.** 2019)

504B.441 vs Common Law

- Common law almost changes “complaint” in 504B.441 into an expression of dissatisfaction except no 90-day presumption. Does it matter in the real world?
- Is a tenant who only complains to landlord and is served with notice of non renewal eligible for the 90-day presumption under Minn. Stat. §504B.285 or is she subject to limitations of common-law defense? See *Dominium Mgmt v. C.L.* (unpublished)*
- Does a tenant-initiated Rent Escrow or TRA require a formal “complaint” to the government?
- *Minn. Ct. App. File No. A03-85 (12/9/2003) at second ¶ of Part I

City Ordinances

- Check your city code
- Minneapolis Code § 244.80(b) provides retaliation protection to a residential tenant [a] who reports a code violation to inspector; or [b] whose landlord is sued to force landlord to fix code violations. It includes an eternal presumption (burden of proof on landlord lasts forever, not just 90 days)

Tenant Initiated Lawsuits –TRO/Temp Injunction/Declaratory Judgment Action

- TRO: Pretty standard motion to halt eviction efforts while case proceeds; irreparable harm balance favors tenants and tenants likely to prevail; little to no court resources needed to administer
- Dec Action: Seeks judgment that notice to vacate is void and of no effect
- See pleadings in *Reyes v. LO2 LLC* (Henn. Cty. Dist Ct.) in packet

Tenant Initiated Lawsuits – Rent Escrow (or TRA)

- Theory →
 - Retaliatory notice is a “violation” of Minn. Stat. § 504B.441
 - Retaliatory notice is a “violation” of the covenants of habitability
 - In Rent Escrow (and TRA), court has equitable powers
- See draft pleadings in packet
 - *Green v. Formanek* (Henn. Cty. Dist Ct.) (memo is original, AER is reconstructed from memory); memo would need to be rewritten to conform to *CHA v. Olson* limiting 504B.441

Generic AER using courts’ HOU302 form

Tenant Initiated Lawsuits –Claim for Money Damages

- I'm unaware of Minnesota case law on the issue
- Allowed in other states. E.g.:
 - *Aweeka v. Bonds*, 145 Cal. App. 3d 309, 193 Cal Rptr. 350 (1983) (if a retaliation defense is valid so must be an affirmative claim)
 - *Morford v. Lensey Corp.*, 110 Ill. App. 3d 792, 442 N.E.2d 933 (1982) (similar)
 - *Sims v. Century Kiest Apts.*, 567 S.W.2d 526 (Tex. Ct. Civ. App. 1978)
 - *Murphy v. Smallridge*, 468 S.E.2d 167 (W. Va. 1996)

Electronic Materials

- This PowerPoint
- Excerpts of Minn. Stat. §§ 504B.001, -.205, -.285, -.441
- Three pleadings + docket from federal district court *Cloverdale v. Pioneer* case
- Briefs in *Cloverdale v. Pioneer*, 580 N.W.2d 46 (see especially Tenant's Brief at 6, 10-11, 23)
- Pleadings in *Reyes v. LO2 LLC*
- Memo and reconstructed AER in *Green v. Formanek*
- Generic AER using courts' HOU302 form