

October 1972

## Recent Changes in the Illinois Forcible Entry and Detainer Act Regarding Condominium Property

Martin F. Spiegel

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Law Commons](#)

---

### Recommended Citation

Martin F. Spiegel, *Recent Changes in the Illinois Forcible Entry and Detainer Act Regarding Condominium Property*, 49 Chi.-Kent L. Rev. 200 (1972).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol49/iss2/5>

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [dginsberg@kentlaw.iit.edu](mailto:dginsberg@kentlaw.iit.edu).

## NOTES AND COMMENTS

### RECENT CHANGES IN THE ILLINOIS FORCIBLE ENTRY AND DETAINER ACT REGARDING CONDOMINIUM PROPERTY

On December 8, 1971, the Illinois General Assembly approved two bills which became effective July 1, 1972. These bills, Senate Bill 645 (Public Act 77-1759) and Senate Bill 646 (Public Act 77-1760), amend the Forcible Entry and Detainer Act,<sup>1</sup> and the Condominium Property Act,<sup>2</sup> giving the condominium property owners' association or board of managers a new remedy under the Forcible Entry and Detainer Act.<sup>3</sup> These acts provide a unique remedy to be used against the condominium property owner which initially must be interpreted in light of Illinois landlord/tenant and contract buyers case law.

#### NEW PROVISIONS OF THE FORCIBLE ENTRY AND DETAINER ACT

Section 2 of the Forcible Entry and Detainer Act, which deals with when the forcible entry and detainer action may be maintained, has had a new subsection added which provides:

Seventh, When any property is subject to the provisions of the "Condominium Property Act", approved June 20, 1963, as amended, and the board of managers of such property is entitled to possession of a unit therein by reason of the failure or refusal of the owner of such unit to pay when due his proportionate share of the expenses of administration, maintenance and repair of the common elements of such property, or of any other expenses lawfully agreed upon, and such unit owner withholds possession of his unit after demand in writing setting forth the amount claimed by the board of managers, or its agents.<sup>4</sup>

1. Ill. Rev. Stat. ch. 57 (1971) [hereinafter referred to as the "Act"].

2. Ill. Rev. Stat. ch. 30, § 301 *et seq.* (1971) [hereinafter referred to as the "Condominium Act"].

3. A third bill, which amended the Homestead Exemption Act, Ill. Rev. Stat. ch. 52 (1971), was passed in conjunction with Senate Bills 645 and 646. The amendment is not discussed in this article but should be noted by the practitioner as relevant with respect to condominium property.

Senate Bill 644 (Public Act 77-1758) amended the Homestead Exemption Act, Ill. Rev. Stat. ch. 52, § 3 (1971), so that section 3 of the act, as of July 1, 1972, now reads:

No property shall, by virtue of this Act, be exempt from sale for non-payment of taxes or assessments, or for a debt or liability incurred for the purchase or improvement thereof, or for enforcement of a lien thereon for nonpayment of common expenses pursuant to the "Condominium Property Act", approved June 20, 1963, as now or hereafter amended.

4. Ill. Rev. Stat. ch. 57, § 2 (1972).

The newly enacted provision entitles the board of managers to a remedy under the Act whenever the condominium unit owner fails to pay his proportionate share of the expenses of administration, maintenance and repair of the common elements of the condominium, *or any other expenses lawfully agreed upon*. This clause seemingly implies that a remedy under the Act now exists in favor of the board of managers for breach of certain contractual obligations which may arise between the condominium property owner and the board of managers that do not involve contracts to purchase and contract buyers. Contracts to purchase and contract buyers are specifically dealt with in other sections of the Act.<sup>5</sup>

The last part of subsection seven deals with the demand for possession by the board of managers. The demand for possession from a condominium property owner provides that the board of managers must demand both possession and the amount of money claimed. This is the only instance in the Act where the demand must include the amount of money claimed by the plaintiff.<sup>6</sup>

The most significant new section of the Act, 13.1, that applies to condominium property, provides:

*As to property subject to the provisions of the "Condominium Property Act", approved June 30, 1963, as amended when the action is based upon the failure of an owner of a unit therein to pay when due his proportionate share of the expenses of administration, maintenance and repair of the common elements, or of any other expenses lawfully agreed upon, and if the court finds that such expenses are due to the plaintiff, the plaintiff shall be entitled to the*

5. See Ill. Rev. Stat. ch. 57, § 2 (fifth), § 13 (1971), both dealing specifically with defaulting contract purchasers.

6. Ill. Rev. Stat. ch. 57, § 3 (1972) now provides:

The demand required by Section 2 may be made by delivering a copy thereof to the tenant, or by leaving such a copy with some person above the age of 12 years, residing on, or being in charge of, the premises; or in case no one is in actual possession of the premises, then by posting the same on the premises, provided, that in case there is a contract for the purchase of such lands or tenements, or in case the property is subject to the provisions of the "Condominium Property Act", approved June 20, 1963, as amended, notice that a proceeding under the provisions of this Act is to be instituted shall be given to the purchaser under such contract, or to the unit owner, as the case may be, at least 30 days prior to the institution of such proceeding, either by notifying such purchaser or unit owner personally of such fact or by sending notice thereof by registered or certified mail to the last known address of such purchaser or unit owner. When any such demand is made by an officer authorized to serve process, his return shall be prima facie evidence of the facts therein stated, and if such demand is made by any person not an officer, the return may be sworn to by the person serving the same, and shall then be prima facie evidence of the facts therein stated. Which demand for possession may be in the following form: To \_\_\_\_\_

I hereby demand immediate possession of the following described premises: (describing the same.)

Which demand shall be signed by the person claiming such possession, his agent, or attorney. Where the property is subject to the provisions of the "Condominium Property Act", approved June 20, 1963, as amended, the demand for possession shall set forth the amount claimed.

*possession of the whole of the premises claimed, and he shall have judgment for the possession thereof and for the amount found due by the court together with reasonable attorney's fees, if any, and for his costs; the court, by order, shall stay the issuance of the writ of restitution for a period of not less than 60 days from the date of the judgment and may stay the issuance of the writ for a period of not to exceed 180 days from such date. If at any time either during or after such period of stay defendant pays such expenses found due by the court, plus costs and reasonable attorney's fees as fixed by the court, defendant may file a motion to vacate the judgment in the court in which the judgment was entered, and, if the court, upon the hearing of such motion, is satisfied that such default in payment of his proportionate share of expenses has been cured, such judgment shall be vacated. Unless defendant files such motion to vacate in such court or files an action seeking to effect or restrain the enforcement of such judgment within said period of stay, execution shall issue immediately upon expiration of such period of stay and all rights of the defendant to possession of his unit shall cease and determine until the date that such judgment may thereafter be vacated in accordance with the foregoing provisions. Nothing therein contained shall be construed as affecting the right of the board of managers, or its agents, to any lawful remedy or relief other than provided by this Act.<sup>7</sup>*

An analysis of the new section 13.1 reveals that if the court determines that the specified common element expenses or other expenses lawfully agreed upon are due and owing to the plaintiff, the plaintiff shall have judgment for possession of the whole premises claimed and for the amount of money found due, plus attorney's fees and court costs. It is at this point that the drafters could have elaborated further. The question arises as to what exactly are the rights of the board of managers once they have become entitled to possession. Conceivably the board would be free to lease the unit and apply the rent received to the debt of the recalcitrant condominium unit owner. This theory appears to be impractical in application since the unit owner may vacate the judgment by curing his default of payment, thus regaining his right to possess the unit. This writer feels that it would be unwise for the board, once entitled to possession, to lease or otherwise cause the unit to become occupied because the unit owner may regain his right to possession.

The last sentence of section 13.1 provides that the plaintiff is not foreclosed from using any other lawful remedy or means of relief, including the remedies of suit for breach of contract, and lien.<sup>8</sup>

#### NEW PROVISIONS OF THE CONDOMINIUM PROPERTY ACT

An entirely new section has been added to the Condominium Act which

7. Ill. Rev. Stat. ch. 57, § 13.1 (1972) (emphasis added).

8. See Ill. Rev. Stat. ch. 30, § 309 (1971). Sharing expenses—Lien for nonpayment.

incorporates the Forcible Entry and Detainer Act Amendments. Section 309.2 entitled "Other Remedies", provides:

In the event of any default by any unit owner in the performance of his obligations under this Act or under the declaration, bylaws, or the rules and regulations of the board of managers, the board of managers or its agents shall have such rights and remedies additional to those provided by this Act as shall be provided in the declaration or by-laws, or as shall otherwise be provided or permitted by law. *If such remedies shall include the right to take possession of such unit owner's interest in the property, the board of managers or its agents may maintain for the benefit of all the other unit owners an action for possession in the manner prescribed by "An Act in regard to forcible entry and detainer", approved February 16, 1874, as amended.*<sup>9</sup>

It should be emphasized that this new remedy under the Act and the Condominium Act is now available to the board of managers for any default by the condominium unit owner of an obligation that accrues under the Condominium Act, the declaration,<sup>10</sup> bylaws,<sup>11</sup> or rules and regulations of the board of managers. The new remedy appears to be elective in nature because of the wording of section 309.2. It appears that in order for the forcible entry and detainer remedy to apply, the declaration or bylaws must make mention of this new remedy.<sup>12</sup>

As of this writing, a search of other leading condominium property acts has not revealed the existence of any provision which allows the board of

9. Ill. Rev. Stat. ch. 30, § 309.2 (1972) (emphasis added).

10. The declaration is the registered or recorded instrument whereby the condominium developer places the property under the provisions of the Condominium Property Act. The condominium unit purchaser thus purchases his property subject to the recorded declaration and is bound by its provisions. The declaration may be deemed a covenant running with the land which binds the unit purchaser to the provisions of the recorded declaration. See Ill. Rev. Stat. ch. 30, §§ 302, 303, 304, 306 (1971); Chicago Bar Association, *Model Declaration of Condominium Ownership* (1967); Kane and Helms, *The Illinois Condominium Property Act*, 1970 L.F. 159, 163-168; 1 A. Ferrer and K. Stecher, *Law of Condominiums*, §§ 301, 302, 351 (1963).

11. The by-laws are the rules which govern the administration of the condominium. They generally provide, among other things, for the maintenance of common elements, voting procedures, assessment procedures, and general rules and regulations governing the conduct of the unit owners. The Condominium Property Act requires that a copy of the by-laws be appended to and recorded with the declaration. Thus the condominium unit purchaser takes his unit subject to the recorded by-laws and recorded declaration. Ill. Rev. Stat. ch. 30, §§ 317, 318 (1971); Chicago Bar Association, *Exhibit "C" to Model Declaration of Condominium Ownership By-Laws* (1967); 1 A. Ferrer and K. Stecher, *Law of Condominiums*, §§ 301, 302, 351 (1963).

12. On July 1, 1972, there were three other changes that took effect pertaining to the Condominium Property Act. These amendments and new sections do not deal with the Forcible Entry and Detainer Act and are not within the scope of this article. See Ill. Rev. Stat. ch. 30, § 310 (1972) dealing with separate taxation, Ill. Rev. Stat. ch. 30, § 312 (1972) dealing with insurance proceeds, and Ill. Rev. Stat. ch. 30, § 18.2 (1972) dealing with administration of condominium property prior to election of initial board of managers.

managers a similar remedy for non-payment such as the Forcible Entry and Detainer Act.<sup>13</sup>

#### ADVANTAGES OF THE RECENT ILLINOIS ENACTMENTS

The advantage of giving the board of managers a new remedy under the Forcible Entry and Detainer Act, read in conjunction with the Condominium Property Act, is that the board of managers now has a powerful and speedy remedy by which to compel the recalcitrant condominium unit owner to make his required payments. Prior to enactment of the present legislation, the Condominium Property Act provided that the remedy to be used by the board of managers was that of a priority lien which could be foreclosed as a mortgage upon real property.<sup>14</sup> In terms of speed, convenience, and legal expense a summary proceeding under the Forcible Entry and Detainer Act is to be preferred to the lien and foreclosure method of enforcement.

The newly amended Forcible Entry and Detainer Act will probably serve to coerce condominium unit owners into the prompt payment of an obligation due and owing to the board of managers. The threat of an immediate loss of the unit owner's right to possession appears to be a very serious threat that would, in all probability, be heeded by a reasonable owner.

A final advantage of the new legislation is that it may encourage condominium sales by giving prospective condominium purchasers a relative sense of security, viz; with the new legislation they can be virtually assured that the obligations of condominium ownership will be shared proportionately by all of the unit owners.

#### DISADVANTAGES OF THE RECENT ILLINOIS ENACTMENTS

The major disadvantage of the new legislation is that the condominium unit owner may be relegated to the status of a rent paying tenant. If the unit owner does not pay his obligations, which are somewhat akin to rent, he may lose his right of possession.

#### 13.

- |                |  |
|----------------|--|
| Arizona:       | <i>A.R.S. §§ 33-551 et seq. (Supp. 1971)</i>   |
| California:    | <i>West's Ann. Civ. Code § 1350 et seq. (Supp. 1972)</i>   |
| Florida:       | <i>F.S.A. § 711.01 et seq. (Supp. 1972)</i>  |
| Maryland:      | <i>Ann. Code of Md. Art. 21, § 117A et seq. (Supp. 1970)</i>   |
| Massachusetts: | <i>M.G.L.A. ch. 183A, § 6 et seq. (Supp. 1972)</i>   |
| Michigan:      | <i>M.C.L.A. § 559.19 et seq. (Supp. 1971)</i>  |
| New Jersey:    | <i>N.J.S.A. ch. 168, § 46:8A et seq. (Supp. 1972)</i>  |
| New York:      | <i>McKinney's Consolidated Laws of New York Annotated, New York Real Property Law § 339d et seq. (McKinney Supp. 1971)</i> |
| Ohio:          | <i>Ohio Rev. Code Ann. § 5311.01 et seq. (Supp. 1971)</i>  |
| Pennsylvania:  | <i>18 P.S. § 4403 et seq. (Supp. 1971)</i>   |
| Washington:    | <i>R.C.W.A. § 64.32.090 et seq. (1971)</i>   |
14. Ill. Rev. Stat. ch. 30, § 309 (1971) Sharing of expenses-Lien for non-payment.

Just as the legislation may serve as an inducement to purchase a condominium unit, the reverse may also be true. Prospective purchasers may refrain from purchase when they realize that in reality they may be little more than rent paying tenants.

#### PROBABLE EFFECT AND JUDICIAL INTERPRETATION

Owing to the fact that Illinois has never had a Forcible Entry and Detainer Act pertaining to fee simple ownership of condominiums, interpretations are likely to come from Illinois landlord and tenant law arising under the Forcible Entry and Detainer Act.

Historically, an action under the Forcible Entry and Detainer Act has been a summary proceeding to determine the right of possession. In *Meier v. Hilton*,<sup>15</sup> the Illinois Supreme Court emphasized the summary nature of the proceeding when the court stated:

The action of forcible entry and detainer is a summary statutory proceeding for restoring to the possession of land one who is wrongfully kept out or has been wrongfully deprived of the possession, in the particular cases mentioned in the statute. It is a possessory action only, and it usually arises where one's possession has been forcibly invaded between landlord and lessee, vendor and vendee, or the purchaser at a judicial sale and a party to the judicial proceeding. The question of title cannot be tried but only the right of possession.<sup>16</sup>

In *Meier* the court held that a defendant in a forcible entry action could not raise the legal defense of better title. Thirty years earlier in *St. Louis Stock Yards v. Wiggins Ferry Co.*<sup>17</sup> the court refused to allow defendant to avail himself of the equitable defense of estoppel *in pais* by stating:

An action of forcible detainer being, as we have just seen, in the strictest sense a proceeding at law, and an estoppel *in pais* affecting real estate being an equitable right, cognizable only in a court of equity, it follows that the circuit court, conceding the existence of the estoppel claimed, properly refused to allow it as a defense to the present action.<sup>18</sup>

These basic rules of *Meier* and *St. Louis Stock Yards* were rather strictly followed for many years and were summarized in *Wein v. Albany Park Motor Sales Co.*<sup>19</sup> where the court, after citing *Meier* and *St. Louis Stock Yards*, said:

15. 257 Ill. 174, 100 N.E. 520 (1912).

16. *Id.* at 179, 100 N.E. at 521.

17. 102 Ill. 514 (1882).

18. *Id.* at 521, *see also* *Jones v. Jones*, 181 Ill. 595, 600, 117 N.E. 1013, 1015 (1917), where the court said:

The equitable right of the appellant to have the deed set aside could not be tried in a forcible entry and detainer suit.

19. 312 Ill. App. 353, 38 N.E.2d 556 (1941).

Since the only purpose of the evidence outlined in defendant's offer of proof was to attack plaintiff's title and to attempt to contradict the recitals in the instruments of title through which plaintiff claims a right of possession, said offer of proof was properly rejected.<sup>20</sup>

The court's refusal to allow legal or equitable defenses has been liberalized in recent years. In *Melburg v. Dakin*<sup>21</sup>, the defendant was a tenant farmer who had planted his spring crops in reliance upon plaintiff's misrepresentations. The court, in reversing for the tenant, allowed him to interpose both legal and equitable defenses to plaintiff's forcible entry and detainer action. The court stated:

Although there is authority to the contrary, under some statutes, the defenses interposed may be equitable as well as legal and there is authority to the effect that all defenses, both legal and equitable, may be made, under a plea of not guilty in a forcible entry and detainer proceeding.<sup>22</sup>

At this point it should be noted that the Forcible Entry and Detainer Act specifically provides:

The defendant may under a general denial of the allegations of the complaint give in evidence any matter in defense of the action. No matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim, or otherwise.<sup>23</sup>

While the courts have been somewhat reluctant to give this clause anything but the strictest interpretation there have been several exceptions. As previously noted in *Melburg* the court will allow equitable or legal defenses to the action where the conduct of one of the parties shocks the conscience of the court.

In *Allenworth v. First Galesburg National Bank and Trust Co.*,<sup>24</sup> plaintiff had lost title to certain property eleven years prior to the present action and had for the past eleven years continually vexed defendant thru a variety of legal actions and proceedings. In the present forcible entry and detainer action defendants counterclaimed for an injunction to restrain plaintiff's harassment. The court, in upholding the counterclaim as germane, stated:

It is, therefore, clear that the actions and notices brought or filed by plaintiff constitute clouds on the title of Galesburg Glass Company, the owner thereof, and that equity has jurisdiction to quiet the title, remove said clouds, and enjoin the further prosecution of any actions by plaintiff. It is also quite clear that equity has jurisdiction to enjoin the prosecution of a forcible entry and detainer

20. *Id.* at 359, 38 N.E.2d at 560.

21. 337 Ill. App. 204, 85 N.E.2d 482 (1949).

22. *Id.* at 211, 85 N.E.2d at 485.

23. Ill. Rev. Stat. ch. 57, § 5 (1971).

24. 7 Ill. App. 2d 1, 128 N.E.2d 600 (1955).



suit even though the defendant may have an adequate remedy at law by reason of a defense to the forcible entry and detainer action.<sup>25</sup>

The "germane" defenses of *Melburg* and *Allensworth* were distinguished in *Bleck v. Cosgrove*.<sup>26</sup> The court in upholding plaintiff's verdict conceded that certain defenses do exist. The court, however, implied that these defenses were limited to the more extreme situations, as presented in *Melburg* and *Allensworth*.<sup>27</sup>

The issue of what defense to allow and when such defense is "germane" in a forcible entry and detainer proceeding was greatly clarified in *Rosewood Corporation v. Fisher*.<sup>28</sup> *Rosewood* involved a consolidation of 156 suits pertaining to certain Negro families who had purchased homes from plaintiff corporation under a land contract purchase plan. The defendants became dissatisfied with the terms of their land purchase contracts and sought to correct their problems through self-help. When defendants defaulted in their payment, plaintiff proceeded under the Forcible Entry and Detainer Act. Defendants answered by claiming as a defense that they had been discriminated against and that plaintiff had taken unfair advantage. In reversing the lower court and holding for the defendant contract purchasers the Illinois Supreme Court stated:

Limiting ourselves to a consideration of the act only so far as it applies to contract purchasers of land, this case is, so far as we can ascertain, one of first impression in this court. It is our opinion that the defenses going to the validity and enforceability of the contracts relied upon by the plaintiffs were germane to the distinctive purpose of the forcible entry and detainer actions and were improperly stricken. That purpose, to repeat, is to restore possession to one who is entitled to the right of possession. "Germane" has been judicially defined as meaning "closely allied," and is further defined in Webster's New Twentieth Century Dictionary, p. 767, as meaning: "closely related; closely connected; relevant; pertinent; appropriate." Whereas here, the right to possession a plaintiff seeks to assert has its source in an installment contract for the purchase of real estate by the defendant, we believe it must necessarily follow that matters which go to the validity and enforceability of that contract are germane, or relevant to a determination of the right to possession. This is particularly true for two reasons. First, because a contract buyer becomes the equitable owner of the property upon execution of an installment contract, (citing cases) and thus by such an action may be stripped of his equitable ownership as well as possession; second, the contract purchaser is faced not only with the loss of possession, but, unlike a tenant, trespasser or a squatter, is likewise faced with the loss of

25. *Id.* at 4, 128 N.E.2d at 601.

26. 32 Ill. App. 2d 267, 177 N.E.2d 647 (1961).

27. *Id.* at 272, 177 N.E.2d at 649.

28. 46 Ill. 2d 249, 263 N.E.2d 833 (1970).

the equity accumulated by payments made on the contract. Here, for example, the Fishers had paid approximately \$10,000 towards satisfaction of their total contract obligations. On the other side of the coin, a contract seller claiming and seeking to enforce a claimed right of possession should not be permitted to prevail on the basis of such contract so long as its validity and enforceability is questionable under the law. Should a contract purchaser not be permitted to defend upon the very contract upon which the seller relies, in our judgment the result could be, as argued, a direct denial of constitutional rights and an indirect denial of civil rights. We believe that contract buyers may plead equitable defenses and be given equitable relief if it is established that the contracts are unconscionable or in violation of civil rights as here contended.<sup>29</sup>

The court then continued to state what effect its decision would have upon the summary aspects of the Forcible Entry and Detainer Act:

It does not escape us that the construction we have placed upon the act may interfere with the summary aspects of the remedy, when it is invoked against contract purchasers. But the right of such purchasers to be heard on relevant matters, and to be secure in their constitutional rights, as well as the desirable purpose of preventing a multiplicity of suits, is, and must be, superior to the desire to provide a speedy remedy for possession.<sup>30</sup>

The "germane" defenses of *Rosewood* were almost immediately expanded upon one year later in *Marine Park Associates v. Johnson*.<sup>31</sup> Although the Illinois Supreme Court in *Rosewood* limited itself strictly to contract purchasers, the Illinois Appellate Court in *Marine Park Associates* upheld defendant's defense to a forcible entry and detainer action that was based upon an alleged violation of defendant's civil and constitutional rights. The defense was based on the theory that defendant had been denied a lease renewal by plaintiff because defendant was a Negro. The court in applying *Rosewood*, which dealt strictly with contract purchasers, expanded the scope of the *Rosewood* "germane" defenses and applied these defenses to an action involving a lessor and lessee. In *Marine Park Associates* the court asked:

Is the assertion of a claim under 42 U.S.C., sec. 3604(a) and sec. 1982, germane to the distinctive purpose of determining plaintiff's right to possession? The answer, we think, is that whether possession is sought by reason of lease termination or refusal to renew, if based upon the rights enunciated and protected by these sections, then such is pertinent and germane under *Rosewood* to the distinctive purpose of the proceeding and can be introduced by "joinder, counterclaim or otherwise". Paraphrasing *Rosewood*, defendant should not be forced to initiate a separate proceeding where the same relief might be forthcoming in the present one.

29. *Id.* at 256-257, 263 N.E.2d at 838.

30. *Id.* at 258, 263 N.E.2d at 839.

31. 1 Ill. App. 3d 460, 274 N.E.2d 645 (1971).

We believe, as the court did in *Rosewood*, with regard to contract buyers, that a lessee may plead equitable defenses and be given equitable relief if it is established that the termination or the failure to renew are in violation of her civil rights as contended. The language of 42 U.S.C., sec. 3604(a) is, shall we say, germane, at this juncture: "It shall be unlawful—(a) to refuse to sell or rent after making a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make available or deny, a dwelling to any person because of race, color, religion, or national origin." Defendant's claim is based on this section-refusal to renew or the termination itself-and if true, such presents an equitable defense.<sup>32</sup>

The Illinois trend of allowing defendant to interpose certain defenses was further expanded in *Jack Spring, Inc. v. Little*.<sup>33</sup> Spring alleged that two months back rent was due and owing, and thus, plaintiff was entitled to possession. The only claim by plaintiff was for possession. No claim for rent was argued before the Illinois Supreme Court. Defendant appealed when plaintiff's motion to strike defendant's answer was granted:

She alleged the existence of an "oral lease"; plaintiff Jack Spring Inc.'s promises, and the breach thereof, to make certain repairs; many structural defects which are in violation of enumerated sections of the Municipal Code of Chicago; plaintiff's wilful neglect and intentional refusal to repair them, and that plaintiff, by reason of said refusal, was "in violation of an implied covenant of habitability . . ." <sup>34</sup>

The court summarized:

Defendants contend the trial court erred in striking their affirmative defenses, thus refusing to permit them to raise the plaintiff's prior breach of their obligation to maintain the premises as a condition to their right to possession. They argue that the obligation to pay "full rent" under a lease is interdependent with the landlord's obligation to maintain and repair the premises, that summary eviction in face of the landlord's failure to maintain the premises is contrary to principles of equity, and that summary eviction based upon an "unconscionable lease" is violative of defendants' constitutional rights. Plaintiffs contended the only issue in a forcible detainer action is the right to possession, and no equitable defenses can be recognized.<sup>35</sup>

32. *Id.* at 468, 274 N.E.2d at 648; *contra* Peoria Housing Authority v. Sanders, 2 Ill. App. 3d 610, 276 N.E.2d 496 (1971) which was decided after *Marine Park Associates*. In Peoria Housing Authority v. Sanders the court refused to apply the *Rosewood* test to lessees and stated at 615, 276 N.E.2d at 500:

It appears clear that the *Rosewood Corp.* case has not scuttled the prompt remedy provided in the Forcible Entry and Detainer Act but on the contrary again the counterclaims must show a defense which is germane to the question of the right to possession. It is also apparent that our Supreme Court has differentiated between cases involving lessees, renters, and those involving purchasers.

33. 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

34. *Id.* at 353, 280 N.E.2d at 210; see generally Jaeger, *The Warranty of Habitability Part II*, 47 Chicago-Kent L. Rev. 1, 53-77 (1971).

35. 50 Ill. 2d 351, 357, 280 N.E.2d 208, 212 (1972).

In reversing for the defendants the court said:

It is apparent, therefore, that even though the plaintiffs do not seek to recover rent in these actions, the question of whether rent is due and owing is not only germane, but in these cases where the right to possession is asserted solely by reason of nonpayment, it is the crucial and decisive issue for determination.<sup>36</sup>

Summarizing the newly expanded "germane" defenses which are now available to tenant defendants in a forcible entry and detainer action the court concluded:

Insofar as defendants' affirmative defenses alleged the breach of express covenants to repair, they were germane to the issue of whether the defendants were indebted to plaintiffs for rent and we find no impediment in our earlier opinions to the determination of the issue in one rather than multiple actions. We hold, therefore, that the trial court erred in striking these affirmative defenses.<sup>37</sup>

#### CONCLUSION

At first impression the recent amendments to the Condominium Property Act and Forcible Entry and Detainer Act appear to be very favorable to the board of managers in that the condominium unit owner may be deprived of the right of possession if he fails to pay his assessments or other legal charges. However, the recent amendments must be construed in light of *Rosewood Corporation v. Fisher*,<sup>38</sup> *Marine Park Associates v. Johnson*,<sup>39</sup> and *Jack Spring, Inc. v. Little*.<sup>40</sup> These three cases have greatly diminished or entirely eliminated the summary aspect of the Forcible Entry and Detainer Act. The legal and equitable defenses which were permitted can perhaps be used by a condominium unit owner holding fee simple title.

The new Forcible Entry and Detainer amendment itself strongly implies that certain defenses may be raised by the defendant owner when the statute states that the plaintiff will be entitled to a judgment for possession ". . . and for the amount found due by the court . . ."<sup>41</sup>

It has been shown that both the condominium unit owner and the board of managers have certain rights, duties and obligations which arise out of the declaration, bylaws, and Condominium Property Act. The board of managers has certain remedies which may be employed against the condominium unit owner. The recent amendments were no doubt enacted to provide the board of managers with the so called "summary" remedy of the

36. *Id.* at 358, 280 N.E.2d at 213.

37. *Id.*

38. 46 Ill. 2d 249, 263 N.E.2d 833 (1970).

39. 1 Ill. App. 3d 460, 274 N.E.2d 645 (1971).

40. 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

41. Ill. Rev. Stat. ch. 57, § 13.1 (1972) (emphasis added).

Forcible Entry and Detainer Act; but this remedy no longer appears to be the "summary" proceeding it once was.

What then are some of the possible defenses that may be accepted by the Illinois courts? An analysis of the more recent Illinois forcible entry and detainer cases shows that the defendant, condominium unit owner, could successfully interpose a "germane" defense to a forcible entry and detainer proceeding if the board of managers had:

1. Failed to comply with the provisions of the declaration, bylaws, or Condominium Property Act;
2. Defrauded the condominium unit owner;
3. Racially discriminated against the proposed lessee of the owner;
4. Taken unfair advantage of the owner;
5. Maintained the common elements in substantial violation of a municipal building code.

The board of managers has a swift remedy which in the absence of the above defenses, may be used to coerce or evict a truly recalcitrant unit owner. The condominium unit owner having a valid and "germane" defense will have an opportunity to present this defense.

MARTIN F. SPIEGEL