**COMMONWEALTH OF MASSACHUSETTS**

**TRIAL COURT**

**DEFENDANT’S MOTION TO DISMISS OR IN THE**

**ALTERNANTIVE, FOR SUMMARY JUDGEMENT**

(Reinstatement of Tenancy)

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| **{{** courts[0].address.county **}}, SS** | {{ courts[0] }} |
|  | Docket Number: {{ docket\_number }} |
|  |  |
| {{ plaintiffs }} |  |
|  |  |
| v. |  |
|  |  |
| {{ defendants }} |  |

The Defendant ("Tenant") moves that this action be dismissed pursuant to Rule 12(b)(1) of the Mass. Rules of Civil Procedure. The Defendant moves pursuant to Rule 56 of the Massachusetts Rules of Civil Procedure for summary judgment in his/her favor on the issue of possession in this action. In support of this motion, the Tenant states the following:

1. A tenancy may be reinstated or re-created notwithstanding its termination where there is payment and acceptance of rent in advance after service of a notice to quit without proper reservation of rights, or where the owner has taken other action which is inconsistent with the termination of the tenancy. See Collins v. Canty, 60 Mass. (6 Cush.) 415 (1850); Jones v. Webb, 320 Mass. 702, 71 N.E.2d 216 (1947); Mastrullo v. Ryan, 328 Mass. 621, 105 N.E.2d 469 (1952); Brockton Housing Authority v. Williams, 14 Mass. App. Ct. 955, 437 N.E.2d 1085 (1982); Martins v. O’Neill, Southeast Housing Court No. 02-SP-00415 (Chaplin, J., Jan. 31, 2003); Bell v. Blankney, Boston Housing Court No. 02-SP-01024 (Chaplin, J., May 13, 2002); Holland v. Aquino, Boston Housing Court No. 98-SP-02602 (Daher, C.J., July 1, 1998).

1. In the present case, the Plaintiff (“Landlord”) has acted or failed to act in the following ways, and by so doing the parties’ conduct has reinstated the tenancy, and/or a new tenancy has been created *[check all that apply*]:

{{ bananas }} The notice to quit served on the Tenant and filed in this court as a basis for this action has no language reserving future monies received from the Tenant as use and occupancy and not as rent (see notice to quit, a copy of which is attached). The Landlord has accepted rent for the month(s) of {{rent\_month}}subsequent to the expiration of the notice to quit, without any reservation of rights. *[Attach any proof of rent payments and manner of acceptance that the Tenant may have.]* See Tokar v. Goffigan, Boston Housing Court Docket No. 08-SP-0486 (Muirhead, J., March 12, 2008) (owner accepted rent after notice to quit and did not reserve rights in either notice to quit or at time rent was accepted).

The Tenant continued to tender rent payments by check to the Landlord after the expiration of the notice to quit. The Landlord only reserved rights regarding how such payment was being accepted on the back of the checks that the Tenant used to pay his/her rent, and such reservation is not sufficient because it does not give the Tenant seasonable notice of such reservation. See Whitehouse Restaurant v. Hoffman, 320 Mass. 183, 68 N.E.2d 686 (1946); Armstrong v. Appel, Boston Housing Court No. 96-SP-00276 (Daher, C.J., May 29, 1996); Palmer v. Miles, Eastern Housing Court No. 17-H84-SP-5097 (Theophilis, J., Jan. 26, 2018).

{{pears }} The Landlord entered into a new lease or executed lease renewal or extension documents effective after service of the notice to quit. *[Attach copies of any such documents.]* See Grant Manor, LP c/o Cornu Mgt. v. Gerena, Boston Housing Court No. 04-SP-02581 (Nasif, J., December 23, 2004); Chestnut Hill Realty Corp. v. Mahoney, Boston Housing Court No. 94-SP-05358 (Winik, J., September 13, 1996); Elad v. Tenants Development Corp., Boston Housing Court Civil Action No. 24891 (Daher, C.J., May 27, 1998); Burbank v. Werman, Boston Housing Court Civil Action No. 06432 (King, J., August 4, 1977); Montgomery Gateway East I v. Herrera, 261 N.J. Super. 235, 241, 618 A.2d 865, 867 (1992). See also Chillicothe Metro. Hous. Auth. v. Anderson, 1988 Ohio App. LEXIS 2552, 1988 WL 69118 (Ohio App. 4 Dist.); Gallatin Housing Authority v. Montesillo, 2002 Tenn. App. LEXIS 574, 2002 WL 1800968 (Tenn. Ct. App.); Superior Housing Authority v. Foote, 158 Wisc.2d 732, 463 N.W.2d 882 (table), 1990 WL 198173 (Wisc. App. 1990); Millennia Housing Mgt. v. Williams, 2015 WL 1276464 (Ohio App. 8 Dist.).

{{ grapes }} Other [please describe]: {{dismissal\_reasons}}

3. As described above, the parties by their conduct created a new tenancy and such tenancy has not been terminated. The Tenant is therefore entitled to judgment in his/her favor on the issue of possession as a matter of law.

Wherefore, the Defendant respectfully requests that this Court dismiss the Plaintiff's case because the Plaintiff failed to terminate the tenancy.

Respectfully submitted,

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I hereby certify that a

true copy of the above

document was served upon

Plaintiff (or Attorney,

if represented) by mail on

\_\_\_\_\_\_\_\_\_\_\_\_ (date) by

VERIFICATION

The Defendant states that all facts asserted herein are true and correct and based on the Defendant's own personal knowledge, any documents attached hereto are true and correct copies, and the Defendant is competent to testify as to the factual matters stated herein.

Signed under penalty of perjury on {{ signature\_date }}.

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{{ defendants }}