BOSTON DIVISION

Docket # SUMMARY PROCESS 05-SP-00187

Parties: HARWOOD CAPITAL CORP. vs ERIN CAREY

Judge: /s/ Kenneth P. Nasif
Associate Justice

Date: March 10, 2005

AMENDMENT\CORRECTION TO THE COURT'S ORDER CONCERNING MOTION OF THE PLAINTIFF TO DISMISS THE COUNTERCLAIMS OF THE DEFENDANT

On March 8, 2005, the Court entered its Order Concerning the Motion of the Plaintiff to Dismiss the Counterclaims of the Defendant.

The bottom sentence at the bottom of page 2 and continuing to the top of page 3 of said Order is hereby amended and corrected to read as follows: "The obvious suggestion is that the legislature intended for the third category of evictions, namely those not alleging nonpayment of rent or where the tenant is at fault for violation of some condition, to be treated differently."

SO ORDERED

-1-

cc: Peter S. Brooks, Esq. \ Todd M. McGrath, Esq.

Seyfarth Shaw LLP

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James R. Rosencranz, Esq.

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200 State Street

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BOSTON DIVISION

Docket # SUMMARY PROCESS NO. 05-SP-00187

Parties: HARWOOD CAPITAL CORP. VS. ERIN CAREY

Judge: /s/ JEFFREY M. WINIK
FIRST JUSTICE

Date: May 13, 2005

ORDER

The attorneys in the above captioned matter are ORDERED to appear at the disposition of their respective clients and designated witnesses on Monday, May 16, 2005, from 9:30 a.m. to completion of said disposition. The disposition of Mr. Harwood is to commence at 9:30 a.m. at Mr. Rosencranz's office located at Fanueil Hall Marketplace Center - 3 North, 200 State Street, Boston, MA. The disposition of Ms. Casey shall commence at Mr. Brooks' office at Seyfarth Shaw LLP, World Trade Center East, Two Seaport Lane, Suite 300, Boston, MA., one-half hour after the completion of Mr. Harwood's disposition. Mr. Baar's disposition shall commence immediately upon the completion of Ms. Casey's disposition.

SO ORDERED.

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End Of Decision

BOSTON DIVISION

Docket # SUMMARY PROCESS No. 05-SP-00187

Parties: HARWOOD CAPITAL CORP. vs ERIN CAREY

Judge: /s/ Kenneth P. Nasif
Associate Justice

Date: March 8, 2005

ORDER CONCERNING MOTION OF THE PLAINTIFF TO DISMISS THE COUNTERCLAIMS OF THE DEFENDANT

This is a Summary Process Case in which the Plaintiff/Landlord is attempting to evict the Defendant/Tenant for the reason that, as alleged by the Plaintiff/Landlord, the Defendant/Tenant is guilty of excessive smoking. According to the Plaintiff/Landlord, the Defendant/Tenant, as well as her co-tenant, are both engaged in heavy smoking and the cigarette smoke has reached the level where it is creating a nuisance for the other tenants and interferes with the quiet enjoyment of the other tenants who are all members of the same condominium association. The Plaintiff/Landlord alleges that the Defendant/Tenant's wrongdoing in creating this nuisance amounts to a violation of the lease and the rules and regulations of the condominium association.

In response, the Defendant/Tenant has filed, by way of Defenses and Counterclaims, claims against the Plaintiff/Landlord relating to her rental of the premises. The Plaintiff/Landlord moves to dismiss the Answers, Defenses, and Counterclaims asserted by the Defendant/Tenant on the grounds that M.G.L., c. 239, s8A does not permit Answers and Counterclaims to be raised in this

type of summary process action. It is the Plaintiff/Landlord's position that said s8A only permits claims against the landlord by the tenant in response to a summary process action when the tenancy is being terminated for nonpayment of rent, or where the tenancy has been terminated without fault of the tenant.

It is the Defendant/Tenant's position that she can file claims against the Plaintiff/Landlord by way of an Answer or Counterclaim even if the tenancy is being terminated on the basis of fault by the tenant.

Chapter 239, s8A states as follows: "In any action under this chapter to recover possession of any premises rented or leased for dwelling purposes, brought pursuant to a notice to quit for nonpayment of rent, or where the tenancy has been terminated without fault of the tenant or occupant, the tenant or occupant

shall be entitled to raise, by defense or counterclaim, any claim against the plaintiff relating to or

arising out of such property, rental, tenancy, or occupancy for breach of warranty, for a breach of any material provision of the rental agreement, or for a violation of any other law."

The intent of the legislature, as reflected in its statutory scheme and as determined by judicial decision, acts to limit the claims to be considered in the interest of maintaining the streamlined nature of summary process. See Fafard v. Lincoln Pharmacy of Medford, Inc., 439 Mass. 512 (2003) (holding statutory scheme does not allow counterclaims in summary process actions).

s8A of chapter 239 appears to support the prohibition of claims by a tenant against the landlord in summary process cases wherein the allegation is the tenant is at fault. In two categories of evictions (nonpayment of rent and no fault by the tenant) the legislature expressly stated that the tenant "shall be entitled" to raise defenses and counterclaims relating to the tenancy. The obvious suggestion is that the legislature intended for the third category of evictions, namely those alleging

nonpayment of rent or where the tenant is at fault for violation of some condition, to be treated differently. In the instant case, the reasons given by the Plaintiff/Landlord for the termination of the occupancy are based solely upon the alleged wrong doing or fault of the Defendant/Tenant. No claim of unpaid rent is raised in the Notice to Quit or in the Complaint. Therefore, this Court finds, the Defendant/Tenant is not entitled to raise by way of defense or counterclaim, any claims against the Plaintiff/Landlord in this action. The Defendant/Tenant's remedy, if any, lies in a separate civil action against the Plaintiff/Landlord.

This is not to say, however, that a tenant is precluded from filing any possible Answer or Counterclaim against the landlord when a landlord brings an action against the tenant to recover possession alleging the tenant is at fault and has violated some condition of the lease or the tenancy. Certain claims in the nature of an Answer, Defense, or Counterclaim, although not bearing directly on the factual allegations of the fault or cause by the tenant are nevertheless fundamental in Landlord-Tenant Law and must be allowed to be raised notwithstanding the language of s8A. In this regard, this Court finds that Defenses or Answers alleging a failure to properly terminate the tenancy prior to the commencement of the action, retaliation against the tenant, or discrimination against the tenant are Defenses or Counterclaims that must be considered and not prohibited. These Defenses are generally not directly "conditions-related" and enjoy a level of stand-alone legislative endorsement (M.G.L., c. 239, s2A for retaliation, and c. 151B for discrimination).

Accordingly, the Plaintiff/Landlord's Motion is ALLOWED in part, and DENIED in part. The Court will ALLOW the Defendant/Tenant to Answer by Denying the Plaintiff/Landlord's Claims, as well as to present her Retaliation Defense and/or Discrimination Defense. As to any and all other Defenses and Counterclaims filed by the Defendant/Tenant, said Defenses and Counterclaims are to be DISMISSED.

ORDER

For the foregoing reasons it is ORDERED that:

1. Plaintiff/Landlord's motion is DENIED insofar as it seeks to dismiss the general denial by the Defendant/Tenant of the Plaintiff/Landlord's claims;

2. Plaintiff/Landlord's motion is also DENIED insofar as it seeks to dismiss the Defendant/Tenant's claims of retaliation and/or discrimination[1]; and

3. Plaintiff/Landlord's motion is ALLOWED insofar as it seeks to Dismiss the Defendant/Tenant's Defenses and Counterclaims alleging: Premature Commencement of Action, Claims against Landlord, Failure to State a Claim upon which Relief can be Granted, Plaintiff/Landlord is Estopped by its Acts, Allegations Barred by their Falsity, Unclean Hands, Landlord has Committed Violations of C. 93A, Waiver, Good Faith, Excused from Performance, Failure of Consideration, Statute of Frauds, Barred by Parole Evidence, Laches, Waiver, Failure to Comply with M.R.C.P. 19, Complaint Barred by Privacy Considerations, Breach of Warranty of Fitness, Interference with Quiet Enjoyment of the Premises, and Unfair and Deceptive Practices.

SO ORDERED

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[1] Although not stated in her written Answer and Counter-Claim, counsel for the Defendant/Tenant in oral

argument alleged that the tenant was being discriminated against because she is a Republican and voted for President Bush while the condominium board and other tenants within the condominium complex are all Democrats.

cc: Peter S. Brooks, Esq. \ Todd M. McGrath, Esq.

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End Of Decision

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BOSTON DIVISION

Docket # SUMMARY PROCESS 05-SP-00187

Parties: HARWOOD CAPITAL CORPORATION VS. ERIN CAREY

Judge: /s/JEFFREY M. WINIK
FIRST JUSTICE

Date: August 23, 2005

MEMORANDUM OF DECISION ON PLAINTIFF'S MOTION FOR COSTS AND

ATTORNEYS' FEES AND DEFENDANT'S MOTION FOR NEW TRIAL

Procedural History

This matter is before the Court on (1) the defendant's Motion for a New Trial and (2) the plaintiffs Motion for Costs and Attorneys' Fees Pursuant to G.L. 231, s.6F.

In January 2005, the plaintiff, Harwood Capital Corporation (hereinafter, "Harwood"), commenced this summary process action against the defendant, Erin Carey (hereinafter, "Carey"). Harwood alleged Carey breached the terms of her lease because she violated Article V, Section 11, subparagraph (c) of the condominium By-Laws, which states that "[n]o unit owner shall cause or permit to exist in his unit, nor shall he cause or permit any occupant of his unit or invitee to cause anywhere in or about the Property, any nuisance, any offensive noise, odor or fumes or any hazard to health." Harwood claimed that cigarette smoke, odors or fumes emanating from Carey's apartment carried into the units of other

residents, creating a nuisance that substantially interfered with the other residents' ability to use and enjoy their homes. Carey filed an

answer in which she denied that she was in breach of her lease. She asserted numerous affirmative defenses, including a retaliation defense, and counterclaims for breach of warranty of fitness, interference with quiet enjoyment, retaliation and unfair and deceptive practices. In an order dated March 8, 2005, the Court (Nasif, J.), acting pursuant to G.L. c. 239, s.8A, p.1, dismissed Carey's breach of warranty, quiet enjoyment and Chapter 93A counterclaims.[1] The judge did not dismiss Carey's retaliation defense and counterclaim as those claims were based on statutes that provided an independent basis to assert a defense/counterclaim distinct from Section 8A. Nonetheless, Carey waived her retaliation defense and counterclaim during the trial. Carey's principal defense - that any problems pertaining to smoke were caused by Harwood's failure to maintain the unit in good repair - was presented to the jury for its consideration. The jury returned a verdict in favor of Harwood on Harwood's claim for possession.

Defendant's Motion for a New Trial

After considering the written submissions and oral arguments presented by counsel at the motion hearing, the defendant's Motion for a New Trial is DENIED.

Under M. R. Civ. P. 59, "the judge should only set aside the verdict if satisfied that the jury `failed to exercise an honest and reasoned judgment in accordance with the controlling principles of law. ' Turnpike Motors, Inc. v. Newbury Group, Inc., 413 Mass. 119, 127 (1992), quoting Robertson v. Gaston Snow & Ely Bartlett, 404 Mass. 515, 520 (1989). A judge should set aside the verdict only when it "is so greatly against the weight

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[1] Section 8A states in relevant part, "In any action under this chapter to recover possession of any premises rented or leased for dwelling purposes, brought pursuant to a notice to quit for nonpayment of rent, or where the tenancy has been terminated without fault of the tenant or occupant, the tenant or occupant shall be entitled to raise, by defense or counterclaim, any claim against the plaintiff relating to or arising out of such property ... for breach of warranty, for a breach of any material provision of the rental agreement, or for a violation of any other law."

of the evidence as to induce in his mind the strong belief that it was not due to a careful consideration of the evidence, but that it was the product of bias, misapprehension or prejudice." Turnpike Motors, Inc., supra. at 127, quoting Scannell v. Boston Elevated Ry., 208 Mass. 513, 514 (1911).

I am satisfied that my rulings on evidentiary objections and

motions during the course of the trial (and during the charge conference) were not erroneous. The instructions I gave to the jury before it began its deliberations incorporated the correct legal principles pertaining to all relevant claims and defenses, including the elements of the plaintiff's possession claim based upon breach of the lease, the law of nuisance as that term is used in the condominium's rules and regulations (the terms of which were incorporated into the lease), and the elements of the defendant's defense based upon her allegation that the plaintiff was responsible for any nuisance that might have resulted from cigarette fumes, odors or smoke because the plaintiff failed to maintain the premises in good repair.

Further, there was sufficient evidence presented at trial to (1) support the jury's verdict, and (2) negate any suggestion that the verdict was the product of the jury's bias, misapprehension or prejudice.

Finally, the defendant has vacated the premises, and therefore, the issue of possession is now moot.

Harwood's Motion for Costs and Attorneys' Fees Pursuant to G.L c. 231, & 6F

After considering the written submissions and oral arguments presented by counsel at the motion hearing, the plaintiffs Motion for Costs and Attorneys' Fees Pursuant to G.L. c. 231, s.6F is DENIED.

Harwood is requesting that the Court, pursuant to G.L. c. 231, s.6F, award Harwood its reasonable attorneys' fees and costs incurred in defending against and seeking to disprove the retaliation defense and counterclaim asserted by Carey, on the grounds that they were wholly insubstantial, frivolous and not advanced in good faith.

Under G.L. c. 231, 6F, a court may award reasonable counsel fees and costs upon a finding that all or substantially all of the claims, defenses, setoffs or counterclaims made by a party who was represented by counsel were wholly insubstantial, frivolous and not advanced in good faith.[2]

A claim or defense is wholly insubstantial if it is "transparent," one "to which a party should not be required to respond" and/or "without even a colorable basis in law." Lewis v. Emerson, 391 Mass. 517, 526 (1984). Furthermore, a claim or defense is considered frivolous if it is "irrelevant to the central issue in the case," lacks weight or importance and/or fails "to controvert the material points of the opposing pleadings." Hahn v. Planning Board of Stoughton, 403 Mass. 332, 337 (1988). In addition to showing that substantially all of another party's claims etc. are wholly insubstantial and frivolous, the moving party must also show that such claims etc. were not advanced in good faith. "Good faith implies an absence of malice, an absence of design to defraud or to seek an unconscionable advantage." Id. (citing Black's Law Dictionary 623-624 (5th ed. 1979)). Actions not made in good faith are "those `interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of

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[2] Unnumbered paragraph 1 of G.L. c. 231, s.6F states in relevant part, "Upon motion of any party in any civil action in which a finding, verdict, decision, award, order or judgment has been made by a judge or justice or by a jury ... the court may determine, after a hearing, as a separate and distinct finding, that all or substantially all of the claims, defenses setoffs or counterclaims, whether of a factual, legal or mixed nature, made by any party who was represented by counsel during most or all of the proceeding, were wholly insubstantial, frivolous and not advanced in good faith. The court shall include in such finding the specific facts and reasons on which the finding is based.

litigation.' Id. (quoting F.R.C.P., Rule 11 (1987)). A frivolous undertaking based on poor judgment does not mean it was made with the absence of good faith. Id. at 338.[3]

I find that the retaliation defense and counterclaim advanced by Carey was wholly insubstantial and frivolous. An affirmative defense under G.L. c. 239, s.2A and a counterclaim under G.L. c. 186, s.18 require proof that a landlord retaliated against a tenant because the tenant engaged in one or more of the specifically protected activities enumerated in the statutes, including reporting a violation or suspected violation to a code enforcement agency and organizing or joining a tenant's union. Here, Carey alleged that her landlord terminated her tenancy because certain members of the condominium association disagreed with her political views. The expression of a political view or affiliation, however, is simply not a protected activity under either G.L. c. 239, s.2A or G.L. c. 186, s.l 8.[4] Therefore, Carey's retaliation defense and counterclaim had no colorable basis in law.[5] Further, there was no evidence that either Carey or her partner ever discussed their political views with Harwood, and there was no evidence that

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[3] The standard by which it is determined whether a claim or defense was advanced without good faith is "neither wholly subjective nor wholly objective." Massachusetts Adventura Travel Inc., v. Mason, 27 Mass.App.Ct. 293, 297 (1989). In addition to considering whether the claim or defense advanced was completely unsupported by the evidence, a court can infer absence of good faith by evaluating the "claimant's experience and training, his knowledge of relevant circumstances ... [,)the extent to which advise and participation of counsel was available to him, the quality and significance of the claimant's grounds advanced for opposing an award under s.s.6F and 6G, and similar criteria." Id. at 299. A person's subjective belief in his claims or defense will not preclude an award against him pursuant to s.6F where such claims or defenses are unsupported by the evidence. Id. at 299.

[4] Nor, is political affiliation a protected category under either G.L. c. 151B or 42 U.S.C. s.3601 et seq. (the federal Fair Housing Act). G.L. c. 151B, s.4 provides that it is illegal for a landlord to discriminate against a tenant based on race, religious creed, color, national origin, sex, sexual orientation, age, ancestry, marital status, family status, handicap, veteran or military status or because of the receipt of public or rental

assistance. The federal Fair Housing Act, 42 U.S.C. s.3601 et seq., prohibits discrimination in renting residential property based on race, color, religion, gender, familial status, handicap or national origin.

[5] I do not accept Carey's argument that the retaliation arguments were "novel" and thus not subject to G.L. c. 231, s.6F. Even a novel or unusual claim, defense or argument must have a colorable basis in law, and the plain language of both retaliation statutes, as well as the relevant case law interpreting the statutes, limit the applicability of both statutes to protected activities specifically enumerated in the statutes.

Harwood ever learned of their political views from others. For these reasons, I conclude that Carey's retaliation defense and counterclaim were wholly insubstantial and frivolous.[6]

Although Carey's retaliation claims were wholly insubstantial and frivolous, those claims did not represent "all or substantially all of the ... defenses ...or counterclaims ... made by [Carey]," as is required to support a motion for attorney's fees under G.L. c. 231, 6F, unnumbered p.1. Carey's main contention at trial was that any problems that may have resulted from odors, fumes or smoke carrying into other units were caused by Harwood's failure to maintain the premises in good repair. Although Carey's breach of warranty and quiet enjoyments counterclaims based upon these allegations were dismissed without prejudice prior to trial in accordance with G.L. c. 239, s.8A[7], her affirmative defense based upon these allegations remained and was a central focus of the trial. In contrast, the retaliation claims involved little trial time and were waived by Carey after a few questions posed by counsel made it clear to her attorney that there was insufficient evidence to support the claims. I conclude, therefore, that Harwood has not established that "all or substantially all" of Carey's defenses or counterclaims were wholly insubstantial and frivolous.

For these reasons, I rule that Harwood is not entitled to attorneys' fees and costs pursuant to G.L.

c. 231, 6F.

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[6] Since I have determined that all or substantially all of Carey's claims were not wholly insubstantial and frivolous, I do not need to decide whether the retaliation defense and counterclaim were advanced in good faith.

[7]The conditions-based counterclaims are not insubstantial

and frivolous. These counterclaims were dismissed prior to trial because G.L. c. 239, s.8A bars such claims from being raised in a summary process case where the claim for possession is based upon allegations of tenant fault (other than non-payment of rent). The conditions-based defenses and claims were not dismissed because they were without merit. See generally Compugraphic Corp. v. DiCenso, 11 Mass.App.Ct. 1020, 1021 (1981) (rescript opinion).

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Conclusion

For the foregoing reasons, the plaintiff's Motion for Costs and Attorneys' Fees Pursuant to G.L. 231, s.6F is DENIED, and the defendant's Motion for a New Trial is DENIED.

- 7-

End Of Decision

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BOSTON DIVISION

Docket # SUMMARY PROCESS NO. 05-SP-00187

Parties: HARWOOD CAPITAL CORP. VS. ERIN CAREY

Judge: JEFFREY M. WINIK
FIRST JUSTICE

Date: November 8, 2005

ORDER

This matter is before the Court on the plaintiff's Motion to Amend Judgment to Include.Costs. The plaintiff is seeking to amend the judgment to include costs totaling $1,450.00. The costs include the filing fee, service of summons/complaint upon defendant, service of deposition and trial subpoenas and deposition transcripts fees. The plaintiff's motion was filed more than three months after judgment entered. The defendant, citing to M.B. Claff, Inc. v. Massachusetts By Transportation Authority, 441 Mass. 596, 603 fn. 7 (2004), argues that the plaintiff's motion to

amend must be denied because a Rule 59(e) motion must be filed within ten days after the entry of judgment. The defendant is incorrect as to that part of the motion that addresses the non-discretionary costs that "should be allowed as of course," but is correct as to that part of the motion that addresses the "discretionary" costs.

On June 8, 2005, after a jury rendered a verdict in favor of the plaintiff on its claim for possession, judgment entered "for the plaintiff for possession and costs." Notwithstanding the language of the judgment, the clerk did not tax or include in the judgment a specific amount for the non-discretionary costs. It was not until September 13, 2005, that the plaintiff filed its motion to amend to include in the judgment the non-discretionary and

discretionary costs it incurred. The motion was argued before the court on October 21, 2005.

Non-Discretionary Costs. M.R.Civ.P., Rule 54(d) provides that "costs shall be

allowed as of course to the prevailing party unless the court otherwise directs . . . Except for those costs which are subject to the discretion of the court, cost shall be taxed by the clerk in accordance with law." In accordance with Rule 54(d), the Housing Court Clerk as a matter of course, and without the need for notice or hearing, taxes the cost of the summons, and the costs associated with the service of the summons as set forth in the constable's return of service. These non-discretionary costs are normally added to the judgment.

M.R.Civ.P. 60(a) provides that the court may at any time on its own initiative or on motion of any party correct a clerical mistake in the judgment arising from oversight or omission. In this case it is clear from the documents in the case file that the plaintiff incurred the following non-discretionary costs: filing fee of $135.00, $5.00 for summons, and the constable's service of summons fee of $39.20. I conclude that as a result of a clerical oversight or omission, the clerk failed to tax and include in the judgment these non-discretionary costs "that shall be allowed as of course" and "taxed by the clerk according to law" pursuant to M.R.Civ.P. 54(d). With respect to these non-discretionary costs only, I shall treat the plaintiff's motion as a request under M.R.Civ.P., Rule 60(a) to correct a clerical mistake in the judgment.[1] As to those non-discretionary costs, the plaintiff's motion shall be ALLOWED.

Discretionary Costs. The plaintiff is also seeking to amend the judgment to include discretionary costs: $256.00 for service of deposition and trial subpoenas, and $960.19 for deposition transcripts. Rule 54(e) states that "the taxation of costs in the taking of depositions . . . shall be subject to the discretion of the court." Rule 54(d) provides that "costs which are subject to the discretion of the court may be taxed by the court upon 5 days' notice." The plaintiff did not file a motion seeking taxation of these discretionary costs before judgment entered. The court was never asked to make a determination in accordance with Rule 54(e) that the taking of these depositions were "reasonably necessary." Therefore, the judgment did not include these discretionary costs.

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[1] The defendant has filed a notice of appeal; however, that appeal has not as yet been docketed in the Appeals Court. Rule 60(a) provides that "[d]uring the pendency of an appeal, such

mistakes may be corrected before the appeal is docketed in the appellate court ..."

Since these deposition-related costs and trial witness subpoena costs are discretionary and the plaintiff did not request that the court tax and add them to the judgment, it cannot be said that the omission of these costs from the judgment was the result of a clerical mistake. Therefore, with respect to these discretionary costs, relief under the provisions of M.R.Civ.P. 60(a) is not available to the plaintiff. Once judgment entered, the plaintiff's only remedy was to move to alter or amend the judgment to add these discretionary costs pursuant to M.R.Civ.P. 59(e). However, a Rule 59 motion "shall be served not later than 10 days after entry of judgment." The plaintiff's request that costs be added to the judgment cannot be entertained as a M.R.Civ.P. 59(e) motion, because the motion was filed over three months after the entry of judgment. See, M.B. Claff, Inc. v. Massachusetts Bay Transportation Authority, fn 7, supra. For this reason, as to the discretionary costs, the plaintiff's motion is DENIED.

ORDER. In accordance with M.R.Civ.P., Rule 60(a), It is ORDERED that the judgment shall be corrected to include the non-discretionary costs of $179.20.

SO ORDERED.