

Running hot and cold

How do you get a tenant out of a strict 25-year commercial lease?

Go ask **Michael P. Sams**. The Boston attorney recently succeeded in convincing a Middlesex Superior Court jury that his charter school client had sufficient cause to terminate its lease for property it has occupied since opening in 2005.

In a special verdict, the jury in *Advanced Math & Science Academy Charter School v. 201 Forest Street, LLC* found that the defendant landlord's failure to fix or replace the heating, ventilation and air conditioning systems constituted a "failure to provide critical services" that "substantially" deprived its tenant the use of the property.

One of the keys to the case was illustrating in human terms the impact of the landlord's inaction, Sams says.

"We took this from the angle of a dry commercial-lease dispute to explaining from the testimony of our witnesses how this was really a human interest story in a way that satisfied the termination provision of the lease," says Sams, who credits the work of his **Kenney & Sams** co-counsel, **Ryan Menard** and **Amanda J. Cox**.

Sams' client currently occupies two buildings at 201 Forest St. in Marlborough. The parties negotiated the lease in 2004 in anticipation of the



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school commencing operations in fall 2005. The lease provided for gradual increases in annual rent, starting at \$260,000 in 2005 and topping out at \$560,000 when the lease was due to expire in 2030.

According to Sams, because the landlord, 201 Forest Street, LLC, had invested heavily in retrofitting the property, it insisted on including terms that made the lease more difficult than normal for the tenant to escape. Relevant to the lawsuit, a provision allowed the tenant to terminate the lease due to the "inability of the Landlord to provide critical services to the Premises," but only if it could be shown that such failure interfered "substantially" with the tenant's use of the property.

The school experienced problems with the property's

HVAC systems from the time it moved in, through the time when it sued to terminate the lease in December 2011, up to the present day, according to Sams.

In addition to problems heating and cooling the building in general, the school's experts found mold and a build-up of carbon dioxide due to lack of circulation.

The landlord took the position that it adequately responded to the tenant's complaints over the years by sending in maintenance technicians to tweak the HVAC systems and, in one instance, replacing a certain element, Sams says.

At trial, Sams says he had to overcome the landlord's argument that there couldn't possibly be "substantial interference" with the use of the

property because the school was successful despite the reported heating and cooling issues.

That argument was countered by school administrators and teachers who testified that the academy's success in terms of ranking and student achievement was due to the progressive educational strategies they followed.

Even more persuasive may have been their testimony of children having to wear jackets, mittens and hats in the classroom during the winter, and the school having to conduct classes outside on hot days, Sams says.

"[The teachers described] kids sweating in the classroom with their foreheads on their forearms, almost falling asleep," he says.

The defendant landlord is represented by **Charles R. Bennett Jr. of Murphy & King** in Boston. Bennett did not respond to a request for comment.

The defendant has filed a motion for judgment notwithstanding the verdict or new trial.

Sams tells Lawyers Weekly that his client intends to occupy the property until the case is fully resolved. The verdict did not address the plaintiff's request for attorneys' fees, nor had the court entered a final judgment on the verdict.

— PAT MURPHY