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Landlord-Tenant Law: Implied Warranty of Habitability in Residential Leases--A Defense to Landlord Eviction Actions

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LANDLORD-TENANT LAW: IMPLIED WARRANTY OF HABITABILITY IN RESIDENTIAL LEASES – A DEFENSE TO LANDLORD EVICTION ACTIONS

Javins v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970)[1]

Appellee landlord filed separate actions in the Landlord and Tenant Branch of the Court of General Sessions in Washington, D.C., seeking eviction of appellants for nonpayment of rent. Admitting a default in rent payment, appellants alleged that approximately 1,500 violations of the Housing Regulations of the District of Columbia, which arose after the lease had commenced, constituted an equitable defense[2] to the eviction action.[3] The trial court refused appellants' offer of proof and entered judgment for the landlord.[4] The District of Columbia Court of Appeals affirmed, rejecting appellants' contention that the landlord had a contractual duty to maintain the premises in compliance with the Housing Regulations.[5] On appeal, the United States Court of Appeals for the District of Columbia reversed and HELD, a warranty of habitability, in compliance with the Housing Regulations for the District of Columbia, is implied by law in leases of urban dwellings and breach of this warranty gives rise to ordinary remedies for breach of contract.[6]

Private property law, more than any other branch of the law, has been shaped largely by historical distinctions.[7] Landlord-tenant law developed from feudal property law and was well suited to a rural, agrarian society.[8] The landlord's primary obligation was to convey a possessory interest to the tenant[9] and, in return, the tenant assumed the duty to pay rent.[10] After the

1. This case was an appeal from Saunders v. First Nat'l Realty Corp., 245 A.2d 836 (D.C. Ct. App. 1968).

2. Appellants relied on a rule of the Landlord and Tenant Branch of the Court of General Sessions, which provides: "In suits in this branch for recovery of possession of property in which the basis of recovery of possession is nonpayment of rent, tenants may set up an equitable defense or claim by way of recoupment or set-off in an amount equal to the rent claim. No counterclaim may be filed unless plaintiff asks for money judgment for rent. The exclusion of prosecution of any claims in this branch shall be without prejudice to the prosecution of any claims in other branches of the court." D.C. Code Ency. General Sessions Court Rules, §II, rule 4(c).

3. Saunders v. First Nat'l Realty Corp., 245 A.2d 836, 837 (D.C. Ct. App. 1968).

4. *Id.* at 839.

5. *Id., rev'd sub nom.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970).

6. 428 F.2d 1071, 1071-72 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

7. *See, e.g.*, Jones v. United States, 362 U.S. 257, 266 (1960); Gardner v. William S. Butler & Co., 245 U.S. 603 (1918).

8. J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 185 (1962).

9. 1 AMERICAN LAW OF PROPERTY §3.37 (A.J. Casner ed. 1952). The English law, followed by a minority of American states, provided that the lessor turn over actual possession. King v. Reynolds, 67 Ala. 229 (1880); Wallace v. Carter, 133 Kan. 303 (1931). However, the majority of American states held the lessor need only turn over the right to possession. Snider v. Deban, 249 Mass. 59, 144 N.E. 69 (1924); Hannah v. Dusch, 154 Va. 356, 153 S.E. 824 (1930).

10. Crouch v. Briles, 30 Ky. 255 (1832) (implied duty to pay rent from occupation of

lease commenced the landlord could not interfere with the tenant's possession of the premises.[11] If the tenant's possession was disturbed, he could recover damages but could not abandon the premises and be exonerated from rent payment unless the landlord's interference was substantial.[12]

The common law imposed no duty upon the landlord to repair or maintain the premises.[13] Three reasons were usually given to justify this "no-repair" doctrine.[14] First, the doctrine of *caveat emptor* was applied to leases since the tenant could inspect and determine the suitability of the premises before accepting the leasehold.[15] After accepting the lease, the tenant assumed all risks and made all necessary repairs. Second, no obligation for the landlord to make repairs was implied since the parties could have expressly provided for this,[16] and third, the tenant-farmer was a "jack-of-all trades" considered capable of making his own repairs.[17]

As society became urbanized, traditional property laws did not satisfy the requirements of the urban apartment dweller.[18] The lessee required not mere possession of the premises but a package of goods and services that included adequate heat, light, ventilation, plumbing facilities, proper sanitation, proper maintenance, and a secure habitable structure.[19] Landlords and tenants were forced by the complex urban environment to handle the proliferated problems and needs by specific covenants in the lease.[20] Many courts, however, have found these covenants inadequate and have introduced modern precepts of contract law into lease interpretation.[21] This "piecemeal"

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premises). This implied duty to pay rent has its basis in seventeenth century English property law. Distress for Rent Act, 11 Geo. 2, c.19, §14 (1738).

11. *See generally* Quinn & Phillips, *The Law of the Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 227-29 (1969).

12. Jackson v. Paterno, 128 App. Div. 474, 112 N.Y.S. 924 (1st Dep't 1908) (lack of heat); Flechner v. Douglass, 136 Misc. 57, 239 N.Y.S. 121 (Sup. Ct. 1929) (failure to supply hot water). In Hunt v. Cope, 98 Eng. Rep. 1065, 1066 (K.B. 1775), Lord Mansfield stated: "The rule of law is clear, namely, that to occasion a suspension of rent, there must be an eviction or expulsion of the lessee."

13. *See, e.g.*, Suydam v. Jackson, 54 N.Y. 450 (1873) (no duty on landlord to repair leaky roof). *See also* Comment, *Periodic Tenant's Repair Obligation in Absence of Covenant*, 41 MARQ. L. REV. 58 (1957).

14. 2 R. POWELL, LAW OF REAL PROPERTY §233 (1967).

15. 1 AMERICAN LAW OF PROPERTY §3.45 (A.J. Casner ed. 1952).

16. Sheets v. Selden, 74 U.S. (7 Wall.) 416, 423 (1868); 1 H. TIFFANY, LAW OF PROPERTY §103 (3d ed. 1939). *Contra*, Harrison v. Meyer, 92 U.S. 111, 114 (1875), where, under civil law, leases are construed as contracts and an obligation to repair is imposed on landlords.

17. 428 F.2d 1071, 1078 (D.C. Cir. 1970).

18. 1 AMERICAN LAW OF PROPERTY §3.78 (A.J. Casner ed. 1952).

19. *Id.* §3.11.

20. 2 R. POWELL, LAW OF REAL PROPERTY §221 (1967).

21. *See, e.g.*, Medico-Dental Bldg. Co. v. Horton & Converse, 21 Cal. 2d 411, 418, 132 P.2d 457, 462 (1942). Courts have also implied a warranty of habitability to short-term, furnished dwelling units. Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). In *Pines* the court deviated from the doctrine of independent covenants and held a tenant had no duty to pay full rent where he was not provided with a habitable household. Some courts have also inserted a warranty of compliance with housing regulations into contracts for new homes. *See, e.g.*, Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1969).

approach to reconstruct the property laws, however, has produced confusion through conflicting court decisions concerning the application of contract principles to leases.[22] Moreover, the ability of landlord-tenant law to provide solutions to current housing problems has been hindered by continued judicial insistence on the doctrine of independence of the covenants of possession and rent.[23]

The court in the instant case recognized the need to modernize property law by construing residential dwelling leases according to general contract principles.[24] Relying on two recent state supreme court decisions allowing implied warranties of quality in housing leases,[25] the court rejected the "no-repair" obligation of the landlord in favor of an implied warranty of habitability based upon the standards of the Housing Regulations.[26] This decision was predicated on three considerations: (1) the old "no-repair" rule was based on assumptions no longer valid; (2) the nature of the present urban housing market requires abandonment of the old rule; and (3) the principles underlying products liability and consumer protection cases are applicable to urban, residential landlord-tenant law.[27]

The court, in refuting the assumptions supporting the old rule, found the modern tenant incapable of making repairs once easily made by the agrarian tenant.[28] Recognizing that when changed circumstances make a particular rule undesirable, the parties themselves should ideally alter the rule, the instant court found that inequality in bargaining power between landlord and tenants precluded the tenants' demanding a change.[29] The increasingly severe housing shortage and other impediments to competition in the rental housing market further diminished tenants' bargaining power and forced them into a "take-it-or-leave-it situation."[30]

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22. 428 F.2d 1071, 1075 (D.C. Cir. 1970). *See generally* Kessler, *The Protection of the Consumer Under Modern Sales Law*, 74 YALE L.J. 262, 263 (1964).

23. This independency of covenants has been the biggest obstacle to overcome in modernizing landlord-tenant law. *See generally* Note, *The California Lease—Contract or Conveyance?*, 4 STAN. L. REV. 244 (1952).

24. 428 F.2d 1071, 1075 (D.C. Cir. 1970).

25. Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969).

26. 428 F.2d 1071, 1076-77 (D.C. Cir. 1970). The court noted that the warranty would apply whether the lease was written or oral.

27. *Id.* at 1077. Another consideration, the obligation to repair imposed by housing regulations, is an independent reason for abolishing the rule as well as an adequate measure of the landlord's duty under the new rule.

28. *Id.* at 1078. In rejecting the old rule, the court also discussed the deleterious effect substandard housing has on society.

29. *Id.* at 1079.

30. *Id.* In 1968 the Kaiser Report recommended that 26 million new and rehabilitated housing units be provided by 1978. PRESIDENT'S COMMITTEE ON URBAN HOUSING, A DECENT HOME 8 (1968). To accomplish this feat at least 6-8 million federally subsidized units must be built. *Id.* A spokesman for the Nixon administration has stated, however, that it would be difficult to construct six million units over this ten-year period. NEWSWEEK, March 17, 1969, at 50. From these facts it is conceivable that the housing shortage will impose an even greater burden on the tenant in the future.

Comparing the urban dweller to a consumer, the court asserted that the same factors that led to the development of warranties of fitness and merchantability in the sale of goods were applicable to residential leases.[31] After leasing a dwelling for a specific period of time, the tenant must rely on the skill and honesty of the landlord since the landlord has a "greater opportunity, incentive, and capacity to inspect and maintain" the premises than the tenant.[32] In essence, the principle of consumer protection the court applied to lease arrangements was protection of consumers' reasonable expectation of quality whenever consumers cannot, for reasons beyond their control but within the sellers' control, protect themselves.[33]

Apart from the consumer protection rationale, the court found the housing code to be an independent and sufficient justification for implying a warranty of habitability.[34] By incorporating the Housing Regulations into residential leases and providing private remedies for tenants injured due to the landlord's violation of the regulations, the court greatly expanded two prior decisions concerning the housing code. In *Whetzel v. Jess Fisher Management Co.*,[35] the court held the housing code imposed on the landlord a duty to repair and a right of action accrued to the tenant for breach of this duty. In *Brown v. Southall Realty Co.*,[36] the court viewed the lease as a contract, and voided it since it had been knowingly executed in violation of the housing code. In light of *Whetzel* and *Brown* the instant court found the housing code created an enforceable obligation on the landlord to repair, and it established standards for determining the validity of leases at their commencement.[37]

Extending *Brown* to include application of the housing code after commencement of the lease, the court found the "landlord had undertaken a continuing obligation to the tenant to maintain the premises in accordance with all applicable law."[38] The court concluded that since the lessee continued to pay the same rent, *Brown* should be extended to require the landlord to keep the premises in the same condition throughout the lease term.[39]

The instant case examined the procedure the tenant should use when he

31. 428 F.2d 1071, 1075-79. *See* UNIFORM COMMERCIAL CODE §§2-314, -315 (1968).

32. 428 F.2d 1071, 1079. For a good analysis of the reliance of purchasers on suppliers of goods and services *see* 8 S. WILLISTON, CONTRACTS §§983-89 (3d ed. W. Jaeger ed. 1964); W. PROSSER, TORTS §95 (3d ed. 1964).

33. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). UNIFORM COMMERCIAL CODE §§2-314, -315 (1968).

34. 428 F.2d 1071, 1080-82. However, housing codes often provide such minimal protection against substandard housing that they may be of little use to a complaining tenant. *See, e.g.*, ST. PETERSBURG, FLA., CODE ch. 58 (1959) (inadequate protection against overcrowding and fires). The inadequacy or nonenforcement of housing codes is evident by the estimated 6.7 million housing units categorized as substandard. PRESIDENT'S COMMITTEE ON URBAN HOUSING, A DECENT HOME 8 (1968).

35. 282 F.2d 943, 950 (D.C. Cir. 1960).

36. 237 A.2d 834, 837 (D.C. Ct. App. 1968).

37. 428 F.2d 1071, 1081 (D.C. Cir. 1970).

38. *Id.* The court also noted it was unnecessary to refer to the housing code expressly in the lease for the code to apply. The code, as it exists at the time of the lease, is automatically incorporated into the lease.

39. *Id.*

believes a breach of this implied warranty has occurred. Since under contract theory the landlord's making repairs and complying with the housing code is a condition of rent payments, the court felt the tenant could abate his payments and then allege a breach by the landlord as a defense to the eviction action.[40] Questions of whether the violations existed during the period for which the rent was due, of whether the violations were sufficiently substantial to affect the tenant's rental obligations, and what portion, if any, of the rent was suspended by the breach would be determined by the jury.[41] If no breach is found, a judgment in favor of the landlord may be issued.[42] If the violations are substantial, the rental obligation is extinguished and the possession action fails.[43]

The instant case should have a substantial and immediate effect on housing conditions in the District of Columbia. By enabling tenants to withhold rent when housing violations exist, the case gives judicial sanction to large-scale rent withholding to force landlords to rehabilitate substandard housing.[44] The decision may also encourage the establishment of tenant unions especially where the landlord owns a large complex of substandard housing.[45]

The landlord, however, may decide it would be unprofitable to repair the building. Instead, he may decide to withdraw the units from the housing market or to abandon the premises, cease paying property taxes, and allow the government to assume control.[46] Vigorous code enforcement, therefore, may reduce the housing supply, especially low-income housing, and shift the economic burden to the lessee through higher rent prices. Although the District of Columbia prohibits retaliatory evictions,[47] courts may be reluctant to find a retaliatory motive when the tenant has been victorious in previous litigation and wishes to remain on the improved premises at the same or a reduced rent.[48] Moreover, since the District of Columbia allows the landlord to evict a tenant through self-help,[49] the defense of retaliatory eviction may be precluded. While later judicial proceedings may grant the tenant a damage remedy or force the landlord to reinstate the tenant, this will not provide an adequate remedy where the evicted tenant cannot locate another residence.

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40. *Id.* at 1082, nn. 61 & 62. The court, however, limited the violations to those affecting common areas the tenant uses and those not caused by the tenant's own wrongdoing. Thus, the court eliminated the consideration of de minimis violations not affecting habitability.

41. *Id.* at 1082-83. *See generally* 39 GEO. WASH. L. REV. 152 (1970).

42. 428 F.2d 1071, 1083 (D.C. Cir. 1970).

43. *Id.* The decision is limited to actions for nonpayment of rent and eviction on any other legal grounds is not affected. *Id.* at 1083 n.64.

44. Note, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304, 320-34 (1965).

45. *See* Note, *Tenant Unions: Their Law and Operation in the State and Nation*, 23 U. FLA. L. REV. 79, 92-98 (1970) for an analysis of tenant union success in advancing tenants' rights.

46. *See, e.g.*, Robinson v. Diamond Housing Corp., 267 A.2d 833 (D.C. Ct. App. 1970).

47. Edwards v. Habib, 397 F.2d 687, 702 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969) (involving an interpretation of 45 D.C. CODE ANN. §§902, 910 (1961)).

48. *See* Robinson v. Diamond Housing Corp., 267 A.2d 833 (D.C. Ct. App. 1970).

49. Snitman v. Goodman, 118 A.2d 394, 397 (D.C. Ct. App. 1955).

The instant case leaves many procedural problems unresolved. The decision suggests the tenant must risk eviction for nonpayment since the jury's conception of habitability may differ from his own.[50] When the tenant withholds rent and the code violations are subsequently determined not to affect habitability, the tenant will lose possession. This possibility of dispossession may deter tenants from relying on the instant case. Moreover, no definite standards for measuring damages caused by the landlord's breach were established.[51] The ordinary contract measure of damages is expectancy: the fair market value of what the tenant should have received less the fair market value of what he actually received.[52] However, it is questionable whether the fair market value of an unlawful contract should be considered. A better solution, adopted by at least one court,[53] is to allow a rent reduction corresponding to diminution in use and enjoyment caused by the lessor's breach.

The court also failed to provide guidelines for the landlord. The landlord may refrain from repairing if he believes a court will find the violations *de minimis* or not detrimental to habitability. Further, definite standards for reactivating rent payments after the repairs have been accomplished were not established by the court. A reasonable interpretation of the decision suggests that the rental obligation for a period of uninhabitability is extinguished; a contrary reading would allow only a temporary suspension of rent that would become due after the repairs were completed. The second proposition would encourage landlords to delay repairs knowing that ultimately all rent must be paid.

The instant decision also raises the question of how long a tenant may remain in possession without paying rent if the landlord refuses or is unable to repair. The court's holding suggests the tenant may either remain indefinitely when the landlord refrains from performing his obligation or bring an action for specific performance to force the landlord to perform his duty.[54]

Many important, but unanswered, questions remain concerning the extension of all contract remedies to a breach of the implied warranty of habitability. For example, is a lessor under a duty to mitigate damages when his tenant abandons the premises? Does the tenant have a duty to repair to mitigate damages cause by a condition under the landlord's control? Does the warranty of habitability apply to a third party when either the landlord or tenant assigns his interest to that party? Can the tenant recover against his landlord for a breach of a promise to perform some duty not affecting hab-

50. 428 F.2d 1071, 1081-82 (D.C. Cir. 1970). *See* Posnanski v. Hood, 46 Wis. 2d 172, 181-82, 174 N.W.2d 528, 532-33 (Wis. 1970), where the court rejected the implied warranty of habitability solely because no adequate guidelines were established.

51. 428 F.2d 1071, 1082-83 (D.C. Cir. 1970). Though the court failed to define "total breach," the term would seem to cover the situation where violations render the apartment virtually uninhabitable.

52. County of Brevard v. Interstate Eng'r Co., 224 So. 2d 786, 788 (4th D.C.A. Fla. 1969).

53. Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (1970).

54. 428 F.2d 1071, 1082 n.61 (D.C. Cir. 1970). These actions by the tenant, however, conflict with the owner's right of control over the property. Thibodeaux v. Uptown Motors Corp., 270 Ill. App. 191, 196 (1933).

itability? The court's reasoning suggests an affirmative answer to all these questions. Although conflict may occur between traditional property law and contract law, treating a lease as a contract in all situations would provide equitable and consistent solutions.

The ramifications of the instant case cannot be fully realized until many of these unanswered questions are resolved by future litigation. The instant case delineates many of the principles now being recognized in many jurisdictions throughout the United States.[55] Many courts are utilizing contract remedies to remove the hardships of old landlord-tenant law and to effectuate new principles consonant with a modern, urban society.[56]

The recognition of ordinary contract remedies secures affirmative relief for the tenant who previously lacked sufficient power to gain relief from the landlord. The present case strengthens tenants' power by giving them judicial support for making repair demands and assuring that at least where the landlord desires continued rent payments the necessary basic repairs will be made. The decision is a step toward attainment of equitable property laws. The adoption of the rationale of the instant case by other courts and the enactment of adequate housing regulations will greatly improve the opportunity of all citizens to obtain a habitable residence.

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55. *See, e.g.*, Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

56. *See* Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969) (rat infestation after commencement of tenancy). In Florida, however, the courts have denied tenants the use of equitable defenses in an eviction action by the landlord for nonpayment. Brownlee v. Sussman, 238 So. 2d 317, 319 (3d D.C.A. Fla. 1970). There the tenant asserted that the dwelling was substandard, was violative of the building code, and the lease was illegal and unenforceable. The court stated the defenses could be raised in equity under a nuisance action but could not be used against a landlord's eviction action for nonpayment of rent.