Ethel JAVINS, Appellant, v. FIRST NATIONAL REALTY CORPORATION, Appellee.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

428 F.2d 1071

May 7, 1970, Decided

J. SKELLY WRIGHT, Circuit Judge:

These cases present the question whether housing code violations which arise during the term of a lease have any effect upon the tenant's obligation to pay rent. We … hold that a warranty of habitability, measured by the standards set out in the Housing Regulations for the District of Columbia, is implied by operation of law into leases of urban dwelling units covered by those Regulations and that breach of this warranty gives rise to the usual remedies for breach of contract.

I

…By separate written leases, each of the appellants rented an apartment in a three-building apartment complex in Northwest Washington known as Clifton Terrace. The landlord, First National Realty Corporation, filed separate actions in the Landlord and Tenant Branch of the Court of General Sessions on April 8, 1966, seeking possession on the ground that each of the appellants had defaulted in the payment of rent due for the month of April. The tenants, appellants here, admitted that they had not paid the landlord any rent for April. However, they alleged numerous [1500] violations of the Housing Regulations as "an equitable defense or [a] claim by way of recoupment or set-off in an amount equal to the rent claim," as provided in the rules of the Court of General Sessions… Appellants conceded at trial, however, that this offer of proof reached only violations which had arisen since the term of the lease had commenced…

…

II

Since, in traditional analysis, a lease was the conveyance of an interest in land, courts have usually utilized the special rules governing real property transactions to resolve controversies involving leases. However, as the Supreme Court has noted in another context, "the body of private property law * * *, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." [6] Courts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life -- particularly old common law doctrines which the courts themselves created and developed. As we have said before, "The continued vitality of the common law * * * depends upon its ability to reflect contemporary community values and ethics."

The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society; it may continue to be reasonable in some leases involving farming or commercial land. In these cases, the value of the lease to the tenant is the land itself. But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 or 40 feet below, or even in the bare right to possession within the four walls of his apartment. When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services - a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance…

Some courts have realized that certain of the old rules of property law governing leases are inappropriate for today's transactions. In order to reach results more in accord with the legitimate expectations of the parties and the standards of the community, courts have been gradually introducing more modern precepts of contract law in interpreting leases. ..

In our judgment the trend toward treating leases as contracts is wise and well considered. Our holding in this case reflects a belief that leases of urban dwelling units should be interpreted and construed like any other contract

III

Modern contract law has recognized that the buyer of goods and services in an industrialized society must rely upon the skill and honesty of the supplier to assure that goods and services purchased are of adequate quality. In interpreting most contracts, courts have sought to protect the legitimate expectations of the buyer and have steadily widened the seller's responsibility for the quality of goods and services through implied warranties of fitness and merchantability…

The rigid doctrines of real property law have tended to inhibit the application of implied warranties to transactions involving real estate. Now, however, courts have begun to hold sellers and developers of real property responsible for the quality of their product. For example, builders of new homes have recently been held liable to purchasers for improper construction on the ground that the builders had breached an implied warranty of fitness. In other cases courts have held builders of new homes liable for breach of an implied warranty that all local building regulations had been complied with….

Despite this trend in the sale of real estate, many courts have been unwilling to imply warranties of quality, specifically a warranty of habitability, into leases of apartments. Recent decisions have offered no convincing explanation for their refusal; rather they have relied without discussion upon the old common law rule that the lessor is not obligated to repair unless he covenants to do so in the written lease contract. However, the Supreme Courts of at least two states, in recent and well reasoned opinions, have held landlords to implied warranties of quality in housing leases. *Lemle v. Breeden, 462 P.2d 470 (Hawaii1969)*; *Reste Realty Corp. v. Cooper, 251 A.2d 268 (New Jersey 1969).* …In our judgment, the old no-repair rule cannot coexist with the obligations imposed on the landlord by a typical modern housing code, and must be abandoned in favor of an implied warranty of habitability. In the District of Columbia, the standards of this warranty are set out in the Housing Regulations.

IV

A. In our judgment the common law itself must recognize the landlord's obligation to keep his premises in a habitable condition. This conclusion is compelled by three separate considerations. First, we believe that the old rule was based on certain factual assumptions which are no longer true; on its own terms, it can no longer be justified. Second, we believe that the consumer protection cases discussed above require that the old rule be abandoned in order to bring residential landlord-tenant law into harmony with the principles on which those cases rest. Third, we think that the nature of today's urban housing market also dictates abandonment of the old rule.

The common law rule absolving the lessor of all obligation to repair originated in the early Middle Ages. Such a rule was perhaps well suited to an agrarian economy; the land was more important than whatever small living structure was included in the leasehold, and the tenant farmer was fully capable of making repairs himself. These historical facts were the basis on which the common law constructed its rule; they also provided the necessary prerequisites for its application.

Court decisions in the late 1800's began to recognize that the factual assumptions of the common law were no longer accurate in some cases. For example, the common law, since it assumed that the land was the most important part of the leasehold, required a tenant to pay rent even if any building on the land was destroyed. Faced with such a rule and the ludicrous results it produced, in 1863 the New York Court of Appeals declined to hold that an upper story tenant was obliged to continue paying rent after his apartment building burned down. The court simply pointed out that the urban tenant had no interest in the land, only in the attached building…

These as well as other similar cases demonstrate that some courts began some time ago to question the common law's assumptions that the land was the most important feature of a leasehold and that the tenant could feasibly make any necessary repairs himself. Where those assumptions no longer reflect contemporary housing patterns, the courts have created exceptions to the general rule that landlords have no duty to keep their premises in repair.

It is overdue for courts to admit that these assumptions are no longer true with regard to all urban housing. Today's urban tenants, the vast majority of whom live in multiple dwelling houses, are interested, not in the land, but solely in "a house suitable for occupation." Furthermore, today's city dweller usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs like the "jack-of-all-trades" farmer who was the common law's model of the lessee. Further, unlike his agrarian predecessor who often remained on one piece of land for his entire life, urban tenants today are more mobile than ever before. A tenant's tenure in a specific apartment will often not be sufficient to justify efforts at repairs. In addition, the increasing complexity of today's dwellings renders them much more difficult to

repair than the structures of earlier times. In a multiple dwelling repair may require access to equipment and areas in the control of the landlord. Low and middle income tenants, even if they were interested in making repairs, would be unable to obtain any financing for major repairs since they have no long-term interest in the property.

Our approach to the common law of landlord and tenant ought to be aided by principles derived from the consumer protection cases referred to above. In a lease contract, a tenant seeks to purchase from his landlord shelter for a specified period of time. The landlord sells housing as a commercial businessman and has much greater opportunity, incentive and capacity to inspect and maintain the condition of his building. Moreover, the tenant must rely upon the skill and *bona fides* of his landlord at least as much as a car buyer must rely upon the car manufacturer. In dealing with major problems, such as heating, plumbing, electrical or structural defects, the tenant's position corresponds precisely with "the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose." *Henningsen v. Bloomfield Motors, Inc.,161 A.2d 69, 78 N. J. 1960).*

Since a lease contract specifies a particular period of time during which the tenant has a right to use his apartment for shelter, he may legitimately expect that the apartment will be fit for habitation for the time period for which it is rented. We point out that in the present cases there is no allegation that appellants' apartments were in poor condition or in violation of the housing code at the commencement of the leases. Since the lessees continue to pay the same rent, they were entitled to expect that the landlord would continue to keep the premises in their beginning condition during the lease term. It is precisely such expectations that the law now recognizes as deserving of formal, legal protection.

Even beyond the rationale of traditional products liability law, the relationship of landlord and tenant suggests further compelling reasons for the law's protection of the tenants' legitimate expectations of quality. The inequality in bargaining power between landlord and tenant has been well documented. Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class discrimination and standardized form leases, mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage of adequate housing further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing stock. Finally, the findings by various studies of the social impact of bad housing has led to the realization that poor housing is detrimental to the whole society, not merely to the unlucky ones who must suffer the daily indignity of living in a slum.

Thus we are led by our inspection of the relevant legal principles and precedents to the conclusion that the old common law rule imposing an obligation upon the lessee to repair during the lease term was really never intended to apply to residential urban leaseholds. Contract principles established in other areas of the law provide a more rational framework for the apportionment of landlord-tenant responsibilities; they strongly suggest that a warranty of habitability be implied into all contracts for urban dwellings.

B. We believe, in any event, that the District's housing code requires that a warranty of habitability be implied in the leases of all housing that it covers. The housing code -- formally designated the Housing Regulations of the District of Columbia -- was established and authorized by the Commissioners of the District of Columbia on August 11, 1955. Since that time, the code has been updated by numerous orders of the Commissioners. The 75 pages of the Regulations provide a comprehensive regulatory scheme setting forth in some detail: (a) the standards which housing in the District of Columbia must meet; (b) which party, the lessor or the lessee, must meet each standard; and (c) a system of inspections, notifications and criminal penalties. The Regulations themselves are silent on the question of private remedies.

Two previous decisions of this court, however, have held that the Housing Regulations create legal rights and duties enforceable in tort by private parties.

The District of Columbia Court of Appeals gave further effect to the Housing Regulations in *Brown v. Southall Realty Co., 237 A.2d 834 (D.C.,1968).* There the landlord knew at the time the lease was signed that housing code violations existed which rendered the apartment "unsafe and unsanitary." Viewing the lease as a contract, the District of Columbia Court of Appeals held that the premises were let in violation of Sections 2304 and 2501 of the Regulations and that the lease, therefore, was void as an illegal contract. In the light of *Brown*, it is clear not only that the housing code creates privately enforceable duties… but that the basic validity of every housing contract depends upon substantial compliance with the housing code at the beginning of the lease term. The *Brown* court relied particularly upon Section 2501 of the Regulations which provides:

"Every premises accommodating one or more habitations shall be maintained and kept in repair so as to provide decent living accommodations for the occupants. This part of this Code contemplates more than mere basic repairs and maintenance to keep out the elements; its purpose is to include repairs and maintenance designed to make a premises or neighborhood healthy and safe."

By its terms, this section applies to maintenance and repair during the lease term. Under the *Brown* holding, serious failure to comply with this section before the lease term begins renders the contract void. We think it untenable to find that this section has no effect on the contract after it has been signed. To the contrary, by signing the lease the landlord has undertaken a continuing obligation to the tenant to maintain the premises in accordance with all applicable law.

This principle of implied warranty is well established. Courts often imply relevant law into contracts to provide a remedy for any damage caused by one party's illegal conduct….56

56 As a general proposition, it is undoubtedly true that parties to a contract intend that applicable law will be complied with by both sides. We recognize, however, that reading statutory provisions into private contracts may have little factual support in the intentions of the particular parties now before us. But, for reasons of public policy, warranties are often implied into contracts by operation of law in order to meet generally prevailing standards of honesty and fair dealing. When the public policy has been enacted into law like the housing code, that policy will usually have deep roots in the expectations and intentions of most people. *See* Costigan, Implied-in-Fact Contracts and Mutual Assent, 33 Harv.L.Rev. 376, 383-385 (1920).

[We hold t]hat the housing code must be read into housing contracts -- a holding also required by the purposes and the structure of the code itself. The duties imposed by the Housing Regulations may not be waived or shifted by agreement if the Regulations specifically place the duty upon the lessor. Criminal penalties are provided if these duties are ignored. This regulatory structure was established by the Commissioners because, in their judgment, the grave conditions in the housing market required serious action. Yet official enforcement of the housing code has been far from uniformly effective. Innumerable studies have documented the desperate condition of rental housing in the District of Columbia and in the nation….

We therefore hold that the Housing Regulations imply a warranty of habitability, measured by the standards which they set out, into leases of all housing that they cover.

V

In the present cases, the landlord sued for possession for nonpayment of rent. Under contract principles, [61] however, the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition. In order to determine whether any rent is owed to the landlord, the tenants must be given an opportunity to prove the housing code violations alleged as breach of the landlord's warranty.

61 In extending all contract remedies for breach to the parties to a lease, we include an action for specific performance of the landlord's implied warranty of habitability.

At **[**39]** trial, the finder of fact must make two findings: (1) whether the alleged violations 63 existed during the period for which past due rent is claimed, and (2) what portion, if any or all, of the tenant's obligation to pay rent was suspended by the landlord's breach. If no part of the tenant's rental obligation is found to have been suspended, then a judgment for possession may issue forthwith. On the other hand, if the jury determines that the entire rental obligation has been extinguished by the landlord's total breach, then the action for possession on the ground of nonpayment must fail. [64]

63 The jury should be instructed that one or two minor violations standing alone which do not affect habitability are *de minimis* and would not entitle the tenant to a reduction in rent.

64 As soon as the landlord made the necessary repairs rent would again become due. Our holding, of course, affects only eviction for nonpayment of rent. The landlord is free to seek eviction at the termination of the lease or on any other legal ground.

The jury may find that part of the tenant's rental obligation has been suspended but that part of the unpaid back rent is indeed owed to the landlord. In these circumstances, no judgment for possession should issue if the tenant agrees to

pay the partial rent found to be due. If the tenant refuses to pay the partial amount, a judgment for possession may then be entered. ..

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