IMPLIED WARRANTY OF HABITABILITY IN RESIDENTIAL LEASES

King v. Moorehead, 495 S.W.2d 65 (Mo. App. 1973)

The tenant refused to pay rent for the use of an apartment that substantially failed to meet housing code standards.[1] Her landlord obtained a judgment in magistrate court for rent and possession.[2] On appeal, the tenant denied indebtedness, asserting, *inter alia*, that the landlord's breach of an implied warranty of habitability constituted a complete failure of consideration that absolved the tenant in whole or substantial part of her obligation to pay rent.[3] The Missouri Court of Appeals reversed. *Held*: An implied warranty of habitability exists in *all* residential leases at the commencement and for the duration of the term, and is a valid defense to an action for rent where the premises substantially fail to meet housing code standards.[4]

Prior to 1965, Missouri courts, adhering to the doctrine of *caveat emptor*, acknowledged neither implied warranties of merchantability or fitness in the sale of goods[5] nor implied warranties of habitability in

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1. The alleged violations of the KANSAS CITY, MO., PROPERTY MAINTENANCE CODE §§ 20.17, .19, .27, .29, .333, .34 (1971), included rodent and vermin infestation, dangerously defective wiring, a leaking roof, an inoperative toilet, and unsound ceilings. King v. Moorehead, 495 S.W.2d 65, 68 (Mo. App. 1973).

2. The circuit court, noting that the tenant had admitted occupancy without payment of rent for the period alleged in the complaint, concluded that the tenant had failed to state legal defenses to the landlord's claim, and entered judgment for the landlord in the amount of $109 for three months' rent. 495 S.W.2d at 68.

3. Plaintiff also argued that the housing code violations, *see* note 1 *supra* and accompanying text, rendered the lease illegal and unenforceable. 495 S.W.2d at 68.

4. 495 S.W.2d 65 (Mo. App. 1973).

The court listed several factors to be considered in determining the substantiality of an alleged breach of an implied warranty of habitability: the nature of the defect; the length of time it has persisted; and the age of the structure. Minor housing code violations that do not affect habitability are to be regarded as de minimis. *Id.* at 76.

Arguably, tenants could look for additional guidance to decisions in which constructive eviction has been established. *See, e.g.*, Boston Housing Author. v. Hemingway, — Mass. —, 293 N.E.2d 831 (1973) (facts sufficient to demonstrate constructive eviction also prove material breach of implied warranty of habitability).

5. State *ex rel.* Jones Store Co. v. Shain, 352 Mo. 630, 179 S.W.2d 19 (1944); W.R. Colchard Mach. Co. v. Lay Wilson Foundry & Mach. Co., 131 Mo. App. 540, 110 S.W. 630 (1908). However, Detjen v. Moerschel Browning Co., 157 Mo. App. 614, 138 S.W. 696 (1911), held that the rule of *caveat emptor* does not bar an action for breach of implied warranty if the seller fraudulently misrepresented the quality of the goods.

the sale or lease of residential property.[6] Although Missouri ascribed to the doctrine of implied warranties of merchantability and fitness in the sale of goods when it adopted the Uniform Commercial Code in 1965,[7] Missouri courts did not recognize the implied warranty of habitability until 1972 when it was applied to the sale of new homes.[8]

King v. Moorehead extends the implied warranty of habitability to

6. The rule was that "fraud apart there was no law against letting a tumble down house." King v. Moorehead, 495 S.W.2d 65, 69 (Mo. App. 1973). *See* Crosby v. Shawnee Realty Co., 225 S.W.2d 509 (Mo. App. 1949); Dailey v. Vogal, 187 Mo. App. 261, 173 S.W. 707 (1915); Griffin v. Freeborn, 181 Mo. App. 203, 168 S.W. 219 (1914); Wilt v. Coughlin, 176 Mo. App. 275, 161 S.W. 888 (1913). Of particular importance to Missouri tenants was the rule established by Burns v. Fuchs, 28 Mo. App. 279 (1887), that breach of a municipal ordinance charging the owner with the duty to repair was not a defense to an action for rent.

The parties were free to negotiate an express warranty or covenant that the landlord would repair and maintain the premises, but by application of the rule of mutually independent covenants, breach of the landlord's express covenant to repair would not excuse the tenant's covenant to pay rent. It would, however, give rise to an action for damages. *See* Grinnel v. Asiuliewicz, 241 Mich. 186, 216 N.W. 388 (1927); Mitchell v. Weiss, 26 S.W.2d 699 (Tex. Civ. App. 1930). *See also* H. TIFFANY, REAL PROPERTY § 909 (3d ed. 1939); S. WILLISTON, CONTRACTS § 890 (3d ed. 1968). Although the operation of the common law lease now seems unduly harsh, it must be recalled that this concept emerged in an agrarian society in which land, from which rent was said to issue, was more important than the few easily repaired dwellings upon it. *Cf.* F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 131 (2d ed. 1923). Courts could reasonably presume that the parties had equal knowledge of the land and the dwellings, and that if the tenant negotiated no covenant to repair this simply reflected his intention. *See generally* H. LESAR, LANDLORD AND TENANT § 3.11 (1957).

Courts eventually recognized certain implied covenants as exceptions to what was in effect a tenant's absolute obligation to pay rent. Thus, Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892), held that one who lets a furnished dwelling for a short term impliedly covenants that it is fit for occupancy, and that breach of this covenant entitles the tenant to terminate the lease. The other exception was the implied covenant of quiet enjoyment. One court explained: "One who rents or leases land or urban realty for a term at a stipulated monthly or yearly rental is as much bound to furnish the property for use during the term as the lessee is to pay rent during such term." Cohen v. Hayden, 180 Iowa 246, 250, 163 N.W. 238, 239 (1917). Eviction—actual, actual-partial, constructive, or constructive-partial—would suspend the tenant's obligation to pay rent, and permit him to sue for repossession or regard the lease as terminated. Maider v. City of Carondolet, 26 Mo. 112 (1857); Fifth Ave. Bldg. Co. v. Kernochan, 221 N.Y. 370, 117 N.E. 579 (1917); *see* Annot., 62 A.L.R. 1257 (1929).

7. MO. REV. STAT. § 400.2-314(1) (1969) provides: "[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." *Id.* § 400.2-315 provides:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods there is . . . an implied warranty that the goods shall be fit for such purpose.

8. Smith v. Old Warson Redev. Co., 479 S.W.2d 795 (Mo. 1972).

residential leases. The *King* court reasoned, as have other courts adopting the implied warranty of habitability in residential leases,[9] that the changing nature of the landlord-tenant relationship demands that the landlord be made responsible for providing adequate housing.[10] The present housing shortage and the resultant superior bargaining power of the landlord, said the court, make it unlikely that a lease agreement which in effect absolves the landlord from any responsibility for maintaining the premises would reflect the intention of both parties.[11] Inasmuch as the urban tenant seeks a commodity—shelter—and must rely upon the landlord's integrity and superior knowledge of the premises,[12] the court concluded that contract principles developed in the analogous area of consumer protection should be applied to the landlord-tenant relationship.[13] Therefore, the offer to lease residential premises should include an implied representation that the premises are reasonably fit for habitation.[14] The court further explained that since housing codes

9. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Mease v. Fox, — Iowa —, 200 N.W.2d 791 (1972); Fritz v. Warthen, — Minn. —, 213 N.W.2d 339 (1973); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Amanuensis Ltd. v. Brown, 65 Misc. 2d 15, 318 N.Y.S.2d 11 (1971); Foisy v. Wyman, — Wash. 2d —, 515 P.2d 160 (1973); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961); *see* 20 DEPAUL L. REV. 544 (1971).

10. 495 S.W.2d at 71-73.

11. *Id.* at 73, *citing* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074-76 (D.C. Cir. 1970).

12. 495 S.W.2d at 73. *Accord,* Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969).

13. 495 S.W.2d at 73.

The reasons for applying the contract principles of consumer protection to both the sale and lease of residential property were best stated in Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 91, 207 A.2d 314, 325-26 (1965):

> When a vendee buys a . . . house . . . he clearly relies on the skill of the developer and on its implied representation that the house will be . . . reasonably fit for habitation. He has no architect or other professional advisor of his own, he has no real competency to inspect on his own, his actual examination is . . . largely superficial, and his opportunity for obtaining meaningful protective changes in the conveyancing documents prepared by the builder vendor is negligible. If there is improper construction such as a defective heating system or a defective ceiling, stairway, and the like, the well-being of the vendee and others is seriously endangered and serious injury is foreseeable. The public interest dictates that if such injury does result from the defective construction its cost should be borne by the responsible developer who created the danger and is in the better economic position to bear the loss rather than the injured party who justifiably relied on the developer's skill and implied representation.

14. 495 S.W.2d at 75.

contemplate placing the burden of restoring and improving housing largely on the landlord,[15] implying a warranty of habitability in residential leases implements the legislative policies of the codes.[16]

The implied warranty of habitability is a much needed remedy for today's tenant of substandard housing. The doctrine of constructive eviction, which permits the tenant to terminate his lease upon the landlord's breach of the implied covenant of quiet enjoyment,[17] does not serve the needs of a tenant whose primary reason for withholding rent is to coerce the landlord into improving the quality of the rented housing. Moreover, in order to assert such a claim, the tenant must maintain the fiction of eviction by vacating the premises.[18] The tenant who abandons, however, frequently faces the prospect of moving to other substandard housing or finding none at all.[19] If a court later rules that the tenant has not established his claim of constructive eviction, he may be held liable for rent over the remainder of the term notwithstanding his abandonment.[20]

15. *Id.* at 73-74. *See, e.g.*, MO. REV. STAT. § 441.500 *et seq.* (Supp. 1974); KANSAS CITY, MO., PROPERTY MAINTENANCE CODE § 20.34 (1971).

16. 495 S.W.2d at 75. In Edwards v. Habib, 397 F.2d 687, 700 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969), the court held that a landlord may not evict in retaliation for a tenant's reporting a housing code violation and stated:

> The housing and sanitary codes . . . indicate a strong and persuasive Congressional concern to secure for the city's slum dwellers decent, or at least safe and sanitary places to live.

Accord, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

17. Leader v. Cooper, 21 Ill. 2d 577, 159 N.E.2d 42 (1959); Auto Supply v. Scene-in-Action Corp., 340 Ill. 196, 172 N.E. 35 (1930); Cox v. Hardy, 371 S.W.2d 945 (Ky. 1963); Dolph v. Barry, 165 Mo. App. 659, 148 S.W. 196 (1912); Dyett v. Pendleton, 8 Cow. 727 (N.Y. 1826); *see* 19 HARV. L. REV. 50 (1906).

18. Massachusetts has lessened the hardship of pleading constructive eviction by permitting the tenant to obtain a declaratory judgment that he has been constructively evicted before he actually vacates. Charlotte Theatres, Inc. v. Gateway Co., 191 F. Supp. 834 (D. Mass. 1961); Burt v. Seven Grand Corp., 340 Mass. 124, 163 N.E.2d 4 (1959). Nevertheless, the tenant cannot actually terminate the lease until he surrenders the premises. Clark v. Spiegal, 22 Cal. App. 3d 74, 99 Cal. Rptr. 86 (1971); Brine v. Bergstrom, 4 Wash. App. 288, 480 P.2d 783 (1971).

19. Note, *The Indigent Tenant and the Doctrine of Constructive Eviction*, 1968 WASH. U.L.Q. 461, 473.

20. Kearns v. Gay Apparel Corp., 232 F. Supp. 475 (M.D.N.C. 1964); Nobel v. Kerr, 123 Ga. App. 319, 180 S.E.2d 601 (1971); Audrey Apts. v. Kornegay, 255 So. 2d 792 (La. App. 1971); Gray v. Kaufman Dairy & Ice Co., 162 N.Y. 388, 56 N.E. 903 (1900); Leo v. Santagada, 45 Misc. 2d 309, 256 N.Y.S.2d 511 (Newburgh City Ct. 1964); Stubbs v. Stewart, 469 S.W.2d 311 (Tex. Civ. App. 1971); Pague v. Petroleum Prods., Inc., 77 Wash. 2d 219, 461 P.2d 317 (1969). In some jurisdictions, the landlord has no obligation to mitigate the rent liability for the remainder of the term.

A second possible defense for tenants is that of illegality, which provides that a tenant may plead that a lease executed in substantial violation of the applicable housing code is a void and unenforceable contract.[21] The illegality defense is generally ill-advised since a tenant pursuing the defense tacitly admits to being a tenant only at will[22] and remains liable for the reasonable rental value for the period of occupancy[23] with no assurance of restitution.[24] Furthermore, a tenant who

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Simons v. Federal Bar Bldg. Corp., 275 A.2d 545 (D.C. App. 1971); Reston v. Centennial Real Estate & Inv. Co., 166 Colo. 377, 445 P.2d 64 (1968); Chavin v. H.H. Rosin & Co., — Del. —, 246 A.2d 921 (1968); Gruman v. Investors Diversified Servs., Inc., 247 Minn. 502, 78 N.W.2d 377 (1956); Jennings v. First Nat'l Bank, 225 Mo. App. 232, 30 S.W.2d 1049 (1930); Tanella v. Rettagliata, 120 N.H. Super. 400, 294 A.2d 431 (1971); Noce v. Stemen, 77 N.M. 71, 419 P.2d 450 (1966); Rand Prods. Co. v. Mintz, 69 Misc. 2d 1055, 332 N.Y.S.2d 452 (N.Y. City Civ. Ct. 1972). In other jurisdictions, a landlord must make a reasonable effort to secure a new tenant for the remainder of the term. Cobb v. Lee, 44 Ala. App. 277, 207 So. 2d 143 (1968); Camelback Land & Inv. Co. v. Phoenix Entertain. Corp., 2 Ariz. App. 250, 407 P.2d 791 (1965); Pinkerton, Inc. v. Palmer, Inc., 113 Ga. App. 859, 149 S.E.2d 859 (1966); Carpenter v. Wisniewski, 139 Ind. App. 325, 215 N.E.2d 882 (1966); Benson v. Iowa Bake-Rite Co., 207 Iowa 410, 221 N.W. 464 (1928); Gordon v. Consol. Sun Ray, Inc., 195 Kan. 341, 404 P.2d 949 (1965); D.H. Overmeyer Co. v. Blakely Floor Covering, Inc., 266 So. 2d 925 (La. App. 1972); Whitehorn v. Dickerson, 419 S.W.2d 713 (Mo. App. 1967); Wright v. Baumann, 239 Ore. 410, 398 P.2d 119 (1965); Henson v. B. & W. Furnace Co., 401 S.W.2d 261 (Tex. Civ. App. 1966); Strauss v. Turck, 197 Wis. 586, 22 N.W. 811 (1929). *See also* 14 IOWA L. REV. 359 (1929).

Most jurisdictions permit the landlord to relet the premises after abandonment, and to sue the former tenant for any deficiency in the rent, provided notice of the reletting is given to the former tenant. Baskin v. Thomas, 12 F.2d 845 (D.C. Cir. 1926); B.K.K. Co. v. Schultz, 7 Cal. App. 3d 786, 86 Cal. Rptr. 760, 507 P.2d 88 (1970); McGrath v. Shalett, 114 Conn. 622, 159 A. 633 (1932); Fichman v. Kiphart, 297 S.W.2d 784 (Mo. App. 1957).

Some courts have held that if the tenant wrongfully abandons the premises and refuses to pay rent, the landlord may regard the lease as repudiated and sue for the total rather than the accrued rent. Novak v. Fontaine Furniture Co., 84 N.H. 93, 146 A. 525 (1929); Liberty Plan Co. v. Adwan, 370 P.2d 928 (Okla. 1962); Pollock v. Ives Theatres, 174 Wash. 65, 24 P.2d 396 (1933). *See generally* McCormick, *The Rights of the Landlord upon Abandonment of the Premises by the Tenant*, 23 MICH. L. REV. 211 (1925).

21. King v. Moorehead, 495 S.W.2d 65, 77 (Mo. App. 1973).

22. Diamond Housing Corp. v. Robinson, 257 A.2d 492 (D.C. App. 1969).

23. William J. Davis, Inc. v. Slade, 271 A.2d 412 (D.C. App. 1970).

24. The court expressly refrained from deciding the issue of whether a tenant who pleads illegality will be deemed in pari delicto with the landlord or whether he may recover in restitution. It is a general principle, however, that a contract entered into in violation of a statute will not bar restitution in favor of a member of the class protected by the statute. Lewis & Queen v. N.M. Ball Sons, 48 Cal. 2d 141, 308 P.2d 713 (1957); Porter v. Arthur Murray, Inc., 249 Cal. App. 2d 410, 57 Cal. Rptr. 554 (1967); Neil v. Pennsylvania Life Ins. Co., 474 P.2d 961 (Okla. 1970); Roxy Auto

pleads illegality elects to forego the remedy of breach of warranty of habitability because the two defenses are contradictory, the former denying the validity of the lease and the latter asserting the enforceability of the lease against the landlord.[25]

The tenant who asserts a breach of implied warranty of habitability avoids the problems associated with constructive eviction and illegality. The tenant need not vacate the premises[26] in order to assert his claim, as he would with constructive eviction, nor need he abandon defenses based on the enforceability of the lease, as he would under the illegality defense. Furthermore, if the court agrees that a breach of warranty has occurred, the tenant may recover damages[27] without renouncing

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Co. v. Moore, 180 Pa. Super. 603, 122 A.2d 87 (1956); Sherwood & Roberts-Kakima, Inc. v. Leach, 67 Wash. 2d 630, 409 P.2d 160 (1965). *See also* Wade, *Restitution of Benefits Acquired through Illegal Transactions*, 95 U. PA. L. REV. 261 (1947). Presumably, this principle would operate to permit the tenant to recover rental payments in excess of the reasonable rental value of the premises in their unrepaired condition.

25. *See* King v. Moorehead, 495 S.W.2d 65, 79 (Mo. App. 1973).

26. The tenant of dilapidated housing who chooses to remain may find the Enforcement of Minimum Housing Code Standards Act, MO. REV. STAT. § 441.500 *et seq.* (1969), instrumental in improvement of his dwelling. Although the statute does not permit any recovery for damages, it does attempt to compel the landlord to abate housing code violations. If the landlord fails to correct code violations within a reasonable time after receiving appropriate notice, the court will appoint a receiver on the petition of one-third of the tenants of a housing unit or of the local housing code enforcement agency. The receiver collects the rent and spends it to correct the violations.

Efforts to enforce housing codes may in some instances be so cumbersome and haphazard as to elicit little voluntary compliance. However, in other instances, they may be so rigorous as to force landlords to abandon their property rather than undertake the cost of repair and maintenance. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 257 (1968); Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254 (1966); Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965). *But see* 1972 WASH. U.L.Q. 374.

Rent withholding statutes similar to that in Missouri are in force in several other states. *E.g.*, ILL. ANN. STAT. ch. 23, § 11-23 (Smith-Hurd Supp. 1973); IOWA CODE ANN. § 413.106 (1971); MASS. GEN. LAWS ANN. ch. 239, § 8A (Supp. 1972); MICH. STAT. ANN. §§ 5.2891(10), (14), (16) (1969); N.Y. REAL PROP. ACTIONS § 755 (McKinney 1963, Supp. 1973); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1973); R.I. GEN. LAWS ANN. § 45-24.2-11 (1971).

Still another option available in some states allows the tenant to repair the premises and deduct the cost from the rent. *E.g.*, MONT. REV. CODES ANN. §§ 42.201-.202 (1947); OKLA. STAT. ANN. tit. 41, § 32 (1954). However, limits on the amount that may be spent on repairs may keep the tenant from making substantial renovations. *E.g.*, CAL. CIV. CODE § 1942 (Deering 1972).

27. The measure of damages is the difference between the promised rent and the rental value of the premises in their unrepaired condition. Thus the tenant who vacates may recover the value of the unexpired term computed as the difference between

the lease.[28] Thus recognition of the implied warranty of habitability affords slum tenants a more effective means of improving substandard housing.

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the promised rent for the remainder of the term and the reasonable rental value of the premises in their unrepaired condition for the remainder of the term. The tenant who remains may apply his damage award as a set-off against future rent. S. WILLISTON, CONTRACTS § 1404 (3d ed. 1968).

However, if the tenant remains, the court will require that he pay rent into the custody of the court. The court may then distribute the rent at its discretion to the landlord for the purpose of restoring habitability. King v. Moorehead, 495 S.W.2d 65, 77 (Mo. App. 1973).

28. A tenant who claims constructive eviction may recover in tort the value of the unexpired term, but must vacate in order to assert such a claim. Kearns v. Sparks, 296 S.W.2d 731 (Ky. 1956); Andrews & Knowles Prod. Co. v. Carrin, 243 N.C. 131, 90 S.E.2d 228 (1955); Zelig v. Blue Point Oyster Co., 61 Ore. 541, 113 P. 852 (1912).

Under the illegality defense restitution may be obtained, *see* note 24 *supra*, but in successfully asserting the defense the tenant exposes himself to possible eviction since he no longer has a valid lease. *See* note 22 *supra*. While an eviction in these circumstances may be considered an impermissible retaliatory action by the landlord, *see id.*, proof of retaliation is difficult.