Tulsa Law Review

Volume 10
Number 1 *Dedicated to John Rogers*

Volume 10 | Number 1

1974

Landlord and Tenant--Covenant of Habitability--Tenant May Use Landlord's Breach Either Defensively in an Action by a Landlord for Nonpayment of Rent or Affirmatively in an Action by the Tenant to Recover Rent Paid

Charles R. Hogshead

Supreme Court has held that where the welfare of the child is in jeopardy or some other unusual circumstance exists then the courts of this state should assume jurisdiction to determine the application on its merits.[13] Thus while the decisions setting out this rule have generally dealth with questions of custody, the fact that the welfare of a child is directly linked, in many instances, to adequate child support payments suggests that the courts of Oklahoma, in a situation similar to *Parker*, might reach the same equitable decision.

The paramount concern must be for the welfare of the minor children involved. In *Parker*, the insufficiency of the original support payments to meet the needs of the children ten years later was properly established. The Tennessee Supreme Court, realizing the incapacity of the Georgia courts to bring the father, a resident of Tennessee, within their jurisdiction, approved the well-reasoned decisions of other states and accepted its duty to adjudicate the litigation for the best interest of the party entitled to relief.[14]

While few states have been willing to accept jurisdiction over litigation seeking modification of a foreign divorce decree, this appears to be a proper solution to a potentially serious problem. For without this device, a divorced parent, required to provide a certain sum as monthly child support, is free from any action to increase that amount by merely moving from the state where the divorce decree was rendered. The welfare of the child is ignored and justice is not served if the far-sighted decision in *Parker* is overlooked.

Theodore J. Williams, Jr.

LANDLORD AND TENANT—COVENANT OF HABITABILITY—TENANT MAY USE LANDLORD'S BREACH EITHER DEFENSIVELY IN AN ACTION BY A LANDLORD FOR NONPAYMENT OF RENT OR AFFIRMATIVELY IN AN ACTION BY THE TENANT TO RECOVER RENT PAID. *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973).

Plaintiff-lessee, Berzito, rented a second-floor four-room furnished apartment from the defendant-lessor for occupancy by herself

13. Clampitt v. Johnson, 359 P.2d 588 (Okla. 1961).
14. Parker at —, 497 S.W.2d at 574.

and three minor children. The trial court found that at the time of the leasing, in September of 1968, the apartment was "in a deplorable condition but that the defendant promised he would make the premises 'livable' and agreed to make certain specific repairs."[1] Plaintiff ceased paying rent on February 23, 1970, due to defendant's repeated failure to correct the inadequate conditions, whereupon defendant brought a summary dispossess action. Judgment was thereupon rendered, on August 27, 1970, granting plaintiff a rent abatement, retroactive to the date of the cessation of rental payments. Plaintiff paid nothing after the judgment date, subsequently quitting the premises on November 14, 1970. In the present action, the plaintiff sought to recover that amount paid in excess of the abated rental value for the entire duration of the tenancy.

The court, in an opinion by Justice Worrall F. Mountain, ruled that the covenant of habitability—either express or implied[2]—and the covenant to pay rent are mutually dependent.[3] Consequently, the tenant may use the landlord's breach either defensively in a dispossess action for nonpayment of rent or affirmatively in an action to recover rent paid in excess of the fair rental value of the leased premises in its state of disrepair.[4] The court in reaching its decision relies primarily on the contract aspect of leasing, as opposed to the traditional property theory.[5] The relief granted by the New Jersey court is similar

1. Berzito v. Gambino, 114 N.J. Super. 124, 129, 274 A.2d 865, 869 (1971) (representation as to condition of apartment and promise of defendant-lessor accepted as fact by trial court); 119 N.J. Super. 332, 335, 291 A.2d 577, 579 (1972) (accepted by Appellate Division); 63 N.J. 460, 308 A.2d 17 (1973) (accepted by New Jersey Supreme Court).

2. Implied covenants of habitability are more readily being accepted by the courts. In those jurisdictions in which state statutes or local housing codes do not require such covenants, public policy has demanded their existence. The following cases represent a sample of those jurisdictions recognizing implied covenants of habitability: Reste Realty Corporation v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961); Brown v. Southall Realty Company, 277 A.2d 834 (D.C.App. 1968); Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1970); Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Glyco v. Schultz, 289 N.E.2d 919 (Mun. Ct. Sylvania, Ohio 1972); Boston Housing Authority v. Hemingway, 293 N.E.2d 831 (Mass. 1973).

3. Berzito v. Gambino, 308 A.2d at 21; *see* Javins v. First National Realty Corporation, 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972).

4. Berzito, 308 A.2d at 22.

5. For a discussion of this concept, see Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443 (1972).

to that suggested by the American Law Institute in its proposed draft for the Restatement of the Law of Property, Second. The proposed remedies afforded the tenant, in a situation where the landlord breaches his covenant to repair, are: termination of the lease, due to constructive eviction, and recovery of damages; affirmation or maintenance of the lease with an abatement in the rent; use of the rent as a set-off to repair the unsuitable condition; or, maintenance of the lease with the right to withhold the rent until the landlord eliminates the unsuitable condition.[6]

Several of these remedies currently being recognized by the courts are clear departures from the common law concepts of property. At common law, there was no such thing as an implied warrant of habitability. The doctrine of *caveat emptor* applied. However, these common law rules were promulgated in the agrarian society of the Middle Ages,[7] having evolved from the rules concerning the prohibition of waste on the part of a tenant. Rent was an obligation of the land itself, which obligation continued despite any warranties or covenants upon which the landlord and tenant might agree. The underlying theory was that the land was the important factor in the leasing transaction, any structures attached thereto being merely incidental to the leasehold. This is no longer a valid presumption in our urbanized society. Today it is the habitation, a dwelling place suitable for occupation, and not the land which concerns the tenant. The laws pertaining to landlord-tenant relationships are gradually changing to meet the needs of this urbanized society.

The most common remedies presently afforded the tenant are termination of the lease[8] and rental set-off for repairs.[9] However, even these remedies prove inadequate in metropolitan areas where housing shortages abound and tenants, due either to indigence or lack of necessary skills, are unable to make repairs themselves. It is in response to this remedial inadequacy that one now sees the granting

6. RESTATEMENT (SECOND) OF PROPERTY §§ 5.1-5.4 (Tent. Draft No. 1, 1973).

7. For a brief discussion by the court of the historical basis of the *caveat emptor* doctrine, see Javins v. First National Realty Corporation, 428 F.2d 1071 (D.C. Cir. 1970). *See generally* 2 F. Pollock and F. Maitland, THE HISTORY OF ENGLISH LAW 131 (2d ed. 1968); 3 W. Holdsworth, A HISTORY OF ENGLISH LAW 122-123 (3d ed. 1923).

8. *See* Kline v. Burns, 276 A.2d 248 (N.H. 1971); Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969); Boston Housing Authority v. Hemingway, 293 N.E.2d 831 (Mass. 1973).

9. *See* Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Jackson v. Rivera, 65 Misc. 2d 468, 318 N.Y.S.2d 7 (N.Y. City Civ. Ct. 1971).