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Lape v. Witter

MARK and AMY LAPE and MARK and AMY LAPE on behalf of their minor child NICHOLAS LAPE,
Plaintiffs,
v. OMAR WITTER and GERALDINE WITTER, Defendants
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action - Law, No. 2007-1411

Tenants' suit against landlords for negligence and breach of implied warranty of habitability; demurrer to landlords' cross-claim

1. The doctrine of the implied warranty of habitability imposes on landlords the duty to provide to their tenants premises which are safe, sanitary and serviced by all necessary modern utilities; the doctrine's aim is to discourage landlords from allowing premises which they lease out to fall into disrepair.

2. Although a landlord may defend himself against a claim that he breached the implied warranty of habitability by alleging that his tenant was contributorily negligent, public policy does not entitle the landlord to bring a cross-claim against the implied warranty of habitability claim.

3. To allow a landlord to pursue a cross-claim against his tenant would impose on the tenant an independent, affirmative duty to ensure that premises owned by and leased out by the landlord are "habitable"; the duty to provide habitable premises runs in one direction only - from the landlord to the tenant, and cannot as a matter of law run from the tenant to the landlord; a landlord cannot use his "shield" defense of contributory negligence as a cross-claim "sword" against his tenant.

Appearances:

Kristen B. Hamilton, Esq., *Counsel for Plaintiffs*

Meghan K. Finnerty, Esq., *Counsel for Defendants*

OPINION

Herman, J., December 9, 2008

Introduction

Before the court are the Lapes' preliminary objections to the Witters' Cross-Claim.[1] The action arises from a residential lease entered into by the parties on April 23, 1999 for a rental unit on the premises of a farmhouse in Greencastle. Mr. and Mrs. Lape, along with their two minor children, were the tenants under the lease continuously between August 1999 and December 21, 2006. At some point during the tenancy, the quality of the drinking water at the rental unit became a matter of concern.

The Lapes filed a complaint containing claims of negligence, violations of the Unfair Trade Practices and Consumer Protection Law for breach of the implied warranty of habitability and failure to return the security deposit (the UTPCRL, 73 P.S. §201-1 et seq.), and failure to return the security deposit pursuant to §250.512 of the Landlord-Tenant Act.[2] The Witters filed preliminary objections to the complaint. The Lapes filed an amended complaint containing the same claims and seeking various types of relief, including treble damages and attorney fees, the security deposit, medical costs, pain and suffering, and punitive damages. After considering briefs and oral argument, the court issued an Order sustaining some objections and overruling others.

The Witters filed an Answer with New Matter in the form of a Cross-Claim. The Lapes filed preliminary objections in the nature of a demurrer to the Cross-Claim. The Witters then filed an amended Cross-Claim addressed to Mr. and Mrs. Lape as additional defendants.[3] The parties filed briefs and the court held oral argument. This matter is ready for decision.

Factual Background

The Lapes allege they reported to the Witters in August 2005 that the water servicing their rental unit was brown and contained a large quantity of dirt particles and that they showed the Witters a jar containing a dirty water sample. The Witters deny this allegation and maintain that the first time the Lapes complained to them about the water was on August 28, 200**6**, a full year later. The Lapes allege that on this latter date, they discovered worms in the water and reported this to the Witters. The Witters admit that the Lapes reported water problems, but deny worms were then mentioned.

According to the Lapes, they brought a water sample to their family doctor in late August of 2006. The doctor told them not to ingest it and, because their youngest child was having diarrhea, the Lapes were not to bathe in the water, either. The Lapes sent a water sample for testing to Commonwealth Water of Greencastle on August 30, 2006. Their children, then 2 and 6 years old, had been suffering from severe diarrhea, especially 2-year-old Nicholas who had been seeing a doctor for severe dehydration. The older child's bowels improved once the family stopped using the water, but Nicholas continued to have intestinal problems, and this was the situation at least up through the time the amended complaint was filed.[4]

Analytical Laboratory Services, Inc. in Middletown, Pennsylvania issued a lab report on September 6, 2006 which indicated that the water to the Lape rental unit was non-potable. The Witters received a copy of the report on September 9, 2006. The parties agree that the Lapes then presented the Witters with receipts for bottled

water and the Witters reimbursed them for bottled water, water dispensers, and water tests. The Witters also gave the Lapes a bottle of bleach to pour down the well in an effort to correct the problem. The Lapes allege that they used the bleach, but that it did not seem to help and they reported this to the Witters and received from them a second bottle of bleach which the Witters assured them would work. The Lapes allege that they resumed using the tap water but then again noticed the presence of worms which prompted them to contact St. Thomas Township.

According to the Lapes, the Witters did nothing to contact them about the water problem during October of 2006. The Witters deny this allegation and maintain that they took the following actions during that month: they contacted Commonwealth Water of Greencastle for information about testing, advised the Lapes about shock chlorinization as a method of solving water problem, reimbursed the Lapes for testing, dispensers and bottled water, re-routed the gray water, contracted for the installation of a UV light system and paid for the system. Sometime between October 26th and early November, the Witters' nephew, who is a plumber and owns a plumbing company, installed a UV light on the premises in an effort to fix the water problem. The Lapes continued to use bottled water per their doctor's instructions.

On either October 25th or October 31st of 2006, the Lapes filed a consumer complaint with the Pennsylvania Office of the Attorney General. The Witters posted an eviction notice on the farmhouse front door on October 25th giving the Lapes 30 days to vacate the premises. The notice stated: "I have been reported to the St. Thomas Sewer Authority to fix the water and sewer problem in 30 days." The Lapes were told to completely remove themselves from the premises by November 25th. On or about October 31st, the Lapes told the Witters they would withhold rent until the water problem was fixed. The Lapes remained in the unit without paying rent between October 31st and December 21, 2006.[5] There is a dispute in the record about whether samples which were taken on November 7th and were the subject of November 9th report showed that the water problem had been solved. According to the Witters, "the sample [did] not exceed the drinking water limit established by the USEPA for Total Coliform and [was] considered to be bacteriologically potable. Zero Total Coliform colonies were detected."[6]

Discussion

Initially we keep in mind that we can grant a demurrer only if, accepting as true all of the well-pled, material facts and all inferences fairly deducible from those facts, the averments of the complaint (or here, a Cross-claim) are clearly insufficient to establish the pleader's right to relief. The law must say with certainty that no recovery is possible. Hess v. Fox Rothschild, 925 A.2d 798 (Pa.Super. 2007).

The Witters allege in New Matter that the Lapes exposed themselves and their children to allegedly non-potable water, failed to mitigate their damages and are alone liable for any damages. In their Cross-Claim, the Witters allege that the Lapes are alone liable, jointly and severally liable, or are liable over for contribution and/or indemnity for any damages they might recover because, according to their own pleading, they allowed Nicholas to be exposed to allegedly non-potable water for a full year before August of 2006 and did so without notifying their doctor or the Witters.

The Lapes argue that they cannot be joined as additional defendants because this would allow the Witters to avoid the responsibility they had as landlords to provide adequate housing as required by the doctrine of implied

warranty of habitability adopted in Pugh v. Holmes, 405 A.2d 897 (Pa. 1979) and further developed in later cases. The foundation of this doctrine is a recognition by the courts that it is good public policy to give residential tenants equal bargaining power with landlords, that such tenants are entitled to expect the premises which they lease to be safe, sanitary, and serviced by all necessary modern utilities, and to discourage landlords from allowing premises to fall into disrepair. Pugh. Landlords cannot insulate themselves from liability by having tenants waive their right to habitable living conditions using exculpatory lease clauses. Fair v. Negley, 390 A.2d 240 (Pa.Super. 1978).

The Lapes contend that if the Witters are permitted to file a Cross-Claim against them for the Witters' own alleged breach of the implied warranty of habitability, "it places tenants in a position for being held liable simply for residing in these properties.Where liability rests on the landlord due to a breach.of the implied warranty of habitability, that liability is not severable or assignable to the tenants through a cross-claim of negligence." Pugh and its progeny "do not permit a tenant to waive their right to the implied warranty and frown upon exculpatory clauses, as both of these would be used by every landlord, rendering the implied warranty of habitability null and void."[7] According to the Witters, this argument does not apply insofar as there is no exculpatory clause in this lease (as there was in Fair which the court held was an invalid attempt to bypass the implied warranty of habitability) and because the Witters' amended Cross-Claim does not rest upon a waiver of the implied warranty of habitability. Instead, to the extent that the facts prove a problem with the water, the Witters are simply preserving their right to prove that the Lapes themselves continued to expose Nicholas to the water and did not mitigate damages even though, according to the Lapes' own pleading, they themselves knew the water's potability was in question as early as August of 2005.

The Lapes allege negligence in addition to a breach of the implied warranty of habitability. Both theories are viable where a tenant contends that he was injured by a condition on a landlord's property which rendered that property unsafe. Keck v. Doughman, 572 A.2d 724 (Pa.Super. 1990); Reed v. Dupuis, 920 A.2d 861 (Pa.Super. 2007). In order for a defect to constitute a breach of the implied warranty of habitability, it must be of the type which will prevent the use of the premises for its intended purpose - to provide a place fit for habitation. At the very least, the premises must be safe and sanitary.[8] In addition, the tenant must prove that he gave notice to the landlord of the defect, that the landlord had a reasonable opportunity to make the necessary repairs, and that he failed to do so. Keck. The basic elements of a cause of action in negligence are, of course, the existence of a duty, breach of that duty, a causal relationship between the breach and the injury complained of, and actual loss or damage. Id (citations omitted).

Keck the tenant sued her landlords under both theories after she fell down stairs at the leased premises. The jury found her 58% contributorily negligent which barred her from recovery under the negligence theory. Because her liability was greater than the landlords', she was also barred from recovering under the theory of implied warranty of habitability. This is because a landlord is entitled to offset his liability under an implied warranty of habitability claim in the same way as he can against a negligence claim. As to this, the Keck court cited the Restatement (Second) of Property, §17.6 which states:

A landlord is subject to liability for physical harm caused to the tenant.by a dangerous condition existing before or arising after the tenant has taken possession, if he has failed to exercise reasonable care to repair the condition and the existence of the condition is a violation of

(1) an implied warranty of habitability; or

(2) a duty created by statute or administrative regulation.

Comment B states:

(a).The implied warranty of habitability is the basis of a duty on the landlord to maintain the property in a habitable condition. By analogy to the negligence per se doctrine, when the landlord violates this duty, he becomes subject to liability for physical harm resulting from such violation.

(b).[t]he landlord [however].has available all the usual defenses to an action in negligence, including contributory negligence and assumption of risk.

(Emphasis in Keck.) Pennsylvania's comparative negligence statute provides:

In all actions brought to recover damages for negligence resulting in injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributable to the plaintiff.

42 Pa.C.S.A. §7102(a).

The main differences between the two causes of action are therefore as follows: First, to prevail on a theory of implied warranty of habitability, a plaintiff must only show injury resulting from a condition which makes his dwelling unsafe or unsanitary. By contrast, a plaintiff proceeding under a negligence theory must show injury caused by the landlord's breach of a statutory or other specifically-defined duty which may change depending on the relationship between the parties. The second difference is that, under the implied warranty of habitability, a plaintiff must show that he specifically notified the landlord of the condition which allegedly caused the injury. By contrast, no such specific notice is required under a negligence theory, although before liability will be imposed, the tenant must usually show that the landlord failed to correct a condition discoverable through the exercise of reasonable care. Keck, citing Restatement (Second) of Torts, §§358-361.

Pennsylvania Rule of Civil Procedure 1031.1, which became effective in 2007, provides:

Rule 1031.1. Cross-Claim

Any party may set forth in the answer or reply under the heading "Cross-claim" a cause of action against any other party to the action that the other party may be

(1) solely liable on the underlying cause of action, or

(2) liable to or with the cross-claimant on any cause of action arising out of the transaction or occurrence or series of transactions or occurrences upon which the underlying cause of action is based.

[Note: Subparagraph (2) permits a cross-claimant to raise a claim that another party is liable over to the cross-claimant or jointly and severally liable with the cross-claimant].Explanatory Comment - 2007: Under Rule 1031.1, the assertion of a claim by one party against another party is a matter of pleading rather than joinder of parties. The claim is to be pleaded as a cross-claim under the new rule].

The Lapes assert that the Cross-Claim is improper because the Witters have not shown that the Lapes knew or should have known the Witters did not fix the reported problems with the water, that the Lapes continued to ingest and use the water after being told by a doctor to stop all use of the water, and that the Lapes continued to ingest the water after thorough testing conducted at the Lapes' request showed the water to be non-potable. These, however, are legitimate factual disputes for the jury to resolve. In order for the Lapes to prevail under the theory of implied warranty of habitability, they must prove that they gave notice of the water problem to the Witters, the Witters had a reasonable opportunity to correct the problem and then failed to do so. Staley v. Bouril, 718 A.2d 283 (Pa. 1998); Fair, *supra*; Pugh; *supra*.

The Witters are indeed entitled to assert all the same defenses available to them in defending against a negligence action. This permits them to argue to the jury that their liability should either be erased or partially offset by the Lapes' own liability insofar as the Lapes were negligent for exposing themselves and their children to water between August of 2005 and August of 2006 which they (the Lapes) knew or should have known was problematic. Nevertheless, we agree with the Lapes that allowing the Witters to bring a Cross-Claim in connection with the implied warranty of habitability claim is contrary to public policy. The Witters' right to argue contributory negligence does not extend to placing upon the Lapes any independent, affirmative duty to ensure that the premises would be "habitable" as that concept is articulated in Pugh and its interpretive cases. As a matter of law, a tenant owes no duty to provide habitable premises. The duty to provide habitable premises runs in one direction only -- from the landlord to the tenant and cannot by definition run from the tenant to the landlord. A landlord cannot use his "shield" defense of contributory negligence as a Cross-Claim "sword" against a tenant. This would burden the tenant with the obligation to guarantee that premises belonging to the landlord and leased out by the landlord are safe, sanitary and equipped with all necessary utilities. This would be contrary to the rationale underlying the doctrine of implied warranty of habitability. We will therefore sustain the Lapes' demurrer to the Witters' Cross-Claim in connection with the implied warranty of habitability.

ORDER OF COURT

Now this 9th day of December 2008, the Court hereby overrules in part and sustains in part the preliminary objections filed by plaintiffs Mark and Amy Lape to the Cross-Claim filed by defendants Omar and Geraldine Witter. The objections are overruled insofar as the Witters are entitled to maintain their allegation in response to the Lapes' claim of negligence that the Lapes are liable under contributory negligence for the damages which the Lapes allegedly suffered. The objections are sustained insofar as the Witters may not maintain in their Cross-Claim a cause of action for breach of the implied warranty of habitability based on a duty the Lapes had to maintain the leased premises in a "habitable condition" as that concept is defined under the doctrine of the implied warranty of habitability.

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[1] According to the Witters' pleadings, they are not the record owners of the property. They aver instead that the property is owned by an entity called "the Jodolich Trust." Neither counsel has addressed this issue further.

[2] 68 P.S. §250.101 et seq.

[3] Before the court had the opportunity to address the first round of objections, the Witters filed a praecipe for a writ to join Mr. and Mrs. Lape as additional defendants.

[4] The amended complaint was filed June 5, 2007.

[5] The Lapes sent the Witters a letter asking for their security deposit. There is a dispute about the process by which the Lapes would be able to reclaim that deposit. This particular part of the case is not directly relevant to the objections before the court.

[6]Exhibit A attached to the Witters' Answer with New Matter and Cross-Claim.

[7] The Witters do not contest the general proposition that a breach of the implied warranty of habitability may serve as the basis for a suit brought by a residential tenant. The doctrine may also be the basis for an affirmative defense to a landlord's suit for rent or possession. The tenant bears the burden of proof under either scenario. Burr v. Callwood, 543 A.2d 583 (Pa.Super. 1988).

[8] The Witters do not dispute that safe, potable water and a functioning sewer system are part of what a tenant may reasonably expect to receive under the implied warranty of habitability.