DePaul Law Review

Volume 22
Issue 1 *Fall 1972*

Article 5

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PROPERTY: SPRING v. LITTLE: LANDLORD-TENANT LAW APPROACHES THE TWENTIETH CENTURY

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> When the 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.[1]

WHILE THIS "well known package" may represent the expectations of an urban dweller when he rents an apartment, the crucial question is: Do his expectations represent enforceable rights? The Illinois Supreme Court has taken the first step towards realization of the package in *Spring v. Little*.[2]

The supreme court opinion dealt with two cases, consolidated by the appellate court because of their similarity.

SPRING *v.* LITTLE

Emma Little entered into an oral lease with Jack Spring on August 1, 1961, to rent an apartment located at 3901 West Jackson Boulevard in the City of Chicago. After a series of renewals of the lease, the tenant, Little, alleged that on August 1, 1967, an agreement was reached to renew the lease for another term. In order to entice this renewal, the landlord, Spring, allegedly, orally promised to: place screens on all windows throughout the demised premises; replace rotten window sashes; repair defective electrical sockets; and redecorate the apartment. When the promised performance was not delivered, Little stopped paying rent. When eviction was sought, the tenant resisted, theorizing that the landlord's failure to properly maintain the demised premises is a defense to plaintiff's action.

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1. Javins v. First National Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970).
2. 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

SUTTON & PETERSON, INC. *v.* PRICE

Price entered into a written lease with Sutton & Peterson, Inc. on December 17, 1966, for an apartment in Chicago. The lease was renewed on April 4, 1968, and, allegedly, the landlord's agent orally promised that: all violations of the Chicago Housing Code would be cured; water damage to plaster and paint would be repaired; the halls and stairways would be adequately lighted; a workable buzzer system would be installed; adequate and safe electrical systems would be installed; and various animals harbored in the basement would be eliminated. Acting in a manner similar to that of tenant Little, tenant Price withheld rent when the promised maintenance work was not performed.

Unprecedented affirmative defenses for resisting eviction were proffered by the tenants in these cases.[3] In each instance, there were numerous defects upon the demised premises, representing violations of the Chicago Housing Code. Such defects, in the eyes of the tenant, rendered the premises unfit and unsafe for human habitation and, therefore, caused the landlord to breach an implied warranty of habitability. Each tenant urged the court to view the tenant's promise to pay rent as dependent upon the landlord's implied obligation to provide a habitable apartment.

WHAT IMPLIED WARRANTY?

The essential nature of the relationship between landlord and tenant developed in feudal England.[4] Having its origins in an agrarian society, the lease has been viewed primarily as a conveyance of a less-than-freehold estate and usual contract principles do not necessarily apply.[5] The landlord's prime duty has been to execute a valid conveyance and refrain from disturbing the tenant's peaceable possession of the demised premises.[6] In return, the creation of a tenancy obligated the tenant to pay rent. This obligation to pay was not generally terminated unless the tenant was dispossessed by the landlord's interfering action.

3. *See* ILL. REV. STAT. ch. 57 (1971).

4. *See* 1 AMERICAN LAW OF PROPERTY § 3.11 (A.J. Casner ed. 1952).

5. *Id.*

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

Traditionally, the most basic legal principle governing the relationship was the doctrine of *caveat emptor—i.e.*, the lease contained no warranty that the demised premises were fit for habitation.[7]

Another governing concept was the independent covenant doctrine.[8] As the landlord-tenant relationship was viewed primarily as a conveyance of land, all covenants entered into between the parties were deemed incidental. A two-level analysis has been applied in describing the relationship.[9] The basic or essential level involved the exchange of the implied quiet enjoyment duty for the payment of rent. A second tier developed as society became more urbanized. For instance, if a tenant renting an apartment was to receive light, decorating or the like, the failure of the landlord to fulfill these requirements at this level did not give the tenant the right to terminate.[10] In general, when faced with breach, the tenant's remedy was at law and recovery was limited to money damages.[11]

The concept of independence of covenants was applicable even to

7. The doctrine of *caveat emptor* is predicated on the assumption that the tenant inspects the demised premises and based thereupon decides to rent or not, depending upon his preferences. It has, therefore, been diminished in its harsh application where the landlord knows or has reason to know of a latent defect (*i.e.*, one which the tenant would not normally discover at the time of his initial inspection of the demised premises), existing at the commencement of the tenancy. Failure to disclose this defect may lead to tort liability. RESTATEMENT (SECOND) TORTS § 356 (1965). In addition, subsequent discovery of the defect, assuming it is material, may allow the tenant the option of rescission. PROSSER, THE LAW OF TORTS §§ 102-103 (3d ed. 1964). *See also* Sanford v. Lee, 248 Mich. 496, 227 N.W. 695 (1929); Clark v. Lewis, 139 Ark. 308, 213 S.W. 746 (1919).

Another exception has been drawn where the demised premises are rented fully furnished for short-term residential purposes. This exception has been drawn because the nature of the transaction is such that the tenant should not reasonably be expected to inspect the premises. *See also* Smith v. Marrable, 152 Eng. Rep. 693 (1843); Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892).

A final exception has been created when the tenant entered into a lease for premises yet to be constructed, since there is, obviously, no opportunity for the tenant to inspect. *See* Woolford v. Electronic Appliances, 24 Cal. App. 2d 385, 75 P.2d 112 (1938).

8. Quinn & Phillips, *supra* note 6, at 233.

9. Casner, *supra* note 4, at § 3.47.

10. "[P]artly because a lease is regarded primarily as a conveyance by the common law, partly because the law governing leases has been dealt with in connection with the law of real estate, and became settled before the law of mutually dependent promises was established, and partly no doubt because leases have ordinarily been elaborately written documents in which the parties might be supposed to have expressed their intent with considerable fullness . . . ." 3 WILLISTON, CONTRACTS § 890, at 2520 (Rev. ed. 1936).

11. Rubens v. Hill, 213 Ill. 523, 72 N.E. 1127 (1904).

promises obligating the landlord to maintain the demised premises. If the tenant were in a position of equal bargaining strength,[12] the use of an express lease covenant would be an appropriate method of providing adequate maintenance. However, even if the tenant is able to secure a covenant obligating the landlord to repair, traditional concepts place the renter in a less than ideal position.[13] Lease provisions to repair have been viewed to be independent of the duty to pay rent, and breach does not grant the tenant an option to terminate.[14]

Applying early common law principles, a doctrine of eviction existed, but afforded very few remedies to the tenant.[15] Should a tenant be physically evicted by the title paramount of another, the obligation to pay rent was suspended. While contract principles could have been utilized to reach this result, maxims of property law were brought into play in order to avoid a substantial departure from the past. The tenant's obligation to pay rent under these circumstances was ended based on the theory that the land would not earn the rent for payment in turn to the landlord.[16] The title paramount of another released the tenant as a breach of the covenant of quiet

12. "[N]o longer does the average prospective tenant occupy a free bargaining status and no longer do the average landlord-to-be and tenant-to-be negotiate a lease on an *'arm's length'* basis. Premises which, under normal circumstances, would be completely unattractive for rental are now, by necessity, at a premium. If our law is to keep in tune with our times we must recognize the present day inferior position of the average tenant vis-a-vis the landlord when it comes to negotiating a lease." Rectmeyer v. Sprecker, 431 Pa. 284, 290, 243 A.2d 395, 398 (1968).

13. 3 WILLISTON, CONTRACTS § 890 (Rev. ed. 1936).

14. When the landlord is in breach of a covenant of repair, the tenant must, if the defects are of a minor nature, make the repairs himself and sue the landlord for the cost. If, however, the defects are substantial, the tenant may sue for damages—the difference between the value of the premises in-repair and out-of-repair. Oppenheimer v. Szulerecki, 297 Ill. 81, 130 N.E. 325 (1921).

The tenant, faced with breach, may plead the cost of repairs or damages as a set-off when sued for rent due and owing. However, Illinois had not, until recently, allowed the tenant to raise the issue when being sued for possession. *Compare* Rubens v. Hill, 213 Ill. 523, 72 N.E. 1127 (1904) *with* Truman v. Redesch, 168 Ill. App. 304 (1912). This distinction has been changed by Spring v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972). *See* note 39 *infra* and corresponding text.

Finally, where the defects are of a substantial nature, the tenant need not make the repairs himself and hence the doctrine of constructive eviction may be available as a remedy, *infra* note 18 and corresponding text.

15. Rapacz, *Origins & Evolution of Constructive Eviction in the United States*, 1 DEPAUL L. REV. 69, 72 (1951).

16. *Id.* at 73.

enjoyment. The early case of *Pendleton v. Dyett*[17] introduced the concept of constructive eviction in the United States. In a black-letter law fashion, this doctrine has the effect of discharging the tenant from his obligation to pay rent when the landlord or his agent breaches a duty owed which substantially interferes with the tenant's beneficial enjoyment of the premises, provided the tenant abandons the demised premises within a reasonable time.[18]

While there has been considerable liberalizaton of the doctrine as originally promulgated, the tenant's remedy is predicated upon a showing that the deficiency in the condition of the demised premises results from the breach of some duty owed by the landlord. However, the doctrine of constructive eviction has not, in general, obviated the more basic concept of *caveat emptor*.[19] It has not in the course of time reformed the notion that a tenant must inspect the premises and rent or not, according to his preferences. The initial minimum condition of the premises has continued to be determined by the strength of the tenant's bargaining position, which, in eras of housing shortage, is nonexistent.

A myriad of solutions have been offered in order to place upon the landlord a threshold duty with respect to the condition of the premises being rented. Each attempts to assist the tenant in his bargaining with landlords. The most common solution proffered by courts and writers is an implied warranty of habitability.[20]

SURVEY OF APPROACHES

To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*.[21]

17. 4 Cow. 581 (N.Y. 1825).

18. As traditionally applied, the doctrine of constructive eviction was applicable only when each of the following elements were satisfied: (1) the landlord, or his agent, must intentionally act or fail to act in violation of an expressed or inferred obligation; (2) the act or omission must cause a material deprivation of the tenant's use and beneficial enjoyment of the premises; and (3) the tenant must vacate the premises within a reasonable length of time. *See generally* Rapacz, *supra* note 15; Casner, *supra* note 4, at § 3.51.

19. Rapacz, *supra* note 15, at 80.

20. *See generally* Peters, *Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord-Tenant*, 40 FORDHAM L. REV. 123 (1971).

21. Pines v. Perssion, 14 Wis. 2d 590, 596, 111 N.W.2d 409, 412-13 (1961).

In *Pines v. Perssion*,[22] several University of Wisconsin students rented a furnished house. After extended efforts to bring the premises into an adequate state of repair, they brought an action to rescind the lease, recover their rent deposit and a sum equivalent to the value of their maintenance labors. In treating this situation, the Wisconsin Supreme Court implied from the existence of building codes a policy judgment that dwellings should be habitable. The court also cited the shortage of adequate housing as a factor in reaching their result. The solution presented was the creation of an implied warranty which the lessor in the instant case had breached because the house, as rented, had defective plumbing, heating and wiring—all of which violated applicable building codes.

The Supreme Court of Hawaii, in *Lemle v. Breeden*,[23] was confronted with a tenant who abandoned a Tahitian-style home near Diamond Head when it was discovered that the house was rat-infested. The court decided to use this fact situation to announce:

> The application of an implied warranty of habitability in leases gives recognition to changes in leasing transactions today. It affirms the fact that a lease is, in essence, a sale as well as a transfer of an estate in land and is, more importantly, a contractual relationship.[24]

Given the contractual nature of the modern landlord-tenant relationship, the Hawaii court proceeded to justify the creation of an implied warranty of habitability and fitness for use by contemporary analogies.

> It is a doctrine [an implied warranty] which has its counterparts in the law of sales and torts and one which when candidly countenanced is impelled by the nature of the transaction and contemporary housing realities.[25]

The case which appears to have generated the widest notation is *Javins v. First National Realty Corporation*.[26] Here, an action for possession was instituted against a nonpaying tenant. The tenant raised as a defense the existence of numerous violations of the applicable housing code. In attacking this fact situation, the United States court of appeals not only announced the existence of an implied

22. 14 Wis. 2d 590, 111 N.W.2d 409 (1961).
23. 51 Hawaii 426, 462 P.2d 470 (1969).
24. *Id.* at 433, 462 P.2d at 474.
25. *Id.*
26. 428 F.2d 1071 (D.C. Cir. 1970).

warranty, but held that general contract principles should apply between landlord and tenant.

ILLINOIS SUPREME COURT

Citing *Javins* extensively, the Illinois Supreme Court utilized the conflict between Jack Spring and Emma Little to announce:

> [W]e hold that included in the contract, both oral and written, governing the tenancies of the defendants in the multiple unit dwellings occupied by them, is an implied warranty of habitability . . . .[27]

The court set forth at length the reasons supporting the imposition of this warranty. It reviewed the common law doctrine of *caveat emptor* which originated in an agrarian society where the understandable emphasis was upon the income-producing character of the soil. The mid-twentieth century urban dweller, however, bargains for the residential unit and not for fertile soil. The court also rendered an interesting commentary in which it contrasted the "jack-of-all-trades" farmer of previous generations and the simple accouterments of the 19th century farming homes with the complex apparatus which typify an urban apartment complex. Finally, the court reasoned that the typical city resident—at least those in need of protection—had neither the means nor desire to invest a substantial amount of money in their short-term housing unit.

Though articulating the existence of an implied warranty, the crucial question becomes: when is there a breach? The warranty, in the words of the supreme court, is "fulfilled by substantial compliance with the pertinent provisions of the Chicago building code."[28] While it was determined that the defendants had sufficiently shown violation of the standard to order a reversal and remand, the real impact of the decision will only be realized when this tight phrase is defined.

The District of Columbia court in *Javins v. First National Realty Corporation*,[29] the case so heavily cited by the Illinois Supreme Court, set their standard of habitability as full compliance with the

27. 50 Ill. 2d at 366, 280 N.E.2d at 217.
28. *Id.*
29. 428 F.2d 1071 (D.C. Cir. 1970).

applicable building code, but did cite that minor violations, unrelated to habitability, would not constitute breach.

There is, obviously, great apprehension as to how this standard will be applied. This fear was articulated by Mr. Justice Kluczynski in his dissenting opinion:

> The rule of law established by the opinion will do more harm than good. It will create a maze of practical problems of substantive and procedural nature, and will inundate the already understaffed metropolitan courts with a flood of protracted litigation. Numerous frivolous, trivial and spurious claims will unduly delay the termination of possessory rights in land and property.[30]

Still another crucial aspect of the landlord-tenant relationship was left ambiguous by the supreme court opinions; to wit: what is the tenant's remedy when faced with breach of the warranty? It appears reasonably clear that if an affirmative duty is placed upon the landlord via the warranty, then breach should afford the tenant the option of avoiding the tenancy by abandonment.[31] However, the court was quite clear that the decision should not be interpreted as relieving the tenant of the obligation to pay rent even though he is faced with the landlord's breach.[32] The right to abandon and rescind is not a real remedy.[33] Hence, the question is: what other relief is available?

A remedy suggested by the New Jersey court in *Marine v. Ireland*[34] would allow a tenant, faced with breach, the option of making the necessary repairs himself and deducting the cost from future rents.

30. 50 Ill. 2d at 372, 280 N.E.2d at 220.

31. Each of the major cases cited from other jurisdictions in recognizing the existence of an implied warranty of habitability indicated that the tenant, when faced with breach, was afforded the contract remedies of damages or rescission. *See* Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Javins v. First National Realty Corporation, 428 F.2d 1071 (D.C. Cir. 1970).

32. 50 Ill. 2d at 367, 280 N.E.2d at 217.

33. Commenting on that requirement of the doctrine of constructive eviction which requires abandonment of the premises by the tenant, one New York court said: "[The] rule rests upon the reasoning that if the premises in fact were not fit for occupancy, the tenant would not have retained possession but would have moved elsewhere, and his remaining in the premises belies any claim that they were not fit and habitable. Such a rule should prevail where a market of available apartment or dwelling accommodations exist. However, where there are no living accommodations available elsewhere or there is such a scarcity of them . . . [then] the reason upon which the rule is based disappears . . . ." Majen Realty Corp. v. Glotzer, 61 N.Y.S.2d 195, 196-97 (1946).

34. 56 N.J. 130, 265 A.2d 526 (1970).

While this solution does compel the landlord to place the demised premises in a habitable state, this approach is available to few tenants because they simply lack the funds to effectuate a result consonant with the projected remedy.[35]

Another remedy is proffered by some courts by ruling that a landlord-tenant "contract" entered into at a time when building code violations exist is illegal.[36] Because the landlord-tenant relationship is deemed void and unenforceable, the courts, while not treating the tenant as a trespasser, imply a tenancy-at-will which is subject to ready termination by either party. Such an approach represents a simplistic approach to a complex problem. In essence, this tenant remedy merely permits termination at will when the demised premises are not in compliance with minimum housing standards. It is, therefore, similar to giving the tenant a right of abandonment, but is not calculated to penalize a landlord who fails to keep the building within the standards set by applicable housing codes. One way of handling this approach would be to relieve the tenant of *all* rental obligations until evicted by court action.

In *Kline v. Burns*,[37] a somewhat cumbersome, but probably effective, remedy was suggested:

> If a material or substantial breach of the implied warranty of habitability is found, the measure of the tenant's damages is the difference between the agreed rent and the fair rental value of the premises as they were during the occupancy by the tenant in an unsafe, unsanitary or unfit condition. In other words, the tenant's rent liability will be limited to the difference between the agreed rent and the reasonable rental value in their condition while occupied.[38]

Clearly, this solution may well cause a serious delay in what has been rather routine eviction hearings;[39] however, other choices do seem

35. This result is drawn by analogy to the "repair and sue doctrine" applied where the landlord breaches an express covenant of repair, *supra* note 14.

36. Brown v. Southall Realty, 237 A.2d 834 (D.C. App. 1968).

37. 276 A.2d 248 (N.H. 1971).

38. *Id.* at 252.

39. In a New Jersey case where the tenant was suing for a refund of rent already paid because of the existence of building code violations, the court commented: "The most difficult aspect of this case is the determination of the amount of abatement to which the tenant is entitled. No expert testimony was produced to show the fair value of the premises without the services which the landlord was required to supply. The tenant urges that this be done on a finding of fact that there has been a percentage reduction in use which entitles the tenant to a corresponding abatement in rent. There is almost a complete absence of authority on

less desirable. Merely allowing the tenant the option of abandoning is not a meaningful remedy as the average city resident has no genuine alternative (*i.e.*, no other better place to move).[40]

While not explicitly announcing that the tenant, by virtue of a breach of the implied warranty, suffers damages which reduce his rental obligations, the Illinois Supreme Court clearly implied that it adopted such a rule in that section of the opinion which treated the procedural aspects of an eviction proceeding.

Having created the implied warranty of habitability, the Illinois Supreme Court was forced to review its impact upon the Forcible Entry and Detainer Statute.[41] The setting was simple. Each tenant had withheld rent because, in his eyes, a breach of the warranty existed. Not receiving the rent, the landlord proceeded to seek eviction, taking a position clearly consistent with traditional property concepts.[42]

In an eviction proceeding, based upon nonpayment of rent, the Illinois statute provides:

> The defendant may under a general denial of allegations of the complaint give in evidence any matters in defense of the action. No matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise.[43]

The question presented was: may the breach of the warranty be raised, as a defense, in an eviction proceeding? The court simply stated: Yes. Citing a 1937 amendment to the eviction statute, which reads, "a claim for rent may be joined in the complaint and judgment obtained for the amount of rent found due . . .,"[44] the court reasoned that since the essence of the landlord's action was predicated upon nonpayment of rent, the tenant may clearly introduce evidence that, because of the breach of warranty, none was due and owing.[45] To the extent the tenant raised as an affirmative

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the subject." Academy Spires, Inc. v. Brown, 111 N.J. Supp. 477, 485, 268 A.2d 556, 561 (1970).

40. For a study of the urban housing shortage and evidence that more than eight million live in substandard housing units, *see* H.R. Rep. No. 365, 89th Cong., 1st Sess. (1965).

41. ILL. REV. STAT. ch. 57 (1971).

42. *Supra* note 10, and corresponding text.

43. ILL. REV. STAT. ch. 57, § 5 (1971).

44. *Id.*

45. "It would be paradoxical, indeed, to hold that if there were actions to re-

defense the breach of express covenants to repair, the court held this nonperformance is germane to an eviction action.[46]

A final point dealt with by the Supreme Court in *Spring v. Little* increased the rights of indigent tenants by making the appellate process more accessible:

> [I]n so far as section 18 of the Forcible Entry and Detainer Act requires the furnishing of bond as a prerequisite to prosecuting an appeal, it is violative of the fourteenth amendment of the Constitution of the United States . . . .[47]

CONCLUSION

While *Spring v. Little* takes a major step in correcting substandard urban housing, it represents only the first in what will be a series of cases defining and refining the rights of tenants. Other decisions will undoubtedly be necessary to resolve the principal problem areas left open by the case. Of primary importance are the following questions: 1) What violations of applicable building codes constitute a breach of the warranty? And, 2) when faced with breach, what does the tenant do?

Addressing the latter query, the supreme court made it abundantly clear that breach does not, in and of itself, relieve the tenant of the obligation to pay rent if he retains possession. However, the breach can, to the extent damages are provable, reduce the amount of rent due and owing. If a tenant, faced with breach, utilizes a variation of "repair and sue," making the necessary repairs himself, then the damages are established. However, if the tenant lacks the funds to proceed in this way—how does he proceed? It can only be assumed that the tenant should withhold all rent, and when sued for rent or eviction raise the defense of breach and plead ready, will-

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cover sums owed for rent, the defendants would be permitted to prove that damages suffered as the result of the plaintiff's breach of warranty equaled or exceeded the rent claimed to be due, and, therefore, that no rent was owed, and at the same time hold that because the plaintiffs seek possession of the premises, to which admittedly, they are not entitled unless rent is due and unpaid after demand, the defendants are precluded from proving that because of the breach of warranty no rent is in fact owed." 50 Ill. 2d at 359, 280 N.E.2d at 213.

46. "Insofar as defendants' affirmative defenses alleged the breach of express covenants to repair, they were germane to the issue . . . ." 50 Ill. 2d at 359, 280 N.E.2d at 213.

47. 50 Ill. 2d at 355, 280 N.E.2d at 211.

ing and able to pay the rent due over and above the damages he has sustained.

Finally, in noting the enhanced rights of tenants, attention should be drawn to a recent pronouncement of the Illinois legislature which became law during 1972. This statute prohibits a landlord from inserting exculpatory clauses to shield himself from his own negligence.

> Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property, exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.[48]

48. ILL. REV. STAT. ch. 80, § 91 (Supp. 1972).