

Landlord and Tenant: Application of Implied Warranty

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RECENT DECISIONS

Landlord and Tenant—Application of Implied Warranty: The plaintiffs, four students at the University of Wisconsin in Madison, entered into a written one-year lease with the defendant landlord for a furnished house. The term of the lease was to commence Sept. 1, 1959. The agreed rent was to be \$175.00 per month prorated over nine months and a sum stipulated as three month's rent was deposited in advance of occupancy. The lease further provided that the house contain furnishings suitable for student housing. During the negotiations in June, 1959, leading to this agreement, the defendant stated he would clean up the house prior to its occupancy; the house at that time was in a concededly filthy condition. Upon their arrival the plaintiffs found that no improvement had been made in the condition of the premises. Discouraged with their own cleaning efforts they were advised by their attorney to call the Madison building department. Several code violations were found; these included inadequate wiring, toilet and sink facilities in disrepair, furnace in disrepair and an absence of sufficient screens and doors. The defendant was given until September 21st to correct the violations. The plaintiffs, however, quit the premises ten days prior to the date set by the building inspector and brought this action for the return of their deposit plus compensation for labor performed upon the leased premises.

The Wisconsin Supreme Court, in affirming the trial court's judgment for the plaintiffs, found that there was an implied warranty of habitability in the lease which was breached by the defendant. The court directed the trial court to enter judgment for the plaintiffs in the amount of the deposit plus an amount recoverable for their labor less reasonable rent for the period of their actual occupancy as determined by that court. *Pines v. Perssion*, 14 Wis. 2d 509, 111 N.W. 2d 409 (1961).¹

The great weight of authority supports the general rule that the lessor does not impliedly covenant or warrant the premises to be in a tenable, fit or suitable condition.² The law applies the doctrine of *caveat emptor*

¹ The trial court based its decision upon Wis. STAT. §234.17 (1959): "Where any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause as to be untenable, and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his fault or neglect, quit and surrender possession of the leasehold premises, and of the land so leased or occupied; and he is not liable to pay to the lessor or owner, rent for the time subsequent to the surrender." The Supreme Court however dismissed this in a summary manner: "We have doubt that Sec. 234.17, stats. applies under the facts of this case. In our opinion, there was an implied warranty of habitability in the lease and that warranty was breached by the appellant."

² 32 AM. JUR. *Landlord and Tenant* §654 (1941); 52 C.J.S. *Landlord and Tenant* §485 (1947); I AMERICAN LAW OF PROPERTY §3.45 (1952); TIFFANY, REAL PROPERTY §908 (3rd ed. 1959).

to this area since the lessee has opportunity to inspect the premises prior to occupancy,³ with the proviso that the landlord is liable for hidden defects of which he does not apprise the tenant.⁴ The doctrine had its origin in the common law where even the destruction of the leased premises did not exempt the lessee from the duty to pay rent unless provision was made for such a contingency in the written agreement to protect the lessee against the general operation of the doctrine.⁵ Wisconsin although having abrogated the harshness of this latter principle still looks with disfavor upon implied warranties in conveyances of real property and has by statutory provision virtually eliminated them except as they pertain to wills and leases for a term not exceeding three years.⁶

Operating within this area of the law classified as landlord and tenant is a generally recognized exception to the general rule of *caveat emptor*. This exception has been termed by the jurisdictions adhering to it as an implied warranty of habitability. By virtue of its decision in the instant case, the court has clearly placed Wisconsin within this group.⁷ However, the implied warranty operates only within the limited scope of short term leases of furnished premises.⁸ The doctrine is well stated in the leading case of *Ingalls v. Hobbs*,⁹ wherein the court was concerned with the rental of a furnished cottage for the summer vacation season. The lessee found the cottage infested with bugs, quit the premises and refused to pay the rent for the remainder of the term. In upholding the lessee's petition, the court enunciated the rule that in a lease of a completely furnished house for a single season there is an implied agreement that the house is fit for immediate habitation.¹⁰ Subsequently the Massachusetts court in *Hacker v. Nitschke*¹¹ applied this rationale to a personal injury action rising out of a defective bunk bed ladder in a furnished house, rented for four weeks. The doctrine has also been applied to a twenty-six week lease of a furnished house where there was a possibility of tuberculosis germs,¹² to an eight month tenancy of furnished premises which were infested with bedbugs,¹³ and also to

³ *Auer v. Vahl*, 129 Wis. 635, 109 N.W. 529 (1906); *Ratte v. Meirjohan*, 79 Ohio App. 387, 70 N.E. 2d 684 (1946); *Kutchera v. Graft*, 191 Iowa 1200, 184 N.W. 297 (1921).

⁴ *Hacker v. Nitschke*, 310 Mass. 754, 39 N.E. 2d 644 (1942); *Looney v. Smith*, 96 N.Y.S. 2d 607 (1950).

⁵ TIFFANY, REAL PROPERTY §908 (3rd. ed. 1939); This rule was changed by statute in Wisconsin: WIS. STAT. §234.17 (1959).

⁶ WIS. STAT. §235.02 (1959); Conveyance and purchaser defined at WIS. STAT. §235.50 (1959).

⁷ *Supra* note 1, at 595, 111 N.W. 2d at 412: "We have not previously considered this exception to the general rule."

⁸ *Supra* note 5.

⁹ 156 Mass. 348, 31 N.E. 286 (1892).

¹⁰ *Ibid.*

¹¹ *Hacker v. Nitschke*, *supra* note 4.

¹² *Collins v. Hopkins*, [1923] 2 K.B. 617.

¹³ *Young v. Povich*, 121 Me. 142, 116 Atl. 26 (1922).

an unfurnished apartment in a multiple dwelling unit infested with bedbugs.¹⁴ All the cases agree that an implied warranty of habitability attaches to short term leases of furnished houses or apartments. The *Delameter* case,¹⁵ however, extends the implied warranty to an *unfurnished* apartment in a multiple dwelling unit. The courts' reasoning in support of the warranty seems to be based on the fact that the lessee does not have ample opportunity to inspect the premises prior to occupancy and hence the harshness of the *caveat emptor* rule should not apply.

The Wisconsin court in implying this warranty to a furnished house extends the definition of "short term" to include a one year lease. Although none of the previously cited cases have precisely defined the duration of "short term," it has never been applied to a lease of this length. The impact of this decision may have a far reaching effect, for seemingly all leases of furnished dwellings or apartments, which are for a term of one year or less, would carry with them an implied warranty of habitability. The *Pines* decision would certainly affect student housing in and around Wisconsin's colleges and universities where heretofore the student has been somewhat at the mercy of the landlord due to the supply and demand factor in furnished dwelling units. The landlord under the *Pines v. Perssion* case would have to assure that the buildings were in fact habitable or suffer the possibility of frequent breaches of his lease agreements.

The factors determinative of the liability of the landlord to retain the deposit and the non-liability of the tenants to pay further rent in the instant case included the before mentioned building code violations, which the court relies on heavily and the general "filthy" condition.¹⁶ None of the previously cited cases related the implied warranty to violations of the local building codes. The court, however, in passing on the issues, was presented with three other factors that could have influenced the decision and which may in future analogous situations determine whether the landlord or tenant shall prevail. First, and foremost, was the landlord's own admittance that the premises were in a "filthy" condition; second, the fact that the tenants were unable to inspect the premises immediately prior to occupancy. Finally, that there was a non-determined factual issue as to whether or not the landlord had promised to repair the premises. To further qualify the general implications that code violations would excuse tenants from the lease agreement the court speaks of the desirability of eliminating protection for landlords who rent "tumbledown" houses¹⁷ but does not indicate that henceforth the lessee

¹⁴ *Delameter v. Foreman*, 184 Minn. 428, 239 N.W. 148 (1931).

¹⁵ *Ibid.*

¹⁶ *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W. 2d 409 (1961).

¹⁷ *Ibid.*

can rely on the technicalities of mere building code violations to abrogate his lease.

In adopting the exception to the general rule of *caveat emptor*, as applied to implied warranties, Wisconsin has afforded a greater degree of protection to the lessee who leases a furnished dwelling unit for one year or less, although the exact grounds upon which his remedy can be sought must await further court interpretation.

EDMUND C. CHMIELINSKI

Conspiracy—Evidentiary Value of Conscious Parallelism: The plaintiff in *Delaware Valley Marine Supply Company v. American Tobacco Company*¹ sought treble damages against five tobacco companies and their present distributor on the ground that the companies entered into a conspiracy in violation of Section 1 of the Sherman Anti-trust Act² by refusing to sell their tobacco products to the plaintiff. The plaintiff sought to organize a ship chandler concern, but, due to its inability to obtain tobacco products, never commenced to do business. All five tobacco companies were then selling to the defendant distributing company Lipschutz Bros., Inc., an already established and reliable firm. In addition, two of the tobacco companies had a second outlet. Thus it appears, and the court so found, that the defendant companies already had adequate representation in the market and that no real need for the plaintiff's services existed. As is the usual case in actions brought under Section 1, there was no direct evidence of an expressed agreement between the defendant companies. The Circuit Court of Appeals in affirming the trial court's directed verdict for the defendants viewed the evidence most favorable to the plaintiff, thereby deciding the case under the assumption that the five companies were each aware of the other's refusal to deal with the plaintiff.

The Sherman Anti-trust provision under which the action was brought in the main case is relatively clear. Its purpose is to prevent conspiracies, a conspiracy being "a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means."³ The difficulty arises in determining what is sufficient proof of the existence of a conspiracy and then actually obtaining the necessary quantum of proof. It is not necessary to prove a conspiracy by direct evidence of an express agreement, written or oral.

¹ *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F. 2d 199 (3d Cir. 1961), *cert. denied*, reported in B.N.A., Antitrust & Trade Reg. Rep., No. 38, p. A-8 (April 3, 1962).

² 26 Stat. 209 (1890), 15 U.S.C. §1 (1958): "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal."

³ EULER, MONOPOLIES AND FEDERAL ANTI-TRUST LAWS §16 (1929).