Recognition of an Implied Covenant of Habitability in Residential Leaseholds: Kamarath v. Bennett

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expansive reading of *Sugarman*'s language and leaves uncertain exactly when the Justices will invoke the *Sugarman* exception and use less demanding review. The *Foley* opinion also leaves unclear which form of scrutiny—strict, intermediate, or minimal—the Court will apply in any given case involving the denial of state employment to aliens.

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C.C. Bennett ordered his tenant, Wilford Kamarath, to vacate his apartment after the apartment building was found to violate the Dallas, Texas housing codes. The tenant refused, remaining for several months without paying rent. Kamarath then moved out and sued his former landlord to recover damages, claiming that the landlord's failure to maintain the premises in a habitable condition constituted a breach of their lease agreement. The trial court held that Bennett had neither breached the contract nor violated any duty imposed by law. The court of appeals affirmed,[1] reiterating the well-established common law rule that a landlord does not impliedly warrant that the leased premises are habitable or reasonably suited for occupancy. The Texas Supreme Court granted a writ of error. *Held, reversed*: There is an implied covenant of habitability imposed by law in residential leases which requires the unit to be suitable for living. *Kamarath v. Bennett*, 568 S.W.2d 658 (Tex. 1978).

I. Evolution of the Implied Covenant of Habitability

Traditionally, the doctrine of caveat emptor governed the lessor-lessee relationship,[2] and Texas courts uniformly followed that doctrine.[3] The landlord could agree to make needed repairs and maintain the condition

1. Kamarath v. Bennett, 549 S.W.2d 784 (Tex. Civ. App.—Waco 1977).

2. *See, e.g.*, Fetters v. City of Des Moines, 260 Iowa 490, 149 N.W.2d 815, 819 (1967) (dictum); Walsh v. Schmidt, 206 Mass. 405, 92 N.E. 496 (1910); Roan v. Bruckner, 180 Neb. 399, 143 N.W.2d 108 (1966); Franklin v. Brown, 118 N.Y. 110, 23 N.E. 126 (1889). *See generally* Comment, *The Implied Warranty of Habitability in Landlord-Tenant Relationships: The Necessity of Application in Texas*, 5 ST. MARY'S L.J. 64 (1973). *See also* Comment, *Implied Warranty of Habitability in Lease of Furnished Premises for Short Term: Erosion of Caveat Emptor*, 3 U. RICH. L. REV. 322 (1969); Note, *Implied Warranty of Habitability in Housing Leases*, 21 DRAKE L. REV. 300 (1972).

3. *See* Yarbrough v. Booher, 141 Tex. 420, 174 S.W.2d 47 (1943); Morton v. Burton-Lingo Co., 136 Tex. 263, 150 S.W.2d 239 (1941); Lynch v. Ortlieb, 70 Tex. 727, 8 S.W. 515 (1888); Weinstein v. Harrison, 66 Tex. 546, 1 S.W. 626 (1886); Kallison v. Ellison, 430 S.W.2d 839 (Tex. Civ. App.—San Antonio 1968, no writ); Goldstein v. Corrigan, 405 S.W.2d 425 (Tex. Civ. App.—Waco 1966, no writ).

of the premises, but the law imposed no such duty upon him.[4] The tenant could not avoid liability for nonpayment of rent if the premises became uninhabitable;[5] only when the landlord procured the lease by fraudulent or deceitful means could the tenant escape his obligations under the agreement.[6] Texas courts, however, did not apply the doctrine in two other areas of real estate law. First, caveat emptor was not applied to the lease of a building when construction thereof had not progressed sufficiently for the tenant to judge its suitability for the intended use.[7] Secondly, the supreme court more recently held that the doctrine was inapplicable to the sale of new houses by a builder-vendor.[8]

The common law rule has found little support among those courts that have recently passed upon the question.[9] The Supreme Court of Wisconsin was among the first to revise its stance.[10] In a probing reexamination of the doctrine of caveat emptor, the court reasoned that the legislature had made its intention known by passing laws and providing for administrative rules that set minimum requirements for housing.[11] The court determined that such legislation had rendered the traditional rule obsolete.[12]

Although most courts that have recognized a covenant of habitability to be implied in leases have followed the Wisconsin court's reasoning,[13] the Supreme Court of New Jersey has adopted a different approach. Rather than holding that the covenant arises from statutes or municipal codes, the

4. *See* Walling v. Houston & T.C.R.R., 195 S.W. 232 (Tex. Civ. App.—Dallas 1915, writ ref'd).

5. *See* Hoover v. Wukasch, 274 S.W.2d 458 (Tex. Civ. App.—Austin 1955, writ ref'd n.r.e.).

6. *See* Lynch v. Ortlieb, 70 Tex. 727, 8 S.W. 515 (1888).

7. J.D. Young Corp. v. McClintic, 26 S.W.2d 460 (Tex. Civ. App.—El Paso 1930), *rev'd on other grounds*, 66 S.W.2d 677 (Tex. Comm'n App. 1933, holding approved) (building leased after construction had begun but before construction had progressed to the point that tenant could judge its suitability for the intended use).

8. Humber v. Morton, 426 S.W.2d 554 (Tex. 1968).

9. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); 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 (1972); Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Commonwealth v. Monumental Properties, Inc., 459 Pa. 450, 329 A.2d 812 (1974).

Some jurisdictions have also imposed the covenant of habitability by statute. *See, e.g.*, CAL. CIV. CODE §§ 1941, 1942 (West 1954); MASS. ANN. LAWS ch. 239, § 8A (Michie/Law. Co-op Supp. 1978). *See generally* Comment, *Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord-Tenant?*, 40 FORDHAM L. REV. 123 (1971).

A few jurisdictions still adhere to the common law rule. *See, e.g.*, Knuckles v. Spaugh, 26 N.C. App. 340, 215 S.E.2d 825, *cert. denied*, 288 N.C. 241, 217 S.E.2d 665 (1975); Sheppard v. Nienow, 254 S.C. 44, 173 S.E.2d 343 (1970).

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

11. 111 N.W.2d at 412-13.

12. "[T]he legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner . . . . To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with current legislative policy concerning housing standards." *Id.*

13. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971).

court held that it arises from the intention of the parties, inferred from the terms of the lease.[14] In *Marini v. Ireland*[15] the court found the requisite intent in a description of the leased premises as a "4 rooms and bath, apartment" and a restriction of the tenant's use of the premises to that of a "dwelling."

The difference in approach can be important in determining whether an attempted waiver of the covenant is enforceable. In *Javins v. First National Realty Corp.*[16] the United States Court of Appeals for the District of Columbia held that the local housing code must be read into housing contracts. The court then stated: "The duties imposed by the Housing Regulations may not be waived or shifted by agreement if the Regulations specifically place the duty upon the lessor."[17] A waiver by the parties would therefore be ineffective.[18] If, instead, the intent of the parties is the source of the covenant, a waiver in the lease agreement would indicate that the parties did not intend to include the covenant in their agreement.[19] A growing body of consumer law suggests, however, that such a conclusion should not be drawn where the waiving party is at a clear disadvantage in bargaining power.[20]

Early suggestions that the implied covenant of habitability is a potential source of expanded tort liability for landlords[21] have not been supported by the courts. The New Jersey Supreme Court, for example, has refused to impose strict liability for personal injuries suffered on the leased premises, adhering instead to traditional negligence requirements.[22]

II. KAMARATH V. BENNETT

Against this background of changing landlord-tenant law, the Texas Supreme Court granted a writ of error to examine its longstanding adher-

14. Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Timber Ridge Town House v. Dietz, 133 N.J. Super. 577, 338 A.2d 21 (Super Ct. Law Div. 1975). The *Berzito* court held that the housing code was admissible in determining whether a breach of the implied warranty of habitability had occurred.

15. 56 N.J. 130, 265 A.2d 562, 533-34 (1970).

16. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

17. 428 F.2d at 1081-82.

18. *But see* Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972) (evidence of waiver was improperly excluded despite earlier reasoning that the covenant arose through the housing code); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971) (waiver listed as a factor to be considered in determining whether there had been a breach of the implied covenant).

19. New Jersey courts have consistently considered evidence of waiver of the covenant in determining the presence of a breach. *See, e.g.*, Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); Timber Ridge Town House v. Dietz, 133 N.J. Super. 577, 338 A.2d 21 (Super. Ct. Law Div. 1975).

20. *Cf.* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (contract of sale for furniture held unconscionable where buyer had no meaningful choice as to terms and where terms were so extreme as to appear unconscionable according to mores and business practices of time and place); Slaughter v. Jefferson Fed. Sav. & Loan Ass'n, 361 F. Supp. 590 (D.D.C. 1973) (cancellation of notes by court upon finding that financing was extended for unconscionable home improvement contracts).

21. J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 218 (2d ed. 1975).

22. Dwyer v. Skyline Apartments, Inc., 63 N.J. 577, 311 A.2d 1 (1973).

ence to the common law rule.[23] In line with the reasoning followed by the New Hampshire Supreme Court in *Kline v. Burns*,[24] the Texas court examined at length the context in which the landlord-tenant relationship originated.[25] The court noted that the leasehold was originally viewed as an estate in land governed by principles of property law.[26] In an agrarian society possession and the right to quiet enjoyment were central to the lessor-lessee relationship.[27] Today, however, the apartment dweller is not interested in procuring an estate in land; he is merely seeking a habitable place to live.[28] The court recognized that the legislature has responded to this change by granting home rule cities the authority to enact minimum housing standards and the power to enforce them.[29] The court observed that in the instant case the landlord admitted that the premises in question were in violation of such a housing code.[30]

In its analysis the court addressed three factors crucial to its decision that an implied covenant of habitability exists in residential leases: (1) the legislature's recognition that public welfare may demand that dwellings be fit for human habitation; (2) the landlord's superior knowledge of the premises he leases and the likelihood that he would know of housing code violations and latent defects when a tenant might not; and (3) the landlord's continued ownership of the premises after expiration of the lease, which makes it logical that he bear the cost of repairs necessary to make the premises habitable.[31] For these reasons, the court recognized an implied covenant of habitability in the rental of dwelling units.[32]

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23. Kamarath v. Bennett, 568 S.W.2d 658 (Tex. 1978). No Texas court of civil appeals had previously questioned adherence to the doctrine of caveat emptor.

24. 111 N.H. 87, 276 A.2d 248 (1971).

25. 568 S.W.2d at 659-60.

26. *Id.* at 560.

27. *Id.*

28. *Id.*

29. TEX. REV. CIV. STAT. ANN. art. 1175, § 35 (Vernon Supp. 1978).

30. 568 S.W.2d at 660.

31. *Id.*

32. *Id.* at 660-61. The supreme court's decision in *Kamarath* is directed only toward residential dwelling units. Inasmuch as the implied warranty of habitability is analogous to the implied warranty of fitness for a particular purpose in the sale of goods, TEX. BUS. & COM. CODE ANN. § 2.315 (Tex. UCC) (Vernon 1968), a question remains as to how far the courts will eventually go in replacing older, more rigid property law principles with current contract doctrines. As mentioned in the text accompanying note 8 *supra*, the Texas Supreme Court has for the past decade recognized an implied warranty of fitness for habitability in the sale of new homes. As contracts for the lease and sale of farmlands and business properties do not directly affect the public welfare to the extent that contracts on residential dwellings do, the court will probably draw a distinction. Should the situation arise, however, where the interest of the general public is threatened by adverse operation of the doctrine of caveat emptor in these areas, the court may respond in like fashion by recognizing some type of warranty of fitness for the intended use. Such a theory is strengthened by the legislature's inclusion of land sales and leases, in general, within the protections of the Deceptive Trade Practices-Consumer Protection Act. TEX. BUS. & COM. CODE ANN. § 17.45 (Vernon Supp. 1978). In concluding that an implied covenant of habitability exists in the rental of residential units, the court looked to the legislature's action in establishing authority for creation of minimum housing standards. Legislative concern in these other areas might be sufficient to convince a court to extend the new rule to the point that all property must be fit for its intended use.

The court clearly indicated that only those defects that "render the premises unsafe, unsanitary, or otherwise unfit for living therein" will result in a breach of the implied covenant of habitability.[33] The premises must be fit for living at the inception of the lease and must be maintained in such a condition.[34] Furthermore, a tenant may not subject the premises to harsh and abnormal uses which deteriorate the dwelling and subsequently claim that the landlord has breached his legal duty to keep the unit in suitable living condition.[35] In the final analysis, presence of a breach of the covenant is a question of fact which may only be resolved by weighing a variety of considerations.[36]

The court's opinion left unanswered several important questions. No opinion was expressed as to the proper measure of damages for breach of the covenant,[37] nor did the court rule upon the applicability of the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA)[38] to a breach

33. 568 S.W.2d at 661.

34. *Id.*

35. *Id.; see* J. CRIBBET, *supra* note 21, at 209-11.

36. 568 S.W.2d at 661. The court listed a number of factors to be considered in deciding whether the covenant has been breached. While the nature of the deficiency, its effect on the habitability of the structure, the length of time for which the defect has been present, and the age of the the structure represent physical considerations related to the condition of the premises, the amount of rent, location of the premises, presence of waiver provisions, and conduct of the tenant represent factors that should only be relevant when considering damages and affirmative defenses.

37. Prior to recognition of the implied covenant of habitability, the tenant could not recover damages, regardless of the condition of the premises. The lessee's only recourse was to vacate the premises at his peril and hope that the court would regard the poor conditions of his dwelling as having constructively evicted him. *See, e.g.*, Keating v. Springer, 146 Ill. 481, 34 N.E. 805 (1893); Higgins v. Whiting, 102 N.J.L. 279, 131 A. 879 (Sup. Ct. 1926). With recognition of the covenant, however, most courts have held that the basic contract remedies are available to the tenant upon the landlord's breach of the implied covenant of habitability. For example, the New Hampshire Supreme Court in Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971), held that the basic contract remedies of damages, reformation, and recission are available to a tenant following his landlord's breach. The court held that the tenant's rent liability was limited to the fair rental value of the premises while they were in an unfit, unsafe, or unsanitary condition. Such a holding was in line with the earlier holding by the United States Court of Appeals for the District of Columbia that the possible suspension of a tenant's obligation to pay rent was a question properly left to the jury. The jury could then determine whether all, part, or none of the rent for the period of the breach was due based on its evaluation of the fair rental value of the premises. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082-83 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

New Jersey's experience is perhaps the most instructive when considering remedies for breach of the implied covenant of habitability. In Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970), the New Jersey Supreme Court provided for the self-help remedy of abatement once proper notice of the needed repairs had been given to the lessor. The tenant was allowed to make the necessary repairs and deduct their cost from the rent as it became due. The court, however, did not recognize the availability of damages in *Marini*. That development came two months later in Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (Essex County Ct. 1970). Although the latter case was distinguishable from *Marini* in that it concerned a multifamily dwelling and no written lease, the court held the *Marini* principles were nonetheless applicable. The lessor argued that under *Marini* the tenant's sole option was to make the repairs or move. The court dismissed such a contention as placing "an emphasis on form, technicality, and fiction." The tenant was then allowed to withhold the difference between the agreed rental and the fair rental value of the premises in the unrepaired condition, thereby establishing a setoff for damages.

38. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1978).

of the implied covenant of habitability. Under the DTPA a consumer may maintain an action if he has been adversely affected by the breach of an implied warranty.[39] Thus, if breach of the implied covenant of habitability is found to be a violation of the DTPA, the lessor might be held liable for treble the tenant's actual damages plus court costs and reasonable attorney's fees.[40]

One writer has suggested that the court implied that landlords might be able to disclaim the covenant of habitability effectively by use of a waiver.[41] If such a conclusion is proper, the implication was made despite express recognition by the court that "[i]n the present day housing market, the landlord is usually in a much better bargaining position than the tenant which could result in the rental of poor housing and violation of public policies."[42] Whether the court will subsequently apply principles of unconscionability to negate or limit the use of warranty waivers is an open question.[43] The supreme court recognized a similar problem in *Crowell v. Housing Authority*,[44] in which it held that an exculpatory clause will be considered void "where one party is at such disadvantage in bargaining power that he is practically compelled to submit to the stipulation."[45] Use of a disclaimer of the implied covenant of habitability as a standard clause in lease agreements would give the tenant little if any choice.

Even if such a waiver is not void under the traditional contract doctrine of unconscionability, its inclusion as a standard clause might constitute an "unconscionable action or course of action" under the statutory definition in the DTPA.[46] In fact, a waiver of the covenant might be totally ineffec-

39. *Id.* § 17.50(a)(2).

40. Such a conclusion would enable aggrieved tenants to gain access more readily to the courts, thereby discouraging the maintenance of dwelling units in an uninhabitable condition. In any event, the landlord could avoid treble damages by curing the defect. *Id.* § 17.50A(3).

41. Heath, *The Implied Warranty of Habitability*, PROB. & PROP., Summer 1978, at 9. Heath also suggests that a waiver of the implied covenant of habitability should comply with TEX. BUS. & COM. CODE ANN. § 2.316 (Tex. UCC) (Vernon 1968). On the other hand, he notes that *id.* § 2.302 provides for the defense of unconscionability.

In fact, the Texas Apartment Association has released a new standardized lease form that waives the implied covenant of habitability. The Dallas Morning News, Sept. 6, 1978, at 1A, col. 4. The Texas Tenants Rights Association, a coalition of tenants' groups, has announced its intention to file suit over the new lease form. *Id.*

42. 568 S.W.2d at 660.

43. *See* notes 16-20 *supra* and accompanying text for a discussion of the manner in which other jurisdictions have dealt with waivers.

44. 495 S.W.2d 887 (Tex. 1973) (Exculpatory clause read as follows: "[N]or shall the Landlord nor any of its representatives or employees be liable for any damage to person or property of the Tenant, his family, or his visitors, which might result from the condition of these or other premises of the Landlord, from theft or from any cause whatsoever." The clause was declared void insofar as it affected the Authority's liability for medical expenses incurred and pain and suffering of tenant who was alleged to have died of carbon monoxide poisoning from a defective gas heater.)

45. *Id.* at 889.

46. The statutory definition of an unconscionable action or course of action is:

> [A]n act or practice which, to a person's detriment: (A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or (B) results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration.