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111 N.W.2d 409
14 Wis.2d 590
Burton PINES et al., Respondents,
v.
Leon PERSSION, Appellant.
Supreme Court of Wisconsin.
Oct. 31, 1961.

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[14 Wis.2d 591] Action by plaintiffs Burton Pines, Gary Weissman, David Klingenstein and William Eaglestein, lessees, against defendant Leon Perssion, lessor, to recover the sum of $699.99, which was deposited by plaintiffs with defendant for the fulfillment of a lease, plus the sum of $137.76 for the labor plaintiffs performed on the leased premises. After a trial to the court findings of fact and conclusions of law were filed which determined that plaintiffs could recover the lease deposit plus $62 for their labor, but less one month's rent of $175. From a judgment to this effect defendant appeals. Plaintiffs have filed a motion for review of that part of the judgment entitling defendant to withhold the sum of $175.

At the time this action was commenced the plaintiffs were students at the University of Wisconsin in Madison. Defendant was engaged in the business of real estate development and ownership. During the 1958-1959 school year plaintiffs were tenants of the defendant in a student rooming house. In May of 1959 they asked the defendant if he had a house they could rent for the 1959-1960 school year. Defendant told them he was thinking of buying a house on the east side of Madison which they might be interested in renting. This was the house involved in the lease and is located at 1144 East Johnson street. The house had in fact been owned and lived in by the defendant since 1951, but he testified he misstated the facts because he was embarrassed about its condition.

Three of the plaintiffs looked at the house in June, 1959 and found it in a filthy condition. Pines testified the defendant stated he would clean and fix up the house, paint it, provide the necessary furnishings and have the house in [14 Wis.2d 592] suitable condition by the start of the school year in the fall. Defendant testified he told plaintiffs he would not do any work on the house until he received a signed lease and a deposit. Pines denied this.

The parties agreed that defendant would lease the house to plaintiffs commencing September 1, 1959 at a monthly rental of $175 prorated over the first nine months of the lease term, or $233.33 per month for

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September through May. Defendant was to have a lease drawn and mail it to plaintiffs. It was to be signed by the plaintiffs' parents as guarantors and a deposit of three months' rent was to be made.

Defendant mailed the lease to Pines in Chicago in the latter part of July. Because the plaintiffs were scattered around the country, Pines had some difficulty in securing the necessary signatures. Pines and the defendant kept in touch by letter and telephone concerning the execution of the lease, and Pines came to Madison in August to see the defendant and the house. Pines testified the house was still in terrible condition and defendant again promised him it would be ready for occupancy on September 1st. Defendant testified he said he had to receive the lease and the deposit before he would do any work on the house, but Pines could not remember him making such a statement.

On August 28th Pines mailed defendant a check for $175 as his share of the deposit and on September 1st he sent the lease and the balance due. Defendant received the signed lease and the deposit about September 3rd.

Plaintiffs began arriving at the house about September 6th. It was still in a filthy condition and there was a lack of student furnishings. Plaintiffs began to clean the house themselves, providing some cleaning materials of their own, and did some painting with paint purchased by

defendant. They became discouraged with their progress and contacted an attorney with reference to their status under the lease. [14 Wis.2d 593] The attorney advised them to request the Madison building department to inspect the premises. This was done on September 9th and several building code violations were found. They included inadequate electrical wiring, kitchen sink and toilet in disrepair, furnace in disrepair, handrail on stairs in disrepair, screens on windows and doors lacking. The city inspector gave defendant until September 21st to correct the violations, and in the meantime plaintiffs were permitted to occupy the house. They vacated the premises on or about September 11th.

The pertinent parts of the lease, which was dated September 4, 1959, are as follows:

'1. For and in consideration of the covenants and agreements of the Lessees hereinafter mentioned, Lessor does hereby devise, lease and let unto Lessees the following described premises, to-wit:

'The entire house located at 1144 East Johnson Street, City of Madison, Dane County, Wisconsin, including furniture to furnish said house suitable for student housing.

'2. Lessees shall have and hold said demised premises for a term of one (1) year commencing on the first day of September, 1959 * * *

'3. [Total annual rent was $2100, to be paid in monthly installments in advance, prorated over the first nine months of the term, or $233.33 per month. The deposit of three months' rent of $699.99 was to be applied for March, April and May of 1960.]

'4. The Lessees also agree to the following: * * * to use said premises as a private dwelling house only * * *

'7. If Lessees shall abandon the demised premises, the same may be re-let by Lessor for such reasonable rent, comparable to prevailing rental for similar premises, and upon such reasonable terms as the Lessor may see fit; and if a sufficient sum shall not be realized, after paying the expenses of re-letting, the Lessees shall pay and satisfy all deficiencies * * *'

The trial court concluded that defendant represented to the plaintiffs that the house would be in a habitable condition[14 Wis.2d 594] by September 1, 1959; it was not in such condition and could not be made so before October

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1, 1959; that sec. 234.17, Stats. applied and under its provisions plaintiffs were entitled to surrender possession of the premises; that they were not liable for rent for the time subsequent to the surrender date, which was found to be September 30, 1959.

Wilkie, Anderson, Bylsma & Eisenberg, Madison, for appellant.

Immell, Herro, Buehner & DeWitt, Duane P. Schumacher, Robert D. Martinson, Madison, for respondents.

MARTIN, Chief Justice.

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.

There is no express provision in the lease that the house was to be in habitable condition by September 1st. We cannot agree with respondents' contention that the provision for 'including furniture to furnish said house suitable for student housing' constitutes an express covenant that the house would be in habitable condition. The phrase 'suitable for student housing' refers to the 'furniture' to be furnished and not to the general condition of the house.

Parol evidence is inadmissible to vary the terms of a written contract which is complete and unambiguous on its face. Hunter v. Hathaway,

1901, 108 Wis. 620, 84 N.W. 996; 32 Am.Jur., Landlord and Tenant, secs. 130, 134.

The general rule is that there are no implied warranties to the effect that at the time a lease term commences the premises are in a tenantable condition or adapted to the purposes for which leased. A tenant is a purchaser of an [14 Wis.2d 595] estate in land, and is subject to the doctrine of caveat emptor. His remedy is to inspect the premises before taking them or to secure an express warranty. Thus, a tenant is not entitled to abandon the premises on the ground of uninhabitability. See I American Law of Property, sec. 3.45; 32 Am.Jur., Landlord and Tenant, sec. 247.

There is an exception to this rule, some courts holding that there is an implied warranty of habitability and fitness of the premises where the subject of the lease is a furnished house. This is based on an intention inferred from the fact that under the circumstances the lessee does not have an adequate opportunity to inspect the premises at the time he accepts the lease. premises at the time he accepts the lease. 35 N.Y.Univ.L.Rev. 1279, 1283-1287; Collins v. Hopkins (1923), 2 K.B. 617, 34 A.L.R. 703, 705. In the Collins Case the English court said:

'Not only is the implied warranty on the letting of a furnished house one which, in my own view, springs by just and necessary implication from the contract, but it is a warranty which tends in the most striking fashion to the public good and the preservation of public health. It is a warranty to be extended rather than restricted. (Emphasis supplied.)'

See, also, Delamater v. Foreman, 1931, 184 Minn. 428, 239 N.W. 148; Ingalls v. Hobbs, 1892, 156 Mass. 348, 31 N.E. 286, 16 L.R.A. 51.

We have not previously considered this exception to the general rule. Obviously, however, the frame of reference in which the old common law rule operated has changed.

Legislation and administrative rules, such as the safeplace statute, building codes and health regulations, all impose certain duties on a property owner with respect to the condition of his premises. Thus, the legislature has made [14 Wis.2d 596] a policy judgment--that it is socially (and politically) desirable to impose these duties on a property owner--which has rendered the old common law rule obsolete. To follow the old rule of no implied warranty of habitability in leases

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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 cliche, caveat emptor. Permitting landlords to rent 'tumbledown' houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners.

There is no question in this case but that the house was not in a condition reasonably and decently fit for occupation when the lease term commenced. Appellant himself admitted it was 'filthy,' so much so that he lied about owning it in the first instance, and he testified that no cleaning or other work was done in the house before the boys moved in. The filth, of course, was seen by the respondents when they inspected the premises prior to signing the lease. They had no way of knowing, however, that the plumbing, heating and wiring systems were defective. Moreover, on the testimony of the building inspector, it was unfit for occupancy, and:

'The state law provides that if the building is not in immediate danger of collapse the owner may board it up so that people cannot enter the building. His second choice is to bring the building up to comply with the safety standards of the code. And his third choice is to tear it down.'

The evidence clearly showed that the implied warranty of habitability was breached.

Respondents' covenant to pay rent and appellant's covenant to provide a habitable house were mutually dependent, and thus a breach of the latter by appellant relieved respondents of any liability under the former.

[14 Wis.2d 597] Since there was a failure of consideration, respondents are absolved from any liability for rent under the lease and their only liability is for the reasonable rental value of the premises during the time of actual occupancy. That period of time was determined by the trial court in its finding No. 9, which is supported by the evidence. Granting respondents' motion for review, we direct the trial court to find what a reasonable rental for that period would be and enter judgment for the respondents in the amount of their deposit plus the amount recoverable for their labor, less the rent so determined by the court.

Cause remanded with instructions to enter judgment for the respondents consistent with this opinion. Respondents may tax double costs in this court for appellant's failure to comply with Rule 6(3), W.S.A. 251.26 as to inclusion of record or appendix page references in the statement of facts.