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Notes and Comments: Covenants of Habitability in Short Term Leases

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COVENANTS OF HABITABILITY IN SHORT TERM LEASES

Covenants of habitability are not new to leases of short duration, but their acceptance has not yet been universally recognized. The author suggests that such covenants are both desirable and necessary.

I. INTRODUCTION

At common law there was no implied covenant that leased premises would be habitable upon the commencement of the tenancy.[1] However, some courts recognized the exception that a furnished dwelling leased for a short term was presumed to be habitable for the purpose of immediate occupancy.[2] More recently, the United States Court of Appeals for the District of Columbia held that a covenant of habitability will be implied in law in leases of residential dwellings;[3] the conditions to which the covenant relates are to be found in the Housing Regulations of the District of Columbia.

Maryland follows the doctrine that there is no implied warranty that a leased dwelling house shall be fit for habitation.[4] With the exception of local public legislation,[5] such is the present state of the law. This comment will review the inadequacies of this legal posture in regard to leases of less than a year's duration.

II. THE DOCTRINE *CAVEAT EMPTOR* IN AN URBAN SOCIETY

Whereas the doctrine of *caveat emptor* was arguably suited for an agrarian society, its continued utilization in an urban setting cannot be

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1. *E.g.*, State *ex rel.* Bohom v. Feldstein, 207 Md. 20, 113 A.2d 100 (1955).
2. Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892); Smith v. Marrable, 11 M. & W. 5, 152 Eng. Rep. 693 (1834); Young v. Povich, 121 Me. 141, 116 A. 26 (1922).
3. Javins v. First Nat'l. Realty Corp., 428 F.2d 1071 (1970).
4. State *ex rel.* Pumphrey v. Manor Real Estate & Trust Co., 176 F.2d 414, 417 (4th Cir. 1949), held the landlord liable to the tenant for injury arising out of uninhabitable premises when the portion of the premises wherein the tenant sustained injury is under the control of the landlord; however, absent such control, the landlord is not liable for injury sustained by the tenant.
5. *E.g.*, Baltimore City residents may invoke breach of an implied warranty of habitability.
   (a) In any written or oral lease or agreement for rental of a dwelling intended for human habitation, the landlord shall be deemed to covenant and warrant that the dwelling is fit for human habitation. If the dwelling is not fit for human habitation, the tenant . . . is entitled to the following remedies . . . .
   (1) An action . . . for breach of contract or warranty which may include a prayer

justified. As early as 1892, the Massachusetts court in *Ingalls v. Hobbs*[6] held that a lease of a completely furnished dwelling house for a single season at a summer watering place contained an implied warranty that the house was fit for habitation. The test applied was that one hiring such furnished dwelling should not be expected to make other than reasonable preparation in appropriating the dwelling to the use for which it was designed.[7]

While a few courts exercised a cautious willingness to overlook the common law doctrine that leases contained no implied covenant of habitability, the evolving exception regarding furnished dwellings leased for a short term was strictly construed, being limited to "temporary" rentals,[8] defects existing at time of rental,[9] and defects in furnishing.[10] It was implicit in these decisions that the lessee was bargaining for the opportunity to enjoy the premises as a temporary dwelling and that the continued application of the doctrine *caveat emptor* was not designed to satisfy that end. The *Ingalls* court reasoned that the lessee bargained not only for the opportunity to enjoy the premises, but also for the opportunity to enjoy them without either the delay or the expense of preparing the dwelling for use.[11] Accordingly, the doctrine of *caveat emptor* (the essence of which placed the burden of uninhabitable premises on the lessee) would often work an unnecessary injustice on the lessee.[12]

In *Lemle v. Breeden*,[13] the plaintiff leased a furnished home in the Diamond Head area of Honolulu and, upon occupancy, discovered it to be infested with rats. He immediately notified the landlord's agent of his intention to vacate and demanded a return of his deposit. The court recognized an implied warranty that a leased dwelling must be habitable and fit for the use intended.[14] It further indicated that "common law conceptions of a lease and the tenant's liability for rent are no longer viable,"[15] in that many lessees in today's urban society no longer reap the rent from the land, their interest being the leasing of premises solely for residential purposes. An additional reason for recognition of the warranty is that it is the lessee's obvious purpose to obtain immediate possession of premises that are in a suitable condition.[16] Further, in

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for recision [*sic*] of the contract:
(2) Recision [*sic*] of the contract including the return of all deposits and money towards rent paid during the period of the breach of the warranty of habitability . . . .

Law of May 17, 1972, Ch. 481, § 9-14.1(a), [1971] Laws of Md. 1053.

6. 156 Mass. 348, 31 N.E. 286 (1892).
7. *Id.* at 351, 31 N.E. at 287.
8. *See* Murray v. Albertson, 50 N.J.L. 167, 13 A. 394 (Ct. Err. & App. 1888).
9. *See* Davenport v. Squibb, 320 Mass. 629, 632-33, 70 N.E.2d 793, 795 (1947).
10. *See* Murray v. Albertson, 50 N.J.L. 167, 13 A. 394 (1888).
11. 156 Mass. 348, 350, 31 N.E. 286 (1892).
12. *Id.*
13. 51 Hawaii 426, 462 P.2d 470 (1969).
14. *Id.* at 433, 462 P.2d at 474.
15. *Id.* at 430, 462 P.2d at 473.
16. *Id.*

Lund v. MacArthur,[17] the covenant of habitability was extended to include unfurnished as well as furnished dwellings; however, the court stated that the defect must be material in order to constitute a breach of the implied covenant of habitability.[18]

In *Marini v. Ireland*,[19] the plaintiff-tenant was permitted to deduct the cost of repairs of a toilet on the premise that the purpose of the lease was to supply the tenant with suitable living quarters. The court recognized that the letting of residential dwellings demands that the premises be safe from latent defects, and that the covenant of habitability therefore guarantees that facilities vital to the use thereof will be free from "faulty original construction or deterioration" from and after the commencement of the tenancy.[20]

III. THE DOCTRINE OF CONSTRUCTIVE EVICTION

In the absence of an implied covenant of habitability, the tenant is confronted with two courses of action: either he remains under the terms of the lease or he vacates. However, if the tenant chooses the latter, he is compelled to comply with the requirements of the doctrine of constructive eviction. The doctrine of constructive eviction requires that the tenant vacate within a reasonable time after giving notice that the premises are uninhabitable or unfit for the tenant's purpose.[21] If the tenant fails to vacate within a reasonable time, he waives his right to terminate the lease, such right being based on the landlord's breach of the implied covenant of quiet enjoyment.[22]

In effect, the doctrine is no more than a legal fiction analogous to the breach of a material covenant in a bilateral contract.[23] In order to terminate the lease upon abandonment, the tenant carries with him the burden of establishing facts sufficient to constitute constructive eviction;[24] but if the lessee wishes to remain, he has *no* remedies when, in fact, he should be afforded the opportunity (at the landlord's expense) to remedy those defects which have rendered the premises uninhabitable.[25] This can be accomplished by allowing the tenant to deduct from his rent the reasonable cost of repairs made which are necessary to restore the premises to a habitable condition.[26]

Where housing has been scarce, a few courts have permitted lessees to remain in occupancy beyond an otherwise "reasonable" time without

17. 51 Hawaii 473, 462 P.2d 482 (1969).
18. *Id.* at 476, 462 P.2d at 483.
19. 56 N.J. 130, 265 A.2d 526 (1970).
20. *Id.* at 144, 265 A.2d at 533-34.
21. *See* McNally v. Moser, 210 Md. 127, 122 A.2d 555 (1955).
22. *See* Automobile Supply Co. v. Scene-In-Action Corp., 340 Ill. 196, 172 N.E. 35 (1930).
23. Lemle v. Breeden, 51 Hawaii 426, 434, 462 P.2d 470, 475 (1969).
24. *Id.* at 434-35, 462 P.2d at 475.
25. Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).
26. *Id.* at 146, 265 A.2d at 535.

waiving their right to terminate the lease.[27] However, this course of action is inadequate: if the tenant chooses to remain, he continues occupying uninhabitable premises. In the alternative, "[i]t is of little comfort to a tenant in these days of housing shortage to accord him the right, upon constructive eviction, to vacate the premises and terminate his obligation to pay rent."[28]

IV. DEPENDENT AND INDEPENDENT COVENANTS

The present problem is to a great extent attributable to the treatment of lease covenants as independent. Under traditional property law, lease covenants may arise in one of two ways: 1) a covenant must be express; or 2) a covenant must arise by implication. The latter is restricted to a situation where such a construction is necessary and indispensable to carry into effect the purpose of the lease.[29] Covenants in the law of contracts, however, are more readily implied, as the courts there attach primary importance to the object intended by the parties when the agreement was consummated.[30] "Where the acts or covenants of the parties are concurrent, and to be done or performed at the same time, the covenants are dependent, and neither party can maintain an action against the other, without averring and proving performance on his part."[31] Conversely, covenants in lease agreements have been treated as independent[32] in that one party can successfully bring suit without having to prove his own performance. Thus, if the landlord breached one of his covenants, the tenant was required to continue paying rent.[33] Though covenants in certain instances have been held to be dependent, the result here was merely to give the tenant a right to discontinue rent payments upon removing himself from the premises.[34] However, an advantage in viewing the lease covenants as dependent, by adopting the contract theory, is the availability to the tenant of the basic contract remedies of damages, reformation and rescission.[35]

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27. Barash v. Pennsylvania Terminal Real Estate Corp., 31 A.D.2d 342, 81 N.E.2d 65, 298 N.Y.S.2d 153 (1969).
28. Marini v. Ireland, 56 N.J. 130, 146, 265 A.2d 526, 535 (1970).
29. *Id.* at 143, 265 A.2d at 533.
30. *Id.*
31. Higgins v. Whiting, 102 N.J.L. 279, 280, 131 A. 879, 880 (Sup. Ct. 1925).
32. *See, e.g.*, Ng v. Warren, 79 Cal. App. 2d 54, 179 P.2d 41 (1947).
33. *See* Gombo v. Martise, 44 Misc. 2d 239, 253 N.Y.S.2d 459 (App. T. 1964), wherein the tenants were precluded from claiming constructive eviction as a defense to landlord's non-payment proceeding because the tenants had not actually removed from the premises. The result therefore was to require the tenant to continue paying rent even though his right to quiet enjoyment was being breached. Note, however, that a new trial was ordered to determine whether New York's "rent strike" provision could be utilized by the tenant.
34. *See* Stevenson Stanoyevich Fund v. Steinacher, 125 N.J.L. 326, 15 A.2d 772 (Sup. Ct. 1940); Higgins v. Whiting, 102 N.J.L. 279, 131 A. 879 (Sup. Ct. 1925); McCurdy v. Wychoff 73 N.J.L. 368, 63 A. 992 (Sup. Ct. 1906); Weiler v. Pancoast, 71 N.J.L. 414, 58 A. 1804 (Sup. Ct. 1904).
35. Lemle v. Breeden, 51 Hawaii 426, 436, 462 P.2d 470, 475 (1969).

V. CONSUMER PROTECTION IN LEASE AGREEMENTS

Maryland law provides that, unless excluded or modified, in every sale of an improvement[36] to real estate there is an implied warranty that the improvement is:

> (1) Free from faulty materials,
> (2) Constructed according to sound engineering standards,
> (3) Constructed in a workmanlike manner, and
> (4) Fit for habitation,
> at the time of delivery of the deed to a completed improvement . . . .[37]

Certainly, a lease of residential premises for a specified period of time is as worthy of warranty protection as is an improvement to real estate in that the lessee, like the purchaser of a home, is attempting to obtain the utility of a place in which to live for a given period of time. If a purchased home must be fit for habitation (and the Maryland legislature has so stated[38]) then the rented premises should be afforded similar protection. There is an inconsistency of logic in according one party warranty protection and not the other, when both parties are seeking the same end.

Furthermore, the *policy* underlying warranty provisions as applied in the area of the sale of goods[39] may also be applicable to this problem by analogy.[40] Article 2 of the Uniform Commercial Code grants an implied warranty, unless excluded or modified, that goods purchased from a merchant[41] seller "are fit for the ordinary purpose for which such goods are used."[42] Further, if the seller has reason to know of the particular purpose for which such goods are to be utilized, and that the buyer is relying on the seller's skill and judgment to select and furnish

36. "Improvement" includes all newly constructed private dwelling units and all fixtures and structures which are made a part of the newly constructed private dwelling units at the time of their construction by building contractors. MD. ANN. CODE art. 21, § 95B (Supp. 1971).
37. *Id.* § 95B (a).
38. *Id.* § 95B (a)(4).
39. "'Goods' means all things (including specially manufactured goods) which are moveable at the time of identification to the contract for sale. . . ." MD. ANN. CODE art. 95B, § 2-105 (1964).
40. *See* Sawyer v. Pioneer Leasing Corp., 244 Ark. 943, 428 S.W.2d 46 (1968); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965); Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House, 59 Misc. 2d 226, 298 N.Y.S.2d 392 (Civ. Ct. 1969), wherein it was recognized that the Code may be applied by analogy to the extent that policies underlying a lease of personal property have been similar to those found in a sale.
41. "'Merchant' means a person who deals in goods of the kind or otherwise . . . holds himself out as having knowledge or skill peculiar to the practice or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."
MD. ANN. CODE art. 95B, § 2-104(1) (1964).
42. *Id.* § 2-314(2)(c).

suitable goods, there is an implied warranty that the goods shall be fit for that purpose.[43] Additionally, in Maryland, a seller's language, oral or written, attempting to exclude or modify warranties of merchantability and fitness for a particular purpose is unenforceable when dealing with consumer goods.[44] The policy underpinnings of these sections may well be utilized in formulating a solution to present inadequacies in residential leases. Arguably, a lease of premises to be used as a dwelling is a "sale" of a space which will be "consumed" over the term of the lease. Accordingly, it is submitted that if a merchant seller[45] impliedly warrants that his goods are suitable for the ordinary purpose for which such goods are to be used, then too, a knowledgeable lessor should warrant that the premises which are the subject of the lease are fit for habitation where the lessor knows that the premises are to be utilized as a place of habitation.

VI. SOCIAL CONSIDERATIONS

This era of rapid population increase has expanded the need and social desirability for adequate housing.[46] "Permitting landlords to rent 'tumbledown' houses is at least a contributing cause to such problems as urban blight, juvenile delinquency and high taxes to conscientious landowners."[47] In light of such factors, the doctrine of *caveat emptor* can no longer be validly entertained.[48] Since the lessor has superior knowledge of the condition of the premises, is made knowledgeable of building code requirements and violations, and is in a better position, by virtue of his expertise, to know of latent defects (structural or otherwise),[49] it should be his duty to assume the responsibility for discovering and remedying conditions which have rendered or threaten to render the premises uninhabitable. As stated in the dissenting opinion in *Bowles v. Mahoney*,[50] "It is fair to presume that no individual would voluntarily choose to live in a dwelling that had become unsafe for human habitation."[51]

In *Brown v. Southall Realty Co.*,[52] the court held that a lease executed by the owner of dwelling property was void[53] if the owner, at the time of executing the lease, knew of existing housing code

43. *Id.* § 2-315.
44. MD. ANN. CODE art. 95 B, § 2-316A (Supp. 1972).
45. See note 41 *supra*.
46. Pines v. Perssion, 14 Wis. 2d 590, 596, 111 N.W.2d 409, 413 (1961).
47. *Id.*
48. *Id.*
49. Reste Realty Corp. v. Cooper, 53 N.J. 444, 452, 251 A.2d 268, 272 (1969).
50. 202 F.2d 320 (D.C. Cir. 1952).
51. *Id.* at 326.
52. 237 A.2d 834 (D.C. App. 1968).
53. Note that, although the lease is void *ab initio*, the tenant nevertheless becomes a tenant at sufferance and therefore the landlord is entitled to rent in an amount equal to the reasonable value of the premises based on its condition at the time of occupancy. William J. Davis, Inc. v. Sladem, 271 A.2d 412 (D.C. App. 1970).

violations which would render the property unsafe or unsanitary. Nevertheless, the court in *Saunders v. First National Realty Corp.*[54] refused to hold that violations occurring after the tenancy commenced voided the lease.[55] In the latter case, the tenant raised the fact that there were numerous housing code violations which rendered the premises uninhabitable as a defense to the landlord's action for possession. The court concluded that although the landlord permitted violations of housing regulations to exist, he would not be precluded from bringing an action for possession based on nonpayment of rent.[56] *Javins v. First National Realty Corp.*[57] reversed the *Saunders* holding and ruled that a warranty of habitability, measured by the conditions set out in the Housing Regulations for the District of Columbia, is implied by operation of law into leases of urban dwelling units covered by those regulations, and that breach of this warranty gives rise to usual remedies for breach of contract.[58] The court went on to say "that the old common law rule imposing an obligation upon the lessee to repair during the lease term was really never intended to apply to residential urban leaseholds."[59]

VII. CONCLUSION

It is submitted that nonrecognition of an implied covenant of habitability has resulted in an inadequacy in present Maryland law. A party leasing a residential dwelling acts on the premise that such dwelling will be fit for habitation. Concluding that such need has been met by a prospective lessee's opportunity to inspect is pure legal fiction in that often the defects are not recognized upon "normal inspection."[60] Furthermore, the remedy of constructive eviction is totally inadequate in that it negates the very purpose of the original lease, *i.e.* providing the tenant with a dwelling fit for habitation. Additionally, the tenant carries with him the burden of establishing facts sufficient to constitute constructive eviction. Actions for damages[61] are inadequate in that the lessee continues to occupy uninhabitable premises. This does little to alleviate existent dangers to life, health and safety.

It is submitted that: 1) there is sufficient authority to justify the Maryland Court of Appeals in implying a warranty in these cases; and 2) the Maryland Legislature should forthwith adopt an implied

54. 245 A.2d 836 (D.C. App. 1968).
55. *Id.* at 838.
56. *Id.* at 839.
57. 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).
58. *Id.* at 1072-73.
59. *Id.* at 1080.
60. The normal inspection "in fact" is in reality less thorough than a normal inspection "at law." More often than not, a tenant, in making a normal inspection "in fact," does not discover what the legal test says he should discover.
61. After July 1, 1973 residents of Baltimore City will have an action at law for the violation of building and electrical codes. MD. ANN. CODE art. 53, § 44 (1972).

covenant of habitability to be included in all residential leases of a year or less. The covenant should apply to both furnished and unfurnished dwellings and should warrant that the premises will be habitable at the commencement of the tenancy, and will remain habitable for the duration of the tenancy. The landlord should not be required, however, to expend funds to repair premises rendered uninhabitable by the tenant during his tenancy. After adopting the implied covenant of habitability, the lease should be viewed as a contract, and the remedies of damages, reformation and rescission should be available. The protection of the implied covenant of habitability could be made available to lessees simply by an act providing that local housing regulations be incorporated into residential leases. This, at least, would alleviate some present inadequacies while we await more extensive revision of landlord tenant law.

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