

LANDLORD MAY BE LIABLE UNDER NEGLIGENCE THEORY TO TENANT

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Pennsylvania courts are very hesitant in permitting lawsuits which merely re-cast an ordinary breach of contract claim into a tort claim. As such, whenever a tort claim is brought between contractual parties, the courts focus on whether the “gist of the action” is defined by the terms of the contract or by the larger social policies embodied by the law of torts.

In the context of a landlord-tenant dispute, the Superior Court of Pennsylvania in *Reed v. Dupuis* recently held that the “gist of the action” doctrine did not prevent a tenant, as a matter of law, from suing a landlord under a negligence theory.

In *Reed*, the landlord leased residential property to the tenant pursuant to a written lease agreement. After substantial rain caused flooding to the basement of the property, the tenant was ordered by the landlord to run fans and increase the heat in the basement. While following the landlord’s instructions, the tenant offered to remove the carpet to the basement, seal the basement, and install new carpeting. The landlord declined that offer. The tenant also requested that the landlord retain the services of a professional cleaner, but that request was refused by the landlord as well.

When water continued to infiltrate the basement, the landlord orally promised to rectify the situation. Since the landlord never did so, mold formed in the basement and spread throughout the property, which allegedly caused physical injury to the tenant and damage to her personal property.

After the tenant voided the lease agreement pursuant to the express warranty of habitability clause, she filed a single-count negligence complaint against the landlord, alleging, among other things, that the landlord breached her duty to exercise reasonable care by failing to correct the water infiltration. The landlord then filed a preliminary objection in the nature of a demurrer, arguing that she did not owe the tenant a duty of care, as a matter of law, and that the lease agreement’s exculpatory clause barred the tenant’s claim.

In sustaining the preliminary objections and thus dismissing the complaint, the trial court, *sua sponte*, found that the negligence claim was barred by the “gist of the action” doctrine because all of the issues set forth in the complaint relate to the terms of the lease agreement. The trial court reasoned that the tenant “ha[d] improperly based her claim on negligence grounds when it is clear that the basis for the alleged liability arises from a failure to perform contract obligations.” The trial court noted that the dispute centered upon the allocation of maintenance duties as set forth in the lease agreement and a “promise” by the landlord to rectify the water infiltration problem.

The tenant then appealed the trial court’s order dismissing the complaint and sustaining the preliminary objections.

The Superior Court found that the complaint was legally sufficient to state a claim of negligence and that the trial court erred, as a matter of law, when it dismissed the complaint under the “gist of the action” doctrine.

In her appeal, the tenant argued that the trial court erred when it determined that her negligence claim was based on contract principles and therefore barred under the “gist of the action” doctrine. She specifically contended that the complaint properly stated a claim for negligence under sections 323 and 357 of the Restatement (Second) of Torts and section 17.6 of the Restatement (Second) of Property. In support of her contention, the tenant cited the Pennsylvania Supreme Court’s ruling in *Reitmeyer v. Sprecher*.

In *Reitmeyer*, the tenant was injured after falling from a defective back porch and sued the landlord for negligence. The tenant alleged in her complaint that the landlord was aware of the defect and that he promised to fix the porch. In reliance on the landlord’s promise to fix the porch, the tenant executed the lease and inhabited the leased premises.

In *Reitmeyer*, the Supreme Court adopted the Restatement (Second) of Torts, section 357, which is titled ‘Where Lessor Contracts to Repair’: “[a] lessor of land is subject to liability for physical harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if (a) the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair, and (b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented, and (c) the lessor fails to exercise reasonable care to perform his contract.”

In reversing the trial court’s granting of a demurrer, the Supreme Court in *Reitmeyer* noted that under the facts of the case, “negligence, not simply the breach of the agreement to repair, is the gist of the action in tort and the agreement to repair does not render the landlord liable unless he has knowledge of the defect and the agreement to repair is supported by consideration.” Because the landlord’s promise to fix the porch was supported by consideration, in that the tenant entered into the lease agreement as a result of the landlord’s promise to repair, the Supreme Court found that the landlord could be held liable in tort under section 357 if he failed to exercise reasonable care in performing his promise to repair.

Similarly, the Superior Court in *Reed* concluded that the tenant had properly stated a claim for negligence under section 357. The Superior Court pointed out that the landlord had knowledge of a condition of disrepair, the disrepair created an unreasonable risk, and she promised to fix the disrepair and failed to exercise reasonable care in performing her promise. Moreover, the Superior Court stated that the facts alleged in the complaint created a reasonable inference that the landlord’s promise to fix the water infiltration was supported by consideration because the tenant refrained from remedying the situation herself or from hiring a professional cleaner to make the repairs.

The Superior Court then discussed why the negligence claim under section 357 was not barred by the “gist of the action” doctrine. Disagreeing with the trial court’s conclusion that the dispute arose from the allocation of maintenance duties as set forth in the lease agreement, the Superior Court emphasized that the landlord’s liability originated from “her awareness of, and promise to rectify, the water infiltration problem”, which, “in turn, created a legal duty on the part of [the landlord] to exercise reasonable care in fulfilling her promise and correcting the disrepair - a duty that is separate and distinct from her contractual duty/promise to simply repair the water infiltration.” In other words, the basis of complaint derived from a duty imposed by the larger

social policies embodied in the law of torts.

Following in the spirit of *Reitmeyer*, the Superior Court in *Reed* also found that the “gist of the action” doctrine did not preclude the tenant from seeking recovery under a theory of negligence pursuant to section 323 of the Restatement (Second) of Torts and section 17.6 of the Restatement (Second) of Property. These sections, similar to section 357, impose on a landlord an independent legal duty to exercise reasonable care when the landlord undertakes to render services for a tenant and repairs known dangerous conditions on the leased premises.

The Superior Court concluded that, based upon the facts contained within the complaint, the legal duties found in section 323 and section 17.6 were not created or grounded in the lease agreement, but rather were distinct and separate obligations created by the larger social policies embodied in the law of torts, emphasizing that “[w]ere [it] to hold otherwise, the tort duties imposed upon a landlord under the above-mentioned sections would be rendered meaningless and their underlying social policies would not be given effect.”

LESSONS LEARNED

As explained by the Superior Court in *Reed*, landlords can be held liable for damages in tort despite the existence a lease agreement. As a result, landlords are caught in a catch-22. By agreeing to make repairs to the leased premises, landlords may be exposing themselves to tort theories of liability which they may not have envisioned when they entered into the lease agreement. On the other hand, landlords have a vested interest in keeping their investment properties in good repair for obvious reasons. Landlords could require their tenants to make the repairs themselves, but the tenants may not either have the financial wherewithal or incentive to ensure that the repairs are made properly or at all. Landlords are thus forced under the Superior Court’s holding in *Reed* to take the legal risk that, if the repairs are not made properly, they will be sued by their tenants under a tort theory of liability.

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