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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000993-MR

JAMES YOUNG — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 16-CI-00999

DWIGHT NORTHINGTON — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT, MAZE, AND TAYLOR, JUDGES.

MAZE, JUDGE. James Young appeals from the summary disposition of his premises liability action. The litigation stems from injuries Young sustained when he slipped and fell during a plumbing back-up in the duplex unit he leased from appellee Dwight Northington. Because we are convinced that genuine issues of

material fact preclude the entry of summary judgment, we reverse the judgment of the Fayette Circuit Court and remand the case for further proceedings.

In 2014, Young entered into a lease with Northington for the rental of one side of a duplex located in Lexington. Although not specified in the lease, Northington reduced Young's rent in exchange for his doing simple maintenance which included changing furnace filters on his side of the duplex, cutting the grass, and cleaning up the yard. Each side of the duplex had a basement with laundry facilities but shared sewer service. The plumbing originated on each side of the duplex but joined at some point and the sewage for both sides exited on Young's side of the duplex.

On March 30, 2015, Young heard a noise in the basement and went downstairs to investigate. Young noticed a trickle of water and, while he was standing on the basement floor, raw sewage began to gush from the pipes near his washing machine. Young picked up a basket of laundry in an attempt to salvage his clothing and noticed that the sewage had increased. Seeing that the sewage was on the bottom of a metal boot he was required to wear due to an injury sustained in a prior home invasion at a difference residence, he attempted to go back upstairs. While attempting to climb the stairs, Young slipped and contact with the carpeted stair caused an abrasion on his injured leg. Although Young immediately treated

his leg with an antiseptic, over the next few days his injured leg began to swell and became extremely painful.

Young was subsequently treated at the University of Kentucky Hospital and ultimately admitted due to a MRSA infection and a large abscess on his left leg. Over the next two years, Young endured multiple surgeries in an attempt to save his leg from amputation. Young testified that his left leg is shorter than his right leg and that there is still a possibility of amputation in the future.

Young initiated the instant litigation on March 11, 2016, by filing a complaint which alleged that Northington's negligence in the maintenance and repair of the plumbing in the duplex led to Young's injuries. After a hearing conducted in April 2017, the circuit court granted Northington's motion for summary judgment.

Young argues in this appeal that summary judgment was improper because Northington breached his duty to maintain a common area in a reasonably safe condition and that the breach was the proximate cause of his injury. We start by reiterating the familiar standard by which appellate courts review a grant of summary judgment:

> The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." The trial court must view the evidence in the light most favorable

> to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor.

Lewis v. B & R Corporation, 56 S.W.3d 432, 436 (Ky. App. 2001)(footnotes omitted). In applying this standard, our Supreme Court instructs that the word "impossible" is to be viewed in a practical, not absolute, sense. *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). Finally, because summary judgment involves only legal questions and whether the existence of any disputed issue of material fact precludes summary judgment, appellate courts need not defer to trial courts' decisions and will review the issue *de novo*. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

In any cause of action based on negligence, a plaintiff bears the burden of establishing a duty on the part of the defendant, breach of that duty, and a causal connection between the breach of the duty and an injury suffered by the plaintiff. *Mullins v. Commonwealth Life Insurance Co*., 839 S.W.2d 245, 247 (Ky. 1992). If there is no duty, there can be no negligence. The general rule regarding duty in landlord-tenant relationships is that "a landlord is not liable for injuries to the tenant or his property because of defects in the leased premises in the absence of a contract or warranty as to the condition of the premises or to repair same, and where the landlord is guilty of no fraud or wilful wrong." *Clary v. Hayes*, 300 Ky. 853, 858, 190 S.W.2d 657, 659 (1945) (quoting *Lindsey v. Kentucky Development*

Co., 291 Ky. 253, 163 S.W.2d 499, 500 (1942)). As with most general rules, there are exceptions and, in this case, appellant cites the common area exception.

As this Court noted in *Jaimes v. Thompson*, 318 S.W.3d 118 (Ky. App. 2010), in determining a landlord's liability for injuries sustained on leased premises, "there is a critical distinction between properties leased wholly by one tenant and properties leased by numerous tenants":

> When a tenant maintains complete control and possession over the premises and the landlord has no contractual or statutory obligation to repair, the landlord is only liable for "the failure to disclose known latent defects at the time the tenant leases the premises." *Carver v. Howard*, 280 S.W.2d 708, 711 (Ky. [] 1955). However, when a portion of the premises is retained by the landlord for the common use and benefit of numerous tenants, the landlord must exercise ordinary care to keep common areas in a reasonably safe condition. *Id*.

Id. at 119-20. *Davis v. Coleman Management Co*., 765 S.W.2d 37, 39 (Ky. App. 1989), explains the common sense reason for the exception: "The landlord is the only person who has control over the common areas, and if the landlord does not take reasonable steps to make such areas reasonably safe, then no one will."

Thus, the pivotal inquiry in this appeal is whether, under the undisputed facts, the plumbing and sewage system in the duplex constitutes a "common area" sufficient to impose a duty of ordinary care on Northington. We are convinced that it does.

In a similar context, this Court concluded that the roof over an apartment building is a common area. Citing the following statement from the Restatement (Second) of Torts, the Court in *Warren v. Winkle*, 400 S.W.3d 755 (Ky. App. 2013), concluded that common area liability applies to the maintenance of walls, roofs, and foundations of apartment buildings:

> A possessor of land who leases a part thereof and retains in his own control any other part which is necessary to the safe use of the leased part, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for physical harm caused by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care.
>
> (a) could have discovered the condition and the risk involved, and
> (b)
> (b) could have made the condition safe.

Id. at 760 (quoting RESTATEMENT (SECOND) OF TORTS § 361 (1965)). We are persuaded that a shared plumbing and sewage system falls squarely within the rationale set out in *Warren* and the Restatement. Like roofs, walls, and foundations, a shared plumbing system is "retained in the lessor's control" and maintenance of that shared system falls to the landlord who must exercise ordinary care to keep it in a reasonably safe condition.

In addition, there is statutory support for the conclusion that a landlord is obliged to maintain common areas. Kentucky Revised Statute ("KRS")

383.595(1), the Uniform Residential Landlord and Tenant Act, provides in pertinent part that a landlord shall:

> (a) Comply with the requirements of applicable building and housing codes materially affecting health and safety; . . .
>
> (c) Keep all common areas of the premises in a clean and safe condition; [and]
>
> (d) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by him[.]

In his deposition, Northington admits he retained responsibility for maintenance of the shared plumbing and sewage system and performed necessary repairs but insists that there can be no breach of his duty absent actual or constructive notice of a problem.

We are convinced that the question of whether Northington had actual or constructive notice of problems with the plumbing and sewage system creates a genuine issue of material fact sufficient to preclude summary judgment. In his answers to interrogatories, Northington stated:

> Prior to Mr. Young's alleged fall, there have been no issues or problems with the plumbing and/or draining system with the exception of some temporary problems created by the tenant in the adjoining duplex at 1684 Hill View Place. On several occasions prior to Mr. Young's alleged fall, the tenant, Ms. Latosha Denise Wray, had improperly disposed of certain items through the

> commode and plumbing system of her duplex which ultimately created a blockage in the main sewer line shared by both duplexes. This in turn created a blockage resulting in some water and debris spilling into the basement floor of the duplex at 1686 Hill View Place. Upon being advised of the problem, I immediately contacted Roto-Rooter and other similar services in an attempt to identify the problem and fix the problem. This happened on several occasions prior to Mr. Young's alleged fall. The other tenant, Ms. Latosha Denise Wray, continued to fail to heed my warnings with regard to the disposal of certain items.

In addition, review of the record disclosed an affidavit by Ms. Wray in which she averred that she had spoken to Northington on several occasions regarding sewage issues with the residence and regarding excessive water bills which she attributed to plumbing problems. At the hearing on the summary judgment motion, the trial court ordered filed a copy of a January 6, 2015 email Ms. Wray sent to Northington's wife concerning problems in her unit. Pertinent to this matter, in the enumeration of problems, the email states "leaks still in the basement." We are convinced that this evidence, along with the deposition testimony of Young and Northington, was sufficient to create a genuine issue as to Northington's actual or constructive notice of plumbing or sewage problems.

Kentucky Rule of Civil Procedure ("CR") 56.03 provides in pertinent part that a motion for summary judgment:

> shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought

> shall be rendered forthwith **if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact** and that the moving party is entitled to a judgment as a matter of law.

(Emphasis added). Based upon the evidence in the record, we are convinced that issues of material fact exist precluding summary disposition of Young's claim.

Finally, we again turn to *Davis*, *supra*, for the import of our decision in terms of Northington's burden:

> This does not impose an undue burden on the landlord. The landlord's actions should be evaluated according to what is reasonable under all the circumstances. The landlord is not a guarantor of the tenants' safety. *Nash v. Searcy*, 256 Ky. 234, 75 S.W.2d 1052, 1056 (1934). The landlord's actual or constructive notice of the hazardous conditions is, of course, a significant factor. *Pease v. Nichols,* Ky., 316 S.W.2d 849, 851 (1958).

765 S.W.2d at 39.

In addition, we are convinced that a reasonable juror might conclude that had Northington exercised ordinary care in regularly inspecting and maintaining the duplex, he could have discovered and remedied the plumbing and sewage problems. Thus, it does not appear that it would be impossible for Young to prevail at trial. *Lewis*, 56 S.W.3d at 436. Under the standard set out in Restatement (Second) of Torts § 361, Northington owed Young the duty to exercise reasonable care to: (a) discover (i) the dangerous condition in the

common area and (ii) the risk involved; and (b) make the condition safe. In our view, only a jury can decide whether he breached that duty.

Accordingly, the judgment of the Fayette Circuit Court is reversed and the case remanded for further proceedings.

LAMBERT, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Kendra L. Rimbert Louisville, Kentucky	Brian H. Stephenson Lexington, Kentucky