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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000486-MR

MADISON FRANK AND
TONYA THOMPSON — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY BUNNELL, JUDGE
ACTION NO. 16-CI-02902

D.P. PREISS COMPANY, INC. d/b/a
THE PREISS COMPANY; AND
CAMPUS ADVANTAGE, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, LAMBERT AND SPALDING,[1] JUDGES.

ACREE, JUDGE: Appellants, Madison Frank and Tonya Thompson, appeal the Fayette Circuit Court's March 5, 2018 summary judgment in favor of Devonshire

[1] Judge Jonathan R. Spalding concurred in this opinion prior to the expiration of his term of office. Release of this opinion was delayed by administrative handling.

Apartments, LLC, Campus Advantage, Inc., and The Preiss Company, LLC, ("Appellees") dismissing Appellants' claim after concluding the Appellees had no duty to repair Frank's apartment bathroom. After careful review, we affirm.

FACTS AND PROCEDURE

On February 27, 2015, Madison Frank, a student at the University of Kentucky, signed a student housing lease contract for one bedroom of a four-bedroom apartment in the multifamily apartment complex at Red Mile Village. On August 15, 2015, Frank moved into Apartment 4305A at 1035 Red Mile Road in Lexington.[2]

Devonshire Apartments, LLC, owns Red Mile Village apartments. Campus Advantage, Inc., was the property manager at Red Mile Village from July 5, 2012, until November 1, 2015, at which time The Preiss Company, LLC, became the property manager for the duration of Frank's time as a resident.

The lease Frank signed contained a Mold & Mildew Addendum wherein lessee agreed to take "responsible steps in notifying Management staff in writing of damages to the room, or common areas within the residence in order to prevent damage or deterioration, including preventing or minimizing the occurrence and growth of mold and mildew in the residence." (Record (R.) at

[2] This apartment was located between two similar multifamily apartments, one on the floor above Frank's and the other the floor below. There were three other bedrooms of this unit communally designated 4305B, 4305C, and 4305D.

823). The lessee – Frank – was required to "promptly notify Management staff in writing of the presence of water leaks, excessive moisture, mold or mildew, or standing water inside the residence or common areas within the residence." *Id.*

Frank stated she first noticed mold in the bathroom in late October or early November 2015.[3] The mold she noticed was located on an interior wall next to the shower, as well as inside the shower. She described the mold as "a little bit of black" on "the drywall of the bathtub or beside the bathtub." (R. at 646, 734). Frank stated she attempted to clean the area, but the black substance eventually returned. Frank again stated the black substance was present in her bathroom but that no report was filed until mid-January 2016 when she verbally mentioned the presence of a black substance in her bathroom to a Preiss Company employee who was delivering free pizza as a tenant relations gesture.[4]

Melanie Embs was Red Mile Village's General Manager for both Campus Advantage and The Preiss Company during this time. Preiss Company representatives stated they were not made aware of Frank's complaint until February 29, 2016, when Frank's mother, Tonya Thompson, notified them of what appeared to be mold or mildew in Frank's bathroom.

[3] The bathroom in question was exclusively used by Frank and was not shared by any of the other residents of apartment 4305.

[4] The employee was giving out free pizza, asking residents about their respective leases, and if the residents had any maintenance requests.

Upon that notification, Embs stated she immediately met with Frank and Thompson, inspected the bathroom, and agreed to transfer Frank to another apartment. Embs believed the black substance in the bathroom was mildew and stated to Frank and Thompson that she would send a maintenance person to check on the bathroom. Another Preiss Company employee, Derek Clark, treated Clark's bathroom after Embs' inspection. He said he bleached and scrubbed the area that Embs identified as affected by mildew. Clark also sprayed the area with a chemical treatment to prevent the mildew from returning.

Frank moved into another two-bedroom apartment on March 18, 2016.[5] Just before Frank moved out, her brother took samples of the black substance in her bathroom and submitted them to Microbac Labs (R. at 918-921, 821). The report from Microbac indicated the substance was correlative of toxic black mold with characteristics of a Stachybotrys species and white mold with characteristics of a Cladosporium species. (R. at 821).

Six months later, Frank moved into her new apartment. Red Mile Village's new general manager, Andrea Allison, hired COIT, a cleaning and restoration service, to test for mold and remediate any potential problems in apartment 4305A's bathroom. (R. at 924, 1054).

[5] The apartment required several forms of upkeep such as cleaning and painting before Frank could move. The Preiss Company stated that Frank chose this apartment among other immediately available options.

Clay Pierce, a COIT employee, conducted the remediation of the bathroom. He stated he removed 3.9 feet of baseboard and twelve square feet of drywall. Pierce stated that when he removed the drywall he saw mold saturated through the drywall from back to front. (R. at 1014). COIT was unable to locate a leak inside the walls that caused the mold and it could not determine the cause of the mold in the bathroom. *Id.*

Frank alleged she suffered significant health problems because of her exposure to the mold in the bathroom.[6] Thompson also alleged similar health problems from the time she occupied the apartment. Frank stated her health problems affected her academic endeavors, which required her to withdraw from the University of Kentucky and cost her over $40,000.00 in medical bills.

On August 10, 2016, Frank filed a complaint against Devonshire Apartments, LLC/Red Mile Village, and The Preiss Company, LLC. She amended her complaint, first on November 15, 2016, naming Campus Advantage, Inc., as a defendant and again on March 6, 2017, naming Tonya Thompson, Frank's mother, as a plaintiff. The respective landlords, Devonshire Apartments, LLC, The Preiss Company, and Campus Advantage, Inc., filed indemnity cross-claims against one another. On December 20, 2017, the landlords moved for summary judgment.

[6] Frank's alleged symptoms included shortness of breath, chest pain, heart palpitations, nausea, food allergies, Hashimoto's thyroiditis, tingling and numbness in her extremities, asthma-like symptoms, and changes to her brain.

After a hearing on the matter, the circuit court granted summary judgment and dismissed Frank's and Thompson's claims with prejudice on the basis that the landlords owed them no duty. Frank and Thompson filed a motion to alter, amend, or vacate March 15, 2018, which the circuit court denied shortly thereafter. Frank and Thompson appealed.

Devonshire Apartments, LLC, was dismissed from this appeal by order of this Court on November 16, 2018.

STANDARD OF REVIEW

Appellate review of a trial court's grant of 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); CR[7] 56.03. "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) (citing *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991)). "Impossible," as set forth in the standard for summary judgment, is meant to be "used in a practical sense, not in an absolute sense." *Id*.

[7] Kentucky Rule of Civil Procedure.

The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Steelvest*, 807 S.W.2d at 480. "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Lewis*, 56 S.W.3d at 436 (citing *Steelvest*, 807 S.W.2d at 482). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Id.*

ANALYSIS

First, Frank and Thompson argue their injuries resulted from the landlord's failure to maintain a common area in a reasonably safe condition. Campus Advantage, Inc., argues that the "common area" exception articulated by another panel of this Court in *Warren v. Winkle*, 400 S.W.3d 755 (Ky. App. 2013) does not apply to this review. Furthermore, Campus Advantage, Inc., argues that Frank and Thompson cannot recover their claimed damages because of the rule of law that the tenant takes the premises as found, which they assert is supported by an abundance of Kentucky jurisprudence. We agree.

The basis of this appeal emanates from the trial court's interpretation of two cases from other panels of this Court, which developed landlord-tenant tort-

based causes of action in Kentucky – *Joiner v. Tran & P Properties, LLC*, 526 S.W.3d 94 (Ky. App. 2017), and *Warren, supra*. *Joiner* more narrowly defines *Warren*'s exception and affirms Kentucky's historical interpretation of the landlords' liability for repairs; *Warren* provides the exception to the general absence of liability for landlords in duty-to-repair circumstances. The circuit court granted summary judgment by applying *Joiner*.

The absence of landlord liability for failure to repair dates back almost one hundred years to *Spinks v. Asp*, 192 Ky. 550, 234 S.W. 14 (1921), which introduced to Kentucky jurisprudence the principle that the landlord is not liable to the tenant for defects arising during the tenancy except when: (1) the defect existed prior to beginning of tenant's term; (2) the landlord then knew of the defect; and (3) the landlord concealed the defect from the tenant.

Over the last fifteen years, several panels of this Court repeatedly affirmed this principle, often expressing surprise at its enduring and unchanging viability, such as the following commentary from 2006:

> Curiously, *Spinks* has never been cited in a published Kentucky case since it was rendered in 1921. As a result, [the tenant in this case] suggests that the case is no longer good law. However, we note that *Spinks* relies on established Kentucky precedent holding that a landlord is not liable for personal injuries growing out of the failure to repair. As in any other contract, the breach of a repair agreement does not extend the landlord's liability beyond damages outside of the reasonable contemplation of the parties. *Dice's Administrator v. Zweigart's*

> *Administrator*, 161 Ky. 646, 171 S.W. 195 (1914). This holding remains a generally accepted principle for recovering damages arising from a breach of contract. *See University of Louisville v. RAM Engineering & Construction, Inc.*, 199 S.W.3d 746, 748 (Ky. App. 2005). Thus, even assuming that the lease provision imposes an affirmative duty on [the landlord] to make repairs, we cannot find that [the landlord] is liable for personal injuries arising from its breach of the agreement to repair.

Pinkston v. Audubon Area Community Services, Inc., 210 S.W.3d 188, 190 (Ky. App. 2006); *True v. Fath Bluegrass Manor Apartment*, 358 S.W.3d 23, 26 (Ky. App. 2011) (same); *Joiner*, 526 S.W.3d at 101 (same).

In *Miller v. Cundiff*, 245 S.W.3d 786 (Ky. App. 2007), this Court again applied the rule when loose carpet in tenant's apartment was blamed for the tenant's fall. This Court denied recovery because the tenant was aware of carpet's condition when she initially walked through the apartment and at the time of her fall. *Id.* at 788.[8] A few years later, in *True v. Fath Bluegrass Manor Apartment*, 358 S.W.3d 23 (Ky. App. 2011), a tenant fell from his apartment balcony and sued his landlord. This Court applied the same rationale it applied in *Miller*, but also

[8] *Miller* quoted *Pinkston* as follows: "'[A] landlord is not liable for injuries caused by breach of a covenant to make repairs to a leased premises. Rather, the remedy for breach of an agreement to repair is the cost of repair.' [*Pinkston*, 210 S.W.3d] at 190, *citing Spinks*[, 234 S.W. at 16]. Thus, even if we agreed that these oral representations could impose such a duty on Cundiff, Miller still would not be entitled to recover damages for her injuries." *Miller*, 245 S.W.3d at 788.

recognized a potential cause of action for tenants against landlords related to negligent repair.[9]

In 2013, in *Warren*, *supra*, a ceiling collapsed on a tenant inside the tenant's apartment. The primary holding was that the landlord retained exclusive control of the roof and the space between the roof and ceiling of the multifamily apartment complex and thus had a duty to keep the roof and the space between the ceiling and roof in a reasonably safe condition. *Warren,* 400 S.W.3d at 761. This holding affirmed the rule known as "the common area exception." It effectively imposes liability on the landlord for a failure to repair common areas used by all tenants or that are necessary to the enjoyment of their individual apartments "because of the supervision and control which he still retains over all parts of the premises not expressly demised to his tenants." *Home Realty Co. v. Carius*, 189 Ky. 228, 224 S.W. 751, 752 (1920).

Warren went on to analyze the extent of the landlord's liability related to any notice of the defect in a common area. The Court outlined a reasonableness test first introduced in *Davis v. Coleman Mgmt. Co.*, 765 S.W.2d 37 (Ky. App. 1989), stating:

[9] Citing *Mahan-Jellico Coal Co. v. Dulling,* 282 Ky. 698, 139 S.W.2d 749 (1940), the Court held that although a landlord had no duty to repair steps leading to the tenant's doorway, it would not be absolved from liability when its *negligent repairs* were the proximate cause of the tenant's injuries. The facts of this case do not support that theory.

> In *Davis,* the Court held that the open and obvious doctrine did not preclude recovery when the common area exception applied. It was pointed out that the rule "does not impose an undue burden on the landlord" and "[t]he landlord's actions should be evaluated according to what is reasonable under all the circumstances." Turning to the factors to be considered, the Court emphasized that "[t]he landlord's actual or constructive notice of the hazardous conditions is, of course, a significant factor" as well as the opportunity to remedy the defect and the reasonableness of the tenant's actions.

Warren, 400 S.W.3d at 761 (citations omitted).

This common area exception has its foundation in the Restatement (Second) of Torts. Restatement (Second) of Torts §361 states:

> 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) could have made the condition safe.

RESTATEMENT (SECOND) OF TORTS § 361 (1965). Comment (b) delineates the areas of an apartment or office building to which the exception applies:

> The rule stated in this Section applies to the maintenance of walls, roofs, and foundations of an apartment house or office building. It applies also to any other part of the land the careful maintenance of which is essential to the

> safe use of the rooms or offices or portion of land leased to the various lessees, such as the central heating, lighting, or water system.

Id.

Joiner, *supra*, narrows the breadth of the exception in *Warren*. In *Joiner*, the tenants found mold in their apartment's bedroom closet, over which they had exclusive control. They were unable to present evidence that the mold was related to a repair needed in a common area, such as the roof, which would affect other tenants. The Court reiterated and quoted major elements of *Spinks*, *Pinkston*, *Miller*, and *True* to distinguish the case from *Warren* and to narrow the common area exception to areas under the exclusive control of the landlord. *Joiner*, 526 S.W.3d at 102. Notably, the Court in *Joiner* also dismissed the tenants' claim because "Kentucky law provides that the remedy for breach of an agreement to repair is the cost of the repair. Because the Joiners did not pay for the repairs, they cannot assert a claim for damages." *Id.*

In reviewing this line of cases, the circuit court believed Frank's and Thompson's claims needed to either meet the common area exception under *Warren* or be dismissed on summary judgment in keeping with *Joiner*. We agree with the circuit court's analysis and follow the reasoning articulated in *Joiner*.

Campus Advantage, Inc., argues that Frank's and Thompson's circumstances are sufficiently similar to those in *Joiner* and that the common area

exception does not apply. Based on the analysis provided in *Joiner*, we are compelled to agree.

Here, we find no evidence in the record sufficient to prove that Frank's bathroom could be considered a common area such that repairs were required for the other tenants' benefit and enjoyment. Frank was the only individual with exclusive control and use of the bathroom and, therefore, the landlords had no duty to repair it as they would a common area.

We next consider Frank's and Thompson's claims that the landlord created, then failed to disclose to them the hazardous condition of black mold in their apartment. However, there is no proof that the landlord created the black mold problem, the source of which was never determined. Furthermore, when Frank discovered the issue and, eventually, reported the problem, Embs and Allison acted reasonably 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 a significant factor. *Pease v. Nichols*, 316 S.W.2d 849, 851 (Ky. 1958). Other factors include the length of time of notice of the defect and the landlord's opportunity to take steps to remedy the condition. *See Corbin Motor Lodge v. Combs*, 740 S.W.2d 944, 947 (Ky. 1987) (Lambert, J., dissenting). The tenant's actions also need to be evaluated for their reasonableness.

Here, Frank signed a lease, inspected and moved into apartment 4305A at the Red Mile Village in August 2015. According to Frank she first found a black substance in the bathroom of that apartment in late October or early November 2015 but did not report the complaint in writing according to the information contained in the record. Both parties agree that Frank verbally relayed her complaint to an employee of Red Mile Village in January 2016, after the employee came to the apartment concerning a matter unrelated to the bathroom. Embs stated that she received official notice of the black substance in the bathroom on February 29, 2016, via a phone call from Thompson. Embs immediately thereafter went to the apartment, met Frank and Thompson, inspected the bathroom, deemed the substance mildew, and assigned Red Mile Village maintenance staff to check on the bathroom. Embs then gave Frank options to move out of the apartment and Frank was in a new two-bedroom apartment on March 18, 2016, less than three weeks after the official notice. Apartment 4305A was vacant until Allison hired COIT to repair the defect in the bathroom. COIT employees found mold and repaired the bathroom but could not determine the cause of the mold.

We find the actions of the landlords in response to the official notice of February 29, 2016, reasonable and sufficiently in accord with our jurisprudence to avoid liability to the appellants. Embs quickly responded and personally

inspected the apartment, Frank was moved into another apartment within three weeks, maintenance attempted remedial measures, the room was left vacant, and the defect in the bathroom was ultimately repaired. Frank's tolerance of the condition is indicated by her failure for several months to report the mold or mildew under a written agreement to do so. When she did report the problem, she did so verbally, not in writing as the agreement required, and the report was to a landlord employee simply delivering pizza as part of a tenant appreciation effort.

Campus Advantage, Inc., also argues that even if it breached its duty, the remedy for the damages is limited to the cost of repairs. Because this Court finds no duty for the landlords to repair, this argument is moot.

CONCLUSION

For the foregoing reasons, we affirm the Fayette Circuit Court's March 9, 2018 summary judgment.

ALL CONCUR.

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