WANDA DEGRUY WRIGHT WIFE OF/AND EMORY WRIGHT	*	**NO. 2003-CA-0119**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
DORY MOTAGHEDI WIFE OF/AND PEJMUN MOTAGHEDI AND THEIR INSURANCE COMPANY, STATE FARM FIRE & CASUALTY COMPANY	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-12317, DIVISION "A-5"
Honorable Carolyn Gill-Jefferson, Judge
* * * * * *

JUDGE

JOAN BERNARD ARMSTRONG
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Dennis R. Bagneris Sr. and Judge Michael E. Kirby)

JACQUELINE MAE GOLDBERG
10555 LAKE FOREST BOULEVARD
SUITE 3-E
NEW ORLEANS, LA 70127

COUNSEL FOR PLAINTIFFS/APPELLANTS

E. ROSS BUCKLEY, JR.
KINGSMILL RIESS, L.L.C
201 ST. CHARLES AVENUE
SUITE 3300

NEW ORLEANS, LA 70170-3300

COUNSEL FOR DEFENDANTS/APPELLEES

AFFIRMED.

This is an appeal from a summary judgment granted in favor of defendants/appellees, Dory Motaghedi, Pejmun Motaghedi and their insurer, State Farm Fire and Casualty Company, and against plaintiffs/appellants, Wanda D. Wright and Emory Wright.

The appellants, as lessees, entered into a residential lease agreement with the appellees, as lessors, on February 8, 1998. The appellants were occupying the leased premises on March 25, 2000 when Mrs. Wright claimed injuries from a fall down the stairs. A petition was filed on August 10, 2000, alleging a defect in the stairs and seeking recovery based on negligence, strict liability and res ipsa loquitor.

The record reflects that on September 6, 2002, the appellees filed a motion for summary judgment seeking dismissal of the appellants' action based on La. R.S. 9:3221, and a provision of the lease which purports to shift responsibility for conditions of the leased premises from lessor to lessee. The appellants have submitted no memorandum in opposition to the summary judgment, no statement of contested facts, and no countervailing affidavits. Summary judgment was granted in favor of the appellees,

dismissing the appellants' action. The trial court certified the judgment as final and appealable in accordance with La. C.C.P art. 1915.

In their first assignment of error, the appellants argue that they were not given ten days from the date of service of the summary judgment as required by La. C.C.P. art. 966 B, which states in part, "[t]he motion for summary judgment and supporting affidavits shall be served at least ten days before the time specified for the hearing." The appellants assert that the motion for summary judgment was served on September 16, 2002, and heard on September 20, 2002.

The appellees argue in their opposition that the motion for summary judgment, along with a statement of uncontested material facts, and a memorandum in support, was filed on September 6, 2002. Further, the appellees assert that on that same day, fourteen days prior to the hearing date, counsel for the appellees mailed copies of all pleadings and documents to the appellants' attorney of record. The appellees contend that the appellants' attorney is located in New Orleans and would have received the mailed courtesy copy by September 10, 2002 (ten days prior to the hearing).

The appellees further argue that if the appellants felt that they had been prejudiced by the time frame within which the motion for summary judgment was filed and heard, counsel for the appellants should have raised

this issue at the time of the hearing. Appellees claim that this issue was first raised on appeal.

The transcript of the hearing shows that the appellants never raised the issue before the trial court that the motion for summary judgment was untimely. The appellants never complained of prejudice, and never requested a continuance or additional time to prepare. The record also indicates that the attorney for the appellees mailed a courtesy copy of the pleadings to the appellants' attorney fourteen days prior to the hearing. Accordingly, we are unable to say that the appellants were prejudiced.

In their second assignment of error, the appellants argue that the trial court erred in granting the summary judgment when material questions of fact exist. Specifically, the appellants argue that there is a genuine issue of material fact as to whether the appellees knew or should have known about the defect in the premises. The appellants cite Mack v. City of Monroe, 595 So. 2d 353 (La. App. 2 Cir. 1992), and Arnold v. Our Lady of the Lake Hosp., Inc., 562 So. 2d 1056 (La. App.1 Cir. 1990) for the position that summary judgment is not appropriate when questions remain as to the existence of a defect, and whether the appellees knew of the defect.

The appellees argue that there are no questions of fact in this case and cite La. R.S. 9:3221 which permits a lessor to transfer responsibility for the

condition of leased premises to the lessee. The statute provides:

> The owner of premises leased under a contract whereby the lessee assumes responsibility for their condition is not liable for injury caused by any defect therein to the lessee or anyone on the premises who derives his right to be thereon from the lessee, unless the owner knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time.

The appellees point out that provisions 133-137 of the lease in question state:

> Lessee assumes responsibility for the condition of the premises. Lessor is not responsible for damage caused by leaks in the roof, by bursting of pipes by freezing or otherwise, or any vices of defects of the leased property, or the consequences thereof, except in the case of positive neglect or failure to take action toward the remedying of such defects within a reasonable amount of time after receiving written notice of such defects. Should Lessee fail to promptly so notify Lessor in writing of any such defects, Lessee will become responsible for any damage or claims resulting to Lessor or other parties.

Appellees contend that in interpreting La. R.S. 9:3221, our courts have held, "for a plaintiff to establish liability on the part of an owner who has contractually transferred responsibility for the condition of his property to his lessee under La. R.S. 9:3221, the plaintiff must establish 1) that he sustained damages; 2) that there was a defect in the owner's property; and 3) that the owner knew or should have known of the defect." Robinson v. Archdiocese of New Orleans, 98-1238 (La. App. 4 Cir. 3/31/99), 731 So. 2d

979, 981, citing Robert v. Espinosa, 576 So. 2d 555 (La. App. 4 Cir. 1991). The appellees further argue that this court stated in Chau v. Takee Outee of Bourbon, Inc., 97-1166 (La. App. 4 Cir. 2/11/98), 707 So. 2d 495, 498, citing Gilliam v. Lumbermens Mut. Cas. Co., 240 La. 697, 124 So. 2d 913 (1960), quoting, Slaughter v. Coleman, 490 So. 2d 570, 571 (La.App. 4 Cir.1986), that La. R.S. 9:3221 "'was undoubtedly designed to relieve the owner of some of the burdens imposed upon him by law in cases where he had given dominion or control of his premises to a tenant under a lease.'"

The appellees further argue that our courts have consistently upheld the validity of lease provisions where lessors have made similar contractual bargains with their lessees under La. R.S. 9:3221. Specifically, the appellees argue that this court, in Dufrene v. Kaiser Aluminum and Chemical Corp., 572 So. 2d 771 (La. App. 4 Cir. 1990), granted summary judgment in favor of the owner of the leased premises on the basis of La. R.S. 9:3221, noting that the statute permits a building owner to contract out of the responsibility imposed by La. C.C. articles 2317 and 2322, and to allow the lessee to assume the responsibility.

The appellees argue that they have met their initial burden of proof in the motion for summary judgment, but that the appellants have failed to produce factual support to establish that they will be able to satisfy the

evidentiary burden at trial. Specifically, the appellees have introduced into evidence the sworn affidavit of the manager of the property, appellee, Dory Motaghedi, which stated that she neither observed nor had been notified of any events that would lead her to believe that any defects were present on the leased premises, and that she had no knowledge of any defects in the stairway. The appellees also rely on the deposition testimony of appellant, Wanda Wright, who testified that prior to the accident, she had not noticed anything out of the ordinary that would lead her to believe the stairway was defective. Finally, the appellees argue that the appellants failed to present any factual support for their claim as they failed to list any expert witnesses who could corroborate the existence of the alleged defect.

Appellate courts review summary judgment *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181, 99-2257 (La. 2/29/00), 755 So. 2d 226, 230.

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions. The procedure is favored and shall be construed to accomplish these ends. La. C.C.P. art. 966(A)(2). A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B).

Under the amended statute, the initial burden of proof remains with the movant to show that no genuine issue of material fact exists. La. C.C.P. art. 966 (C)(2); Coates v. Anco Insulations, Inc., 2000-1331 (La. App. 4 Cir. 3/21/01), 786 So. 2d 749. An adverse party to a supported motion for summary judgment may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided by law, must set forth specific facts showing that there is a genuine issue of material fact for trial. La. C.C.P. art. 967; Townley v. City of Iowa, 97-493 (La. App. 3 Cir. 10/29/97), 702 So. 2d 323, 326.

In the lease in question, the appellees clearly delegated their liability for defective conditions of the leased premises to the appellants. Our courts have consistently held such lease provisions to be valid and binding pursuant to La. R.S. 9:3221. Chau; Muse v. Katz, 93-1066, 93-1067 (La. App. 4 Cir. 2/11/94), 632 So. 2d 1846; Tassin v. Slidell Mini-Storage, Inc., 396 So. 2d 1261 (La. 1981).

The First Circuit Court of Appeal expressed the logic behind R.S. 9:3221, by stating, “[i]t is the person whose responsibility it is to maintain

the property who is likely to know the defects in the premises. The absentee landlord is in no position to know unless he is informed. The tenant lives on the property and maintains it. Consequently he is in the best position to discover problems. He then must notify the landlord, and the landlord must remedy the problem within a reasonable time after notice of the problem, or be liable for injury caused thereby." Matt v. Cox, 478 So. 2d 918, 919 (La. App. 1 Cir. 1985). We agree with this rationale.

We do recognize, however, that where there is such a lease provision in effect, which exonerates the property owner from liability, the lessee is not necessarily barred from any recovery. For a lessee to establish liability on the part of an owner, who has contractually passed on responsibility for the condition of his property to his lessee under La. R.S. 9:3221, the lessee must establish 1) that he sustained damages; 2) that there was a defect in the owner's property; and 3) that the owner knew or should have known of the defect. Robert. We find that the appellants have not met these requirements.

In the present case, provision 133 of the lease shows that the appellants assumed responsibility for the condition of the premises. The affidavit of appellee, Dory Motaghedi, and the deposition testimony of appellant, Wanda Wright, demonstrate that the appellees never received notice of any defect, and consequently, had no knowledge of any defect.

The record reflects that the appellants have not presented, by affidavit or by other competent evidence, any evidence that would support a finding that there are genuine issues of material fact in dispute. Accordingly, we cannot say that the trial court erred by granting the motion for summary judgment. The appellants have offered no evidence to show that the leased premises contained a defect, or that the appellees knew or should have known of any defect.

Thus, we find that the trial court was correct in granting summary judgment in favor of the appellees.

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED.