NOT DESIGNATED FOR PUBLICATION

CHRISTOPHER LACINAK	*	**NO. 2006-CA-1338**
VERSUS	*	**COURT OF APPEAL**
ALLSTATE INSURANCE COMPANY/ENCOMPASS INSURANCE AND JAY CORENSET	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2004-16325, DIVISION "D-16"
Honorable Lloyd J. Medley, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, Judge Terri F. Love)

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REVERSED AND REMANDED

This is a personal injury suit. This suit arises from Christopher Lacinak leasing an apartment owned by Jay Corenswet. Mr. Lacinak sued Mr. Corenswet and his insurer, Encompass Insurance Company, for injuries he allegedly sustained as a result of exposure to toxic mold in the apartment. From the trial court's judgment granting Mr. Corenswet's motion for summary judgment and dismissing all the defendants, Mr. Lacinak appeals. For the reasons that follow, we reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

The following chronological statement of the facts is taken from the evidence presented on the motion for summary judgment.

On October 22, 2000, Mr. Lacinak leased an apartment from Mr. Corenswet located at 4618 Orleans Avenue in New Orleans. The written lease agreement was for a one-year term commencing on November 15, 2000, and included an automatic month-to-month renewal. The lease also included a waiver provision in the "Liability" section stating that Mr. Lacinak, as Lessee, was assuming responsibility for the condition of the leased premises. This waiver provision was neither called to Mr. Lacinak's attention nor explained to him.

In November 2000 when the lease commenced, there was no evidence

of the presence of mold or fungal growth in the apartment.

From November 2000 until October 2002, Mr. Lacinak, who is a professional musician, traveled around the country and spent only about one week per month in the apartment. During this period, he noticed when he was in the apartment he consistently felt fatigued; whereas, when he was traveling he had more energy. During this period, he also noticed that the inside of the apartment seemed unusually damp. He noticed the dampness especially during the latter part of this period.

In October 2002, Mr. Lacinak first started having symptoms related to exposure to toxic mold. Specifically, he consistently was fatigued, had recurrent sinus infections, had weakness in his joints, and began showing signs of arthritis. The onset of these symptoms coincided with when he began to spend more time in the apartment.

In late December 2003, some maps that Mr. Lacinak had mounted with adhesive material on the kitchen wall began falling down. When he attempted to determine the reason, he noticed that the wall was very damp, as if saturated with water. The dampness, however, was not making a puddle on the floor.

In January 2004, Mr. Corenswet came to Mr. Lacinak's apartment on another matter. At that time, Mr. Lacinak brought the damp wall and the

"overall dampness problems" to Mr. Corenswet's attention. He also brought to his attention that some of the kitchen floor tiles located near the damp wall had become detached. Although Mr. Corenswet examined the condition of the wall surface, he failed to investigate whether the source of the dampness was coming from inside the wall and whether any water was present. Nor did he attempt to determine the extent of the dampness. Mr. Corenswet's sole action was to examine the roof gable of the two-story apartment building from the ground and thereby rule out the roof as a cause of the dampness.

On February 29, 2004, Mr. Corenswet's handyman replaced the bathroom sink in Mr. Lacinak's apartment. The wall behind the bathroom sink was an inside wall that separated the bathroom from the kitchen. This wall was adjacent to the damp kitchen wall that Mr. Lacinak called to Mr. Corenswet's attention in January 2004. In changing the sink, the handyman discovered water in the wall from a leaking pipe. The leaking pipe had rotted a hole in the floor and the floor joist. The areas of wood that were rotted through were a 2x4 inch wall sill, a floorboard, and a 4x8 inch floor joist. When the handyman discovered the wood in the wall was rotted, he opened the wall. When he did so, Mr. Lacinak immediately noticed a bad odor. His neighbor, who was also present, began to have a severe allergic-

type reaction. The next morning Mr. Lacinak's lungs were very congested. He began to have coughing spells, which symptoms continued.

On March 4, 2004, Mr. Lacinak called Mr. Corenswet and reported to him what the handyman had discovered on February 29, 2004, and how it had affected him. Thereafter, extensive work was done to repair the rotted floor joist and to replace the floorboard and the entire wall. The damaged, rotted wood had been covered with a black substance.

Alleging injuries due to exposure to toxic mold in the apartment, Mr. Lacinak filed this suit against Mr. Corenswet and his insurer, Encompass, on November 16, 2004. On July 1, 2005, Mr. Corenswet filed a motion for summary judgment. Due to Hurricane Katrina, the hearing on the motion was delayed. On June 5, 2006, the trial court granted the motion and dismissed this suit with prejudice as to all defendants. This appeal followed.

STANDARD OF REVIEW

Appellate courts review grants of summary judgment *de novo* using the same standard applied by the trial court in deciding the motion for summary judgment. *Schmidt v. Chevez,* 00-2456, p. 4 (La. App. 4 Cir.1/10/01), 778 So.2d 668, 670. Summary judgment shall be granted 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). The party seeking summary judgment has the burden of affirmatively showing the absence of a genuine issue of material fact. La. C.C.P. art. 966(C)(2). A fact is "material" if its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable theory of recovery. *Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512, p. 27 (La. 7/5/94), 639 So.2d 730, 751.

In this case, we must determine whether there is any genuine issue of material fact regarding the liability of a lessor to a lessee for a defect in the leased premises. The legal ground on which the trial court relied in granting Mr. Corenswet's motion for summary judgment is the waiver provision in the lease under which Mr. Lacinak assumed responsibility for the condition of the premises as provided for in La. R.S. 9:3221 (before the January 1, 2005 amendment). Based on that waiver provision, Mr. Corenswet contends that he is not strictly liable to Mr. Corneset under former La. C.C. art. 2695. As noted below, Mr. Lacinak disputes the validity of the waiver provision for two reasons.

Despite a valid waiver provision under La. R.S. 9:3221, a lessor is still subject to potential liability for negligence. In order to establish such liability, the plaintiff must prove the following three elements: (i) that

damages were sustained because of a defect in the property, (ii) that the lessor knew or should have known of this defect, and (iii) that the lessor failed to remedy the defect within a reasonable time. *Muse v. Katz*, 93-1066, 93-1067 (La. App. 4 Cir. 2/11/94), 632 So.2d 846, 848.

As noted, Mr. Lacinak contends the waiver provision is invalid for two reasons: (i) because it was neither brought to his attention nor explained to him, and (ii) because it is invalidated by La. C.C. art. 2004. Alternatively, he contends that even assuming the waiver provision is valid there is a genuine issue of material fact as to the second element he must prove to establish negligence—whether Mr. Corenswet should have known of the defect.

Mr. Lacinak's first argument is that the waiver provision is invalid because the specific lease language was not brought to his attention or explained to him as required by the jurisprudence. The jurisprudence he cites is distinguishable in that it involves the lease of movables and thus does not involve La. R.S. 9:3221, which only applies to the lease of premises. The jurisprudence construing La. R.S. 9:3221 has not required that such waiver provisions be brought to the lessees' attention or explained to them. *See Ford v. Bienvenu*, 00-2376, pp. 8-9 (La. App. 4 Cir. 8/29//01), 804 So.2d 64, 69-70.

Mr. Lacinak's second argument is that the waiver provision is invalidated by La. C.C. art. 2004, which provides in pertinent part that "[a]ny clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party." La. C.C. art. 2004. In support, he cites *Ramirez v. Fair Grounds Corp.*, 575 So.2d 811 (La. 1991). In *Ramirez*, the issue was whether a hold-harmless provision in a stall-space agreement, which was described as a license to use the space free of charge, was invalidated by La. C.C. art. 2004. Answering that question in the affirmative, the Louisiana Supreme Court invalidated the provision because it excluded in advance the Fair Grounds' liability for causing physical injury to the plaintiff, who was a party to the license agreement.

Mr. Lacinak's reliance on *Ramirez* is misplaced. In *Mendoza v. Seidenbach*, 598 So.2d 404, 406 (La. App. 4th Cir. 1992), we rejected the argument that the license agreement in *Ramirez* is analogous to a lease; thus, we found La. C.C. art. 2004 did not invalidate a waiver provision under La. R.S. 9:3221. *See also Guillory v. Foster*, 93-996 (La. App. 3 Cir. 3/2/94), 634 So.2d 1372, 1374 (holding that "if Article 2004 had been intended to negate La. R.S. 9:3221, the latter statute would have been repealed in the act which enacted the former statute.")

As noted, Mr. Lacinak's alternative argument is that even assuming

the waiver provision is valid, summary judgment was inappropriate because a genuine issue of material fact exists as to whether Mr. Corenswet should have known of the defect, *i.e.*, the leaking pipe that caused the mold and fungal growth. In support, he cites his affidavit in which he attests that the leaking pipe had caused the rotting through of a large area of wood—a 2x4 inch wall sill, the floorboard, and a 4x8 inch floor joist. This evidence, he contends, supports a reasonable inference that the leaking pipe was of long-standing origin and was present at the commencement of the lease. He also contends that in January 2004 when he brought to Mr. Corenswet's attention the damp kitchen wall, Mr. Corsenswet should have taken steps—besides viewing the outside gable—to determine the source of the dampness on the inside wall.

Mr. Corenswet counters that it is sheer speculation that the leaking pipe may have existed before the inception of the lease—four years before it was discovered. He emphasizes the lack of evidence of any minimum length of time required to create rot in wood or the volume of water that leaked or the environmental factors to which the wood was exposed. He further emphasizes that Mr. Lacinak's own affidavit reveals that he did not notice any abnormal moisture until January 2004. Mr. Corenswet, however, fails to address the notice provided to him in January 2004 of the damp kitchen wall

and the "overall dampness problems."

Despite the Legislature's mandate favoring summary judgment, "factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor." *Willis v. Medders*, 00-2507, p. 2 (La. 12/8/00), 775 So.2d 1049, 1050. Given the evidence in the record before us, we find there is a genuine issue of material fact as to whether Mr. Corenswet should have known in January 2004 that there was a defect. We thus find the trial court erred in granting summary judgment and remand for further proceedings.

DECREE

For the foregoing reasons, the judgment of the trial court is reversed. This matter is remanded for further proceedings.

REVERSED AND REMANDED