

Century Indem. Co. v. Parsons Hill P'ship, No. 703-10-07 Rdcv (Cohen, J., Dec. 10, 2008)

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**STATE OF VERMONT
RUTLAND COUNTY**

CENTURY INDEMNITY COMPANY, as)	
SUCCESSOR TO INSURANCE)	Rutland Superior Court
COMPANY OF NORTH AMERICA,)	Docket No. 703-10-07 Rdcv
)	
Plaintiff,)	
v.)	
)	
PARSONS HILL PARTNERSHIP, ET AL.,)	
)	
Defendant)	

PARSONS HILL PARTNERSHIP, ET AL.,)	
)	Rutland Superior Court
Plaintiff,)	Docket No. 730-10-07 Rdcv
)	
v.)	
)	
CENTURY INDEMNITY COMPANY, as)	
SUCCESSOR TO INSURANCE)	
COMPANY OF NORTH AMERICA,)	
)	
Defendant)	

DECISION ON INSURANCE COVERAGE

This is an action for declaratory judgment to settle the scope of insurance coverage provided by Century Indemnity Company (Century) to Parsons Hill Partnership. The sole remaining claim in this action is for breach of the implied warranty of habitability.

This matter is before the Court for Docket No. 703-10-07 Rdcv, on “Willard” Defendants’ Motion for Summary Judgment against Century Insurance Company, filed December 12, 2007. “Willard” Defendants filed this Motion in response to Century Indemnity Company’s Complaint for Declaratory Relief, filed October 19, 2007.

This matter is also before the Court for Docket No. 730-10-07 on Parsons Hill Partnership’s Complaint, filed October 31, 2007, in which it prays for declaratory relief as to the issue of insurance coverage.

Both Century Indemnity Company and Parsons Hill Partnership seek a ruling declaring what, if any, obligation Century Indemnity Company has to defend and indemnify Parsons Hill Partnership in connection with underlying lawsuits brought by the tenants (“Willard” and “Poulin”) for an alleged breach of an implied warranty of habitability.

Century Insurance Company, as Successor to Insurance Company of North America, is represented by Kevin E. Brown, Esq and Lawrence A. Serlin, Esq. Parsons Hill Partnership is represented by Lisa Chalidze, Esq. and Eugene Rakow, Esq. The “Willard” tenants are represented by John Paul Faignant, Esq. The “Poulin” tenants are represented by John Welch, Jr., Esq.

Summary Judgment Standard

Summary judgment is appropriate where there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3). In response to an appropriate motion, judgment must be rendered "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 any material fact and that any party is entitled to

judgment as a matter of law." V.R.C.P. 56(c)(3). In determining whether a genuine issue of material fact exists, the Court accepts as true allegations made in opposition to the motion for summary judgment, provided they are supported by evidentiary material. *Robertson v. Mylan Labs, Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356. The nonmoving party then receives the benefit of all reasonable doubts and inferences arising from those facts. *Woolaver v. State*, 2003 VT 71, ¶ 2, 175 Vt. 397. Furthermore, where, as here, "the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. The burden then shifts to the nonmoving party to persuade the court that there is a triable issue of fact." *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 18 (1995) (internal citations omitted).

Background

Parsons Hill Partnership has owned an apartment complex in Castleton, Vermont since the early 1980's. In early 1983, water tests conducted at the complex by the Vermont Department of Health revealed that the water contained unsafe levels of Perchloroethylene (PCE) - a known toxin. The Department of Health assigned the water "No Drink" status. After being notified verbally, Yvonne Rooney, general partner of Parsons Hill, received written confirmation of these results from the state. However, from 1983 to 1997, Parsons Hill did nothing to fix or address the issue.

Tenants contend that they drank, bathed in, cooked with, and cleaned with the PCE-contaminated water for fourteen years until one tenant inadvertently learned of the problem in July 1997. While conducting internet research as part of her employment, tenant Candace Willard discovered information on a state web site indicating that the

water at Parsons Hill was contaminated with PCE. At that point, Ms. Willard and other tenants hired a consultant and an attorney, and thereafter brought suit.

The tenants conducted extensive discovery and reached a settlement with numerous defendants on all counts except the warranty of habitability count against the partnership and the Rooneys. That is the sole remaining claim to be resolved. See *Willard v. Parsons Hill Partnership*, 2005 VT 69, 178 Vt. 300.

Century Indemnity Company's predecessor in interest, Insurance Company of North America (INA) issued a Policy for the period April 4, 1987 to April 4, 1988. Parsons Hill Partnership contends that INA issued coverage comparable to that Policy's terms for a Policy for the period from April 4, 1982 to April 4, 1987.

In September 1998, Century and the Rooneys entered into a Non-Waiver Agreement under which Century agreed to defend the underlying claims. Century also separately advised Parsons Hill Partnership in writing, at the time the Non-Waiver Agreement was entered into, that it was reserving all of its rights concerning Parsons Hill's claims for insurance coverage.

Century contends that the claim for breach of the implied warranty of habitability is not within the terms of coverage under the alleged policies. Century now seeks a judicial determination as to their duty to defend and indemnify with respect to the tenants claims against Parsons Hill Partnership for breach of the implied warranty of habitability.

Discussion

The Policy issued to Parsons Hill Partnership by Century Indemnity Company states:

Liability Claims We Will Cover

If you or another *insured* has a legal responsibility to pay a claim someone made based on *bodily injury, personal injury, or property damage*, resulting from an *occurrence*, we will pay that claim if it is covered under this policy.

* * *

Personal Injury

Personal Injury means:

* * *

- Wrongfully entering someone’s home, business *premises*, or other property.
- Wrongfully evicting someone from his or her home, business *premises*, or other property.
- Any other wrongful invasion of someone’s right of occupancy.

Section II, Part VI of the Habitational Package Policy.

The final sentence – “Any other wrongful invasion of someone’s right of occupancy” – is the provision at issue.

The essence of Century’s argument is that this provision does not cover a breach of the warranty of habitability because an actual “possessory” right has not been invaded. Century’s argument parallels the interpretation of a similar provision from *In re Aberdeen 100, Inc.*, 1995 WL 447341 (Bkrcty. D.Vt.), in which that court denied coverage for a breach of the warranty of habitability.

Parsons Hill and the Willard and Poulin tenants argue that the term “right of occupancy” includes more than just a “possessory” right to the leased property, and a breach of the warranty of habitability is covered by the provision. Parsons Hill’s argument reflects the holding in *Beltway Management Co. v. Lexington-Landmark*

Insurance Company, 746 F.Supp. 1145 (D.D.C. 1990), in which the court found coverage for a breach of the warranty of habitability under a similar provision.

Construction of the language of an insurance contract is a question of law, not of fact; accordingly a court makes its own inquiry into the legal effect of the contracts' terms and the relationships between them. *Fireman's Fund Ins. Co. v. CNA Ins. Co.*, 2004 VT 93, ¶ 8, 177 Vt. 215. Insurance contracts are to be interpreted according to their terms and the intent of the parties as expressed by the policies' language. *Id.* at ¶ 9.

Insurance contracts must be given a practical, reasonable, and fair interpretation, consonant with the apparent object and intent of the parties, and strained or forced constructions are to be avoided. *McAlister v. Vermont Property and Cas. Ins. Guar. Ass'n*, 2006 VT 85, ¶ 17, 180 Vt. 203.

Any ambiguities in insurance policies are construed in favor of finding coverage. *DeBartolo v. Underwriters at Lloyd's of London*, 2007 VT 31, ¶ 9, 181 Vt. 609. Ambiguity arises where insurance policy language can be reasonably or fairly susceptible of different constructions. *Chamberlain v. Metropolitan Property and Cas. Ins. Co.*, 171 Vt. 513, 515 (2000). If a disputed term is susceptible to two or more reasonable interpretations, the ambiguity must be resolved in favor of the insured. *Serecky v. National Grange Mut. Ins.*, 2004 VT 58, ¶ 17, 177 Vt. 58. A dispute, however, over the proper interpretation of a contract or insurance policy does not automatically render the language ambiguous. *Towns v. Vermont Mut. Ins. Co.*, 169 Vt. 545, 546 (1999). An insurer, furthermore, will not be deprived of unambiguous terms placed in the contract for its benefit. *Fireman's Fund Ins. Co.*, 2004 VT 93, ¶ 9.

The Vermont Supreme Court has neither interpreted the meaning of the clause “[a]ny other wrongful invasion of someone’s right of occupancy,” nor specifically defined the term “occupancy.”

Likewise, the word “occupancy”, which is the term at the heart of this argument, is not defined in the Policy itself. When a disputed term has not been specifically defined in an insurance policy, it should be defined according to its plain, ordinary and popular meaning. *Fireman’s Fund Ins. Co.*, 2004 VT 93, ¶ 8; see *Northern Sec. Ins. Co. v. Perron*, 172 Vt. 204, 210 (2001) (holding that the word “accident” was not defined in the policy, thus term should be defined according to the usual understanding of the term's significance to the ordinary person); see also 2 Couch on Ins. § 22:38 (3d ed. 2008) (“Usual and ordinary meaning” has been stated variously to be that meaning which the particular language conveys to the popular mind; to most people; to the average, ordinary, normal, or reasonable man; to persons with usual and ordinary understanding; and to a businessman or a layman, rather than a lawyer or insurance professional).

Merriam-Webster’s Online Dictionary contains only one definition of “occupancy” which is applicable to a landlord-tenant relationship: “the fact or condition of holding, possessing, or residing in or on something.” Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/occupancy> (last visited Dec. 1, 2008)

Black’s Law Dictionary defines “occupancy” as “[t]he act, state, or condition of holding, possessing, or residing in or on something; actual possession, residence, or tenancy, esp. of a dwelling or land.” Black’s Law Dictionary 1108 (8th ed. 2004).

Both definitions clearly state that the term “occupancy” encompasses more than just physical possession of the property – it also includes *residing* in or on the property. In addition, *Black’s* definition also includes the concept of tenancy. Thus the plain, ordinary and popular meaning of the word “occupancy” as used by an ordinary person reasonably includes both *residency* and *tenancy* in or on the property.

The provision “any other wrongful invasion of someone’s right of occupancy” reasonably includes wrongful invasion of those rights associated with possession, residency, and tenancy of the property. To read the provision to unambiguously mean that coverage exists only as to physical possessory rights of the property is a strained interpretation in light of the plain and ordinary meaning of the word occupancy. See *McAlister*, 2006 VT 85, ¶ 17 (holding that strained or forced constructions are to be avoided). Furthermore, applying the usual understanding of the term “occupancy” to the ordinary person, an interpretation of the provision which provides coverage only for possessory rights is *not* reasonable.

As drafter of the policy, Century could have included specific language limiting coverage to invasion of someone’s physical possessory rights. Century, however, included the word “occupancy” which is broader than “possession,” according to its plain and ordinary meaning, in the realm of the landlord-tenant relationship. Courts presume that the parties relied on the ordinary meaning of a word not defined by the insurance policy. *Pepin v. Allstate Ins. Co.*, 2004 VT 18, ¶ 10, 176 Vt. 307.

Before delving into the case law analyzing coverage provisions similar to that of the instant case, it is important to first lay out the applicable Vermont law in regards to breach of the implied warranty of habitability.

Hilder v. St. Peter, 144 Vt. 150 (1984), is the seminal case on the implied warranty of habitability. *Hilder* held that in the rental of any residential dwelling unit an implied warranty of habitability exists in the lease, whether oral or written, that the landlord will deliver over and maintain, throughout the period of tenancy, premises that are safe, clean, and fit for human habitation. *Id.* at 159. This warranty is implied in tenancies for a specified period or at will. *Id.* at 159-160. Additionally, the implied warranty of habitability cannot be waived by any written provision in the lease or by oral agreement. *Id.* at 160.

The Court's reasoning behind this holding was that the traditional common law property concepts of lease, which originated in the Middle Ages, did not comport with modern society's need for adequate housing. *Id.* at 157-158.

Under the traditional common law notion of lease, the relationship between the landlord and tenant was controlled by the doctrine of caveat lessee; that is, the tenant took possession of the demised premises irrespective of their state of disrepair. *Id.* at 157. The landlord's only covenant was to deliver possession of the property to the tenant. *Id.* There was no duty to render the premises habitable unless there was an express covenant to repair in the written lease. *Id.* The land, not the dwelling, was regarded as the essence of the conveyance. *Id.*

The *Hilder* Court noted that an exception to the rule of caveat lessee was the doctrine of constructive eviction. *Id.* If the landlord wrongfully interfered with the tenant's enjoyment of the demised premises, or failed to render a duty to the tenant as expressly required under the terms of the lease, the tenant could abandon the premises and cease paying rent. *Id.* (citing *Legier v. Deveneau*, 98 Vt. 188, 190 (1924)).

The Court noted that this approach to landlord and tenant relations had “become an anachronism in twentieth century, urban society.” *Id.* “Today’s tenant enters into lease agreements, not to obtain arable land, but to obtain safe, sanitary, and comfortable housing.” *Id.* at 157-58.

“[Tenants] seek a well known package of goods and services – a package which includes not merely walls and ceilings, but also adequate heat, light, and ventilation, *serviceable plumbing facilities*, secure windows and doors, proper sanitation, and proper maintenance.” *Id.* at 158 (citing *Javins v. First National Realty Corp.*, 428 F.2d 1071, 1074 (D.C.Cir. 1970)) (emphasis added).

It is clear that under Vermont law the right of occupancy includes that “package of goods” which are necessary to make the premises *occupiable* and suitable for *residency*. The implied warranty of habitability seeks to guarantee that a “landlord will deliver over and maintain, throughout the period of tenancy, premises that are safe, clean, and fit for human habitation.” *Id.* at 159.

Furthermore, the Court held that the doctrine of constructive eviction and implied warranty of habitability were essentially one in the same. *Id.* at 164. Constructive eviction, which requires the tenant to abandon the property in order to escape liability for rent, is no longer viable. *Id.* Where the tenant seeks, not to escape rent liability, but to receive compensatory damages in the amount of rent already paid, abandonment is similarly unnecessary. *Id.* (citing *Northern Terminals, Inc. v. Smith Grocery & Variety, Inc.*, 138 Vt. 389, 396-97). Therefore, when a landlord breaches the implied warranty of habitability, the tenant may withhold future rent, and may also seek damages in the amount of rent previously paid. *Id.*

The reasoning of *Beltway Management Co. v. Lexington-Landmark Insurance Company*, 746 F.Supp. 1145 (D.C.C. 1990), comports with *Hilder's* view of modern residential lease in Vermont. This Court finds *Beltway* persuasive.

In *Beltway*, the court found that breach of the warranty of habitability was covered by the provision “wrongful entry or eviction or other invasion of the right of private occupancy.” 746 F.Supp. at 1159. The *Beltway* court relied on (1) the plain meaning of the contract’s terms, (2) the modern understanding of lease, and (3) the avoidance of terms as surplusage.

Particularly persuasive is the fact that *Beltway*, like *Hilder*, relied heavily on the modern understanding of residential lease and the “package of goods” annunciated in *Javins*. *Id.* at 1149 (citing *Javins*, 428 F.2d at 1074).

Furthermore, the *Beltway* court reasoned that “it is not lightly to be assumed that any contractual terms are mere surplusage, especially those included in a definition.” *Id.* at 1154.

Like the insurer in *Beltway*, Century asserts that the rights of someone’s occupancy are limited to possessory interests, but it does not offer any examples of what claims against the insured would be covered. See *Id.* If the phrase “any other wrongful invasion of someone’s right of occupancy,” covered only the same losses as “wrongfully entering” or “wrongfully evicting” then it would be mere surplusage and a meaningless provision. See *Id.*

Along these lines, Century also asserts that the doctrine of “ejusdem generis” applies to the provision in question. This rule provides that when general words follow an enumeration of specific persons or things, the general words are not construed in their

widest extent, but are applied only to persons or things of the same general kind or class as those specifically enumerated. *Groshong v. Mutual of Enumclaw Ins. Co.*, 985 P.2d 1284, 1289-90 (Or. 1999).

Applying this doctrine only bolsters the insured's argument for coverage. Constructive eviction must be included either as a "wrongful eviction" in its own right, or under the provision "any other wrongful invasion of someone's rights of occupancy" as it is *at least* of the same kind and class as "wrongful eviction." *Hilder* held that constructive eviction and breach of the implied warranty of habitability are essentially indistinguishable concepts. *Hilder*, 144 Vt. at 164. Breach of the implied warranty of habitability, therefore, *is* of the same general kind or class of those specifically enumerated.

Century argues that the holding in *In re Aberdeen 100, Inc.*, 1995 WL 447341 (Bkrcty.D.Vt.), should be applied. *In re Aberdeen 100, Inc.* is wholly unpersuasive.

The *Aberdeen* court was faced with the question of whether the provision "the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy..." covered a breach of the warranty of habitability. *Id.* at *12. The court construed the provision "invasion of the right of private occupancy" to require actual physical dispossession and held that it did not cover breach of the implied warranty of habitability. *Id.*

The court stated: "Although the premises may have been rendered uninhabitable, there has been no interference with the 'right of private occupancy.' It may be unpleasant, unhealthy, unsafe, and undesirable to continue to occupy the premises, but there has been no interference with the right to do so." *Id.*

This type of reasoning flies in the face not only of the reasoning and holding of *Hilder*, but also the plain and ordinary meaning of the terms of the provision. The *Aberdeen* court did not analyze the plain and ordinary meaning of the terms, or *Hilder*. In fact, *Hilder* is not cited once in the opinion.

In the instant case, the best Century could have hoped for was that there would be more than one reasonable interpretation of the provision. Even then the coverage would still be construed in favor of the insured as the provision would be ambiguous. Century, however, can not even show ambiguity.

In light of the plain and ordinary meaning of the term “occupancy,” the provision “any other wrongful invasion of someone’s right of occupancy” has only one reasonable interpretation and is therefore unambiguous. This sole reasonable interpretation is confirmed by both the reasoning and holdings of *Hilder* and *Beltway*.

The provision covers those personal injuries caused by wrongful invasion of a tenant’s right to *occupy* a property. This includes more than physical possession of the property – it also includes those rights which make the premises *habitable* and therefore fit for *residency* and *tenancy*. A breach of the implied warranty of habitability is therefore covered by the provision.

Century Indemnity Company is legally obligated to defend the action and to indemnify Parsons Hill Partnership for any judgment, settlement, resolution, or awards that may be entered in this matter.

ORDER

“Willard” Defendants’ Motion for Summary Judgment against Century Insurance Company, filed December 12, 2007, Docket No. 703-10-07 Rdcv, is GRANTED.

Parsons Hill Partnership's Complaint, filed October 31, 2007, Docket No. 730-10-07, in regards to declaratory relief for insurance coverage is GRANTED.

Dated at Rutland, Vermont this _____ day of _____, 2008.

Hon. William Cohen
Superior Court Judge