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Article 22

Real Property--Section 78 of the Multiple Dwelling Law--Contractual Obligations Between Landlord and Tenant (Emigrant Industrial Bank v. One Hundred Eight West Forty Ninth Street Corp., 255 App. Div. 570 (1st Dept. 1938))

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against defendants, although in the meantime the law has changed, because an adjudication erroneous however it may be is *res judicata.*[13]

P. S.

REAL PROPERTY—SECTION 78 OF THE MULTIPLE DWELLING LAW — CONTRACTUAL OBLIGATIONS BETWEEN LANDLORD AND TENANT.—Defendant corporation leased premises from the plaintiff in order to sub-let the same, under a lease which contained the following covenants: (1) landlord reserved the right to re-enter to make such repairs as he might deem necessary; (2) the tenant was to make such repairs of the premises as were due to its neglect or misuse; (3) there should be no allowance to tenant for a diminution of rental value and no liability upon landlord for failure to make any repairs. The tenant repaired the premises which had deteriorated without his fault after the landlord had refused so to do. The tenant then tendered his bill of costs together with the balance of the rent after deducting said costs which the landlord refused to accept. In the landlord's action for summary proceedings the tenant counterclaimed for the value of the repairs to be set off as against the rent, claiming that Section 78 of the N. Y. Multiple Dwelling Law [1] had imposed a duty upon the landlord to repair. The trial court dismissed the counterclaim and gave judgment to the plaintiff. On appeal, *held,* affirmed. Although Section 78 has extended the landlord's tort liability, it does not alter the contract obligations of the parties. Their rights must be determined by the covenants in the lease and in the absence of the landlord's *express* covenant to repair the tenant cannot successfully set off the cost of repairs. *Emigrant Industrial Bank* v. *One Hundred Eight West Forty Ninth Street Corp.,* 255 App. Div. 570, 8 N. Y. S. (2d) 354 (1st Dept. 1938).

A covenant to repair will never be implied.[2] An oral contract

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[13] 2 FREEMAN, JUDGMENTS (5th ed. 1925) 1436, § 709 ("But where the parties and the matter to be determined are identical, the former adjudication is *res judicata* and conclusive of the law as applied to that matter, even though it is afterwards determined that the law was erroneously adjudicated or applied."). "The effect of the judgment is not at all dependent upon the correctness of the verdict or finding upon which it was rendered." Wilson's Executor v. Deen, 121 U. S. 525, 534, 7 Sup. Ct. 1004 (1887).

[1] "Every multiple dwelling and every part thereof shall be kept in good repair * * *. The owner of such multiple dwelling shall be responsible for compliance with the provisions of this section but the tenant also shall be liable for every violation of the provisions of this section if such violation is caused by his own wilful act or negligence or that of any member of his household or his guest."

[2] Witty v. Matthews, 52 N. Y. 512 (1873); Daly v. Wise, 132 N. Y. 306, 30 N. E. 837 (1892).

to repair at the time of, or previous to a written demise has been held to be inadmissible as violating the parol evidence rule.[3] Where particular repairs are specified in the lease the courts limit the construction to be no broader than the language used.[4] A covenant which reserves the landlord's right to re-enter does not impose upon him the duty to make repairs [5] and if he does make repairs it is not considered an admission of his duty to repair.[6] It seems that in no section of the Multiple Dwelling Law is there an express or implied authorization conferred upon the tenant to make repairs and receive remuneration therefor where the landlord had not covenanted to repair. But the statute permits the Tenement House Department to make repairs [7] or the Department may order the landlord so to do and non-compliance thereof would subject him to penalty under criminal prosecution.[8] Since the statute is in derogation of the common law it must be strictly construed.[9] Thus, where the theory of an action is on contract it would seem that the success of the action cannot be predicated upon the landlord's enlarged statutory duty to repair.[10]

A lessee may bring an independent action for damages where the lessor breached his covenant to repair, the damages being limited to the lessee's cost for the repairs.[11] However, where the landlord sues for the rent the tenant's proper remedy would be to counterclaim for the repairs.[12] A tenant may also counterclaim where his personal

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[3] Hartford & New York Steamboat Co. v. Mayor, etc. of the City of New York, 78 N. Y. 1 (1879); Hall v. Beston, 26 App. Div. 105, 49 N. Y. Supp. 811 (1st Dept. 1898); Smith v. Smull, 69 App. Div. 452, 74 N. Y. Supp. 1061 (2d Dept. 1902); 1 TIFFANY, LANDLORD AND TENANT (1st ed. 1912) § 87, n.134; 1 THOMPSON, NEW YORK LAW OF LANDLORD AND TENANT (1st ed. 1937) §§ 311–13.

[4] Instant case; Ducker v. Genovese, 93 App. Div. 575, 87 N. Y. Supp. 889 (2d Dept. 1904); City of New York v. United States Trust Co., 116 App. Div. 349, 101 N. Y. Supp. 574 (1st Dept. 1906); Freiot v. Jacobs, 209 App. Div. 334, 204 N. Y. Supp. 446 (3d Dept. 1924).

[5] Richmond v. Lee, 123 App. Div. 279, 107 N. Y. Supp. 1072 (1st Dept. 1908); Baitzel v. Rhinelander, 179 App. Div. 735, 167 N. Y. Supp. 343 (1st Dept. 1917).

[6] Elefante v. Pizitz, 182 App. Div. 819, 169 N. Y. Supp. 910 (1st Dept. 1918), *aff'd*, 230 N. Y. 567, 130 N. E. 896 (1918).

[7] N. Y. MULTIPLE DWELLING LAW § 309; Adamec v. Post, 273 N. Y. 250, 7 N. E. (2d) 120 (1937) (if the owner refused to make the alterations the city was authorized to make them, the cost becoming a lien upon the property subject to taxes, assessments and prior mortgages).

[8] N. Y. MULTIPLE DWELLING LAW § 304; Davar Holdings v. Cohen, 255 App. Div. 445, 7 N. Y. S. (2d) 911 (1st Dept. 1938).

[9] Liddell v. Novak, 246 App. Div. 848, 285 N. Y. Supp. 22 (2d Dept. 1936); Wessely v. Trustees of First German Methodist Episcopal Church, 165 Misc. 834, 300 N. Y. Supp. 942 (1937).

[10] See EDGAR AND EDGAR, LAW OF TORTS (3d ed. 1936) § 8.

[11] Goelet v. Goldstein, 229 App. Div. 456, 242 N. Y. Supp. 586 (1st Dept. 1930).

[12] Myers v. Burns, 35 N. Y. 269 (1866); Cook v. Soule, 56 N. Y. 420 (1874); Two Hundred Forty West Thirty Seventh Street Corp. v. Lippmann, 241 App. Div. 529, 272 N. Y. Supp. 739 (1st Dept. 1934).

property has been damaged as a result of disrepairs.[13] But the landlord's failure to repair is never a defense to an action for rent.[14] The contention of the defendant herein is much weaker than that advanced in *Davar Holdings* v. *Cohen* [15] where the landlord disobeyed the Tenement House Department's order to repair, since in the instant case such order is lacking. The court in the *Davar* case gave judgment to the landlord and dismissed the tenant's counterclaim for repairs on two grounds: (1) The controversy is one solely between the landlord and the Tenement House Department; (2) The settled rule that a tenant may not recover for repairs in absence of the landlord's express covenant to repair [16] has not been altered by the Multiple Dwelling Law. But even if it is assumed that the defendant's contention herein is tenable he cannot succeed since he had expressly covenanted to waive such recovery.[17] It is possible that the facts might warrant the tenant to avail himself of Laws of 1930, c. 871.[18]

J. F. W.

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[13] Jelico Realty v. Schilling Furniture Co., 252 App. Div. 817, 298 N. Y. Supp. 852 (3d Dept. 1937); Harfield Realty Co. v. Spuyten Amusement Corp., 150 Misc. 904, 270 N. Y. Supp. 692 (1934); Coleman Holding Corp. v. Altman, 150 Misc. 724, 270 N. Y. Supp. 81 (1934).

[14] Goelet v. Goldstein, 229 App. Div. 456, 242 N. Y. Supp. 586 (1st Dept. 1930); 321 Columbus Avenue Corp. v. Lazarus, 142 Misc. 325, 253 N. Y. Supp. 624 (1931).

[15] 255 App. Div. 445, 7 N. Y. S. (2d) 911 (1st Dept. 1938).

[16] Witty v. Matthews, 52 N. Y. 512 (1873); 1 TIFFANY, *op. cit. supra* note 3, § 87, n.80; 1 THOMPSON, *op. cit. supra* note 3, § 450, n.12.

[17] Instant case at 576 (the defendant covenanted that there should be no allowance for a diminution for rental value and no liability upon the landlord if he should fail to make the repairs).

[18] N. Y. Laws of 1930, c. 871. "Upon proper proof that a notice or order * * * to make necessary and proper repairs has been made by the Tenement House Department * * * matters affecting building or part thereof used for dwelling purposes in the city of New York, if the condition against which said notice or order is directed is, in the opinion of the court, such as to constructively evict the tenant from a portion of the premises occupied by him, the court before whom the case is pending may stay summary proceedings to dispossess the tenant for nonpayment of rent * * *. Such stay shall continue in force until an order shall be made by the court vacating the same but no such order vacating such stay shall be made except upon three days' notice of hearing to the tenant or defendant or his attorney and proof that such notice or order has been complied with.

"The tenant or defendant shall not be entitled to the stay herein provided for unless he shall deposit * * * with the clerk of the court * * * the rent for the month or months then due, * * *. Such stay may be vacated upon three days' notice upon the failure of the tenant to deposit with the clerk of the court * * * the said month's rent within five days after such rent shall become due during the pendency of such proceeding or action.

"Neither the landlord nor any other person shall be entitled to withdraw any of the moneys so deposited during the continuance of the stay. Upon entry of an order vacating stay * * * moneys deposited by the tenant or defendant shall be paid to the plaintiff or landlord or his duly authorized agent." But see note 15, *supra;* 941 Park Avenue Corp. v. Fried, 148 Misc. 137, 265 N. Y. Supp. 239 (1933); Schulte Real Estate Co. v. Uhl, 157 Misc. 417, 283 N. Y. Supp. 806 (1935).