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NOTES

LESSOR'S OBLIGATION TO MAINTAIN A HABITABLE DWELLING: ENFORCEMENT BY LESSEE AND RETALIATORY ACTION BY LESSOR

In the 1975 regular session of the Louisiana legislature, three bills were introduced for the purpose of prohibiting retaliatory conduct by residential lessors against their lessees.¹ "Retaliatory conduct" under the proposed legislation included eviction, reduction in services, or an increase in rent by the lessor in response to the lessee's reporting of housing code violations to municipal authorities, complaining of the condition of the leased premises to the lessor, or joining a tenants' union.²

As the above legislation failed to achieve passage, this note will briefly examine the current status of the law in Louisiana and other jurisdictions with respect to a lessor's obligation to maintain a habitable dwelling and his lessee's right to enforce that obligation. Existing means of preventing retaliation by the lessor for the lessee's attempts to enforce his right to a habitable dwelling will be considered.

At common law a lease traditionally was considered an estate in land, and the tenant took the leased premises with existing infirmities.³ The tenant was bound to inspect the thing before leasing it and was subject to the doctrine of *caveat emptor*, since the common law traditionally implied no warranty by the lessor that the leased premises were habitable or suitable for the tenant's purposes.⁴ However, in recent

1. La. H.B. 709, 1st Reg. Sess. (1975): 1975 LEGISLATIVE CALENDAR OF THE STATE OF LOUISIANA, 1st Reg. Sess. 200; La. H.B. 790, 1st Reg. Sess. (1975): 1975 LEGISLATIVE CALENDAR OF THE STATE OF LOUISIANA, 1st Reg. Sess. 220; La. S.B. 251, 1st Reg. Sess. (1975): 1975 LEGISLATIVE CALENDAR OF THE STATE OF LOUISIANA, 1st Reg. Sess. 548.

2. The problem of retaliatory conduct has been cited as particularly acute in low-income areas where there is a shortage of habitable housing. See F. GRAD, LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS at 124 (1968) [hereinafter cited as GRAD]; Lipsky & Neumann, *Landlord-Tenant Law in the United States and West Germany—A Comparison of Legal Approaches*, 44 TUL. L. REV. 36 (1969) [hereinafter cited as Lipsky & Neumann]; Note, 6 RUTGERS CAMDEN L.J. 565 (1975). Residential tenants, because of limited housing markets, are in an unequal bargaining position when dealing with landlords.

3. 2 R. POWELL, THE LAW OF REAL PROPERTY 178 & 300 (1967) [hereinafter cited as POWELL].

4. R. MINOR & J. WURTS, THE LAW OF REAL PROPERTY 305 (1910); POWELL at 300.

years some common law courts have abandoned the rule of no warranty of habitability.⁵

The adoption of municipal housing codes has been instrumental in this change. Although the housing codes normally provide only for governmental enforcement of standards of habitability and safety, the Court of Appeals, District of Columbia, held in *Javins v. First National Realty Corp.*⁶ that the housing codes enacted for Washington, D.C., established a standard for a lessor's warranty of habitability by operation of law. By adopting this statutory standard of habitability the court barred the landlord's enforcement of the tenant's obligation to pay rent when the premises were in violation of the housing codes.⁷ Following its lead, other jurisdictions have established warranties of habitability both jurisprudentially⁸ and statutorily,⁹ often utilizing existing housing codes as standards of habitability.

In Louisiana, a lease is a synallagmatic contract.¹⁰ Civil Code article 2692 requires the lessor to maintain the premises "in a condition such as to serve for the use" intended by contracting parties.¹¹ Furthermore, Civil Code article 2695¹²

5. *E.g.*, *Lemle v. Breeden*, 462 P.2d 470 (Hawaii 1969); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1968); *Pines v. Perssion*, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

6. 428 F.2d 1071 (D.C. Cir. 1970).

7. *See also* *Brown v. Southall Realty Corp.*, 237 A.2d 834 (D.C. App. 1968) (lease held void when entered into in violation of existing housing codes).

8. *E.g.*, *Bayview Estates, Inc. v. Bayview Mobile Homeowners Ass'n*, 508 F.2d 405 (6th Cir. 1974); *LeClair v. Woodward*, 316 A.2d 791 (Conn. Cir. 1970); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 531, 280 N.E.2d 208 (1972); *City of Dover v. B.C.P. Realty Corp.*, 112 N.H. 238, 293 A.2d 599 (1973); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970). *Contra*, *Blackwell v. Del Bosco*, 536 P.2d 838 (Colo. App. 1975).

9. *E.g.*, CONN. GEN. STAT. ANN. §§ 47-24 (1958) and 47-24b (1958); MICH. STAT. ANN. § 26.1109 (1970); N.H. REV. STAT. ANN. § 48-A:Sub. 3 (1955); N.J. STAT. ANN. 2A:42-85 (1952).

10. LA. CIV. CODE art. 2669.

11. *Id.* art. 2692: "The lessor is bound from the very nature of the contract, and without any clause to that effect: (1) To deliver the thing leased to the lessee. (2) To maintain the thing in a condition such as to serve for the use for which it is hired. (3) To cause the lessee to be in a peaceable possession of the thing during the continuance of the lease."

12. *Id.* art. 2695: "The lessor guarantees the lessee against all the vices and defects of the thing, which may prevent its being used even in case it should appear he knew nothing of the existence of such vices and defects, at the time the lease was made, and even if they have arisen since, provided they do not arise from the fault of the lessee; and if any loss should result to

provides for a warranty by operation of law that the leased premises are fit for the purposes intended;¹³ the article 2695 warranty is comparable logically to the implied warranty of habitability that has developed in other jurisdictions.¹⁴ Thus the law of lease in Louisiana, unlike the common law, has provided the lessee a statutory warranty of fitness for many years. Although Louisiana courts have not applied housing codes as a standard of habitability for the enforcement of Civil Code articles 2692 and 2695, these codes provide an available standard should courts decide to apply them.¹⁵ Such an application would be consistent with the purposes of the establishment of housing codes as well as with articles 2692 and 2695;¹⁶ thus, where codes exist courts should consider them in applying a standard of fitness under these articles.

In Louisiana and elsewhere several methods exist through which the tenant can seek to insure that the leased premises are maintained properly. He can report violations of housing code provisions to the proper authorities, or he can demand informally that the landlord remedy an unsatisfactory condition in the leased premises. Another alternative is for tenants to organize in order to effect greater influence or pressure on landlords to insure that they correct deficiencies in the leased premises.¹⁷ In Louisiana, the lessee can sue for dissolution of the lease agreement and resultant damages,¹⁸ and Civil Code article 2695 offers a basis for indemnification

the lessee from the vices and defects, the lessor shall be bound to indemnify him for the same."

13. *Brunies v. Police Jury of Jefferson Parish*, 237 La. 227, 110 So. 2d 732 (1959); *Lazare, Levy & Co. v. Madden*, 116 La. 374, 40 So. 766 (1906); *Denman v. Lopez*, 12 La. Ann. 823 (1857); *Caffin v. Redon*, 6 La. Ann. 487 (1851); *Equilease Corp. v. Hill*, 290 So. 2d 423 (La. App. 4th Cir. 1974); Note, 23 LA. L. REV. 458 (1963).

14. See *Purnell v. Dugue*, 129 So. 178 (La. App. Or. Cir. 1930) (lack of heat in a modern apartment was found to be in violation of the warranty of fitness for purposes intended).

15. See *Evans v. Does*, 283 So. 2d 804 (La. App. 2d Cir. 1973).

16. See *Kenner, La.*, Code Ch. 5, §§ 5-57 and 5-78 (1972); *New Orleans, La.*, Code Ch. 30, § 30-13 (1956), for language expressing a public policy interest in maintaining safe, habitable housing.

17. See *Davis & Schwartz, Tenant Unions: An Experiment in Private Law-Making*, 2 HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. 237 (1967).

18. Later cases have shown a reticence to dissolve a lease on the basis of violation of warranty. *Billeaudeau v. Soileau*, 303 So. 2d 810 (La. App. 3d Cir. 1974); *Bialy v. Katz*, 273 So. 2d 360 (La. App. 3d Cir. 1973), *cert. denied*, 275 So. 2d 870 (La. 1973).

for injuries incurred by the lessee as the result of violation of the warranty of fitness. Planiol suggests that a reduction in rent is an appropriate remedy under this article.¹⁹

A more effective device tenants use to force landlords to maintain habitable leased premises is the withholding of rent until needed repairs are made. At traditional common law no such remedy was available because a tenant's obligation to pay rent was independent of any covenant to repair on the part of the landlord.²⁰ As a result, a landlord could obtain remedy for non-payment of rent even though the tenant withheld the rent only because the landlord was delinquent in making agreed-upon repairs. A recognition that this traditional rule of lease law did not adequately protect tenants under residential leases has led to changes in several jurisdictions.²¹ In some instances a tenant may enforce the landlord's obligation to make repairs by paying rent into the registry of the court and preventing the landlord from receiving it until he makes required repairs.²²

The Louisiana lessee has never suffered from the infirm doctrine of independent covenants since a lease in Louisiana is treated as a contract with dependent obligations.²³ Louisiana Civil Code article 2694 permits the lessee to deduct the cost of repairs from the rent owed the lessor and to effect needed repairs himself.²⁴ However, such a deduction for re-

19. 2 PLANIOL, CIVIL LAW TREATISE pt. 2, no. 1689 at 24 (11th ed. La. St. L. Inst. transl. 1959). Allowing a lessee to remain in possession of leased premises at a reduced rent is more advantageous for the lessee than dissolution and damages when there is a limited housing market or the tenant is of limited financial means.

20. See GRAD at 119; Lipsky & Neumann at 39.

21. *E.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 (D.C. Cir. 1970); Pines v. Persson, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

22. FLA. STAT. ANN. § 83:60 (1973); N.Y. REAL PROP. ACT AND PROC. LAWS § 755 (1963); N.Y. MULT. DWELL. LAWS § 302-a (1974); PURDON'S PENN. STAT. ANN. Tit. 35, § 1700-01 (1966). See also Robinson v. Diamond Housing Corp., 463 F.2d 853 (D.C. Cir. 1972) (court recognized rent withholding as a valid private enforcement mechanism for housing codes in the same manner that private reporting of code violations is considered necessary to enforce housing code provisions).

23. LA. CIV. CODE art. 2669.

24. *Id.* art. 2694: "If the lessor do not make the necessary repairs in the manner required in the preceding article, the lessee may call on him to make them. If he refuse or neglect to make them, the lessee may himself cause them to be made, and deduct the price from the rent due, on proving the repairs were indispensable, and that the price which he has paid was just and

pairs can serve only to achieve minor repairs, as the value of repairs the tenant may make is limited to the amount of rent due the lessor. Furthermore, Louisiana courts have held consistently that article 2694 does not give a lessee the right to remain in possession of leased premises rent-free until the lessor complies with his statutory duty to repair.²⁵ Only after the lessor is put on notice and fails to repair may the lessee withhold rent and then only if he repairs the premises.²⁶

The aforementioned devices of assuring the landlord's performance of agreed-upon or statutorily required repairs are of little value if the landlord can retaliate against the tenant's use of these devices.²⁷ Although the proposed Louisiana legislation would have prohibited retaliation in the form of increased rent or decreased services in all cases, as the law stands now, the lessee is protected from increased rent or decreased services only when he has a lease agreement with a set term.²⁸ If the lease has no specific term, the lessor can force the lessee to pay increased rent or accept reduced services by threatening to use the lessor's right to evict upon giving the required statutory notice.²⁹

The form of retaliatory conduct that has received the most attention is retaliatory eviction. In the leading case involving the prohibition of retaliatory eviction, *Edwards v. Habib*,³⁰ the United States Court of Appeals, District of Columbia, held that a landlord can evict for any reason or no reason at all so long as the eviction is not in retaliation for a tenant's reporting housing code violations. The case espoused two theories upon which to base its prohibition of retaliatory eviction. First, in dicta, the court propounded that the gov-

reasonable." See *Mullen v. Kerlec*, 115 La. 783, 40 So. 46 (1905); *Winn v. Spearing*, 26 La. Ann. 384 (1874); *Cameron v. Krantz*, 299 So. 2d 919 (La. App. 3d Cir. 1974); *Degrey v. Fox*, 205 So. 2d 849 (La. App. 4th Cir. 1968); *Purnell v. Dugue*, 129 So. 178 (La. App. Or. Cir. 1930). For similar law in other jurisdictions see *Schweiger v. Superior Ct. of Alameda Cty.*, 90 Cal. R. 729, 476 P.2d 97 (1970); *Berzito v. Gambino*, 63 N.J. 460, 380 A.2d 17 (1973); MONT. REV. CODES ANN. § 42-202 (1961); OKLA. STAT. ANN. 41 § 32 (1951); N.D. CENT. CODE § 47-16-13 (1960).

25. See cases in note 24, *supra*.

26. *Id.*

27. See GRAD at 124; Lipsky & Neumann at 60-64; Note, 6 RUTGERS CAMDEN L.J. 565 (1975).

28. LA. CIV. CODE art. 2684.

29. LA. CODE CIV. P. art. 4701; LA. CIV. CODE art. 2686.

30. 397 F.2d 687 (D.C. Cir. 1968).

ernmental entity's providing the landlord with a means for evicting a tenant for exercising his first amendment right of free speech was sufficient to constitute "state action" under the fourteenth amendment and thus could be prohibited on constitutional grounds.³¹ This rationale has received some subsequent application,³² but has not been used as a leading justification for prohibiting retaliatory eviction.

The court in *Edwards* based its holding primarily on its recognition of the need for habitable housing in the Washington, D.C., area and a legislative intent behind the passage of the District of Columbia housing codes.³³ Judge Wright explained:

The notion that the effectiveness of remedial legislation will be inhibited if those reporting violations of it can legally be intimidated is so fundamental that a presumption against the legality of such intimidation can be inferred as inherent in the legislation even if it is not expressed in the statute itself.³⁴

This rationale has been of greater application than the "state action" theory both in the case law³⁵ and statutes³⁶ of other jurisdictions.

Louisiana has no statutory or jurisprudential prohibition of retaliatory eviction. Article 4701 of the Code of Civil Procedure provides for summary proceedings for eviction upon termination of the lease by expiration of an agreed term, non-payment of rent, the lessor's action, or any other rea-

31. U.S. CONST. amend. I; U.S. CONST. amend. XIV.

32. See *Thorpe v. Housing Auth. City of Durham*, 386 U.S. 670, 674 (1967) (concurring opinion); *Hosey v. Club Van Cortlandt*, 299 F. Supp. 501 (S.D.N.Y. 1969). *Contra*, *Lindsey v. Normet*, 405 U.S. 56 (1972); *Fallis v. Dunbar*, 386 F. Supp. 1117 (W.D. Ohio 1974); *Aluli v. Trusdell*, 508 P.2d 1217 (Hawaii 1973).

33. 397 F.2d at 700 n.40.

34. 397 F.2d at 701-02.

35. *Schweiger v. Superior Ct. of Alameda Cty.*, 90 Cal. R. 729, 476 P.2d 97 (1970); *Cornell v. Dimmick*, 342 N.Y.S.2d 275 (1973); *Dickhut v. Norton*, 45 Wis. 2d 389, 173 N.W.2d 297 (1970). See also *Bowles v. Blue Lake Dev. Corp.*, 504 F.2d 1094 (5th Cir. 1974); *Aweeka v. Bonds*, 97 Cal. R. 650 (Cal. App. 1971); *Wilkins v. Tebbetts*, 216 So. 2d 477 (3d Dist. Fla. 1968); *Bradley v. Gallagher*, 14 Ill. App. 3d 652, 303 N.E.2d 251 (1973); *Newmann v. Hallock*, 281 A.2d 544 (N.J. App. 1971).

36. CAL. CIV. CODE § 1942.5 (1974); CONN. GEN. STAT. ANN. § 52-540 (1958); ILL. STAT. ANN. Ch. 80, § 71 (1966); ANN. LAWS OF MASS. Ch. 186, § 18 (1969); N.J. STAT. ANN. 2A:42-10.10 (1952).

son.³⁷ Also, if the lease has no set term to protect the lessee, the lessor can give the requisite notice under this article and cause the lessee's eviction without cause,³⁸ giving a lessor an opportunity to evict in retaliation for the lessee's exercise of a right, such as withholding rent for repairs, that he is entitled to exercise.³⁹ In the absence of a statutory prohibition of retaliatory eviction, the Louisiana courts could apply the reasoning of *Edwards v. Habib*, particularly in light of the warranty of fitness contained in Civil Code article 2695.⁴⁰

The retaliatory conduct of a lessor toward his lessee can also be evaluated in light of the traditional civilian concept of abuse of rights, the exercise of a right by one party in a manner that causes injury to another.⁴¹ Developing originally in the area of property law,⁴² the abuse of rights doctrine has been expanded in some jurisdictions into other areas, such as contract and malicious or frivolous use of the judicial system.⁴³ Jossierand has defined abuse of rights as the exercise of

37. LA. CODE CIV. P. art. 4701: "When a lessee's right of occupancy has ceased because of the termination of the lease by expiration of its term, action by the lessor, non-payment of rent, or any other reason, and the lessor wishes to obtain possession of the premises, the lessor or his agent shall cause written notice to vacate the premises to be delivered to the lessee. The notice shall allow the lessee not less than five days from the date of the delivery to vacate leased premises.

"If the lease has no definite term, the notice required by law for its termination shall be considered as notice to vacate under this article. If the lease has a definite term, notice to vacate may be given not more than thirty days before the expiration of the term."

38. LA. CIV. CODE art. 2686; see also Lipsky & Neumann at 61. Most residential leases operate on a month-to-month basis and the tenant is thus not protected by a lengthy term in the lease.

39. See *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972) (determination of retaliatory motive is particularly inappropriate for determination at a summary proceeding). See also *Clore v. Fredman*, 59 Ill. 2d 20, 319 N.E.2d 18 (1974). In *Leggio v. Manion*, 172 So. 2d 748 (La. App. 4th Cir. 1965), the court held that withholding rent for repairs under LA. CIV. CODE art. 2694 can be raised as an affirmative defense in summary eviction proceedings.

40. LA. CIV. CODE arts. 2692, 2695.

41. See Crabb, *The French Concept of Abuse of Rights*, 6 INTER. AM. L. REV. 1 (1964); Cueto-Rua, *Abuse of Rights*, 35 LA. L. REV. 965 (1975); Mayrand, *Abuse of Rights in France and Quebec*, 34 LA. L. REV. 993 (1974) [hereinafter cited as Mayrand].

42. *E.g.*, LA. CIV. CODE art. 667; see Mayrand at 994.

43. Quebec courts in several instances have required good faith on the part of a party seeking to terminate a contract even when the right of termination is allowed expressly in the contract. This good faith requirement

a right in a manner inconsistent with the social aim or objective of the right.⁴⁴ Although Louisiana courts have not yet utilized the concept of abuse of rights as suggested by Josserand in the area of landlord-tenant relations, such an application would provide a sound, logical basis for the prohibition of retaliatory conduct by a residential lessor.

Even though present Louisiana law does provide possibilities for the prohibition of retaliatory lessor conduct, Louisiana courts have not yet utilized these options. Legislation prohibiting such conduct would not only provide protection for the residential lessee but would also be consistent with the civilian concept of abuse of rights while providing needed specificity in the law governing the landlord and tenant relationship.

John R. Gardner

RECONVENTION FOR DEFAMATION IN THE PLEADINGS: TOWARD RESPONSIBLE LITIGATION

Defamation has been described as "an invasion of the interest in reputation and good name."¹ In Louisiana this interest receives such high regard that,² in contrast to the majority of common law states,³ Louisiana courts extend only a qualified privilege to statements made by a party or his

has been applied to lease agreements in instances where the lessor has a stipulation in the lease barring the lessee from subletting or assigning his lease. *Mayrand* at 1011.

44. *Mayrand* at 1000.

1. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 111 at 737 (4th ed. 1971) [hereinafter cited as PROSSER].

2. *E.g.*, *Kennedy v. Item Co.*, 213 La. 347, 372, 34 So. 2d 886, 895 (1948) (interest in reputation is an "inalienable right of every man to be protected . . .").

3. In order to be protected under the common law absolute privilege, an otherwise defamatory statement made in judicial pleadings need only be relevant to the issue in question to be nonactionable. Thus, if relevant, a false statement made with malice in judicial pleadings would be protected by the common law privilege, but not by the Louisiana qualified privilege. *See, e.g.*, *MacLarty v. Whiteford*, 30 Colo. App. 378, 496 P.2d 1071 (1972); *Finish Allatoona's Interstate Right, Inc. v. Burruss*, 131 Ga. App. 572, 206 S.E.2d 679 (1974); *Sanders v. Leeson Air Cond. Corp.*, 362 Mich. 692, 108 N.W.2d 761 (1961); *Bromund v. Holt*, 24 Wis. 2d 336, 129 N.W.2d 149 (1964); 50 AM. JUR. 2D, *Libel and Slander* § 238 (1970).