Vermont Superior Court
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Chittenden Unit

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 128-2-20 Cncv

LeBlanc vs. Handler

DECISION ON MOTION FOR SUMMARY JUDGMENT

In December 2018, a fire broke out in the kitchen of the home that Plaintiff Bret Leblanc had rented to Defendant Samantha Handler. Mr. Leblanc sued to recover damages resulting from the fire; Ms. Handler counterclaimed for breach of the implied warranty of habitability. Mr. Leblanc now moves for summary judgment on the counterclaim. The court grants the motion.

BACKGROUND

The standard on a motion for summary judgment is so familiar that ordinarily it need not be recited. Here, however, Ms. Handler's failure to perceive and meet her burdens suggests the wisdom of restating the obvious. Under Rule 56, the initial burden falls on the moving party to show an absence of dispute of material fact. *E.g.*, *Couture v. Trainer*, 2017 VT 73, ¶ 9, 205 Vt. 319 (citing V.R.C.P. 56(a)). When the moving party has made that showing, the burden shifts to the non-moving party; that party may not rest on mere allegations, but must come forward with evidence that raises a dispute as to the facts in issue. *E.g.*, *Clayton v. Unsworth*, 2010 VT 84, ¶ 16, 188 Vt. 432 (citing *Alpstetten Ass'n, Inc. v. Kelly*, 137 Vt. 508, 514 (1979)). Where that party bears the burden of proof on an issue, if fairly challenged by the motion papers, it must come forward with evidence sufficient to meet its burden of proof on that issue. *E.g.*, *Burgess v. Lamoille Housing P'Ship*, 2016 VT 31, ¶ 17, 201 Vt. 450 (citing *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989)). The evidence, on either side, must be admissible. *See* V.R.C.P. 56(c)(2), (4); *Gross v. Turner*, 2018 VT 80, ¶ 8, 208 Vt. 112 ("Once a claim is challenged by a properly supported motion for summary judgment, the nonmoving party may not rest upon the allegations in the pleadings, but must come forward with admissible evidence to raise a dispute regarding the facts."). The court must view all evidence in the light most favorable to the non-moving party and give that party the benefit of all reasonable doubts and inferences. *Carr v. Peerless Ins. Co.*, 168 Vt. 465, 476 (1998).

Here, Ms. Handler asserts multiple breaches of the implied warranty of habitability. She therefore bears the burden of proving each element of her claim with respect to each alleged breach. Mr. Leblanc's motion papers fairly challenge her ability to meet her burden of proof. Thus, Ms. Handler may not simply rest on her allegations, but must instead come forward with evidence sufficient to sustain that burden. In many respects, however, Ms. Handler's motion papers fail to supply the necessary evidence.

Viewed through this lens, the following facts emerge as both material and undisputed for purposes of this motion. In 2017, Ms. Handler leased a single-family home in Shelburne from Mr. Leblanc. Mr. LeBlanc had resided in the unit immediately prior to Ms. Handler's tenancy. During that time he personally made improvements to the home. One such improvement included the installation of a new kitchen range hood above the gas-fired kitchen range. As it turns out, that installation was not to code; the hood was much closer to the stovetop than allowed. There is no evidence, however, that Mr. Leblanc was ever aware that this was a code violation.

On the evening of December 16, 2018, a fire broke out on the stovetop. Ms. Handler extinguished the flames, but not before the fire spread. The Shelburne Fire Department responded to and extinguished the fire, but the residence (and much of Ms. Handler's personal property) suffered substantial damage.

In her counterclaim, Ms. Handler alleged a number of defects in the home. Through discovery and in her motion papers, she elaborated on those allegations. With respect to those alleged defects, the undisputed facts are as follows.

First, after the fire, the Shelburne Fire Department notified Mr. LeBlanc that it had found no smoke or carbon monoxide detectors within the premises; it advised him further that the housing code required that smoke detectors be hard-wired detectors. When rented, the premises had battery-powered smoke detectors. During the course of Ms. Handler's tenancy, someone—not Mr. Leblanc— had removed them. There is no evidence, however, that anyone ever brought these defects to Mr. Leblanc's attention, or that he was otherwise aware that they were in fact defects. Nor is there any evidence that the lack of either carbon monoxide monitors or hard-wired smoke detectors caused any harm.

Next, Ms. Handler alleges that Mr. Leblanc "fail[ed] to maintain the vent structure above the stove, which caused the fire." Counterclaim, ¶ 8. Bluntly, however, there is no competent evidence in the record to support any part of this assertion. Indeed, on the facts properly before the court, it is undisputed that the vent structure was clean at the outset of Ms. Handler's tenancy. Thus, any failure to

clean cannot be laid at Mr. Leblanc's doorstep. Accordingly this allegation fails for a total lack of proof and need not be addressed in the analysis below.

As a result of the fire, Ms. Handler had to move into temporary housing while Mr. Leblanc made repairs. She was eager to return home, and so asked to move back in before repairs were completed. Mr. LeBlanc agreed, although remediation was far from complete; kitchen cabinets, countertop, and appliances had not yet arrived or been installed. On January 8, 2019, Ms. Handler moved back in. Sometime thereafter, Mr. Leblanc placed a piece of plywood as a makeshift kitchen countertop; it did not extend the full length of the cabinets below, so Ms. Handler found a piece of drywall and Mr. Leblanc used it instead. While Ms. Handler argues that this was a code violation, there is no evidence that Mr. Leblanc was aware of any such violation; nor is there any evidence that the makeshift solution had any material impact on health or safety. In any event, Mr. Leblanc installed a new, non-porous countertop on February 13, 2019, and the entire remediation was substantially complete within a week after.

Ms. Handler next complains of water in the unfinished basement. Evidently, in late 2017 or early 2018 the basement flooded. There is no evidence that Ms. Handler brought this to Mr. Leblanc's attention. Within a few days, the sump pump in the basement had removed most of the water; what remained—if Ms. Handler is to be believed, for over a year—was a three-foot square area of "standing water." Nevertheless, Ms. Handler did not bring this to Mr. Leblanc's attention until June 17, 2019. Nor did Ms. Handler make any attempt to address the situation herself. When it was brought to his attention, Mr. Leblanc advised that there was nothing he could do to prevent water from leaking into the basement. There is no evidence, however, that the area of standing water in any way affected health and safety.

Finally, Ms. Handler complains of a number of smaller issues: two leaks in the entryway ceiling, issues with the skylight in her bedroom, a leaking shower faucet, and exterior mold. With the possible exception of the shower faucet, in each instance Mr. Leblanc responded promptly to address the problem. In no instance is there any evidence that Mr. Handler's response did not fix the problem. Equally, in no instance is there any evidence that the problem had any effect on health and safety.

ANALYSIS

On these facts, Ms. Handler's claims fail. However characterized—whether as arising under statute or at common law—proof of a claim for breach of the implied warranty of habitability requires evidence of four elements. With respect to none of her claims has Ms. Handler adduced evidence of all four.

Ms. Handler expressly invoked the protections of the Residential Rental Agreements Act ("RRAA") in her counterclaim. The RRAA recognizes a right of action for breach of the implied warranty of habitability. *See* 9 V.S.A. § 4458. To make out a claim, a tenant must show: (1) a breach of the landlord's obligations under 9 V.S.A. § 4457; (2) "actual notice of the noncompliance from the tenant, a governmental entity or a qualified inspector"; (3) that the landlord "fail[ed] to make repairs within a reasonable time"; and (4) "that the noncompliance materially affects health and safety." 9 V.S.A. § 4458(a).

Under the RRAA,

> [i]n any residential rental agreement, the landlord shall be deemed to covenant and warrant to deliver over and maintain, throughout the period of the tenancy, premises that are safe, clean, and fit for human habitation and that comply with the requirements of applicable building, housing, and health regulations.

9 V.S.A. § 4457(a). With respect to several of Ms. Handler's claimed defects—the leaks in the entryway ceiling, issues with the skylight in the bedroom, the leaking shower faucet, and exterior mold—Ms. Handler adduced no evidence that the claimed defects, either individually or in combination, rendered the home less than "safe, clean, and fit for human habitation" or out of compliance with applicable codes. This failure alone defeats these claims; there is no proof of breach of the obligations imposed by § 4457.

Moreover, while Ms. Handler did bring these issues to Mr. Leblanc's attention, the undisputed facts make clear that with the possible exception of the leaking shower faucet in each instance, he responded promptly to address the issue; all but the faucet were fixed in a matter of a few days. There is then no evidence that any of the problems recurred. Equally, there is no evidence that any of these claimed defects had any material effect on health and safety. These claims therefore fail on not one but three of the statutory criteria.

This then leaves Ms. Handler's claims with respect to the lack of carbon monoxide detectors and hard-wired smoke detectors, the location of the range hood, the makeshift kitchen countertop, and the claim regarding water in the basement. With respect to all four, there is no evidence that Mr. Leblanc had actual knowledge—from any source—that the alleged defect took the premises out of compliance with any applicable requirement. Equally, at least with respect to the water in the basement and the makeshift countertop, there is no evidence that the alleged defect had any material impact on health and safety.[1] Indeed, there is no evidence that the lack of carbon monoxide detectors or hard-wired

[1] Moreover, even were there proof that Mr. Leblanc was aware that the makeshift countertop was a code violation, and the there was some material impact on health and safety, the length of time to order and install a new counter was far from unreasonable. This claim, too, then fails on three of the four statutory criteria.

smoke detectors had any actual impact on health and safety. Here, at least, one could argue that the risk from such a lack is so obvious as to require no actual impact; the same cannot be said of a small puddle in the basement that Ms. Handler evidently found so innocuous that she did not even bother bringing it to Mr. Leblanc's attention for well over a year. The court need not resolve this argument, however, as the lack of actual knowledge alone defeats each of these claims.[2] *See Terry v. O'Brien*, 2015 VT 132, ¶ 21, 200 Vt. 511 (rejecting constructive notice claim under RRAA).

The foregoing analysis disposes of Ms. Handler's statutory claim. That, a review of the pleadings confirms, is the only claim she has pleaded. Nevertheless, in denying Mr. Leblanc's motion to dismiss, the court entertained the possibility that a common law claim might yet lie. Curiously, Ms. Handler never moved to amend her counterclaim to assert such a claim. Thus, the court might properly dismiss the counterclaim its entirety, as relying exclusively on the statute. In an abundance of caution, however, the court addresses the potential for a common law claim.

It bears observing at the outset that it is far from clear that any common law right of action for breach of the warranty of habitability survived the 2000 amendments to 9 V.S.A. § 4458(a). In *Terry*, the Court suggested, without deciding, that the 2000 amendment appeared to "supplant" or preempt, all common law causes of action for breach of the implied warranty. *Id*. ¶ 20. Ultimately, though, because the tenants in *Terry* sought relief pursuant to the statute alone, and because that is how the claim was presented to the jury, the Court did not need to decide the preemption issue, and it expressly withheld from doing so. *See id*.

The analysis in *Terry* persuades this court that if the Supreme Court were presented with the issue, it would conclude that there is no longer a separate, common law claim for breach of the warranty of habitability. *See id.* ¶¶ 16–20. Like that Court, however, the court need not rest its dismissal of a common law claim on statutory preemption—and not simply because, as in *Terry*, Ms. Handler did not plead a common law claim. Rather, consideration of the history of the common law claim for breach of the warranty of habitability makes clear that like the statutory claim, the common law claim requires proof of breach, impact on health or safety, and, most importantly here, the landlord's actual knowledge and reasonable opportunity to cure.

The Vermont Supreme Court first recognized a common-law claim for breach of the warranty of habitability in *Hilder v. St. Peter*, 144 Vt. 150 (1984). There, the Court held that to make out such a claim, a tenant "must first show that he or she notified the landlord 'of the deficiency or defect not

[2] There is evidence, from Ms. Handler's expert, that the location of the range hood was a cause of the fire's spread; this satisfies the material impact on health and safety criterion. Again, however, there is no evidence that Mr. Leblanc knew this was a defect.

known to the landlord and [allowed] a reasonable time for its correction.' " *Id.* at 161. The court also observed that "[i]n determining whether there has been a breach of the implied warranty of habitability, courts should inquire whether the claimed defect has an impact on the safety or health of the tenant." *Id.* at 160–61.

In *Willard v. Parsons Hill Partnership*, the Court distinguished the common law and statutory claims. 2005 VT 69, 178 Vt. 300. In the course of a lengthy discussion, the Court observed that while the statute, in the form it existed at the time, required notice of defect from tenant to landlord, the common law right of action extended to cases in which the tenant, being unaware of a defect, cannot bring it to the landlord's attention. *Id.* ¶¶ 17–27. Importantly, however, the Court affirmed that the common law right of action required proof that the landlord had actual knowledge of the defect and failed to remedy it. *Id.* ¶ 27. Then, in *Terry*, while avoiding the preemption question, the Court observed that the common law right of action required proof of a landlord's actual knowledge of defect. 2015 VT 132, ¶ 18.

The requirement of actual knowledge and opportunity to cure is rooted in the history of the relatively recent adoption of the common law claim. For centuries prior to the 1960's, "[t]he relationship between 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." *Hilder*, 144 Vt. at 157. Under that doctrine,

> [t]he tenant's obligation to pay rent existed independently of the landlord's duty to deliver possession, so that as long as possession remained in the tenant, the tenant remained liable for payment of rent. The landlord was under no duty to render the premises habitable unless there was an express covenant to repair in the written lease. The land, not the dwelling, was regarded as the essence of the conveyance.

Id. According to the *Terry* Court, the implied warranty of habitability was then adopted "in derogation" of caveat lessee, insofar as the landlord's obligation to furnish habitable premises and the tenant's obligation to pay rent were recognized as mutual and interdependent, contractual promises. 2015 VT 132, ¶ 19 n.1. That observation clarifies or "puts into context why the warranty is limited . . . in a way that insulates . . . landlords who are often in the best position to prevent and insure against latent defects from liability." *Id*. The newly recognized warranty did not completely turn the tables, so as to make the landlord the absolute insurer or guarantor of all hidden defects or problems with the premises. In fact, during the 1960's, courts rejected a proposed new tort of "slumlordism"— allowing tenants to sue to broadly enforce violations of residential housing and sanitary codes—in favor of a new implied warranty of habitability, which "flowed logically from principles of contract law." D.

Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 U. Ark. Little Rock L. Rev. 793, 804–05 (2013) [hereinafter "Campbell"]. Thus, the tenant was not completely relieved of its contractual obligation of performance (the payment of rent) upon a finding of the existence or occurrence of a habitability defect, and without giving the landlord notice and opportunity to cure. The *Terry* Court correctly reasoned that the change effected by the new implied warranty was limited or balanced, by the concept of notice and opportunity to cure, rather than a wholesale evisceration of the caveat lessee doctrine.[3]

This conclusion finds support in the Court's recognition that claims for breach of the implied warranty of habitability "sound in contract," *Willard*, 2005 VT 69, ¶ 30; *see Weiler v. Hooshiari*, 2011 VT 16, ¶ 9, 189 Vt. 257, and thus permit only "the standard contract remedies." *Hilder*, 144 Vt. at 161. In a seminal case in this area, the D.C. Circuit reasoned that the recognition of an implied warranty of habitability in residential leases would be consistent with implied warranty obligations that had already been recognized (and even codified) in analogous areas of contract law, such as the law pertaining to products liability and the sale of goods. *See Javins v. First National Realty Corp.*, 428 F.2d 1071, 1075–76 (D.C. Cir. 1970); *id.* at 1080 ("Contract principles established in other areas of the law provide a more rational framework for the apportionment of landlord-tenant responsibilities[.]"). Following *Javins*—on which *Hilder* relied extensively—"[c]ourts found it a short step from the obligations imposed in the contract for goods to contracts for housing." Campbell, *supra*, at 805.

That historical connection to the law pertaining to the sale of goods is significant, since a central provision of Article 2 of the Uniform Commercial Code allows a seller to cure a non-conforming tender of merchandise following a buyer's rejection, and thereby preclude the seller's remedy of contract cancellation or forfeiture. *See* W. Lawrence, *Cure after Breach of Contract under the Restatement (Second) of Contracts: An Analytical Comparison with the Uniform Commercial Code*, 70 Minn. L. Rev. 713 (1986) (comparing Section 2-508 of the UCC with the Restatement approach to the cure concept) [hereinafter "Lawrence"].[4] That right to notice and opportunity to cure serves to temper

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[3] That reading finds support in *Hilder*-era understandings of the common law. *See* O. Browder, *The Taming of the Duty – The Tort Liability of Landlords*, 81 Mich. L. Rev. 99, 136 (1982) ("[T]he so-called warranty of habitability, when applied to the facts of many cases involving defective premises, is not a warranty at all, but a promise to repair."); *id*. ("[I]nherent in the nature of the landlord-tenant relation . . . [is s]ome voice [that] keeps repeating, in case after case: the landlord must be given notice of the defect and time to repair it."); J. Mallor, *The Implied Warranty of Habitability and the "Non-Merchant" Landlord*, 22 Duq. L. Rev. 637, 653 (1984) (recognizing the "almost universally recognized prerequisite to liability that the landlord be notified of the defect and be given a reasonable opportunity to repair").

[4] The Vermont Legislature codified UCC Section 2-508 in 9A V.S.A. § 2–508. The *Restatement (Second) of Contracts* § 237 recognizes a similar right to cure. *See* Lawrence, *supra*, at 723.

or lessen the buyer's expansive and otherwise absolute right, under the so-called "perfect tender rule," to simply reject goods containing imperfections. *See Fanok v. Carver Boat Corp., LLC*, 576 F. Supp. 2d 404, 418 (E.D.N.Y. 2008). The right to cure mitigates the seller's losses, so long as the seller's cure is reasonably timely and can still meet the buyer's expectations. *See* Lawrence, *supra*, at 725 (right to cure "protect[s] expectations and avoid[s] waste of resources, while also protecting the breaching party against forfeiture of its contract rights"). Indeed, under both the UCC and the Restatement of Contracts,

> the cure concept stems from the notion that our remedial system encourages parties to enter contracts by giving them damages based on "the benefit of the bargain" for disappointed expectations, rather than trying to deter contract breaches through compulsion or punishment.

Lawrence, *supra*, at 725. Critically, therefore, the "contracts remedial approach" " 'is not directed at *compulsion* of *promisors* to *prevent* breach; rather, it is aimed at relief to *promisees* to *redress* breach.' " *Id*. at 727 n.74 (quoting E. Farnsworth, *Legal Remedies for Breach of Contract*, 70 Colum. L. Rev. 1145, 1147 (1970) (emphasis in original)).

These principles apply equally to the concept of notice and right to cure under the implied warranty of habitability. For example, just as the under the law of the sale of goods, the law of the implied warranty of habitability "does not incorporate a fault element." *Goreham v. Martins*, 147 N.E. 2d 478, 487 (Mass. 2020); *see Weiler*, 2011 VT 16, ¶ 10 (emphasizing this point). "The warranty of habitability is not intended to punish landlords for misbehavior but rather to ensure that tenants receive what they are paying for: a habitable place to live. *Goreham*, 147 N.E. 2d at 487; *see Weiler*, 2011 VT 16, ¶ 9 ("Leases are contracts, and damages for breach generally turn on the respective promises of the parties and are limited to recovery of the benefit of the bargain. Claims for personal injury or property damage sound in tort . . . and depend on comparative degrees of fault.").

Thus, the implied warranty remedies available to a tenant, like those available to the buyer of goods, are limited by the requirements of notice of noncompliance (or "buyer's rightful rejection"), together with the reasonable opportunity for the landlord (or seller) to effectuate a cure. If the landlord (or seller) cures in a fashion that furnishes what was essentially bargained for (i.e., habitable premises) within a reasonable period of time after notice of noncompliance (or rejection of first tender) is given, there is essentially no remedy. If a landlord, after receiving notice, furnishes a repair or cure within a reasonable time period that restores habitability, the tenant has no right to recover. *See Willard*, 2005 VT 69, ¶ 41 ("A tenant is not automatically entitled to habitability damages the instant a defect arises; such damages are available only upon the landlord's knowing failure to timely remedy the defect."). In

this regard, the only potential distinction between a common law remedy and the statutory remedy is the source of a landlord's actual knowledge of defect—under that statute, notice must come from specified sources, whereas at common law it might come from any source at all.

For this reason, Ms. Handler's theory—that a landlord can be liable under an implied warranty theory for defects of which it should have known—is inconsistent with the accepted contract law remedial approach that governs the common law implied warranty of habitability remedy. Nor does this leave a residential tenant without remedy for a landlord's negligence or other misconduct. For example, under the Consumer Protection Act, 9 V.S.A. § 2453, landlords face liability for renting an apartment that they knew or should have known was in violation of health and safety codes. *See Terry*, 2015 VT 132, ¶¶ 25–40. Under that statute, landlords "may not avoid liability by intentionally remaining ignorant of information that they have a duty to disclose," and "tenants can establish through circumstantial evidence alone that landlords knew or should have known of a code violation nor other defect impacting habitability." *Id*. at ¶ 39. Further, tort remedies are available, in instances where landlords' negligence causes personal injuries or loss of personal property (and in such cases, the housing codes may be evidence of an unreasonably dangerous condition, *see Favreau v. Miller*, 156 Vt. 222, 233 (1991)). Finally, as the *Hilder* Court recognized, punitive damages may be available under the implied warranty of habitability if the landlord's conduct was "of such a willful and wanton or fraudulent nature" as to justify exemplary damages. *Hilder*, 144 Vt. at 164.[5] Thus, landlords who fail to inform themselves of code requirements and ensure their premises are compliant are hardly "off the hook" or insulated from risk.

Thus, the common law right of action for breach of the implied warranty of habitability, to the extent that it might be thought to survive the 2000 amendments to 9 V.S.A. § 4458, requires proof, at a minimum, that a landlord had actual knowledge of a habitability defect and failed to cure it within a reasonable period after receiving knowledge. The discussion above makes clear that Ms. Handler cannot prove both of these elements with respect to any of her claims of defect. For some she cannot prove actual knowledge of defect; for others, she cannot prove that the defect had a material effect on habitability, and for still others, she cannot show a failure to repair. In short, her common law claims, to the extent still recognized in the law of Vermont, fail for the same reasons as do her statutory claims.

[5] This teaching does not apply here because Ms. Handler has neither pleaded nor shown facts that come close to meeting the punitive damages standard.

ORDER

The court grants Mr. Leblanc's motion for summary judgment. Ms. Handler's counterclaim is dismissed with prejudice. The parties having represented nearly a year ago that the case in chief is ready for trial, the clerk will schedule a one-day court trial.

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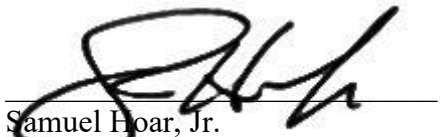

Samuel Hoar, Jr.
Superior Court Judge