Montana Law Review

Volume 36
Issue 1 *Winter 1975*

Article 10

1-1-1975

Green v. The Superior Court: The Implied Warranty of Habitability in California and Montana

Christopher B. Swartley

GREEN v. THE SUPERIOR COURT: THE IMPLIED WARRANTY OF HABITABILITY IN CALIFORNIA AND MONTANA

Christopher B. Swartley

INTRODUCTION

According to traditional common law rules of the law of landlord and tenant, the conveyance of the leasehold estate by the landlord at the commencement of the term of the lease completed the landlord's duties under the lease, and an independent obligation sprang up in the tenant to pay the rent reserved to the landlord for the entire period expressed in the lease. Such rent issued from the land without reference to th buildings upon it, and the tenant acted as a mere conduit through which the income of the land passed. There existed no duty in the landlord to maintain the premises in a habitable condtion either prior to, or during, the term.

In the majority of states, the law remains unchanged from that of feudal England. Courts in a growing number of jurisdictions, however, are recognizing the drastic changes which have occurred in the area of landlord-tenant relations, and also the constantly increasing shortage of decent urban housing. Consequently, a number of recent cases indicate a trend of modernization, discarding outdated and unsuited common law concepts in favor of a more realistic approach in light of current developments.[1]

One significant change has been the judicial treatment of the residential lease as a contract rather than as a conveyance, thereby abrogating the traditional rule that lease covenants are independent. From dependence of covenants it is a short step to require a landlord to maintain his premises, in exchange for the tenant's rent payment. Thus, by the process of implication, a covenant has been recognized and imputed to urban residential landlords, that the leased premises are, and will remain, in a habitable condition. Such an implied warranty of habitability has been recognized by the California supreme court, In Bank,[2] within the same statutory framework as Montana.[3]

[1]Javins v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970)), *cert denied*, 400 U.S. 925 (1970); Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974); Boston Housing Authority v. Hemingway, 293 N.E.2d 831 (Mass. 1973); Morbeth Realty Corp. v. Velez, 73 Misc.2d 996, 343 N.Y.S.2d 406 (1973); Foisy v. Wyman, 83 Wash.2d 22, 515 P.2d 160 (1973); King v. Moorehead, 495 S.W.2d 65 (Mo. App. 1973); Berzito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973); Rome v. Walker, 38 Mich. App. 458, 196 N.W.2d 850 (1972); Glyco v. Schultz, 289 N.E.2d 919 (Mun. Ct. Ohio 1972); Jack Spring, Inc. v. Little, 50 Ill.2d 351, 280 N.E.2d 208 (1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969).

[2]Green v. Superior Court of the City and County of San Francisco, 10 Cal.3d 616, 517 P.2d 1168, 111 Cal.Rptr. 704 (1974).

[3]*Compare* CALIFORNIA CIVIL CODE, §§ 1925-1935 (West 1954) [hereinafter cited as

GREEN V. SUPERIOR COURT

In June of 1972, California's court of appeal reviewed the changing outlook toward landlord-tenant relations in other jurisdictions and decided that a warranty of habitability would be implied by law in residential leases in California.[4] Two years later, in *Green v. Superior Court,* the California supreme court reviewed this holding and emphatically approved it, adding further that the breach of this warranty could be raised as a defense by tenants in unlawful detainer actions,[5] regardless of the tenant's statutory "repair and deduct" remedy.[6]

In September 1972, landlord Sumski commenced an unlawful detainer action in San Francisco small claims court against tenant Green seeking possession and back rent due. Green admitted non-payment but alleged in defense the failure of the landlord to maintain the premises in a habitable condition. The court awarded the landlard possession and entered judgment against the tenant for rent due. The tenant appealed to the San Francisco superior court, where trial de novo was held. In the course of the proceedings, the tenant submitted as evidence a Department of Public Works inspection report disclosing eighty housing code violations, and further detailed in testimony a list of major defects in the dwelling including a collapsing ceiling; mice, rats, and cockroaches; four heatless rooms; blocked plumbing; faulty wiring; and others. The landlord claimed that these defects afforded the tenant no defense in an unlawful detainer action; the superior court agreed, holding that the "repair and deduct" provisions of the California Civil Code[7] contained the tenant's exclusive remedy. Judgment was accordingly entered for the landlord.

The tenant sought hearing by the California supreme court, and due to the statewide importance of the issues presented, a hearing was granted pursuant to the court's discretionary powers. A writ of mandate

---

Cal. Civ. C. (West 1954)] *with* REVISED CODES OF MONTANA, §§ 42-101—42-111 (1947) [hereinafter cited as R.C.M. 1947].
Compare also Cal. Civ. C. (West 1954), §§ 1941-1950 *with* R.C.M. 1947, §§ 42-201—42-210. These sections deal with hiring in general and hiring of real property.
Compare CALIFORNIA CODE OF CIVIL PROCEDURE, §§ 1159-1179 (West 1972) [hereinafter cited as Cal.C.C.P. (West 1972)] *with* R.C.M. 1947, §§ 93-9701—93-9720. These sections deal with forcible entry and detainer.

[4]Hinson v. Delis, 26 Cal.App.3d 62, 102 Cal.Rptr. 661 (1972).

[5]Cal.C.C.P. (West 1972), § 1170 and R.C.M. 1947, § 93-9711 both provide that: "On or before the day fixed for his appearance the defendant may appear and answer or demur."

[6]R.C.M. 1947, § 42-202 provides that: "If, within a reasonable time after notice to the lessor of delapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, where the costs of such repairs do not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions." The California provision was exactly the same until a 1970 amendment added that the remedy was to be available to the tenant only once in any twelve month period. Cal. Civ. C. (West 1954), § 1942.

[7]*Id.*

was issued staying execution of the lower court's judgment on the condition that the tenant pay into the court all rents presently due. In the interim between trials the tenant quit the premises, and the landlord claimed that such action rendered the questions presented moot. The court held that the outstanding money judgment against the tenant and the general importance of the problems were sufficient in themselves to require immediate resolution of all issues.

In a lengthy opinion reviewing not only the facts raised in the case before it, but also the transformation of landlord-tenant relations and resultant changes in the law in other jurisdictions, the court set forth the new rules for California in three parts:

> . . . modern conditions compel the recognition of a common law implied warranty of habitability in residential leases.[8]
>
> **The 'repair and deduct' remedy . . . was not intended as the exclusive remedy for tenants in this field and does not preclude the recognition of a common law warranty of habitability.[9]**
>
> **A tenant may raise a landlord's breach of an implied warranty of habitability as a defense in an unlawful detainer proceeding.[10]**

A relatively clear set of guidelines was also established by the court for other courts, and for landlords, to follow in the future. Thus, under the new warranty

> . . . substantial compliance with those applicable building and housing code standards which materially affect health and safety will suffice to meet the landlord's obligations. . .[11]

Finally, the superior court was instructed to vacate its judgment and proceed with the unlawful detainer action in conformance with the supreme court's ruling.

THE RATIONALE FOR THE NEW APPROACH

The implied warranty of habitability as recognized in *Green* essentially dictates that

> . . . a residential landlord covenants that premises he leases for living quarters will be maintained in a habitable state for the duration of the lease. This does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that 'bare living requirements' must be maintained.[12]

This new approach to landlord-tenant relations is the result of synthesis and anaylsis by the court of several crucial factors. Additional support for this holding can be found in the reasoning of courts in other jurisdictions. A review of the courts' rationale demonstrates the logic of the conclusions.

It has been suggested that the common law rule of independence of

[8]Green v. Superior Court, *supra* note 2 at 1176.
[9]*Id.* (emphasis by the court).
[10]*Id.* at 1178 (emphasis by the court).
[11]*Id.* at 1183.
[12]*Id.* at 1182.

lease covenants may have been an historical accident, due to the development of lease principles prior to the establishment of mutuality of covenants in contract law.[13] Whatever the historical reasons, present conditions no longer justify blind adherence to such a rule. Rather than land, the commodity known as the "dwelling unit" is the basis of lease agreements. Consequently, the theory that rent issued forth from the land conveyed under a leasehold estate, independently of acts of the parties to the lease, is no longer tenable.

> . . . the application of contract principles, including the mutual dependence of covenants, is particularly appropriate in dealing with residential leases of urban dwelling units.[14]

In addition to reshaping the basis of the lease, urbanization has also resulted in a significant change in the parties to the lease:

> . . . today's city dweller usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs like the 'jack-of-all-trades' farmer who was the common law's model of the lessee. Further . . . urban tenants today are more mobile than ever before. A tenant's tenure in a specific apartment will often not be sufficient to justify efforts at repairs. In addition, the increasing complexity of today's dwellings renders them much more difficult to repair than the structures of earlier times.[15]

Adding to this the often prohibitive costs of repair, it is clear that . . . the position of . . . today's urban tenant is barely related to . . . that of . . . his common law ancestors.

The "scarcity of adequate low cost housing in virtually every urban setting"[16] due to both urbanization and population growth, is another factor considered by the courts. In addition to weakening the tenants already precarious bargaining position, shortages make tenants less willing to vacate sub-standard housing.

Further support for the new warranty is drawn by analogy from developments in other areas of the law.

> In the law of sales of chattels, the trend is markedly in favor of implying warranties of fitness and merchantability.[17]
>
> In most significant respects, the modern urban tenant is in the same position as any other normal consumer of goods.[18]

When viewed as a contract, with the tenant treated as a consumer, the lease loses its feudal trappings and becomes more flexible in the hands of judges. Arguments in favor of products liability are easily adaptable to the law of landlord-tenant relations.[19]

The enactment of comprehensive housing codes at both the state and local level throughout the country forced courts to reexamine the common law. First, contracts are presumed to be made in reference

[13]King v. Moorehead, *supra* note 1 at 69 n. 5, and authority cited therein.

[14]Green v. Superior Court, *supra* note 2 at 1173.

[15]Javins v. First National Realty Corp., *supra* note 1 at 1078.

[16]Green v. Superior Court, *supra* note 2 at 1173.

[17]Lemle v. Breeden, *supra* note 1 at 473, citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS, §§ 95, 97 (3d ed. 1964).

[18]Green v. Superior Court, *supra* note 2 at 1175.

to existing law,[20] and therefore housing codes should be read into housing contracts.[21] Also, such codes:

> . . . affirm that, under contemporary conditions, public policy compels landlords to bear the primary responsibility for maintaining safe, clean, and habitable housing in our state.[22]

Finally, since it is the landlord as property owner who is usually notified of code violations, and the tenant may be unable to even discover, let alone remedy, such violations, it follows that the burden of repair should fall on the landlord.[23]

This broad spectrum of arguments covers not only the California court's reasoning, but that of essentially all of the courts which have accepted the doctrine of implied warranty of habitability. One further theme is pervasive, though not always articulated, and that is judicial sympathy for the tenant as underdog. Over time, courts have developed exceptions to the harsh rules such as caveat emptor and independence of lease convenants.[24] Realizing the inadequacy of such exceptions, it has been reasoned that:

> . . . to search for gaps and exceptions in a legal doctrine . . . which exists only because of the somnolence of the common law and the courts is to perpetuate further judicial fictions when preferable alternatives exist.[25]

The best alternative developed to date is the implied warranty of habitability which, though it is somewhat of a fiction itself, helps to equalize the positions of the landlord and tenant in a straightforward manner.

Clearly the rationale of the courts developing the new approach has a firm base in logic and social realities. It has been argued, however, that this policy-oriented reasoning is the function of the legislative branch. The courts counter this by noting that the common law of landlord and tenant was judicially created in the first place. This issue is

[19]Lemle v. Breeden, *supra* note 1 at 473-474. Thus, the demands for public safety are best met by the supplier of goods who has represented their quality, is best equipped to remove any defects, is able to bear losses more easily than the average consumer, and is able to distribute the costs of improving his product throughout the consuming public. *See also* Morbeth Realty Corp. v. Velez, *supra* note 1 at 411; "By significantly reducing the economic motivation of landlords to maintain services, [the old approach] had precisely the kind of effect on the maintenance of apartment units that would be recognized as inevitable if suppliers of goods and services understood that they must receive full payment even if they did not perform according to their agreement."

[20]Steele v. Latimer, *supra* note 1 at 309-310, citing 17 AM.JUR.2D *Contracts* § 257 (1964).

[21]*Id.*

[22]Green v. Superior Court, *supra* note 2 at 1175; *see* Pines v. Perssion, 14 Wis.2d 590, 111 N.W.2d 409, 412-413 (1961).

[23]Kline v. Burns, *supra* note 1 at 251.

[24]Green v. Superior Court, *supra* note 2 at 1174, nn. 10, 11; King v. Moorehead, *supra* note 1 at 69, 70; Lemle v. Breeden, *supra* note 1 at 475. Exceptions include the doctrine of constructive eviction, the covenant of quiet enjoyment, and the warranty of habitability of short term leases of furnished dwellings (such as hotel rooms). All three doctrines because of their limited applications and incomplete remedies, have come to be regarded as ineffective.

[25]Lemle v. Breeden, *supra* note 1 at 475.

settled Califorinia and a dozen other jurisdictions, and the implied warranty of habitability is becoming an established doctrine as well as the modern trend.

SIGNIFICANCE TO MONTANA

The California court's holding in *Green* has special significance to Montana in view of this state's development of the law of landlord and tenant. First, Montana's statutory provisions concerning landlord-tenant relations were adopted almost verbatim from those of California,[26] upon which the *Green* decision rested. The same holds true with regard to the Forcible Entry and Detainer statutes.[27] Secondly, although Montana has not definitively ruled on the implied warranty, the state supreme court has indicated that a statutory construction by the California courts in the area of landlord-tenant will be authoritative.[28] Finally, the general conditions which formed the basis of the new approach in other jurisdictions exist today in Montana, at least to sufficient degree to be judicially recognized. Consequently, when a case like *Green* presents itself, absent some legislative change, the tenant will have an authoritative argument with which he can seek recognition of the implied warranty of habitability.

Although the tenant's contentions in *Green* were based on a non-statutory, common law rule of implied warranty, the landlord argued that the Civil Code provisions, which are the parents of Montana's landlord-tenant law,[29] foreclosed the adoption of such a warranty.[30] The landlord reasoned that the statutes, in providing a duty and a remedy for its breach, were intended to exclude any additional remedies a tenant might have.[31] The court rejected this defense, noting that:

> . . . the statutory remedies of §1942 have traditionally been viewed as additional to, and complementary of, the tenant's common law rights . . . the statutory framework of §1941 et seq. has never been viewed as a curtailment of the growth of the common law in this field . . . the limited nature of the "repair and deduct" remedy, in itself, suggests that it was not designed to serve as an exclusive remedy for tenants in this area.[32]

A new construction has thus been given to the statutes which broadens the scope of tenant remedies.

A similar broadening construction has been given to the statute authorizing summary repossession for unlawful detainer.[33] The landlord

[26]*See* discussion, *supra* notes 3, 6.

[27]*See* materials, *supra* notes 3, 5.

[28]Noe v. Cameron, 62 Mont. 527, 205 P. 256, 257 (1922); Bush v. Baker, 51 Mont. 326, 152 P. 750, 752 (1915); *see* Lake v. Emigh, 118 Mont. 325, 167 P.2d 575 (1946) which cites to California for support of an interpretation of R.C.M. 1935, §§ 7741-7742, the forerunners of R.C.M. 1947, §§ 42-201—42-202.

[29]*See* material, *supra* notes 3, 6.

[30]Green v. Superior Court, *supra* note 2 at 1176.

[31]*Id.* at 1177. Montana has followed this interpretation in Lake v. Emigh, *supra* note 28 at 579.

[32]*Id.*

contended that to preserve the summary nature of the proceedings the California courts have limited the availability of certain defenses, and breach of warranty is one of the excluded defenses. This contention was rejected on the ground that this defense is so essential to a just resolution of the issues that the state's interest in a speedy procedure cannot justify its foreclosure. The court doubted that frustration of the summary nature of the proceedings would necessarily result from its holding, since the availability of other defenses has not caused such a result.[34]

What weight will these constructions have on the Montana courts when they are asked to decide such a case? All that can be said in answer is that although the Califronia holding is in no way binding on the Montana courts, it has been held in the past that California's construction of the statutes governing the law of landlord-tenant were valid, approved, and adopted.[35] Thus Montana adheres to the law as it stood prior to *Green* in holding that the statutory "repair and deduct" remedy is the tenant's sole redress.[36] But the court has indicated that although implied covenants are not favored,

> . . . [they] may arise when there is a satisfactory basis in the express contract of the parties [to a lease] which makes it necessary to imply certain duties and obligations in order to effect the purposes of the parties . . .[37]

It appears, therefore, that although Montana has not definitively ruled on the implied warranty of habitability, and although the old statutory construction of California is still the rule, there is sound basis in *Green* and in past Montana holdings from which to argue for the new approach.

Finally, the conditions which moved the California court to abandon the old common law rule of no implied warranty seem to exist in Montana, even though population concentrations are not so great. The legislature has recognized the problem:

> It is hereby declared that unsanitary or unsafe dwelling accommodations exist in urban and rural areas throughout the state and that such unsafe or unsanitary conditions arise from overcrowding and concentration of population . . . that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals, and welfare of the citizens of the state . . .[38]

Shortages in housing invariably cause increases in demand, resulting in an even weaker bargaining position for the already under-protected tenant. Tenants in Montana are no more able than their California counterparts to make technical repairs to their homes and apartments, and one month's rent goes no further here in purchasing services or

[33] *See* material, *supra* notes 3, 5.

[34] Green v. Superior Court, *supra* note 2 at 1178-1182.

[35] See cases, *supra* note 28.

[36] *Id.*

[37] Turman v. Safeway Stores, Inc., 132 Mont. 273, 317 P.2d 302, 306 (1957), quoting 32 AM.JUR. *Landlord and Tenant*, § 143 (1941).

[38] R.C.M. 1947, § 35-102.

supplies. Building codes are in existence at both the state and local levels, at least in the larger communities. Thus even though in some areas of this state the feudal land-oriented lease principles may still be applicable,[39] changing conditions in the urban areas are comparable to the developments which lead California to reexamine its law and grant the tenant a new remedy.

Clearly *Green* will be a significant factor in any future litigation in the area of landlord-tenant relations. Equally clear is the fact that it is impossible to predict with certainty what the Montana courts will do with California's new interpretation. Suffice it to say at this point that a strong argument may be made that *Green's* holding is logically applicable in Montana.

CONCLUSION

Legislative consideration of the porblems created by urban development may foreclose judicial action of the type taken in California. Although the California court felt that change of the rules of landlord-tenant law was within its power, it cannot be denied that reform would be a proper legislative function. Such action was begun in the form of Senate Bill 643 in the last legislative session, but this measure was defeated. These efforts should not be abandoned, since the need for change becomes sharper each year, and since court action, even if it were taken, would doubtless be less effective than a clear legislative mandate. Problem areas such as the determination of damages, enforcement of housing codes, and exactly what violations constitute a landlord's breach could be provided for prior to the appearance of an actual controversy, and the court's burden could thus be lightened substantially. It is apparent that action in this area of the law is bound to be required in the future as the population of Montana expands. The legislature should forestall judicial confusion by a planned and comprehensive attack on the problem in advance.

[39]Note that the holding in *Green* may arguably be limited to leases of urban residential property, as the court's rationale is based at least partially on changes in city dwelling, which may not apply to farm or suburban residential leases.