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Landlord and Tenant -- Retaliatory Evictions and Housing Code Enforcement

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consideration of the jury, the policy manifested by section 58-30 of the North Carolina General Statutes has been stretched to an extreme.

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Landlord and Tenant—Retaliatory Evictions and Housing Code Enforcement

The low income tenant in North Carolina must rely primarily upon municipal housing codes to ameliorate substandard housing conditions.[1] Although enforcement of code regulations has to some extent elevated the quality of existing urban housing, the process of repair under the codes, particularly for the benefit of the low income tenant, is hampered by the probability of considerable delay.

There may be delay between the first appearance of the defect and tne inspector's knowledge of the defect. Since a limited number of inspectors must inspect not only those dwellings suspected of being substandard but also all other housing in the city,[2] a general program of area inspections is tedious and time consuming. Therefore, inspectors are forced to rely upon reports of code violations from interested parties as an additional means of discovering violations. A tenant of adequate means, having a bargaining power equal to that of the landlord, is likely to repair himself or prompt his landlord to repair a serious defect rather than reporting it and awaiting municipal action under the enforcement process. But a low income tenant can seldom undertake repair; furthermore, a paucity of decent housing[3] may discourage him from antagonizing his landlord by reporting code violations.

The landlord might also retard the process of repair after the defect has been discovered by the inspector. A recalcitrant landlord of slum property will hesitate to expend money for repair of premises of only tenable value[4] and may take advantage of methods available under the

[1] Enabling legislation for municipal housing codes is found in N.C. GEN. STAT. § 160-182 (Supp. 1969).

[2] For example, there are six building inspectors to implement a program of city-wide housing inspection for the city of Durham. When the program is completed, it will have taken about ten years. Interview with Building Inspector for the City of Durham, North Carolina, Dec. 10, 1970.

[3] The North Carolina General Assembly has recognized that the state suffers from a housing shortage and that a substantial number of existing dwellings are in a substandard condition. N.C. GEN. STAT. § 157-2 (1966) (legislation enabling the establishment of municipal housing authorities).

[4] *See Symposium—Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965).

housing codes to postpone enforcement.[5] After the inspector notifies the landlord of the nature of the violation, the landlord is entitled to a hearing before the inspector,[6] and if necessary, he may then be ordered to correct the defect within a specified time.[7] If the landlord fails to repair within the time allotted he may be granted an extension of the time.[8] If after the extension he fails to repair, he may be subject to a criminal penalty,[9] and the city may make the repairs at his expense[10] or force him to vacate the building.[11] However, the need for low-rent urban housing of any condition as well as a general sympathy toward landlords may contribute to the reluctance to employ these extreme measures of code enforcement.[12] During the periods of delay both before and after municipal recognition of the defect, the low income tenant must endure disrepair or quit the premises.[13] He can do little under the common law to stimulate accelerated action by his landlord.

Ignoring the possible disparities of bargaining power between the

[5] The enforcement process provided by the codes may involve uncomfortable delay for the tenant. To begin with, the officials must locate the owner or provide adequate means of notice of the violation if his whereabouts are unknown. *E.g.*, DURHAM, N.C., CODE § 10-8(9) (Supp. 1969). Of course, the owner must have an opportunity to contest the violation and adequate time to comply with an order of the inspector. *E.g.*, DURHAM, N.C., CODE §§ 10-8(5)-(7) (Supp. 1969). There may be further delay if the owner chooses to petition to the superior court for an injunction in restraint of carrying out an order. *E.g.*, DURHAM, N.C., CODE § 10-8(8) (Supp. 1969). Moreover, the inspector may not be permitted to exercise his duty to correct or remove a particular dwelling in violation of the code unless the city council orders by ordinance the inspector to proceed. *E.g.*, DURHAM, N.C., CODE § 10-10 (Supp. 1969).

[6] *E.g.*, DURHAM, N.C., CODE § 10-8(4) (Supp. 1969).

[7] *E.g.*, DURHAM, N.C., CODE § 10-8(5) (Supp. 1969). The time within which the owner must comply is left largely within the discretion of the inspector.

[8] *E.g.*, DURHAM, N.C., CODE §§ 10-8(6), (7) (Supp. 1969).

[9] *E.g.*, DURHAM, N.C., CODE §§ 10-8(6), (14) (Supp. 1969); GREENSBORO, N.C., CODE § 10-28 (1961). However, criminal penalties are rarely imposed upon the landlord. *See Symposium*, 78 HARV. L. REV., *supra* note 4, at 822-23. For example, in Durham criminal penalties have been imposed for violation of the housing code three times in the last eleven years. Interview with Building Inspector for the City of Durham, North Carolina, Dec. 10, 1970.

[10] *E.g.*, DURHAM, N.C., CODE § 10-8(11) (Supp. 1969). Durham does not resort to this remedy. Interview with Building Inspector for the City of Durham, North Carolina, Dec. 10, 1970.

[11] *E.g.*, DURHAM, N.C., CODE § 10-8(10) (Supp. 1969).

[12] In Durham, the owner who does not comply with an order to repair is generally given a continuance of the time originally granted for repairs. Interview with Building Inspector for the City of Durham, North Carolina, Dec. 10, 1970.

[13] The tenant himself may repair less serious defects, but for the low income tenant even minor repairs may be burdensome. California, for example, allows the tenant to make limited repairs and deduct the costs from rent payments. CAL. CIV. CODE §§ 1941-42 (West 1954).

landlord and the tenant,[14] the common law position was that the doctrine of caveat emptor applied to the lessee,[15] and in the absence of a covenant to repair the landlord had neither a duty to put the premises in a suitable condition prior to the lease[16] nor to maintain them thereafter.[17] The rationale for this position was that a tenant was not required to lease premises when he was dissatisfied with their condition, and if the landlord became responsible for disrepair subsequent to the tenant's going into possession, the tenant could abandon the premises and claim he had been constructively evicted by his landlord.[18] North Carolina courts have not rejected or significantly altered archaic common law concepts to cope with housing problems augmented by increasing urbanization. The tenant in North Carolina cannot claim a constructive eviction to recover rent paid for a defective dwelling unless he abandons the premises,[19] but the difficulty of finding alternative low-rent housing practically precludes abandonment. Furthermore, if the tenant relies upon the remedy of constructive eviction, he takes the risk that the court will not find in his favor after he has relinquished possession. In North Carolina, for example, gradual disrepair of the premises when the lessor has not covenanted to repair does not justify a claim of constructive eviction.[20] Consequently, if the tenant wishes to remain in possession, he is deprived of any effective remedy to force the landlord to comply with the dictates of the applicable municipal housing code.

North Carolina courts have been extremely reluctant to allow recovery by the tenant for personal injuries sustained as a result of a hazardous condition of the premises.[21] Even if the tenant has notified the landlord of defects and the landlord has agreed to repair but fails to do so, he is not liable for the tenant's injuries.[22] This rule extends to the situation where the landlord has specifically covenanted to repair (a covenant rarely undertaken in slum areas);[23] the courts have reasoned that com-

[14] *See generally* Kessler, *Contracts of Adhesion: Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

[15] See Note, *Landlord and Tenant—Recent Erosions of Caveat Emptor in the Leasing of Residential Housing*, 49 N.C.L. REV. 175 (1970).

[16] 1 AMERICAN LAW OF PROPERTY § 3.45 (A.J. Casner ed. 1952).

[17] *Id.* § 3.78.

[18] *Id.* § 3.51.

[19] Thompson v. Shoemaker, 7 N.C. App. 687, 690, 173 S.E.2d 627, 630 (1970).

[20] Carolina Mortgage Co. v. Massie, 209 N.C. 146, 183 S.E. 425 (1936).

[21] Rickman Mfg. Co. v. Gable, 246 N.C. 1, 97 S.E.2d 672 (1957).

[22] Moss v. Hicks, 240 N.C. 788, 83 S.E.2d 890 (1954).

[23] *See* Schoshinski, *Remedies for the Indigent Tenant: Proposals for Change*, 54 GEO. L.J. 519, 521 (1966).

pensation for physical injury is not assumed by the parties to the covenant.[24] The position advocated in North Carolina reflects the anomaly that a landlord who is already subject to a duty to the municipality to keep the premises in a safe condition is immune from liability to his tenant even though he has been negligent or dilatory in performing this duty.[25] Thus, the landlord may delay the process of code enforcement indefinitely without fear of tort liability due to his inaction.

Recently, the North Carolina Court of Appeals, in *Thompson v. Shoemaker*,[26] reaffirmed the common law position and held that violations of the housing code did not alter established common law doctrine. The court required abandonment of the premises to support a claim of constructive eviction[27] and ruled that a failure to abandon constituted contributory negligence barring any claim for physical injury.[28] The court failed to accept the plaintiff's argument that common law principles requiring abandonment are not fairly applicable because of the shortage of adequate housing by refusing to take judicial notice of any aspect of the city's housing situation.[29] The court should have taken such notice since the legislature took notice of the scarcity of decent housing when it passed enabling legislation for the establishment of public housing authorities.[30] Furthermore, the housing codes themselves provide that extensive deterioration may occur before destruction of the building becomes necessary.[31] Arguably, implicit in such provisions is the realization that current housing shortages demand that existing dwellings be retained if at all possible. It is interesting to note that in *Thompson* the unlawful defects of the dwelling had remained unrepaired for about a year,[32] and yet the tenant's only feasible remedy was to passively rely upon normal procedures of code enforcement.

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[24] Jordan v. Miller, 179 N.C. 73, 75, 101 S.E. 550, 551 (1919).

[25] New York has held the landlord liable for injuries to the tenant when the proximate cause of the injuries was a defect in violation of the building code. Babba v. Yonkers Nat'l Bank & Trust Co., 265 App. Div. 829, 37 N.Y.S.2d 561 (1942) (mem.). *See also* Crawford v. Palomar, 7 Mich. App. 21, 151 N.W.2d 236 (1967).

[26] 7 N.C. App. 687, 173 S.E.2d 627 (1970).

[27] *Id.* at 690, 173 S.E.2d at 630.

[28] *Id.*

[29] *Id.*

[30] N.C. GEN. STAT. § 157-2 (1966).

[31] For example, the Code of the City of Wilmington provides that a dwelling may be repaired if the cost of repair does not exceed fifty per cent of the value of the building. WILMINGTON, N.C., CODE §§ 6-59, -60 (1961). The City of Greensboro allows repair if it does not exceed sixty per cent of the value of the building. GREENSBORO, N.C., CODE § 10-23(b) (1961).

[32] 7 N.C. App. at 689, 173 S.E.2d at 629.

If a tenant chooses to rely solely upon the process of code enforcement, he should personally report defects to code officials since area inspections may not uncover the defect for years.[33] However, to dispose of a troublesome tenant and to set an example for other tenants, the landlord would be within his common law right to evict the tenant who reports a violation after the expiration of his term[34] or to raise the rent so that the tenant could no longer afford to rent the premises.[35] North Carolina has summary ejectment statutes that set up the procedure by which a landlord may remove a tenant who holds over after his term has ended or who has failed to pay rent.[36] These statutes do not provide for the defense of a retaliatory motive on the part of the landlord. In North Carolina, the summary ejectment procedure is the exclusive remedy for removal and the landlord cannot employ self-help to evict a tenant.[37] Thus, the North Carolina legislature could, by foreclosing the right to summary ejectment in cases of retaliatory eviction or rent increase, protect the tenant who reports a housing code violation.

Even in the absence of legislative action, the North Carolina courts should consider the decisions of other jurisdictions and hold that, as a matter of statutory construction and for reasons of public policy, retaliatory evictions cannot be permitted.[38] Allowing the landlord to rely upon the summary ejectment statutes to thwart housing code enforcement would frustrate the saluatory purpose sought to be achieved by the state legislation enabling municipalities to adopt housing codes.[39] The difficulty with this argument is that any restriction of the summary ejectment statutes by the enabling statute must be implied since the statute makes no reference to the problem of evictions. Nevertheless, the courts might prevent retaliatory evictions without attempting to ascertain legislative intent simply by deciding that such evictions are against public policy.[40] Efficient opera-

[33] *See* note 2 *supra.*

[34] 1 AMERICAN LAW OF PROPERTY § 3.33 (A.J. Casner ed. 1952). *See* N.C. GEN. STAT. § 42-14 (1966), which sets out the applicable notice necessary to teminate a tenancy.

[35] 1 AMERICAN LAW OF PROPERTY § 3.64 (A.J. Casner ed. 1952).

[36] *See* N.C. GEN. STAT. §§ 42-26 to -37 (1966).

[37] North Carolina has held that a landlord is liable for damages when he employs self-help to evict a holdover tenant. Mosseller v. Deaver, 106 N.C. 494, 11 S.E. 529 (1889).

[38] *See* Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1016 (1969); Schweiger v. Superior Court, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970).

[39] N.C. GEN. STAT. § 160-182 (Supp. 1969).

[40] Edwards v. Habib, 397 F.2d 687, 699 (D.C. Cir. 1968).

tion of code enforcement procedures necessitates a freedom of access by aggrieved parties to enforcement officials.

Perhaps the courts have valid reasons for declining to qualify the common law right of the landlord, for in the absence of relevant and comprehensive statutes, judicial decisions cannot immediately resolve exigent issues.[41] Statutory reform in North Carolina could prompt more effective enforcement of the housing codes by granting the tenant the right to refuse to pay rent to the landlord for a dwelling that violates the housing code.[42] To allow the tenant complete freedom from payment of rent would permit him to abuse the protection intended by the statute since he would have nothing to lose by committing waste and remaining in possession with no bona fide intention to pay rent. On the other hand, a rent escrow provision would require the tenant to pay rent as usual; however, this rent would go into the fund rather than directly to the landlord.[43] This fund could then be applied to the cost of any necessary repairs. To be given maximum effect a statute providing for a rent escrow agreement should be supplemented by a provision specifically prohibiting the landlord from evicting the tenant, raising the rent, or requiring additional lease obligations in retaliation for the tenant's reporting code violations.[44]

Because the landlord normally has access to records of expenses related to the property, to evidence of proposed changes of investments or use of the property, or has knowledge of specific instances of waste by the tenant, the burden of going forward on the issue of a retaliatory motive should shift to the landlord after the tenant has established his reporting of code violations and the subsequent attempted evictions by the landlord. Following an attempted wrongful eviction or after the establishment of the escrow agreement the presumption of a retaliatory motive should dissipate only after the passage of a reasonable amount of time.[45] Of course, if the owner wishes to remove his property from the

[41] One issue not decided in *Habib* was how long the tenant could remain in possession after he had reported housing code violations. The dissenting opinion strongly argued that the court should have waited for legislative action. *Id.* at 703-05.

[42] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 111, § 127F (Supp. 1969); N.J. STAT. ANN. § 2A: 170-92.1 (Supp. 1969); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1970); R.I. GEN. LAWS § 34-20-10 (1968).

[43] *E.g.*, MASS. GEN. LAWS ANN. ch. 111, § 127F (Supp. 1969); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1970).

[44] *E.g.*, MICH. STAT. ANN. § 27A.5646 (Supp. 1970).

[45] *See* ABF MODEL RESIDENTIAL LANDLORD-TENANT CODE § 2-407(1) (Tent. Draft 1969). The Model Code provides for a period of six months.

housing market, no construction of the statute should interfere with his right to do so.

The suggested statutory provisions would involve an extremely delicate balancing of the rights of the landlord and tenant. But if interpreted in light of the policies underlying existing municipal housing codes, the laws would not unduly restrict property rights. The end result would be more effective compliance with housing code standards, and for the landlord who maintains these standards, his common law rights against the tenant would be preserved.

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Labor Law—Duty to Bargain About Changes in Benefits for Retired Employees

Suppose that employees, who are members of a collective bargaining unit, are permitted, pursuant to the terms of a collective bargaining agreement, to remain members of an employee group health insurance plan with the employer making monthly contributions for them when they retire. Congress thereafter enacts legislation that entitles these retired employees to certain health care benefits that duplicate some of the benefits of the group plan. The employer, concerned about the welfare of his former employees, wishes to substitute new benefits for those duplicated. Does he, under the Labor Management Relations Act (the Act),[1] have a duty to bargain with the union representing the employees about the proposed change? This question arose for the first time in the history of the Act in the recent case of *Pittsburgh Plate Glass Co., Chem. Div. v. NLRB*.[2]

Since 1949, Local Union No. 1, Allied Chemical and Alkali Workers of America, had been the exclusive bargaining representative of Pittsburgh Plate Glass Company's employees at the Barberton, Ohio plant and mine.[3] A contract was negotiated in 1950 that included provisions for a group health insurance plan for employees; there was also an oral agreement that retired employees could participate in the plan but would bear the entire cost of such participation. In 1959 an improvement in the

[1] 29 U.S.C. §§ 141-87 (1964).

[2] 427 F.2d 936 (6th Cir. 1970), *cert. granted*, 39 U.S.L.W. 3353 (U.S. Feb. 23, 1971) (Nos. 910, 961).

[3] *Id.* at 938.