Wilbanks v. Ombrellaro

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JUDGES: Concurring: Kenneth H. Kato, Stephen M Brown

UNPUBLISHED OPINION

This is an appeal from the dismissal of a tenant's personal injury suit against her landlord. An improperly installed return air duct allowed insulation dust to flow into living areas. But when the landlord learned of the problem he hired a contractor who identified the defect and repaired it. We conclude it was repaired appropriately and timely under any of the legal theories advanced by the tenant. We therefore affirm the summary dismissal of the complaint.

FACTS

Richard and Karen Ombrellaro bought a new house in October 1994. They lived there until August 1998. The Ombrellaros then leased the house to Martha and Richard Wilbanks. Ms. Wilbanks told Ms. Ombrellaro in January 1999 that she thought there was something in the house making them sick. Ms. Wilbanks told Ms. Ombrellaro on March 12 that she found gray fibrous material throughout the house. She told Ms. Ombrellaro her daughter was sick and that the doctor recommended the air ducts in the house be inspected and cleaned. Mr. Wilbanks contacted the Ombrellaros on March 19 to again request that the air ducts be inspected and cleaned. Mr. Ombrellaro agreed and an appointment was made for Monday, March 22--the earliest available appointment. Chris Quinton inspected and cleaned the air ducts on March 22. He identified the problem during his inspection. The return air duct had not been separately sealed and isolated from the insulation in the attic when the house was built. This allowed fibers from the blown-in insulation to enter the ventilation system. Mr. Quinton returned the following day, March 23, and sealed the defective air duct. The Wilbanks[1] sued the Ombrellaros and several others. The Ombrellaros moved for summary judgment and the trial court granted the motion.

DISCUSSION

We review the trial court's grant of summary judgment de novo. Tucker v. Hayford, 118 Wn. App. 246, 251, 75 P.3d 980 (2003). We view the documents and evidence designated in the trial court order in the light most favorable to the nonmoving party. RAP 9.12; Tucker, 118 Wn. App. at 251. Summary judgment will be granted when there are no genuine issues of material fact and the issues presented can be resolved as a matter of law in favor of the moving party. CR 56(c); Tucker, 118 Wn. App. at 251. Issues of material fact must be shown by actual evidence and not bare assertions. Ellis v. City of

Seattle, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). Ms. Wilbanks challenges several court orders that granted summary judgment in favor of the Ombrellaros, Safeco Insurance Company of America, and Safeco Corporation. She, however, only assigns error to and briefs her challenge to the order that granted the Ombrellaros' motion for summary judgment. This is the only order we will then address on appeal. Goehle v. Fred Hutchinson Cancer Research Ctr., 100 Wn. App. 609, 620, 1 P.3d 579 (2000).

Residential Landlord Tenant Act

Ms. Wilbanks argues the defect in the air duct was a defect that was imminently hazardous to life. Therefore, the Ombrellaros were required to make the necessary repairs within 24 hours and failed to do so. She also contends that even if the court were to accept the Ombrellaros' argument that they had 10 days to commence repairs, they still failed to meet the deadline. The Ombrellaros respond that they did not fail to maintain the property under the Residential Landlord-Tenant Act (RLTA). First, Ms. Wilbanks did not provide the Ombrellaros with written notice of a defect as required by the RLTA. Second, the Ombrellaros commenced repairs within 10 days of Ms. Wilbanks' oral complaint and the repairs were completed promptly. The 10- day period did not begin until March 12, 1999. Ms. Wilbanks was required to inform the Ombrellaros of the 'nature of the defective condition.' RCW 59.18.070. Ms. Wilbanks did not inform the Ombrellaros of a specific problem until March 12. The condition was not 'imminently hazardous to life' and therefore the Ombrellaros did not have to make repairs within 24 hours. RCW 59.18.070(1).

The RLTA requires a landlord to make necessary repairs after he or she has received written notice of a defective condition from a tenant. RCW 59.18.060, .070. The landlord is required to commence remedial action within a specified time period depending on the nature of the defect: '(1) Not more than twenty-four hours, where the defective condition deprives the tenant of hot or cold water, heat, or electricity, or is imminently hazardous to life; . . . and (3) Not more than ten days in all other cases.' RCW 59.18.070(1), (3) (emphasis added). The 'remedial work' must be 'completed promptly.' RCW 59.18.070 (emphasis added).

Ms. Wilbanks first contacted Ms. Ombrellaro in January 1999 and mentioned that she thought there was something in the house making them sick. Ms. Wilbanks told Ms. Ombrellaro on March 12 that she found gray fibrous material throughout the house. She told Ms. Ombrellaro her daughter was sick and the doctor thought the air ducts might need to be inspected and cleaned. Ms. Wilbanks reported that the doctor agreed 'the fibers could be what was making us sick.' Clerk's Papers (CP) at 665 (emphasis added). Ms. Wilbanks said the doctor recommended that the family stay out of the house until the ducts were cleaned.

The Wilbanks again contacted the Ombrellaros on March 19. And an appointment was made for the next available date to have the air ducts inspected and cleaned.

The air ducts were inspected on March 22. The inspector determined that the problem was an

unsealed return air duct in the attic. The gray fibers were pieces of 'paper fiber insulation' that had been pulled into the central air system. CP at 616. Neither Ms. Wilbanks nor the Ombrellaros knew what the substance was until the home was inspected. The Ombrellaros had the problem repaired the next day.

The trial court ruled that Ms. Wilbanks' January phone call was not sufficient to provide the Ombrellaros with notice of the nature of the problem. And once the Ombrellaros received notice in March, the problem was 'appropriately remedied.' Report of Proceedings (July 31, 2003) (RP) at 29. We agree.

Even if we assume Ms. Wilbanks' version of the facts, the evidence does not support the conclusion that the Ombrellaros failed to timely correct the faulty duct work under the RLTA. Ms. Wilbanks did not give the Ombrellaros notice of 'the nature of the defective condition' until March 12. RCW 59.18.070 (emphasis added); RP at 13; CP at 548. Ms. Wilbanks failed to present any evidence that the problem was known to be 'imminently hazardous to life' when she reported it to the Ombrellaros on March 12. In fact, Ms. Wilbanks did not even know what the gray substance was until the air ducts were inspected and cleaned. CP at 666. Under RCW 59.18.070, the Ombrellaros then had 10 days to 'commence remedial action.'

The Ombrellaros lived out of town and took the only action they could; they hired someone to inspect the property. And they 'commenced remedial action' on March 19 when an appointment was made to have a professional inspect the air ducts on the earliest available date. RCW 59.18.070. That date was March 22. The Ombrellaros had the faulty air duct promptly repaired on March 23, as required by RCW 59.18.070.

The trial judge then properly dismissed any claim based on the Residential Landlord-Tenant Act.

Lease Agreement

Ms. Wilbanks argues that the lease agreement required the Ombrellaros to maintain the property in a condition that was fit for habitation--including the heating system. And they breached the lease agreement when they failed to timely commence repairs.

A landlord is generally not liable for injuries caused by a defect in the premises unless he contracts to maintain and repair the property and he fails to do so. Brown v. Hauge, 105 Wn. App. 800, 804, 21 P.3d 716 (2001). The landlord must fail to take reasonable care to repair the property once he has been notified that repairs are needed. Id.; Tucker, 118 Wn. App. at 252; Restatement (Second) of Torts sec. 357 (1965).

'The lessor's duty to repair . . . is not contractual but is a tort duty based on the fact that the contract gives the lessor ability to make the repairs and control over them. . . . Unless the contract stipulates

that the lessor shall inspect the premises to ascertain the need of repairs, a contract to keep the interior in safe condition subjects the lessor to liability if, but only if, reasonable care is not exercised after the lessee has given him notice of the need of repairs.'

Tucker, 118 Wn. App. at 252 (quoting Teglo v. Porter, 65 Wn.2d 772, 774-75, 399 P.2d 519 (1965)).

Ms. Wilbanks argues the Ombrellaros failed to exercise reasonable care under the lease agreement to remedy the problem. She concedes, however, that her claim for a breach of the lease agreement essentially mirrors her claim under the RLTA. And as we have already concluded, the Ombrellaros adequately remedied the situation within the time limits prescribed under the RLTA.

On this record, the Ombrellaros exercised reasonable care to perform the necessary repairs under the lease agreement.

Ms. Wilbanks raises additional arguments in her brief with regard to a leaky pipe and certain sections of the lease that she believes are unenforceable. Appellant's Br. at 11, 23-25. But these arguments were not raised before the trial court and are not appropriate for appellate review. RAP 2.5(a); Lindblad v. Boeing Co., 108 Wn. App. 198, 207, 31 P.3d 1 (2001).

The court properly dismissed these claims.

Common Law Causes of Action

Ms. Wilbanks argues that she called the Ombrellaros on March 12, 1999 and informed them of a problem with the heating ducts. The Ombrellaros therefore had knowledge of the latent defect in the home. A landlord is liable under common law for harm caused to a tenant that is the result of "(1) latent or hidden defects in the leasehold (2) that existed at the commencement of the leasehold (3) of which the landlord had actual knowledge (4) and of which the landlord failed to inform the tenant." Frobig v. Gordon, 124 Wn.2d 732, 735, 881 P.2d 226 (1994) (emphasis added) (quoting Younger v. United States, 662 F.2d 580, 582 (9th Cir. 1981)). This does not require that the landlord seek out obscure defects. Tucker, 118 Wn. App. at 255. But the landlord is required to make his tenants aware of the defects he has knowledge of that would likely be undiscoverable. Id.

The Ombrellaros were not required to inspect the ventilation ducts or the air quality in the house on a regular basis. And they had no actual knowledge, nor could they have had any actual knowledge, of the problem. The Ombrellaros lived in the house for four years without a problem. Ms. Wilbanks moved into the house in August 1998 and did not notice any gray fibers until late November. She told the Ombrellaros on March 12, 1999, of the problem. There is, then, no evidence that the Ombrellaros had actual knowledge of the defective air duct or that they should have known of the defect at the time they leased the house.

Restatement (Second) of Property Claims

Ms. Wilbanks' argument is that the defective air duct created a dangerous condition. And under the Restatement (Second) of Property sec. 17.6 (1977), the Ombrellaros are liable if they failed to exercise reasonable care to timely discover and remedy the dangerous condition. Here, the Ombrellaros lived in the house for four years. They therefore had four years to discover the problem. Ms. Wilbanks advised the Ombrellaros in January 1999 and on March 12 of a problem in the home. The Ombrellaros respond that liability under the Restatement requires that the Ombrellaros either knew or could have known of a dangerous condition in the exercise of reasonable care. And Ms. Wilbanks has failed to show this. Moreover, Ms. Wilbanks has not shown that the condition was 'dangerous.'

A landlord is liable for harm caused to the tenant where the tenant establishes '(1) that the condition was dangerous, (2) that the landlord was aware of the condition or had a reasonable opportunity to discover the condition and failed to exercise ordinary care to repair the condition, and (3) that the existence of the condition was a violation of an implied warranty of habitability or a duty created by statute or regulation.' Lian v. Stalick, 115 Wn. App. 590, 595, 62 P.3d 933 (2003) (emphasis added).

But again Ms. Wilbanks has not shown that the Ombrellaros had actual knowledge of the defective condition, that they had a reasonable opportunity to discover it, or that they failed to exercise ordinary care to repair it.

Unlawful Exclusion or Retaliation

Ms. Wilbanks did not raise the issues of unlawful exclusion or retaliation in the trial court. We will only review those arguments that were raised before the trial court. RAP 2.5(a); Lindblad, 108 Wn. App. at 207. This question, then, is not properly before us. RAP 2.5(a).

We affirm the summary dismissal of the complaint.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Sweeney, J.

WE CONCUR:

Kato, C.J.

Brown, J.

1. Mr. Wilbanks was dismissed by stipulation.