RENDERED: MAY 23, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000978-MR

LORRAINE MAY — APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 05-CI-90321

JAY MOORE, ADMINISTRATOR OF THE
ESTATE OF DIXIE MOORE, DECEASED — APPELLEE

OPINION
AFFIRMNG

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; KNOPF,[1] SENIOR JUDGE.

COMBS, CHIEF JUDGE: Lorraine May, the appellant, appeals from a summary judgment entered against her in her lawsuit for personal injuries that she sustained on rental property owned by Dixie Moore. Dixie Moore, the original

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

defendant/appellee, died on January 10, 2007, during the pendency of the case. The circuit court allowed revival of the action against Jay Moore in his capacity as administrator of the estate of Dixie Moore.

The facts relevant to this appeal are undisputed. May entered into a rental agreement with Moore on May 5, 2004, to rent a house at 53 Clayton Lane in Morehead, Kentucky. As part of this agreement, May agreed to "inform [Moore] promptly of any problems which require maintenance." The agreement also provided May with the telephone numbers of Moore and her maintenance man, Barry Reynolds,[2] who was entrusted with making all repairs to May's rental properties.

In the early fall of 2004, May's daughter entered the kitchen and turned on a light switch. At that point, flames and black smoke shot out from one of the two light fixtures in the kitchen. May immediately turned off the light switch, and the flames stopped. She reported the incident to Moore.

Moore said that she would send Reynolds over to look at the light fixture. He arrived three days later. He removed the decorative globe that covered the fixture and inspected the damage. He told May that he was unable to fix the light at that time because he needed to get some tools. He said that he would return later. At this point, the light fixture at the other end of the kitchen remained usable.

[2] Reynolds passed away in the summer of 2005.

Reynolds returned approximately two or three days later with a new decorative globe. According to May, Reynolds climbed a stepladder and began "poking around" at the light fixture's wiring with an unknown instrument. When he did this, flames again shot out from the fixture, and Reynolds received an electrical shock that almost caused him to fall from the stepladder. At this time, the second light fixture at the other end of the kitchen "flickered like a flame;" both of its light bulbs burned out. Reynolds taped off some exposed wiring in the first light and instructed May not to use the corresponding light switch that turned it on until he returned. He left and told May that he needed more tools to complete the work but that he would be back "in a little bit."

Three or four days passed, and Reynolds had not returned. May was concerned about the exposed wiring and the fact that her kitchen had little to no light for most of the day. She called Moore to express her concerns. Moore advised May that Reynolds "would get around to it." Approximately five or six days after Reynolds' second visit, May decided to take matters into her own hands. She attempted to change the light bulb in the second light fixture to try to remedy the problem. She climbed onto a kitchen chair but still could not reach the fixture. While attempting to step down from the chair, May fell onto the floor. She severely injured her left knee, and she broke the tibia in her left leg. Multiple surgeries followed to correct her injuries – including knee-replacement.

May filed suit against Moore in Rowan Circuit Court on September 29, 2005, seeking to recover damages for the injuries that she suffered in her fall.

May claimed that Moore, both directly and through Reynolds, as her agent, was negligent in failing to repair the light fixture in a timely and correct manner. She also claimed that May was negligent because she had failed to install lighting fixtures and wiring in compliance with applicable building and safety laws. May alleged that Moore had breached the parties' rental contract by failing to provide timely maintenance, and she sought damages for breach of contract.[3] She claimed damages pursuant to Kentucky Revised Statutes (KRS) 367.110, *et seq.* - the Kentucky Consumer Protection Act.

Following the completion of discovery, Moore filed a motion for summary judgment on January 22, 2007. She argued that May could not assert a claim for personal injury damages arising from a breach of contract as a result of this court's decision in *Pinkston v. Audubon Area Community Service, Inc.*, 210 S.W.3d 188 (Ky.App. 2006). In arguing that no cause of action arose in negligence, Moore contended that she only owed May a legal duty to disclose any hidden or concealed defects of which she was aware at the time May rented the property. As there was no breach of this duty, she contended that May had no claim in negligence. Finally, Moore argued that she had done nothing that would remotely constitute a proximate cause of May's injuries resulting from her falling from a chair while attempting to change a light bulb.

In response to Moore's motion, May argued that *Pinkston* was inapplicable and that the circuit court should have been guided by *Mahan-Jellico*

[3] May later amended her complaint to add a claim that Moore had breached the parties' rental contract by failing to return her security deposit.

Coal Co. v. Dulling, 282 Ky. 698, 139 S.W.2d 749 (1940). *Mahan-Jellico* holds that once a landlord undertakes to make repairs or improvements to rental property, he has a duty to do so in a non-negligent manner. He is liable for damages if he breaches that duty and an injury results. May contended that Reynolds's alleged negligence was indeed the proximate cause of her injuries and that the issue of negligence was a question of fact for the jury.

On April 20, 2007, the circuit court entered an order granting Moore's motion for summary judgment. Relying on *Pinkston*, *supra*, the court held that May could not claim damages for a personal injury claim arising from a breach of a rental agreement. In rejecting her negligence claim, the court reasoned that *Mahan-Jellico*, *supra*, was highly distinguishable and could not serve as precedent because the plaintiff in that case had been reassured by the defendant landlord that certain repairs had been made. The court noted that May was fully aware that the repairs in her kitchen were not complete. Finally, the court held that there was no evidence in the record to support a claim that Moore's actions were the proximate cause of May's injuries as a matter of law. This appeal followed.

In reviewing a summary judgment, our standard of review is to determine "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Since we analyze questions of law rather than of fact, our review is *de novo*. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky.App. 2000). We must view the record in a light

most favorable to the party opposing summary judgment, and all doubts are to be resolved in favor of the party adversely affected. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is appropriate only when "it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Id.* The issue of impossibility is viewed in a practical sense - not an absolute one. *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

May first argues that the circuit court "erroneously analyzed [her] negligence claim by concluding that any liability that arises from the landlord-tenant relationship must be based in contract." However, the wording of the order granting summary judgment recites that May declined to base her cause of action on the landlord-tenant relationship and instead relied on breach of the maintenance agreement:

> The plaintiff has attempted to assert a cause of action for personal injuries that she sustained when she fell from a chair while attempting to change a light bulb in a home that she rented from the defendant. **The plaintiff has denied that the basis for her cause of action is a landlord-tenant relationship**, and instead is claiming that the liability as to the defendant is based on defendant's failure to make repairs to a light in the rental property, as the plaintiff argues was required **under the rental agreement**. (Emphases added.)

Order and Judgment, April 20, 2007, p.1. Since the rental agreement governed, the court correctly determined that May could not recover for personal injuries and that her only sustainable claim for damages was the cost of repair to the electrical

problem. Its reasoning was directly congruent with our decision in *Pinkston, supra,* which held as follows:

> [A] landlord is not liable for injuries caused by breach of a covenant to make repairs to a leased premises. Rather, **the remedy** for breach of an agreement to repair **is the cost of repair**. (Emphases added.)

Pinkston, 210 S.W.3d at 190. May has not asserted a claim for repair costs. Consequently, the circuit court correctly concluded that May does not have a tenable action for personal injury damages based solely upon a breach of contract.

The court separately addressed May's claim for negligence and correctly found that the only duty owed by a landlord to a tenant is that of disclosure of "any known defective condition which is unknown to the tenant." Order and Judgment, April 20, 2007, p.2. The evolution of Kentucky law as to the nature of this duty is ably recapitulated and summarized in *Lambert v. Franklin Real Estate, Co.*, 37 S.W.3d 770, 775-776 (Ky. App. 2000):

> "A landlord has a duty to disclose a known defective condition which is unknown to the tenant and not discoverable through reasonable inspection." *Milby v. Mears*, Ky.App. 580 S.W.2d 724, 728 (1979). However, "[i]t has been a long-standing rule in Kentucky that a tenant takes the premises as he finds them. The landlord need not exercise even ordinary care to furnish reasonably safe premises, and he is not generally liable for injuries caused by defects therein." *Milby* at 728. "[T]he landlord is under no implied obligation to repair the demised premises in the absence of a contract to that effect, nor is he responsible to a tenant for injuries to persons or property caused by defects therein, where there has been no reservation on the part of the landlord of any portion of the rented premises. In such cases the law applies to the contract or lease the doctrine of caveat

> emptor." *Home Realty Co. v. Carius,* 189 Ky. 228, 224 S.W. 751 (1920). Where the tenant is put in complete and unrestricted possession and control of the premises, as here, the landlord is liable only for the failure to disclose known latent defects at the time the tenant leases the premises. *Carver v. Howard*, Ky., 280 S.W.2d 708, 711 (1955).

The dangerous condition of the electrical fixtures was both open, obvious, and known to May. Therefore, under established precedent, Moore owed no duty to May as a matter of law. As there is no cause of action for negligence, the issue of proximate cause is a moot point. May's own negligent actions in standing on a chair cannot be imputed to Moore under any viable legal theory.

Accordingly, we affirm the summary judgment of the Rowan Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

David S. Strite
Michael R. McDonner
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Joseph C. Klausing
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

John J. Ellis
Morehead, Kentucky