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Landlord tort liability:

White v Contreras, 2002

Roger Bernhardt

Landlord who covenants or undertakes to install tenant’s window screen—but fails to do so—may be liable to tenant’s child who falls out of window.
White v Contreras (2002) 95 CA4th 137, 115 CR2d 299

An apartment building’s rules stated that all building repairs were to be performed by the landlord and that tenants could not make repairs or alterations without the landlord’s consent. A tenant told the landlord a window screen was needed because he believed his three-year-old son could fall out of the window of his third-story apartment. The landlord never installed the screen, although he came to the apartment five times and promised to do so. The boy fell out of the window, sustaining injuries that left him permanently disabled. In the boy’s negligence suit, the trial court entered summary judgment against him, ruling that as a matter of law the landlord owed no duty to install the screen.

The court of appeal reversed. Generally, a landlord owes no duty to a tenant to install window screens to prevent a tenant’s child from falling from the tenant’s window. Here, however, the court found that plaintiff’s evidence established the landlord’s obligation to install the screen based on the landlord’s rules and promises to repair. Thus, the negligent breach of the covenant to repair may result in tort liability, not just contractual liability. Furthermore, the plaintiff’s evidence, if accepted, would also establish the elements of a negligent undertaking claim, i.e., the negligent performance of a voluntary undertaking.

THE EDITOR’S TAKE: When Amos v Alpha Prop. Mgmt. (1999) 73 CA4th 895, 87 CR2d 34, cited in White and reported in 22 CEB RPLR 215 (Oct. 1999), was decided, I opined that this type of case is pretty much always going to go to the jury and that landlords therefore better be sure that the entire building is completely safe for children (parents who apply to be tenants cannot, under our fair housing laws, be excluded on the basis that they bring children with them). This decision does nothing to lead me to recant that opinion.

Amos pinned liability on the fact that the unprotected window was in a common area, where landlords have always been exposed to risks of negligence liability because they—rather than the tenants—are the possessors of those areas. While Pineda v Ennabe (1998) 61 CA4th 1403, 72 CR2d 206, cited in White and reported in 21 CEB RPLR 109 (May 1998), took that distinction seriously, here the court neatly avoided it by finding that landlord liability can be premised on two other exceptions to the general rule that a landlord who is not in possession will not be liable: (1) breach of covenant to repair and (2) negligent failure to make repairs.

Both of these exceptions apply even when the injury occurs within the rented apartment rather than in the common area (indeed, there is hardly any reason for them to apply where a common area is involved). As to liability for breach of covenant, courts—as this one observes—are long past limiting damages to repair costs rather than personal injuries. But, I was surprised to see the rule applied to the case of a gratuitous, i.e., technically unenforceable, covenant to repair (absent some kind of promissory estoppel theory), and not held subject to the defense that the promisee...
tenant should take steps to avoid the consequences of the landlord’s nonperformance by, e.g.,
keeping the unscreened window closed or moving the furniture away from it.

As to the exception for negligent making of repairs, I confess that this is the first time I ever
heard simple nonperformance of a promise called negligence, which appears to me to blur the
distinctions between two different doctrines. (But then, I am not a personal injury lawyer.)

The most surprising aspect of the case to me was that the court did not come right out and hold
that landlords have a general duty of care to install screens (if not bars) on all windows in the
building, including windows inside the apartments (where the tenants are the ones in possession).
Clearly, the court wanted to reach that result, and its judicial restraint is remarkable in light of its
strong beliefs in that direction.

This decision, as well as the decisions in Amos and Pineda, comes from the Second District.
Landlords in Los Angeles may have trouble reconciling the three opinions, but I suggest they put
prudence over tempting fate and start closing up those windows. Roger Bernhardt