DOING WELL BY DOING RIGHT: GETTING JUSTICE FOR INJURED CLIENTS UNDER THE RESIDENTIAL LANDLORD TENANT ACT AND GETTING PAID FOR YOUR WORK

ROB KLINE

OCTOBER 26, 2010

OTLA NEW LAWYERS SECTION

I. Habitability

A. "A landlord shall at all times during the tenancy maintain the dwelling unit in a habitable condition." ORS 90.320(1). The statute further states: "For purposes of this section, a dwelling unit shall be considered unhabitable if it substantially lacks:

"(a) Effective waterproofing and weather protection of roof and exterior walls, including windows and doors;

"(b) Plumbing facilities which conform to applicable law in effect at the time of installation, and maintained in good working order;

"(c) A water supply approved under applicable law, which is:

"(A) Under the control of the tenant or landlord and is capable of producing hot and cold running water;

"(B) Furnished to appropriate fixtures;

"(C) Connected to a sewage disposal system approved under applicable law; and

"(D) Maintained so as to provide safe drinking water and to be in good working order to the extent that the system can be controlled by the landlord;

"(d) Adequate heating facilities which conform to applicable law at the time of installation and maintained in good working order;

"(e) Electrical lighting with wiring and electrical equipment which conform to applicable law at the time of installation and maintained in good working order;

"(f) Buildings, grounds and appurtenances at the time of the commencement of the rental agreement in every part safe for normal and reasonably foreseeable uses, clean, sanitary and free from all accumulations of debris, filth, rubbish, garbage, rodents and vermin, and all areas under control of the landlord kept in every part safe for normal and reasonably foreseeable uses, clean, sanitary and free from all accumulations of debris, filth, rubbish, garbage, rodents and vermin;

"(g) Except as otherwise provided by local ordinance or by written agreement between the landlord and the tenant, an adequate number of appropriate receptacles for garbage and rubbish in clean condition and good repair at the time of the commencement of the rental agreement, and the landlord shall provide and maintain appropriate serviceable receptacles thereafter and arrange for their removal;

"(h) Floors, walls, ceilings, stairways and railings maintained in good repair;

"(i) Ventilating, air conditioning and other facilities and appliances, including elevators, maintained in good repair if supplied or required to be supplied by the landlord;

"(j) Safety from fire hazards, including a working smoke alarm or smoke detector, with working batteries if solely battery-operated, provided only at the beginning of any new tenancy when the tenant first takes possession of the premises, as provided in ORS 479.270, but not to include the tenant's testing of the smoke alarm or smoke detector as provided in ORS 90.325 (6); or

" (k) Working locks for all dwelling entrance doors, and, unless contrary to applicable law, latches for all windows, by which access may be had to that portion of the premises which the tenant is entitled under the rental agreement to occupy to the exclusion of others and keys for such locks which require keys."

ORS 90.320(1).

B. List is nonexclusive.

A dwelling unit is unhabitable if it suffers from any other condition that "pose[s] danger to health or safety of the same kind and as serious as those which the specific requirements of paragraphs (a) through (k) [of ORS 90.320(1)] are meant to prevent." *Bellikka v. Green*, 306 Or 630, 636, 762 P2d 997 (1988).

C. Strict liability

1. The RLTA creates a statutory cause of action for any violation of the habitability provisions of the statute as follows: "Except as provided in this chapter, the tenant may recover damages and obtain injunctive relief for *any noncompliance* by the landlord with * * * ORS 90.320 * * *." ORS 90.360(2) (emphasis added).

2. No obligation to prove landlord was negligent under ORS 90.320(1)(h): "Floors, walls, ceilings, stairways and railings maintained in good repair* * * ." *See, e.g., Eyvonne M. Harris v. Alberta Street Apartments Preservation, Inc.,* et al., Multnomah County Circuit Court

Case No. 0804 05054 (letter opinion of Judge Henry C. Breithaupt dated March 16, 2009 granting plaintiff's motion for summary judgment) (attached).

II. Case selection

A. Credible plaintiff.

B. Watch out for counterclaims like unpaid rent, action for possession.

C. Special considerations for mold claims.

III. Case investigation

A. Act quickly—get photographs before the landlord repairs the condition.

B. City of Portland Bureau of Development Services. Reporting code violations: www.portlandonline.com/bds/index.cfm?c=34180. (503) 823-CODE.

1. "Free" expert opinion.

2. History of violations.

C. Retaliation.

90.385 provides:

"(1) Except as provided in this section, a landlord may not retaliate by increasing rent or decreasing services, by serving a notice to terminate the tenancy or by bringing or threatening to bring an action for possession after:

"(a) The tenant has complained to, or expressed to the landlord in writing an intention to complain to, a governmental agency charged with responsibility for enforcement of any of the following concerning a violation applicable to the tenancy:

"(A) A building, health or housing code materially affecting health or safety* * *."

IV. Attorney fees

A. "In any action on a rental agreement or arising under this chapter, reasonable attorney fees at trial and on appeal *may be awarded* to the prevailing party together with costs and necessary disbursements, notwithstanding any agreement to the contrary. As used in this section, 'prevailing party' means the party in whose favor final judgment is rendered." ORS 90.255 (emphasis added).

B. Although the statute provides that attorney fees "may be awarded" to the prevailing party, "normally a 'prevailing party' would be entitled to recover attorney fees, barring unusual circumstances which might arise in any particular case." *Executive Mgt. Corp. v. Juckett*, 274 Or 515, 519, 547 P2d 603 (1976).

C. Be careful—no fees for defense of counterclaims.

D. The white hat must be on your client.

"A court shall consider the following factors in determining whether to award attorney fees in any case in which an award of attorney fees is authorized by statute and in which the court has discretion to decide whether to award attorney fees:

"(a) *The conduct of the parties* in the transactions or occurrences that gave rise to the litigation, *including any conduct of a party that was reckless, willful, malicious, in bad faith or illegal.*

"(b) The objective reasonableness of the claims and defenses asserted by the parties.

"(c) The extent to which an award of an attorney fee in the case would deter others from asserting good faith claims or defenses in similar cases.

"(d) The extent to which an award of an attorney fee in the case would deter others from asserting meritless claims and defenses.

"(e) The objective reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings.

"(f) The objective reasonableness of the parties and the diligence of the parties in *pursuing settlement* of the dispute."

ORS 20.075(1) (emphasis added).

E. Create an attorney fee petition that will withstand scrutiny.

1. Track your time carefully.

2. Fully describe each task.

3. Avoid 'block' entries.

4. Don't expect to recover for secretarial tasks.

V. Hypothetical

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

EYVONNE M. HARRIS,

Plaintiff,

v.

ALBERTA STREET APARTMENTS PRESERVATION, INC.; SABIN COMMUNITY DEVELOPMENT CORPORATION; and CASCADE MANAGEMENT, INC.,

Defendants.

Case No. 0804 05054

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendants' response to plaintiff's motion for summary judgment raises two primary contentions. First, defendants argue that plaintiff fails to offer any evidence that defendants negligently maintained the premises. As described below, that argument fails because plaintiff is required to prove only substantial noncompliance with the Residential Landlord Tenant Act ("RLTA"), ORS 90.100 *et seq.*, not that defendants were negligent. Defendants' second argument is that the secure attachment of a cabinet to a wall is not covered by the RLTA. That argument also fails for the reasons explained below.

DISCUSSION

I. PLAINTIFF IS REQUIRED TO PROVE NONCOMPLIANCE WITH THE STATUTE, NOT NEGLIGENT MAINTENANCE

Defendants cite *Humbert v. Sellars*, 300 Or 113, 708 P2d 344 (1985) for the proposition that plaintiff must establish that the landlord negligently failed to maintain the premises. Defendants'

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Response To Plaintiff's Motion For Summary Judgment, p. 2, line 24 to p. 3, line 15. *Humbert* does not stand for that proposition and, even if it did, it has been overruled by the Supreme Court in *Davis v. Campbell*, 327 Or 584, 965 P2d 1017 (1998), and *Coulter Property Management v. James*, 328 Or 164, 970 P2d 209 (1998).

Interestingly, the very point raised by defendants was mentioned in a concurring opinion written by Justice Lent in *Humbert*: "I do not fully understand whether the majority is holding that violation of ORS [90.320](1)(h) establishes strict liability. What is meant by 'maintained' in good repair? Is that a continuing, absolute, nondelegable duty that is breached the instant that the floor falls into disrepair? Must the landlord be aware of the state of disrepair and have an opportunity to repair? If the landlord must know, or in the exercise of reasonable care know, of the state of disrepair and fail to take ordinary care to make repairs, are we not back to just negligence?" *Humbert*, 300 Or at 124 n 5.

Justice Lent's query was answered in *Coulter*. In *Coulter*, a tenant sued a landlord for damages arising out of hand and wrist injuries sustained when the railing of tenant's second-story apartment broke and tenant fell to the ground. *Coulter Property Management v. James*, 138 Or App 568, 570, 910 P2d 397 (1996). It was undisputed that the landlord had annually inspected the balcony and that neither landlord or tenant had known that the railing was defective in any way. *Id* at 571. The trial court struck tenant's habitability claim under the RLTA, apparently deciding "that tenant did not have an independent action under the RLTA because to allow recovery when a landlord has no notice of an unhabitable condition would impose 'absolute liability' on landlords." *Id.* at 570 n 3. However, tenant's RLTA claim was submitted to the jury as a negligence per se claim.

The Court of Appeals in *Coulter* held that the trial court properly dismissed tenant's RLTA claim on the ground that landlord had no notice of any defect in the railing before the accident, but that the trial court erred when it allowed that same claim to go forward under a different label. The Court of Appeals explained its decision as follows: "The RLTA provides legal recourse for a tenant

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1 whose dwelling unit is 'unhabitable' because it 'substantially lacks' the basic health and safety
2 features that are enumerated in the statute. ORS 90.320(1). The RLTA has never been applied to
3 situations in which a landlord has regularly inspected the premises, there is no known defect,
4 possession has been transferred to the tenant, the tenant is either unaware of any defect or is aware
5 but has not notified the landlord, and the alleged defect is in an area over which the tenant has
6 exclusive control, as was the case here. Furthermore, in the absence of an agreement to do so, a
7 landlord does not have an obligation to repair defects that are not obvious and that arise after the
8 tenant has assumed exclusive control of the premises." *Coulter*, 138 Or App at 575.

9 The Oregon Supreme Court reversed, holding in pertinent part that the RLTA does not require
10 that a tenant prove that the landlord knew or should have known of an alleged habitability violation.
11 328 Or 164, 166. The grounds for that decision are explained in *Davis*, 327 Or 584, which was
12 decided a couple months before the Supreme Court's decision in *Coulter*. In *Davis*, tenants rented a
13 house from landlord. 327 Or at 586. Two years later, heat transmitting through chimney bricks in a
14 fireplace caused a fire that destroyed the house. *Id.* At the time of the fire, neither plaintiffs nor
15 defendant had experienced any problems with the fireplace and neither party was aware that its
16 condition presented a fire hazard. *Id.* The trial court granted defendant's motion for summary
17 judgment, agreeing with defendant's contention that plaintiff had failed to set forth evidence that
18 defendant knew, or should have known, that there was a latent defect in the fireplace chimney. *Id.*

19 The Court of Appeals in *Davis* reversed, explaining: "There is no mention of a landlord's
20 knowledge as a condition of recovery under ORS 90.360(2). The statute says that 'the tenant may
21 recover damages * * * for any noncompliance' with the habitability requirements of ORS 90.320
22 [ ]. The statute does not say 'any negligent noncompliance.' Nor does it refer to 'noncompliance
23 after notice from the tenant' or [']noncompliance when the landlord knew or in the exercise of
24 reasonable care should have known' of the nonhabitable condition. It simply says that a tenant may
25 bring an action for damages for *'any* noncompliance' with the habitability requirements of the
26

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RLTA, regardless of the landlord's knowledge or lack of knowledge of the condition of the premises." *Davis*, 144 Ore. App. 288, 293-94, 288 P2d 1248 (1996) (emphasis in original).

The Supreme Court in *Davis* agreed, holding: "We similarly discern no textual ambiguity in the habitability requirement, ORS 90.320(1)(j) (1991). As this court noted in *Napolski v. Champney*, 295 Ore. 408, 415, 667 P.2d 1013 (1983), referring to what later became ORS 90.320 (1991): "The act *affirmatively obligates* residential landlords to maintain rental properties in 'habitable condition' * * *." (Emphasis in original.) Under the plain terms of the statute, a landlord fails to fulfill that affirmative obligation if, at any time during the tenancy, the dwelling unit substantially lacks safety from the hazards of fire. ORS 90.320(1)(j) (1991). The statute did not provide that a dwelling unit shall be considered uninhabitable only if the tenant is able to prove that the landlord either knew or should have known that the unit was unsafe from fire. The fact that a dwelling unit substantially lacks safety from fire -- without regard to a landlord's knowledge, actual or constructive. -- Is sufficient to establish a statutory violation. To adopt defendant's contrary construction of ORS 90.320(1)(j) (1991) would require us to insert text into the statute." *Davis*, 327 Or at 589.

In this case, plaintiff is not required to prove that the defendants knew or should have known that the cabinet was inadequately secured to the wall. Plaintiff is no more required to do that than the tenant in *Coulter* was required to prove that landlord knew or should have know that the railing was improperly attached, or the tenant in *Davis* was required to prove that landlord knew or should have known of a defect in the chimney. Defendants seek an end-run around this problem in their position by contending that plaintiff must allege and prove that the cabinet fell due to defendants' negligent maintenance. Of course, to establish negligent maintenance, plaintiff would have to prove that defendants knew or should have known that the cabinets were improperly attached to the wall. That is not what the statute requires. Plaintiff must prove noncompliance with the habitability requirements of the RLTA, not that defendant was negligent.

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II. The RLTA Applies Here

Defendants argue that the RLTA does not apply here because "cabinets are not walls," Defendants' Response To Plaintiff's Motion For Summary Judgment, p. 1, line 24, and *Belikka v. Green* is dicta, *Id.*, p. 4, line 6. Both of those arguments fail because the RLTA is much broader than defendants admit.

The habitability provisions of the RLTA are described in *Bellikka* as follows: "The RLTA, after stating in ORS 91.770(1) the landlord's general obligation 'at all times during the tenancy [is to] maintain the dwelling unit in a habitable condition,' continues, '[f]or purposes of this section, a dwelling unit shall be considered unhabitable [***8] if it substantially lacks' a series of specified features. These include structural features such as weather protection and '[f]loors, walls, ceilings, stairways and railing maintained in good repair,' ORS 91.770(1)(h); sanitary requirements, such as water and sewage connections and garbage receptacles; and locks and other features for safety from intruders and fire hazards. The statute says that substantial lack or inadequate maintenance of these features 'shall be considered' to make a dwelling unhabitable, but it does not expressly say that only substantial lack or failure to maintain the listed items shall be so considered. It does not say that 'unhabitable' means the lack of the listed features or otherwise indicate that the list is exclusive." *Bellikka v. Green*, 306 Ore. 630, 635, 762 P2d 997 (Or. 1988).

Dicta or not, the above language describes the structure of the statute. Therefore, regardless of whether the cabinet in plaintiff's apartment unit is encompassed by the terms "[f]loors, walls, ceilings, stairways and railings" in ORS 90.320(1)(h), defendants still cannot avoid their general obligation to at all times during the tenancy maintain the dwelling unit in a habitable condition.

The *Bellikka* court also notes that "[t]his court already has recognized that other conditions besides those listed in paragraphs (a) through (k) can make residential quarters unhabitable." *Bellikka*, 306 Or at 636. The court then applies well-established principles of statutory tort analysis for determining when other conditions not listed in the statute render a unit unhabitable. The court concludes that a dwelling unit is unhabitable if it suffers from any other condition that "pose[s]

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danger to health or safety of the same kind and as serious as those which the specific requirements of paragraphs (a) through (k) [of ORS 90.320(1)] are meant to prevent." *Bellikka*, 306 Or at 636. That holding, which is contained in an en banc opinion of the Supreme Court, has remained unchallenged for more than 20 years. If it was an inaccurate statement of law, surely the courts, or the legislature, would have addressed it. It follows that defendant cannot dismiss this provision of *Bellikka* by casting it as "dicta."

Defendants also attempt to avoid the application of the statute by asserting that plaintiff has not established that the unit *substantially* lacks one of the safety and health requirements under the statute. In defendants' view, "the failure to have one cabinet remain attached does not automatically render the unit unhabitable." Defendants' Response To Plaintiff's Motion For Summary Judgment, p. 2, line 7-10. If defendants are correct, plaintiff would have to prove that defendants were negligent. However, as described above, liability under the RLTA is premised upon a violation of the statute, not negligence. It follows that the failure to secure one cabinet renders the unit unhabitable; there is no statutory exception for a single occurrence.

For all of the above reasons, plaintiff has established that her apartment unit was unhabitable under ORS 90.320.

CONCLUSION

Plaintiff's motion for summary judgment should be allowed.

DATED this 10th day of March, 2009.

ROBERT C. KLINE, JR., OSB #98271
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Attorney for Plaintiff

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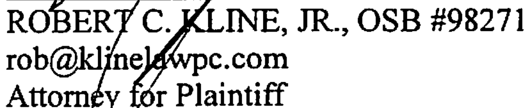
CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2009, I served the foregoing PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT on the individual named below by faxing and mailing a correct copy thereof contained in a sealed envelope, with postage prepaid, deposited in the post office at Portland, Oregon on said date and addressed as follows:

Mark Zipse
Zipse, Elkins & Mitchell
Attorneys at Law
10260 SW Greenburg Rd., Suite 710
Portland, OR 97223
Fax: 503-245-3191
Attorney for Defendants



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CIRCUIT COURT OF THE STATE OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. FOURTH AVENUE
PORTLAND, OR 97204-1123

March 16, 2009

Robert C Kline
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Mark Zipse
Zipse Elkins & Mitchell
10260 SW Greenburg Road Ste 710
Portland OR 97223

Re: Harris v. Alberta Street Apartments Preservation, Inc., et al., No. 080405054

Dear Counsel:

This matter is before the court on the motion of Plaintiff. The court considers the motion to have been on the issue of liability only. As to the arguments contained in the written submissions of counsel, Plaintiff prevails. As to the suggestion at the hearing that Defendant had the benefit of ORS 90.360(2), the record does not contain evidence from which a reasonable trier of fact could conclude that the defenses of that section are available to Defendant. The motion of Plaintiff is granted as to liability.

Counsel for Plaintiff is directed to prepare an appropriate form of order.

Very Truly Yours,

Henry C. Breithaupt
Judge

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3
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MULTNOMAH

6 EYVONNE M. HARRIS, 7 Plaintiff, 8 V. 9 ALBERTA STREET APARTMENTS PRESERVATION, INC.; SABIN COMMUNITY 10 DEVELOPMENT CORPORATION; AND CASCADE MANAGEMENT, INC., 11 12 Defendants.	Case No. 0804 05054 ORDER REGARDING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

13 Plaintiff's Motion for Summary Judgment on her claim under the Residential Landlord
14 Tenant Act ("RLTA"), ORS 90.320(1) and 90.360(2), came on for hearing on March 12, 2009,
15 plaintiff appearing by and through her attorney, Rob Kline, and defendants appearing by and
16 through their attorney, Mark Zipse. The Court having considered plaintiff's motion and the record
17 herein, and being fully advised,
18 IT IS HEREBY ORDERED that plaintiff's Motion for Summary Judgment is GRANTED.
19
20
21 Judge Henry C. Breithaupt
Circuit Court Judge
22
23 Submitted by:
24 Robert C. Kline Jr.
25 OSB No. 98271
Attorneys for Plaintiff
26

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2009, I served the foregoing ORDER REGARDING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT on the individuals below by mailing a correct copy thereof contained in a sealed envelope, with postage prepaid, deposited in the post office at Portland, Oregon on said date and addressed as follows:

Mark Zipse
Zipse, Elkins & Mitchell
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10260 SW Greenburg Rd., Suite 710
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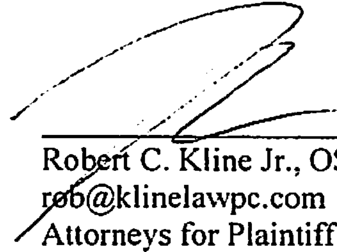

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▣ Circuit Ct. ☐ U.S. Dist. Ct. ▣ Case No. 0804-05054
☐ Appeals Ct. ☐ Bankruptcy Ct. Our File No. ____________ Robert C. Kline, Jr.
☐ Supreme Ct. ☐ Other ____________________ (Attorney)

Please indicate when the document listed below was processed. Thank you.

Eyvonne Harris v. Alberta Street Apartments, et al.

(Short Title of Case or Proceeding)

Order Regarding Plaintiff's Motion for Summary Judgment

(Title of Document)

■ Date signed MAR 26 2008 By Judge Henry C. Breithaupt
☐ Date entered APR - 3 2009 By: ____________________
☐ Date terminated ____________
■ Date filed APR - 1 2009
☐ Date served ____________
☐ Attorney fees awarded $ ________ ☐ Costs awarded at $ ____________
☐ Motion allowed ☐ Motion denied

Remarks: ____________________ ____________________

Judge/Deputy/Clerk