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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001267-MR

MELISSA BROCK — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 09-CI-008897

BARRY BENNETT AND
JUDITH BENNETT — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON,[1] COMBS AND VANMETER, JUDGES.

CAPERTON, JUDGE: The Appellant, Melissa Brock, appeals the March 28, 2013, opinion and order of the Jefferson Circuit Court, which granted summary judgment to Appellees, Barry and Judith Bennett, on Brock's claims for damages

[1] Judge Caperton authored this opinion prior to Judge Debra Lambert being sworn in on January 5, 2015, as Judge of Division 1, Third Appellate District. Release of this opinion was delayed by administrative handling.

arising under the Uniform Residential Landlord and Tenant Act (URTLA) and in tort on grounds of invasion of privacy, intentional infliction of emotional distress, outrageous conduct, and for personal injuries which Brock asserted that she sustained because of defects in the construction of a handrail on the premises. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

The Bennetts owned the property located at 1221 Homeview Drive, which was a single-family dwelling, and which they rented to Brock in March of 2009. Judith Bennett was not a party to the lease. The lease term was for six months at a rate of $650 per month. Brock read the lease before she signed it. That lease provided that:

> The tenant has inspected the residence and found it satisfactory. Tenant agrees to maintain the residence and the surrounding outside area in a clean and sanitary manner and not to make any alterations to the residence without the landlord's written consent. At the termination of this lease, the tenant agrees to leave the residence in the same condition as when it was received, except for normal wear and tear.

The residence at issue is a two-story building with a basement. The main floor consists of a living room, two bedrooms, a kitchen, and a bathroom. A small hallway leads from the kitchen to the basement stairs. While Brock acknowledges that she inspected the residence before signing the lease and moving in, she asserted below that the stair rail leading to the basement was defective.

Concerning the handrail itself, Brock initially testified that she viewed both the steps and handrail when she took possession of the property, and that she did not actually see Mr. Bennett install the handrail.[2] Subsequently, however, in a June 29, 2002, affidavit filed in opposition to the Bennetts' motion for summary judgment, Brock testified that the handrail was installed by Mr. Bennett personally, in her presence, without the assistance of anyone else, and that the handrail was not complete before she took possession of the premises. Bennett testified that he contracted with handyman Joe Burress to install the handrail, and Burress also testified to that effect. According to Burress, he spent approximately two days redoing the steps and installing the handrail before Brock's tenancy began. Burress testified that he secured the handrail at the top of the steps by connecting it tightly to the wall at the top of the steps and the other end of the handrail to a post at the bottom step. Brock now asserts that she had not used the handrail prior to her injury, and further, that an engineer, Joseph Cattan, inspected the handrail and reported that it was constructed in violation of codes.

On June 17, 2009, Brock lost her balance and fell on the basement stairs, and she asserts that this fall was a result of the defect in the handrail on those stairs. Brock states that she had not used the handrail prior to her injury, and that there was no lighting in the basement of the home. Brock states that as a result of the fall, she sustained personal injuries, including a fracture to her upper

[2] A review of the record indicates that Brock testified twice in her deposition that she did not see Mr. Bennett secure the handrail to the steps or to the wall.

extremity for which she has incurred medical expense, and which has caused her pain and suffering.

Brock further alleged that Bennett had a pattern of inspecting the premises without giving prior notice. Brock stated that Bennett came to the premises when she was not properly dressed and took photographs of her without her consent, which embarrassed her. In addition, she alleged that while on the premises during one of these inspections, Bennett took photographs from a camera taken by a boyfriend of Brock without her clothes on in a hot tub and displayed them on the internet.

Below, Brock also alleged that subsequent to the complaints made by Brock to Bennett and the authorities, Bennett sent letters to Brock on July 20, 2009, and August 3, 2009, stating that she was in default on the rent, and would be evicted from the premises if the rent was not paid. Brock also alleged that Bennett took deliberate action to retaliate against her by drilling a hole in the premises to impair air conditioning services, and by damaging the ventilation and piping.

Brock filed suit against the Bennetts, alleging negligence, intentional infliction of emotional distress, violations of the Uniform Residential Landlord Tenant Act (URLTA), and breach of a lease agreement. The Bennetts asserted counterclaims against Brock for outstanding rent, fees, utility bills, and damage to the leased premises.

Following the presentation of evidence below, the trial court rendered the aforementioned March 28, 2013, opinion and order, wherein it made separate

findings on the three categories of claims and counterclaims, namely, negligence, intentional infliction of emotional distress, and contract. First, the court held that Brock failed to demonstrate that Bennett was aware of a latent defect which was unknown to Brock or which could not reasonably have been discovered. Secondly, the trial court held that Bennett's alleged conduct and Brock's alleged injuries did not meet the required showing to support Brock's claim of intentional infliction of emotional distress. Third, the trial court found that Brock withheld rent and did not pay utilities, and accordingly, granted the Bennetts' claims for rent and associated late fees. Concerning two of the Bennetts' counterclaims for reimbursement, the court transferred those matters to the Jefferson District Court.[3] It is from that opinion and order that Brock now appeals to this Court.

On appeal, Brock makes eight arguments: (1) The circuit court should not have granted Bennett's motion for summary judgment on Brock's claim for damages pursuant to Kentucky Revised Statutes (KRS) 383.640(1)(b)[4]; (2) Bennett

[3] To that end, we note that Brock has devoted a portion of her brief to this Court to arguing the matter of whether or not she complied with her obligation to maintain the premises. As noted, the trial court transferred the premises damage claim to district court. Accordingly, that matter is not at issue in this appeal, and we decline to address it further herein.

[4] KRS 383.640 provides that:

> (1) If, contrary to the rental agreement of KRS 383.595, the landlord willfully fails to supply heat, running water, hot water, electric, gas, or other essential service, the tenant may give written notice to the landlord specifying the breach and may:
>
> > (a) Procure reasonable amounts of heat, hot water, running water, electric, gas, and the essential service during the period of the landlord's noncompliance and deduct their actual and reasonable cost from the rent;
> >
> > (b) Recover damages based upon the diminution in the fair rental value of the dwelling unit; or
> >
> > (c) Procure reasonable substitute housing during the period of the landlord's noncompliance, in which case the tenant is excused from paying rent for the period of the landlord's noncompliance.

should not have been granted summary judgment on Brock's claim for damages for retaliatory conduct pursuant to KRS 383.705; (3) The circuit court should not have granted Bennett summary judgment on Brock's complaints for violation of KRS 383.705; (4) The circuit court should not have granted summary judgment to Bennett regarding Brock's complaint for damages pursuant to KRS 383.615;[5] (5) The circuit court should not have granted summary judgment to Bennett on Brock's complaints constituting a violation of KRS 383.655; (6) The circuit court should not have granted summary judgment to Bennett on his claim for two months' rent; (7) The circuit court should not have dismissed Brock's complaint for invasion of privacy and intentional infliction of emotional distress; and (8) The

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(2) In addition to a remedy provided in paragraph (c) of subsection (1) the tenant may recover reasonable attorney's fees.
(3) If the tenant proceeds under this section, he may not proceed under KRS 383.625 or 383.635 as to that breach.
(4) Rights of the tenant under this section do not arise until he has given notice to the landlord or if the condition was caused by the deliberate or negligent act or omission of the tenant, a member of his family, or other person on the premises with his consent.

[5] KRS 383.615 provides that:

(1) A tenant shall not unreasonably withhold consent to the landlord to enter into the dwelling unit in order to inspect the premises, make necessary or agreed repairs, decorations, alterations, or improvements, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workmen, or contractors.
(2) A landlord may enter the dwelling unit without consent of the tenant in case of emergency.
(3) A landlord shall not abuse the right of access or use it to harass the tenant. Except in case of emergency or unless it is impracticable to do so, the landlord shall give the tenant at least two (2) days' notice of his intent to enter and may enter only at reasonable times.
(4) A landlord has no other right of access except:
(a) Pursuant to court order;
(b) As permitted by KRS 383.665 and 383.670(2); or
(c) Unless the tenant has abandoned or surrendered the premises.

circuit court should not have dismissed Brock's personal injury claim.

In response, the Bennetts argue that: (1) Brock has no viable negligence claim against them; (2) Brock breached her lease and accordingly has no claim for damages under the URLTA or otherwise; and (3) Brock failed to allege "outrageous" conduct of a level sufficient to support her claim for severe emotional distress, and that, accordingly, the Court correctly dismissed that claim.

We believe that the arguments of the parties can best be addressed as follows: (1) Whether the trial court correctly determined that Brock failed to present evidence that the Bennetts failed to disclose a known latent defect not reasonably discoverable at the time that Brock took possession; (2) Whether the trial court correctly determined that Brock failed to sustain a negligence claim under Kentucky law; (3) Whether the trial court correctly determined that Brock failed to submit sufficient evidence to support a claim of "outrageous" conduct or severe emotional distress; and (4) Whether the court correctly determined that Brock owed unpaid rent and late fees.

Prior to addressing these issues, we note that the standard of review on appeal of a trial court order granting summary judgment is 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. Kentucky Rules of Civil Procedure 56.03. Further, we note that the record must be viewed in a light most favorable to the party opposing the motion for summary judgment. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Consequently, summary judgment must be granted only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. *Huddleston v. Hughes*, 843 S.W.2d 901, 902 (Ky. App. 1992). We review the arguments of the parties with these standards in mind.

In addressing the first issue before us, namely, whether the trial court correctly determined that Brock failed to present evidence that the Bennetts failed to disclose a known latent defect not reasonably discoverable at the time that Brock took possession, we note that the longstanding rule in Kentucky is that a tenant takes the premises he leases as he finds them. *Clary v. Hayes*, 190 S.W.2d 657, 658 (Ky. App. 1945). Under common law, a landlord's liability is limited to failure to disclose latent defects to the tenant at the time that the tenant leased the premises. *Parson v. Whitlow*, 453 S.W.2d 270, 271 (Ky. 1970). *See also Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770 (Ky. App. 2000).

Upon review of the record, we are in agreement with the trial court that no evidence of record submitted by Brock creates a genuine issue of material fact concerning her claim that the Bennetts were aware of any latent defect in the property which was unknown to Brock, or could not reasonably have been discovered. While Brock now asserts that she personally witnessed Bennett construct the handrail, this is in direct contradiction to her prior deposition testimony that she did not see him do so.[6] Indeed, a review of Brock's own

[6] As our courts have previously held, "Affidavits in which witnesses recant their testimony are quite naturally regarded with great distrust and usually given very little weight." *Thacker v. Commonwealth*, 453 S.W.2d 566 (Ky. 1970). Thus, although Brock may now attempt to characterize the affidavit in her brief as merely explaining her earlier testimony, the court was

deposition testimony indicates that she had never had issues with the step or the railing, and that she never voiced any complaints concerning the railing or the steps to the Bennetts prior to the date of her alleged fall. Accordingly, we are in agreement with the trial court that even in the light most favorable to Brock, there are no circumstances, in light of the evidence submitted below, under which she could prevail at trial. Accordingly, we believe that summary judgment was properly granted on this issue, and we affirm.

Having so found, we now turn to the second issue before us, which is whether the trial court correctly determined that Brock failed to sustain a negligence claim under Kentucky law. On appeal, Brock alleges numerous URLTA violations, though she concedes that these violations do not give rise to a negligence action for personal injury. In *Miller v. Cundiff*, 245 S.W.3d 786 (Ky. App. 2007),[7] this Court held that:

> We conclude, therefore, that to the extent the URLTA imposes a duty on landlords to make repairs to leased premises, the landlord's liability for breach of that duty does not extend beyond that authorized at common law for breach of a repair agreement. At common law, the breach of a contractual duty to repair does not extend the landlord's liability beyond damages outside the reasonable contemplation of the parties.

Miller at 789.

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free to rely upon whichever portions of Brock's testimony seemed most credible.

[7] We note that Brock urges this Court to overrule the decision in *Miller*, which she argues is "not well-reasoned." We decline to do so.

Brock further asserts that the Bennetts may be liable under KRS 446.070[8] for the allegedly defective handrail as a "violation of code." Upon review of this argument and applicable law, we disagree. Liability pursuant to KRS 446.070 is only triggered if the individual making the claim is in the class of persons a statute was intended to protect, if the injury suffered was an event the statute was designed to prevent, and if the violation of the statute was a substantial factor in causing the injury. Certainly, the National Building Code is a federal regulatory code. *See Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005). Violations of federal laws and regulations are not actionable under KRS 446.070. *T & M Jewelry, Inc. v. Hicks*, 189 S.W.3d 526, 530 (Ky. 2006).

Even assuming that a building code violation occurred, we believe that Brock's arguments and reliance upon KRS 198B.130[9] are misplaced in this

[8] KRS 446.070 provides that: "A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

[9] KRS 198B.130 provides that:

> (1) Notwithstanding any other remedies available, any person or party, in an individual capacity or on behalf of a class of persons or parties, damaged as a result of a violation of this chapter or the Uniform State Building Code, has a cause of action in any court of competent jurisdiction against the person or party who committed the violation. An award may include damages and the cost of litigation, including reasonable attorney's fees.
> (2) Any action based upon a claim of violation of this section shall be brought within one (1) year of the date on which the damage is discovered or in the exercise of reasonable diligence could have been discovered. However, in no event shall an action be brought under this section more than ten (10) years after the date of first occupation or settlement date, whichever is sooner.
> (3) Nothing in this section shall be construed to bar any common law liability of a contractor or subcontractor or any right or cause of action against any contractor or subcontractor created by any other statute.

instance. While KRS 198B.130(1) does grant a private cause of action to "any person or party … damages as a result of a violation of this Chapter or the uniform state building code," this is separate and distinct from a statutory cause of action for personal injury, and does not create an action for personal injury. *Real Estate Marketing, Inc. v. Franz*, 885 S.W.2d 921, 927 (Ky. 1994) (*overruled on other grounds by Giddons & Lewis, Inc. v. Industrial Risk Insurers*, 348 S.W.3d 729 (Ky. 2011)). Therein, our Kentucky Supreme Court held that:

> Reasonably interpreted, if a statutory violation has occurred, KRS 198B.130 requires payment of either the cost of repair to bring the property up to code compliance or payment of the diminution in fair market value of the property because of code violations, whichever is less.

Id.

Ultimately, we are in agreement with the court below that Brock does not have a viable claim for personal injury under KRS 198B.130, nor does she have a viable negligence claim under landlord-tenant common law, or ordinary principles of negligence. Accordingly, we believe that the court correctly found Brock's claims to fail as matter of law.

Having so found, we now turn to Brock's claim for intentional infliction of emotional distress. Brock asserts that Barry Bennett's aforementioned behavior toward her sufficed to support a claim of intentional infliction of emotional distress. We note that in order to prevail on a claim of intentional infliction of emotional distress (IIED), Brock had the burden to prove that she suffered severe emotional distress as a direct result of intentional conduct on the

part of the Bennetts that was so outrageous and intolerable that it would offend the generally accepted standards of decency and morality. *Kroger Co. v. Willgruber*, 920 S.W.2d 61, 65 (Ky. 1996). Indeed, the conduct at issue must be so outrageous in character and extreme in degree as to go beyond all possible bounds of decency and to be utterly intolerable in a civilized community. *Stringer v. Wal-Mart Stores, Inc*., 151 S.W.3d 781, 791 (Ky. 2004). Upon review of the record, the arguments of the parties, and the applicable law, we are in agreement with the court below that such was not the case *sub judice*.

Having reviewed the basis for Brock's IIED claim, we are in agreement with the court below that even if the allegations at issue were substantiated, they do not rise to the level necessary to constitute the "outrageous conduct" necessary to successfully prove such a claim. Having so found, we believe that the trial court appropriately granted summary judgment on this issue, and we affirm.

Finally, we turn to the issue of whether the court below correctly determined that Brock owed unpaid rent and late fees for August and September of 2009. Our review of the record indicates that there is no dispute that Brock failed to pay rent for a period of time when she was clearly in possession of the property. Further, the plain language of the lease indicates that Brock inspected the premises before taking possession and that she found the residence satisfactory. Any alleged defects should have properly been addressed prior to Brock's refusal to pay rent.

Accordingly, we are in agreement with the determination of the court below that Brock owes the rent and late fees which she chose not to pay.

Wherefore, for the foregoing reasons, we hereby affirm the March 28, 2013, opinion and order of the Jefferson Circuit Court, the Honorable A.C. McKay Chauvin, presiding.

ALL CONCUR.

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