RECENT CASES DEFINING THE LANDLORD'S DUTY TO PROTECT TENANTS FROM CRIMINAL ACTS OF THIRD PERSONS

by James A. Bryant"

In an attempt to receive compensation for injuries victims of criminal assaults are looking to their landlords. Obviously there has to be a connection between the tenant's injury, the apartment and the criminal assault. A variety of legal theories are available; however, most cases are decided on the basis of negligence. Other theories include implied warranty, express warranty, and breach of contract. Before a tenant can recover for negligence they must establish a duty. The duty imposed on the landlord can arise from a general duty to provide security or the voluntary assumption of that duty. The duty, if any, imposed by state law varies widely from state to state. The variation is great enough to where in a specific case the applicable state law will have to be examined to determine liability.

The seminal case holding the landlord liable for the criminal acts of a third person *is Kline v. 1500 Massachusetts Avenue Apartment CorporationK* In *Kline,* a female tenant was criminally assaulted and robbed by an intruder in the common hallway of the apartment building in which she was living. At the time the tenant signed the lease a doorman was on duty at the main entrance twenty four hours a day together with other security provided by the landlord. The tenant maintained that one of the reasons for entering the lease was the security provided by the landlord. During the term of the lease security was reduced so that at the time of the assault less security was being provided than at the time the lease was executed. Additionally the assault in question was foreseeable because similar assaults had been occurring in the building. The court noted that only the landlord could do anything about the security of the common area. The court held that the obligation of the

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[1] 439 F.2d 477 (1970).

landlord could be grounded in both contract and tort.[2] The tort standard was based on the protection commonly provided in similar apartments in similar neighborhoods. The contract obligation was to maintain security at the same level as it was at the beginning of the lease.

WARRANTY OR CONTRACT

Although less common than negligence, liability may be imposed for breach of warranty or contract. In *Flood* v. *Wisconsin Real Estate Inv. Trust,*[3] the court noted the contractual nature of an apartment lease in contrast to the traditional view of a lease being a conveyance or interest in real property for the term of the lease. Plaintiff was raped and assaulted when she surprised burglars in her apartment. She was allowed to recover for her injuries on breach of express and implied warranties of security provided by the apartment complex where she lived. The court held that there was an implied warranty to provide security at the level it was provided at the inception of the lease. There was also enough evidence of advertisements and conversations between plaintiff and the managers of the building to raise a jury question as to whether an express warranty existed.

The Court of Appeals in Ohio refused to hold that the landlord had a common law duty to afford reasonable protection against entry by an intruder even in a high crime area where such entries were foreseeable.[4] The tenant was raped after an intruder gained entry into her basement apartment through a window that did not have a lock. There was disputed evidence as to whether or not a contract existed to put locks on the windows. If a contract existed, the tenant could recover for her injuries based on breach of contract. In this case, there was enough evidence of a contract to make out a jury question.

NO DUTY

Several Louisiana cases hold that the landlord does not have a duty to protect tenants from criminal acts of third persons. In *Reilly v. Fairway View II Associates,*[5] an intruder entered the Reillys' apartment through a defective sliding glass door. The intruder raped Phyllis Reilly, stole the Reillys's car and other moveable effects. The court applied a Louisiana statute and held the landlord had no duty to protect tenants from criminal assaults by third parties. The same result was reached in *Cornelius* v. *Housing Authority*

[2] *Id*. at 486.

[3] 503 F.Supp. 1157 (1980).

[4] Blair v. Property Mgmt. Consultants, 531 N.E.2d 752 (Ohio App. 1987).

[5] 544 So.2d 73 (La. App. 1989).

of New Orleans[6] when the tenant's child was murdered in the common area of a New Orleans housing project. The court again applied a statute absolving the landlord from liability for crimes committed against tenants by a person not claiming any right to the premises. Likewise a raped laundromat patron had no right against the owner/lessor of the building where the laundromat was located.[7] Plaintiff was waiting on her cloths to wash when an intruder forced her at gunpoint into an adjacent room where she was raped. In another case the existence of rumors about a child molester was not enough to create a duty to provide security to tenants in an apartment complex.[8] An 11 year old minor was molested near the apartment complex. Without more evidence of criminal activity, the landlord was not obligated to provide security to the tenants of the complex.

ASSAULTS BY OTHER TENANTS

Tenants are usually unsuccessful in their suits against landlords when the assaults are committed by other tenants. Typical of the cases against landlords for assaults by fellow tenants is *Firpi v. New York City Housing Authority*[9]. In order to recover, the tenant has to prove that the act was foreseeable and that the landlord could reasonably do something to prevent the assault. This requirement arose because the action was brought under a negligence theory and without foreseeability and the ability to prevent the incident no negligence occurs. In *Firpi*,[10] the plaintiff was physically attacked by another tenant who allegedly had a history of disputes with the plaintiff. At no time prior to the assault did the plaintiff ask the housing authority to evict the co-tenant who committed the assault. Nor was there evidence that had such a request been made that the defendant housing authority had sufficient grounds or authority to evict the co-tenant who committed the assault. Hence no foreseeability or ability to prevent the assault with the result that the defendant was not negligent. The problem of foreseeability and preventability again prevented a tenant from recovering for an assault by a co- tenant in *Morton* v. *Kirkland*There had been a history of complaints and counter complaints between plaintiff and defendant, the most serious when the co-tenant allegedly brandished a gun in plaintiffs presence. The landlord had brought an eviction proceeding against the co-tenant but had it dismissed for some unknown reason. The court noted that a co-tenant has a right to be in the common area of the apartment complex and that the landlord has less

[6] 539 So.2d 1250 (La. App. 1989).

7 Brent v. Williams, 524 So.2d 158 (La. App. 1988).

8. O.H. by T.E.B. v. Ballard Realty Co., 516 So.2d 519 (Ala. 1987).

[9] 573 N.Y.S.2d 704 (1991).

[10] *Id*.

[11] 558 A2d 693 (D.C. App. 1989).

power to control the conduct of a co-tenant than a stranger who could be kept out by reasonable security measures.

In *Gill* v. *NYC Housing Authority,*[12] the court had to contend with whether a landlord had a duty to prevent a mentally ill tenant from committing a violent assault on a co-tenant. The plaintiff claimed that the landlord should have investigated the mental illness of the co-tenant; however, the court pointed out the limitation on this type of investigation. Nor was there sufficient evidence that the landlord had enough information to make the event foreseeable. Likewise without any reason to act, there was nothing the landlord could do to prevent the incident. In another case a permanent resident in a hotel brought an action against the hotel when he was shot by a transient guest.[13] The hotel was advertised as "gay managed" and other guests expressed concern over the transient guest's "anti-gay" attitude. The shooting incident arouse over an argument about the volume of the transient guest's stereo. Again the issue of foreseeability is of prime importance in the hotel not being liable. In this case there was no evidence that the hotel could have anticipated the incident. Furthermore, a hotel does not have a right to inspect the luggage of it's guest to look for weapons.

In *Williams* v. *Gorman,*[14] an action was brought against the landlord for injuries resulting from an assault against a tenant by a co-tenant. The action was based on both breach of warranty and negligence. The incident in question occurred when a tenant in the apartment above fired a gunshot blast that blew a hole in plaintiffs ceiling. While plaintiff was not shot, she claimed the blast blew her across the room. In any event, she suffered a lacerated eye and damage to her nose. In a prior incident a fight in the apartment above resulted in the chandelier in plaintiffs apartment falling from the ceiling and breaking a glass table. The court refused to apply the breach of implied warranty of habitability for injuries resulting from criminal acts of others and held that the lack of foreseeability defeated plaintiffs negligence claim.

NEGLIGENT PERFORMANCE OF ASSUMED DUTY

Even in states that do not impose a general duty on landlords to protect tenants from the criminal acts of third persons, the landlord can voluntarily assume such a duty. If the landlord assumes the obligation of such a duty, he or she will be liable if the duty is performed in a negligent manner. The court in *Feld* v. *Merriam,*[is] specifically noted that Section 323 of the Restatement of Torts recites the rule that one who undertakes to perform a service whether gratuitously or for consideration is liable for physical harm, if

[12] 519 N.Y.S. 364 (1987).

[13] Gray v. Kircher, 236 Cal. Rptr. 891 (Cal. App. 1987).

[14] 520 A.2d 761 (NJ. Super. A.D. 1986).

[13] 485 A.2d 742 (Pa. 1984).

he does so in a negligent manner. The tenants in *Feld*[16] were abducted in the parking garage that served their apartment. They were forced into the back seat of their car at gunpoint by three armed felons. They were driven past the guard on duty at the gate. The husband was put out of the car and the wife assaulted. How the felons gained entry to the garage or why they were not discovered is not revealed in the opinion. The court held that no general duty to provide security existed, and the landlord was only obligated not to be negligent in the way the services are performed. The court specifically noted "a tenant may rely upon a program of protection only within the reasonable expectations of the program. He cannot expect that the landlord will defeat all the designs of felonry."[17]

In *Shea* v. *Preservation Chicago, Inc,.*[11] an intruder gained entry into the building through an interior security door with a defective safety lock and assaulted plaintiff causing her severe injury. At the signing of plaintiffs lease she was told that the lock would be repaired. Defendants made several unsuccessful attempts to repair the lock. The landlord had assumed control over the common area of the apartment and had a "duty to exercise such control in a reasonable manner."[19] Other than the assumed duty, the landlord did not have a duty to protect tenant's from foreseeable criminal acts of third persons. When a landlord undertook to provide a fenced and guarded parking lot, it had an obligation to do so in a non negligent manner.[20] A woman was assaulted in the fenced and guarded parking lot. The landlord had no general duty to provide security but by voluntarily assuming the duty had an obligation to do so in a non-negligent manner. In *Palmer* v. *Pritchard Bros,.*[21] a female tenant was physically and sexually assaulted when an intruder entered her apartment through her bedroom window. A newsletter was distributed to the tenants that stated security was provided seven nights a week. The court recited the rule that the landlord had no general duty to provide security but did mention the landlord's obligation, "to take reasonable precautions to provide security in the common areas."[22] The court recognized that a landlord may create an obligation, "by means of contractual provisions to provide security for his tenants."[23] So it is fairly clear that even when no duty exists the landlord can voluntarily obligate himself or herself to provide security to his or her tenants.

[16] *Id*.

[17] *Id*. at 747.

18. 206 111. App. 3d 657, 565 N.E.2d 20 (1990).

[19] *Id*. at 23.

[20] Rhodes v. United Jewish Charities, 184 Mich. App. 740, 459 N.W.2d 44 (1990).

[21] 61 Ohio Misc. 2d 150, 575 N.E.2d 900 (1990).

[22] *Id*. at 901.

[23] *Id*.

The landlord's duty can arise from an obligation to provide minimum security in its operation, maintenance and control of a dormitory[24] but is more likely to arise, when criminal assaults become foreseeable due to similar criminal activity in the area.[25] Probably the best description of a duty is that while a landlord is not an insurer of a tenant's safety and has no general duty to protect tenants from criminal acts of third persons, the landlord does have a duty to protect tenants from foreseeable criminal conduct.[26] Foreseeability of criminal activity is vital both for establishing a duty and determining causation.[27] If a duty is found to exist, it is for the jury to decide if isthas in fact been breached.[2]* Nor does the criminal activity have to be of the exact nature as the assault on the tenant.[29] In *Larochelle,*[30] the court held that a landlord was potentially liable to a tenant for the sexual battery she suffered in her apartment, even though the other crimes committed in a four to twelve radius of her apartment were nonviolent in nature though unsavory. Likewise, extensive criminal activity on the same premises precluded a summary judgement for the landlord, and the tenant was entitled to a trial on the reasonableness of her landlord's security measures after she was raped and sodomized by an unknown assailant on the 38th floor of the premises owned by the defendant landlord.[31]

The definition of duty may be centered on the adequacy of the locks for the apartment. In a Virginia case the landlord escaped liability for violating a local ordinance requiring dead bolt locks because a state statute that did not require such locks on the type of apartment plaintiff rented preempted the local ordinance.[32] Plaintiff was raped in her apartment by an unknown assailant who may have entered through the previously locked front door to her apartment which was equipped with a button type lock.[33] In *K.S.R* v. *Novak and Sons, Inc.*[M] plaintiffs landlord failed to repair her door that had been kicked in breaking the locks the week before she was raped in her apartment. The assailant had been caught several times before the incident masturbating in the building. Needless to say the attack was foreseeable resulting in a duty on the landlord to take reasonable

24 Green v. Dormitory Authority of State, 577 N.Y.S.2d 675 (A.D. 3 Dept. 1991).

25.Carrol v. Ar De Realty Corp. N.V., 167 A.D.2d 216, 561 N.Y.S.2d 721 (1990).

26. Ten Associates v. McCutchen, 398 So.2d 860 (Fla. App. 1981).

[27] *Id*. at 863.

[28.] *Id*. at 862.

[29] Larochelle v. Water & Way Limited, 589 So.2d 976 (Fla. App. 1991).

[30] *Id*.

[31] Carroll v. Ar De Realty Corp. N.V,, 167 A.D.2d 216, 561 N.Y.S.2d 721 (1990).

[32] Klingbeil Management Group Co. v. Vito, 357 S.E.2d 200 (Va. 1987).

[33] *Id*.

[34] 225 Neb. 498, 406 N.W.2d 636 (1987).

precautionary measures to protect his tenants safety.[35] The landlord's failure to provide locks and keys resulted in potential liability for both compensatory and punitive damages in *Paterson* v. *Deeb.*[36] In Florida both a statute and common law required the landlord to provide adequate locks and keys.[37] Prior criminal acts in vicinity of apartment were relevant to foreseeability of sexual attack on tenant, because no duty existed unless the attack was foreseeable.[34] The apartment in question was an old building that was going to be demolished, and the landlord did not want to spend the money on locks and keys.[39]

CAUSATION

Foreseeability is not only important with respect to duty but also with respect to causation. In *Camacho* v. *Edelman*the tenant's guest failed to establish probable cause, when the tenant's former lover kicked in the double locked metal reinforced door to the apartment, because the attack was not foreseeable. Tenant's guest was stabbed by tenant's former boyfriend. The criminal attack by tenant's former lover was not a foreseeable event.[41] The landlord's failure to keep front doors locked did not proximately cause plaintiffs damages, when she was accosted by two unidentified assailants one and one half blocks from her apartment and forced to return to her apartment where she was robbed of various items of personal property.[42] *In Robinson* v. *N.Y. City Housing Authority,*[43] a tenant who was raped, brought an action against her landlord claiming that it was negligent not to have a lock on the outer door as well as on the inside security door. In this case there was no breach of duty, because the doors complied with the law. Furthermore, there was lack of causation, because the assailant followed the tenant through both doors and got on the elevator with her where he forced her to remain until it reached the twenty-sixth floor. The assailant then forced the tenant up the stairs to the roof where he raped her. Nothing that the landlord did or failed to do caused plaintiffs injuries.

Causation was present when the landlord's master key policy allowed too many persons access to the master key which allowed plaintiffs apartment to be burglarized by landlord's employee.[44] In this case there had been a prior

35. Id.

36. 472 So.2d 1210 (Fla. App. 1985).

37 *Id*.

38.*Id*.

39.*Id*.

40 574 N.Y.S.2d 356 (AD. 1 Dept. 1991).

41 Id. at 357. .

42 Salvamoser v. Pratt Institute, 150 AD.2d 666, 541 N.Y.S.2d 541 (1989).

43 150 A.D.2d 208, 540 N.Y.S.2d 811 (1989).

44 Center Management Corp. v. Bowman. 526 N.E.2d 228 (Ind. App. 1988).

burglary so the second burglary was foreseeable. Defendant could have restricted access to the master keys but did not do so rendering the second burglary more likely.

In *Rogers v. Rosen*,[41] the court recognized a duty on the part of a landlord to protect a tenant against foreseeable criminal acts of third persons, but found that causation was lacking. The tenant was injured when she jumped out of the window of her second story apartment to escape from an assailant who had entered her apartment. The assailant gained entry by using a ladder to reach the second story window which he broke. The window was otherwise secure, and the ladder had possibly been left on the premises by an independent contractor who had performed work on the premises prior to the break in. Likewise in *Mengel v. Rosen*,[46] even if the landlord was negligent in hiring an employee with a juvenile criminal record, the assailant entered plaintiffs apartment by using her own keys which she had left in the door. The assailant then forced plaintiff to drive him in her own car, using the keys she had left in the door, to a secluded spot where he raped her. The court held that "The proximate cause of appellant's injuries was not the breach of duty by appellees, but the opportunity of entrance to her apartment afforded by appellant's keys."[47] In another case, the landlord met his duty by providing locks for outside doors and providing two locks, a chain and a peephole.[48] In this case causation was again missing, because the assailant entered the tenants apartment when she opened the door without looking to see who was outside.

CONCLUSION

Most recent cases against landlords follow a familiar negligence pattern. The landlord is liable to the tenant only if the tenant can show the landlord owed the tenant a duty to protect the tenant against foreseeable criminal acts of third persons, that the landlord breach that duty, and that the breach of duty by the landlord caused the tenant's injuries. If landlord's are to be liable to tenants for the crimes of third persons, then negligence is probably the most rational approach, because it allows an examination of the reasonableness of the landlords conduct, and the landlord should only be liable when the landlords conduct is unreasonable.

As a minimum, a prudent landlord should equip all apartment entrance doors with dead bolt locks. It would probably also be prudent to provide peep holes so the tenant can see who is outside the apartment before opening the door. Window locks are also desirable. The provision of security in the form of guards may be necessary in appropriate circumstances.

[45] 737 P.2d 562 (Okl. 1987).

46 735 P.2d 560 (Okl. 1987).

47. Id. at 563.

48. Charmichael v. Colonial Square Apartments, 38 Ohio App. 3d 131, 528 N.E.2d 585 (1987).

Similarly in some areas self-locking outside doors for the common area may be required. Whatever steps the landlord takes must be done in a careful manner because once a duty is assumed, it must be preformed with ordinary care.