62 Mass.App.Ct. 1104
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

Joann DONNELLY,
v.
COHASSET HOUSING AUTHORITY.

No. 03-P-998. | Oct. 1, 2004.

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** A Superior Court judge entered summary judgment on each of four counts in Joann Donnelly's complaint against the Cohasset Housing Authority (authority) arising from her claim of injury from second-hand cigarette smoke that she contends emanted from the apartment below hers. We reverse in part and affirm in part.

In deciding a motion for summary judgment, the court may consider pleadings, depositions, answers to interrogatories, admissions on file, and affidavits.[1] Mass.R.Civ.P. 56(c), 365 Mass. 824 (1974); *Community Natl. Bank v. Dawes,* 369 Mass. 550, 553 (1976). As the parties register no objection to any of the materials introduced at the hearing, we consider them on appeal.

We review in some detail the rules governing summary judgment procedure. Summary judgment is appropriate where there are no genuine issues of material fact and where the summary judgment record entitles the moving party to judgment as matter of law. *Community Natl. Bank v. Dawes, supra; Nashua Corp. v. First State Ins. Co.,* 420 Mass. 196, 202 (1995); Mass.R.Civ.P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue and that the summary judgment record entitles him or her to judgment as matter of law. *Pederson v. Time, Inc.,* 404 Mass. 14, 16-17 (1989). A party moving for summary judgment who does not bear the burden of proof at trial may demonstrate the absence of a triable issue either by submitting affirmative evidence negating an essential element of the nonmoving party's case or by showing that the nonmoving party is unlikely to be able to prove that element at trial. *Kourouvacilis v. General Motors Corp.,* 410 Mass. 706, 716 (1991). *Flesner v. Technical Communications Corp.,* 410 Mass. 805, 809 (1991). The nonmoving party cannot defeat the motion for summary judgment by resting on its "pleadings and mere assertions of disputed facts." *LaLonde v. Eissner,* 405 Mass. 207, 209 (1989). "[V]ague and general allegations of expected proof" are not enough to defeat a motion for summary judgment. *Community Natl. Bank v. Dawes, supra* at 555-556, quoting from *Albre Marble & Tile Co. v. John Bowen Co.,* 338 Mass. 394, 397 (1959). Because the burden is on the movant, all evidence presented is construed in favor of the party opposing the motion, and the opposing party is given the benefit of all favorable inferences that can be drawn from that evidence. See *Parent v. Stone & Webster Engr. Corp.,* 408 Mass. 108, 112-113 (1990). "A toehold [ ] is enough to survive a motion for summary judgment." *Marr Equipment Corp. v. I.T.O. Corp.,* 14 Mass.App.Ct. 231, 235 (1982). The trial court is not to "pass upon the credibility of witnesses or the weight of the evidence or make its own decision of facts," and "should not grant a party's motion for summary judgment merely because the facts he offers appear more plausible than those tendered in opposition" or because it appears that the nonmoving party is not likely to prevail at trial. *Attorney General v. Bailey,* 386 Mass. 367, 370 (1982) (citations omitted). The duty of the judge "is not to conduct a 'trial by affidavits' (or other supporting materials), but to 'determine whether there is a substantial issue of fact." ' *Noyes v. Quincy Mut. Fire Ins. Co.,* 7 Mass.App.Ct. 723, 726 (1979), quoting from *Norwood Morris Plan Co. v. McCarthy,* 295 Mass. 597, 603 (1936).

***2** On appeal, we may consider any ground on which the plaintiff can survive the authority's motion for summary judgment. Cf. *Champagne v. Commissioner of Correction,* 395 Mass. 382, 386 (1985).

With these principles in mind, we review the trial judge's grants of summary judgment with respect to each of the counts in plaintiff's complaint.

Donnelly first alleges that the authority was liable under G.L. c. 186, § 14,[2] as it directly or indirectly interfered with the quiet enjoyment of her residential premises. "The covenant of quiet enjoyment protects a tenant's right to freedom from serious interference with [her] tenancy-acts or omissions that impair the character and value of the leasehold." *Doe v. New Bedford Hous. Authy.,* 417 Mass. 273, 285 (1994). A landlord may incur liability as the result of conduct of third parties, if serious interference with the tenancy is a "natural and probable consequence of what the landlord did, what he failed to do, or what he permitted to be done." *Ibid.* (landlord failed to take reasonable and relatively easy measures to stop ongoing drug dealing in common areas that prevented the tenants' use of those areas). Failure to repair defects in the premises of which the landlord has notice can give rise to liability, if such defects result in a serious interference with the tenancy. See *Cruz Mgmt. Co. v. Thomas,* 417 Mass. 782, 789 (1994). The conduct must at least be negligent; there is no requirement that the conduct be intentional, nor does the statute impose or permit strict liability. See *Al-Ziab v. Mourgis,* 424 Mass. 847, 850-851 (1997).

Intrusion into a leased premises of smoke, soot, and oil through cracks and other openings in the apartment, when not remedied by the landlord within a reasonable time, have been held to constitute an act done by the landlord with the effect of depriving the tenant of the enjoyment of the demised premises, and constituted a constructive eviction. *Westland Hous. Corp. v. Scott,* 312 Mass. 375, 383 (1942). At least one jurisdiction has held that whether there was transmission of cigarette smoke into a tenant's upper rental unit from a lower rental unit, and whether the smoke was sufficient to constitute a breach of the covenant of quiet enjoyment, were issues of fact that precluded summary judgment. See *Dworkin v. Paley,* 93 Ohio App.3d 383, 387-388 (1994). In any event, the authority does not contend that intrusion of cigarette smoke into Donnelly's apartment could not be grounds for a possible breach of quiet enjoyment, as a matter of law, or a condition for which a landlord could never be liable.

In considering Donnelly's claim that the authority interfered with her right of quiet enjoyment by failing to correct defective conditions that permitted the smoke to infiltrate her apartment, the motion judge first determined that Donnelly failed to offer evidence that smoke actually did infiltrate the apartment in any significant quantity. On our review of the record, we disagree. First, there is no requirement that Donnelly show that smoke in a significant quantity came into the apartment; rather, she must offer evidence that there is a dispute of fact that smoke sufficient to interfere with her quiet enjoyment of the premises entered the apartment, and that the smoke entered because of defective conditions. Donnelly introduced affidavits of several people who smelled cigarette smoke in her apartment and in the common areas adjacent to her apartment. She also introduced letters from physicians stating that she experienced symptoms which she attributed to the smoke, and that she had not suffered from the symptoms prior to the conditions existing in her apartment, and a doctor's affidavit that smoke could cause the symptoms from which she suffered. We agree with Donnelly that these items, coupled with the fact that, after notice of the existence of the condition the authority took some action, but none sufficient to eliminate the problem, constituted sufficient evidence to gain the "toe-hold" needed to show a disputed issue of material fact. The motion judge noted that there was no evidence that anyone had ever tested for the presence of cigarette smoke in the apartment; while the absence of such testing might ultimately reduce the weight of the plaintiff's evidence, it was not for the motion judge to put the evidence in the balance.

***3** The motion judge further concluded that evidence was lacking that the authority had notice of specific defects that might permit infiltration of smoke. Without question, the evidence shows that the authority was on notice that Donnelly was claiming infiltration of the smoke through some defect in the premises. The tenant need not specify the particular defect. See *Simon v. Solomon,* 385 Mass. 91, 95 (1982). Further, in assessing the report of the Cohasset town health agent, that smoke could enter through separations in the subfloor joists, the motion judge concluded that the report was sufficiently vague to prevent a reasonable inference that the floor was the source of the problem, and that his report was the only evidence of a defect in the flooring. Once again, Donnelly was not required to specify a particular defect, but only that the smoke was

entering the apartment through some defect for which the landlord was responsible, and the report was some evidence, to be weighed by a finder of fact, of a potential defect as the source of the problem. As well, the motion judge considered the report of Covino Environmental Associates as refuting the suggestion of the health agent. Here again, it was for a finder of fact to weigh the two reports and to determine which to credit. The Covino report, stating that air flow studies indicated that air from the downstairs apartment was entering through a small crack located under the tile floor in a corner of the kitchen, and from the hallway through a space above the door to the apartment, could provide evidence from which a finder of fact could determine that smoke was entering the apartment from defects for which the authority might be responsible.[3] In sum, when viewed in the light most favorable to Donnelly, there was evidence from which a fact finder might determine that smoke was infiltrating the apartment from the apartment below, that the smoke was sufficient to cause harm to Donnelly such as to interfere with her quiet enjoyment of the property, that the smoke was infiltrating through a defect for which the authority was responsible, that the authority had taken some action to stop the infiltration, but had declined to take other action, that it was negligent in this respect, and that its failure to take action to stop the infiltration was the cause of the interference. We reverse the order of summary judgment with respect to count I.

In count II of her complaint, Donnelly contends that the authority's failure to repair the allegedly defective conditions amounted to a violation of her lease, and in count III she alleges negligence on the part of the authority. Item A in the lease agreement requires that the authority observe Donnelly's statutory right of quiet enjoyment. As discussed above, there was sufficient evidence to overcome summary judgment on this issue, and on the issue whether the actions of the authority were the cause of Donnelly's alleged injury. That being the case, there was sufficient evidence to overcome a motion for summary judgment on the breach of contract claim and the negligence claim. We need not reach the question whether there was sufficient evidence with respect to breach of other contract provisions. We reverse the order of summary judgment with respect to counts II and III.

***4** We agree with the authority that the motion judge properly granted summary judgment on count IV of the complaint, alleging discrimination based on a disability. On a review most favorable to Donnelly, the summary judgment materials fail to establish that she suffered a "handicap," as defined in G.L. c. 151B. We affirm the grant of summary judgment on count IV.
So ordered.

Parallel Citations

815 N.E.2d 1103 (Table), 2004 WL 2238545 (Mass.App.Ct.)

Footnotes

[1] In a footnote to her decision, the motion judge indicated that certain submissions of both parties failed to fulfil the requirements of Superior Court Rule 9A(b)(5). The motion judge indicated that, in exercise of her discretion and in order to address the case on its merits, and thus avoid further delay, she would consider all evidentiary materials submitted, gleaning the pertinent facts from the admissible evidence offered. She further indicated that, despite objection from both parties, she would consider new materials submitted subsequent to oral argument, would consider, absent any dispute with respect to authenticity, documents submitted by both sides without proper authentication, and, as neither side moved to strike, would consider documents submitted by both parties in the nature of expert reports, despite the absence of affidavits or information as to the qualifications of the purported experts. Other than the above broad statements, the motion judge did not indicate specifically her reason for exercising discretion in considering each item of evidence, whether objected to or not, in the range of materials submitted. Neither party argues on appeal that the motion judge abused her discretion in considering the material, and we will not consider whether such a broad-ranging inclusion of improper summary judgment materials amounted to an abuse of discretion. We simply note that "[s]ummary judgment is not a casual procedure. It is a proceeding that bids fair to be dispositive of the case." *Chiu-Kun Woo v. Moy,* 17 Mass.App.Ct. 949, 949-950 (1983). With respect to affidavits, the evidence therein must be admissible. "The rationale for requiring admissible evidence in affidavits is to ensure that 'trial would [not be] futile on account of lack of competent evidence." ' *Madsen v. Erwin,* 395 Mass. 715, 721 (1985), quoting from *Kern v. Tri-State Ins. Co.,* 386 F.2d 754, 756 (8th Cir.1967). As well, the requirements of

Mass.R.Civ.P. 56(e), 365 Mass. 824 (1974), are mandatory where affidavits are concerned. See *Jameson v. Jameson,* 176 F.2d 58, 60 (D.C.Cir.1949); 10B Wright, Miller & Kane, Federal Practice and Procedure § 2738, at 328 (1998). As *Madsen* holds, a judge has discretion to consider improper summary judgment material. However, when a motion judge chooses to exercise discretion in the consideration of improper summary judgment material, it would be better practice to specifically identify the improper material, the reason it is improper, and the reason for exercising discretion to consider it.

[2] The statute provides in pertinent part: "Any lessor or landlord of any building or part thereof occupied for dwelling purposes [ ] who directly or indirectly interferes with the quiet enjoyment of any residential premises by the occupant ... shall be liable for actual and consequential damages or three month's rent, whichever is greater, and the costs of the action, including a reasonable attorney's fee, all of which may be applied in setoff to or in recoupment against any claim for rent owed or owing." G.L. c. 186, § 14, as amended by St.1973, c. 773, § 2.

[3] The report further stated that no air flow was found at the bottom of the door, while there was other evidence that the door had a broken "sweep" at the bottom, which might permit infiltration. Once again, it would be for a finder of fact to determine which evidence to credit, and what weight to give to any evidence so credited.

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