

IN THE COURT OF COMMON PLEAS DAUPHIN COUNTY, PENNSYLVANIA

PENNSWOOD APARTMENTS L.P. :  
Plaintiff, :  
v. : NO. 2005 CV 529  
KEYSTONE SERVICE SYSTEMS, INC.:  
Defendant :

OPINION

Pennswood Apartments L.P. (hereinafter "Pennswood") initiated this litigation to recover damages resulting from an April 20, 2004 fire in a townhouse (hereinafter "Townhouse") owned by them at 5124 Haverford Road in Lower Paxton Township. At the time, the Townhouse was leased to defendant Keystone Service Systems, Inc. (hereinafter "Keystone").[1] Keystone, in turn, sublet the Townhouse to persons for whom Keystone provided services.[2]

Pennswood's complaint contains two counts: breach of contract (Count I) and negligence (Count II). Under the breach of contract claim, Pennswood relies on language in the lease which requires Keystone to repair or reimburse Pennswood for any damage to the premises and restore the premises to the condition existing at the inception of the term. For example, Pennswood cites these paragraphs:

5. TENANT shall reimburse LANDLORD on demand for all expenses incurred by LANDLORD in repairing damage resulting from acts or omission of TENANT or its guests, licensees, or invitees.....

8. TENANT is required to restore the Apartment upon termination of the term of this lease, to the condition existing at the inception of the term, ... normal wear and tear excepted, ....

14. TENANT is required to maintain the Apartment and the Fixtures therein in good repair and cleanliness and subject to the provisions of Paragraph 17 hereof, shall make, as and when needed as a result of misuse or neglect by TENANT, all repairs in and about Apartment necessary to preserve it in good order and condition, which repairs shall be of a quality and class equal to the original work

17. Except for claims arising out of acts caused by the affirmative negligence of the LANDLORD or its agents, the TENANT shall indemnify and hold LANDLORD harmless, at TENANT'S expense, from and against any and all claims, actions, damages, liability and expense in connection with loss of life, personal injury, and/or property damage arising out of any occurrence upon the demised premises or the occupancy or use thereof by TENANT, ....

Pennswood's second count, negligence, relies on a determination by fire investigators who traced the origin of the fire to an extension cord pinched beneath the leg of a dresser in a bedroom. Pennswood claims that Keystone breached a duty of inspection of the Townhouse to ensure that electrical power cords were properly utilized and further breached a duty to supervise their clients occupying the premises. Pennswood has now moved for partial summary judgment as to liability on both counts.

With regard to the contract claim, Pennswood asserts that there is no issue of material fact in that the Townhouse was not surrendered in the condition as originally let, even though Keystone had an express contractual duty to do so, reasonable wear and tear excepted. As for their tort claim, Pennswood states that there is no factual dispute that the cause *of* the fire was the improper use of an extension cord; in other words, that Keystone and /or its "Clients" were negligent.

#### THE CONTRACT CLAIM

As noted above, Pennswood premises their entitlement to summary judgment on those lease provisions which require the premises to be surrendered as let and which require tenant to reimburse landlord for all damage resulting from acts or omission of the tenant. The argument has a ring of persuasiveness about it until one reads the lease in its entirety. Such a reading inevitably brings one to a provision which specifically covers the case at hand:

18. ... If the Apartment shall be partially damaged by fire *or* other insured casualty without the fault or negligence of TENANT ... the Apartment shall be repaired and restored by and at the expense of LANDLORD... .

Paragraph 18 further explains that, in the case of partial damage, the rent shall be abated or apportioned. Where the damage is total and the premises rendered untenable, the landlord may rebuild or terminate the lease.

For our purposes, the operative words in Paragraph 18 are "without the fault or negligence of TENANT." And that, of course, begs the issue raised in Count II of the complaint. It is thus the issue of negligence which controls the entire issue of liability - whether viewed from either the breach of contract duty or breach of tort duty, *i.e.* standard care.

#### THE NEGLIGENCE CLAIM

Pennswood rests its claim for summary judgment under Court II - Negligence on the deposition of Dennis A. Woodring, a certified fire investigator. Woodring traced the source of the fire to an electrical cord pinched under the leg of a dresser. He believed this to be the "ignition source for this fire." (Woodring Dep., 35).

A similar conclusion was reached by Keystone's expert, Lee D. McAdams, CFEI. "I feel the most probable cause *of* the fire is from some type of electrical failure in one of various power cords leading to the power strip, television, Playstation, or some other cord leading to some other device." Contrary to Woodring's opinion, McAdams stated: "I do not feel it is possible to pinpoint the power cord for the power strip to have been the cause of the fire, nor do I feel anyone can be certain that the leg of the chest was on top of the power cord." (McAdams Report, 5).

Even were we to be able to conclude that there was no factual dispute as to the origin of the fire, Pennswood would still fall far short of establishing negligence. Neither expert opined on the standard of care or the breach thereof. Moreover, even if they had, the proper handling and use of electrical cords is not so arcane a subject that lay jurors would not be able to render their own judgment in this regard.

The Pennsylvania Rules of Civil Procedure provide that summary judgment is appropriate "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action" and the moving party is therefore entitled to judgment as a matter of law. Pa.R.Civ.P. 1035.2(1). The relevant elements necessary to permit summary judgment are as follows:

First, the pleadings, depositions, answers to interrogatories, admissions on file, together with any affidavits, must demonstrate that there exists no genuine issue of fact. Second the moving party must be entitled to judgment as a matter of law. The moving party has the burden of proving that no genuine issue of material fact exists. However, the non-moving party may not rest upon averments contained in its pleadings; the non-moving party must demonstrate that there is a genuine issue for trial. The court must examine the record in the light most favorable to the non-moving party and resolve all doubts against the moving party. Finally, an entry of summary judgment is granted only in cases where the right is clear and free of doubt.

Blackman v. Federal Realty Inv. Trust, 664 A.2d 139, 141-142 (Pa. Super. 1995).

Our review of the present state of the record leads us to conclude that the issue of "fault or negligence" (Lease Pgh. 18) is very much a wide-open question. As such, Pennswood's Motion for Partial Summary Judgment must be denied.

#### ORDER

AND NOW, August 5, 2008,

IT IS HEREBY ORDERED that the motion for Partial Summary Judgment of Plaintiff Pennswood Apartments, L.P. is hereby denied.

BY THE COURT

Joseph H. Kleinfelter Judge

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[1] The June 1, 2002 lease agreement shows the Jager Development Company as landlord.

[2] Keystone provided housing for former patients of mental health facilities who were in the process of transitioning into the community.