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Landlord-Tenant - The Breach of an Implied Warranty of Habitability in the Lease of a Multiple Unit Residence Is a Defense to a Forcible Entry and Detainer Action

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LANDLORD-TENANT—The Breach of an Implied Warranty of Habitability in the Lease of a Multiple Unit Residence is a Defense to a Forcible Entry and Detainer Action.

Emma Little, a resident of Chicago, renewed the oral lease of her apartment with Jack Spring, Inc., on August 1, 1967. This renewal, the third since the commencement of the lease in August, 1961, was induced by her landlord's verbal promise to make certain repairs including the installation of screens, the replacement of rotted windows and sashes, and the correction of malfunctioning electrical outlets. Because of the landlord's failure to make these repairs, as well as his failure to rectify numerous structural defects in violation of the Municipal Code of Chicago, the Cook County Department of Public Aid withheld payment of rent for Emma Little, a welfare recipient. Following her second default in monthly rent payments, Jack Spring, Inc. brought an action under the Forcible Entry and Detainer Act[1] to evict the lessee-defendant. The trial court entered summary judgment for the plaintiff-lessor; the defendant appealed directly to the Illinois Supreme Court.

After reviewing the defendant's allegations that the landlord had breached his promise to repair and that the existence of the many violations of the housing code made "the premises unfit and unsafe for habitation"[2] the court observed that:

> [t]he principal thrust of defendant's argument . . . is that a lease is a series of 'expressed and implied bilateral covenants' between the landlord and the tenant, and that the latter's promise to pay monthly rent is not to be considered independent of the landlord's oral promises and obligations to repair defects and maintain the leased premises consistently with the requirements of the city building code.[3]

The court noted that these contentions were in direct contravention of Illinois common law and further, that they advocated a change that might do more to impede rather than to aid the improvement of the

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1. ILL. REV. STAT. ch. 57 (1967).
2. Jack Spring, Inc. v. Little, No. 41730 (Ill., filed Nov., 1970), *rev'd on rehearing*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972).
3. *Id.*

urban housing situation for lower income tenants. The court, therefore, upheld the trial court's decision.

On rehearing, the Illinois Supreme Court reversed[4] its prior decision on the grounds that "an implied warranty of habitability which is fulfilled by substantial compliance with the pertinent provisions of the . . . building code" is included in both oral and written leases of multiple unit dwellings.[5] The court further held that the breach of an implied warranty was "germane" to the issue of possession and was therefore, a valid defense in a forcible entry and detainer action.[6]

The decision of the court in *Jack Spring, Inc. v. Little* is significant as it altered two well-established principles of landlort-tenant law. The court implied a warranty of habitability into the leases of urban dwellings and imposed upon the landlord the constant duty to repair the premises, where none had previously existed. The court also, by construing the lease as a contract, held the covenants in the lease to be mutually dependent and thereby potentially expanded the scope of defenses in an action for possession to include all the defenses to the enforceability of a contract.

CONVEYANCE OR CONTRACT?

At common law the lease has been traditionally treated as a conveyance of an interest in the land for a term;[7] therefore, landlord-tenant relations have been governed by the rules of real property law.[8] Under this approach, rent is the "quid pro quo" for the right to possession.[9] Once the lessor delivers the right of possession and thereafter does not interfere with the lessee's possession, use or enjoyment of the premises, his part of the agreement is executed;[10] absent an express covenant or statute to the contrary, he is under no duty to repair or maintain the dwelling in a habitable condition.[11] The les-

4. Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972).
5. Id. at 366, 280 N.E.2d at 217.
6. Consolidated for hearing with Jack Spring, Inc. v. Little, because of the similarity of the facts and issues, was Sutton & Peterson, Inc. v. Price, No. 41739 (Ill., filed Nov., 1970).
7. 2 R. POWELL, THE LAW OF REAL PROPERTY §221(1) at 178 (Rohan ed., 1967) [hereinafter cited as 2 R. POWELL]; 1 H. TIFFANY, THE LAW OF REAL PROPERTY §73 (3 ed., 1969).
8. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); 40 FORDHAM L. REV. 123 (1971).
9. 1 AMERICAN LAW OF PROPERTY § 3.11 at 202 (A.J. Casner ed., 1952) [hereinafter cited as 1 AM. LAW].
10. 40 FORDHAM L. REV. 123 (1971).
11. 1 AM. LAW, *supra* note 9, §3.78 at 347; 40 A.L.R.3d 646, 649.

see, on the other hand, becomes both owner and occupier for the duration of the lease subject to the doctrine of *caveat emptor.*[12] He acquires the premises in their existing condition and has the implied obligation to make minor repairs, to keep the building "windtight and watertight", so as to preserve the property in substantially the same condition as at the commencement of the lease term, "ordinary wear excepted."[13]

Realizing the severe inequities that strict adherence to property law principles may cause, courts have carved out exceptions to the rule of *caveat emptor.* The most notable of these exceptions are the implied warranty of habitability in a lease of a furnished house for a short term[14] and an implied warranty of fitness for purpose in a lease of a building under construction.[15] The principle justification for this divergence from traditional landlord-tenant laws is the tenant's inability to inspect the premises and discover the defects. An additional, and perhaps more cogent, reason relied on by some courts is the fact that the tenant is implicitly or explicitly bargaining for possession of the leased area in a suitable condition. As *Ingalls v. Hobbs* stated:

> One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to the well-understood purpose of the hirer to use it as a habitation.[16]

However, if the expectations of the tenant were the determinative test, the general rule of no implied warranty would be rendered inoperative[17] for, as one court stated, "It is fair to presume that no individual would voluntarily choose to live in a dwelling that had become unsafe for human habitation."[18]

Recognizing the artificiality of carving out exceptions to the "wooden rules of property law",[19] a number of courts in recent years

12. 1 AM. LAW, *supra* note 9, §3.78 at 347. The majority American rule is that there is no implied warranty of habitability in leases, *see* 20 DEPAUL L. REV. 955, 971 (1971).
13. "[T]he tenant was required to replace broken windows and doors, repair a leaking roof and restore boards on the side of a building. He was not required to rebuild or restore a building, or any substantial part thereof, that had been destroyed or become dilapidated from ordinary wear that it had to be torn down. Nor was he under any obligation to correct defects existing at the commencement of his lease." 1 AM. LAW, *supra* note 9, §3.78 at 347.
14. Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892).
15. J.D. Young v. McClintic, 66 S.W.2d 676 (Tex. Civ. App., 1933).
16. Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892).
17. Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969).
18. *Id.* at 431, 462 P.2d at 473, quoting Bowles v. Mahoney, 202 F.2d 320, 326 (1952).
19. *Id.* at 433, 462 P.2d at 474.

have rejected *in toto* the doctrine of *caveat emptor* when applied to leases of urban residential dwellings and have found warranties of habitability to be implied in these transactions.[20] The common denominator of these decisions is the acknowledgment that the lease is essentially a contractual relationship and, therefore, should be treated according to the law of contracts. *Jack Spring, Inc. v. Little* is a progeny of this trend.

The *Spring* court specifically referred to the lease as a contract and relied on contract principles to reach its holding. While the court did not explicitly justify its adherence to contract principles, it did quote with approval the opinion in *Javins v. First National Realty Corp.*. In that decision, the Court of Appeals for the District of Columbia Circuit analogized a lease of an urban residence to the sale of a product as it stated:

> When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well-known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.[21]

The *Javins* court also pointed out that because of a growth in the use and detail of specific lease covenants, leases have developed a "predominantly contractual" character.[22] These aspects of modern leases are indicative that the modern lessee expects substantially more than the mere conveyance of an interest in land for a term. To protect these changed expectations the courts have gradually utilized precepts of contract law when interpreting leases.[23] In recognition of this evolution and also as a means of eliminating the confusion that the piecemeal application of contract principles has caused, *Javins* held that "leases of urban dwelling units should henceforth be interpreted and construed like any other contract."[24] It appears, therefore, that the Illinois court's extensive quotation of the *Javins* decision indicates the implicit adoption of this contract approach.

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20. Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).
21. 428 F.2d at 1074.
22. *Id.*, citing 2 R. POWELL, *supra* note 7, § 221 at 179.
23. *E.g.*, Medico-Dental Bldg. Co. v. Horton & Converse, 21 Cal.2d 411, 418, 132 P.2d 457, 462 (1942). *See also*, 1 AM. LAW, *supra* note 9; 24 I.L.P. §41 at 285.
24. 428 F.2d at 1075.

IMPLIED WARRANTY OF HABITABILITY

The court in *Spring* determined that the municipal building code imposed on the lessor of an urban multiple unit residence a duty to maintain his apartments in accordance with the code.[25] The requirement that a lease be in compliance with existing law is not a new precept. Prior decisions have often applied to leases the rule of contract law that a contract which is prohibited by public law is void and unenforceable, but their holdings have generally been confined to a denial of rent where the premises were let for the perpetration of such criminal activities as prostitution and gambling.[26] However, in several recent cases this rule has been the basis of denying the lessor a judgment for rent when the condition or use of the premises was in contravention of municipal ordinances.[27] In *Brown v. Southall Realty Co.*,[28] for example, the court ruled that serious failure to comply with the housing regulations prior to the commencement of the term rendered the lease void as an illegal contract.

The courts in both *Spring* and *Javins* departed from decisions like *Brown* in that they did not seek to avoid the lease at its inception. Rather they sought to impose on the landlord a continuing obligation to maintain the premises in accordance with the building code throughout the term of the lease, and also to provide the aggrieved tenant with an alternate remedy to dispossession. The *Spring* decision went one step beyond *Javins* and applied this obligation to defects which exist at the beginning of the lease. The court, in effect, implied a warranty that if the premises are not in compliance at the commencement of the lease, the landlord will bring them into compliance during the lease term. The result is to make the lease *voidable* by the tenant. If the premises are not in substantial compliance with the building code at the inception of the lease, the tenant may either abandon the premises and use the breach of the warranty as a defense to an action for rent, or attempt to enforce compliance by remaining in possession and withholding rent. Since the existence

25. Marini v. Ireland, 56 N.J. 130, 144, 265 A.2d 526, 534 (1970); "It is a mere matter of semantics whether we designate this covenant one 'to repair' or 'of habitability and livability fitness'."

26. Fields v. Brown, 188 Ill. 111, 58 N.E. 977 (1900); Harris v. McDonald, 194 Ill. 75, 62 N.E. 310 (1901).

27. Longenecker v. Hardin, 264 N.E.2d 878 (Ill. App. Ct. 1970); Brown v. Southall Realty Co., 237 A.2d 834 (D.C. Ct. App., 1968). Early precedent for this position appears in the case of Heineck v. Grosse, 99 Ill. App. 441 (1902) wherein a lease which was executed in violation of an ordinace prohibiting the occupancy of part of a sidewalk for private purposes was held invalid.

28. 237 A.2d 834 (D.C. Ct. App. 1968).

of violations at the beginning of the lease term removes the landlord from the ambit of the *Javins* holding, lessors could find it beneficial to keep the buildings in disrepair. The lease would merely be declared void and the landlord could lease the non-conforming apartment to another tenant.[29] Thus, this aspect of the *Spring* decision is a significant improvement over *Javins*.

The courts in *Spring* and *Javins* determined that incorporation of the housing code into the lease, and thereby making it an integral part of the agreement, was necessary to impose on the lessor the continuing obligation of maintenance. In support of this position, both courts relied on the decision of the Illinois Supreme Court in *Schiro v. W.E. Gould & Co.*.[30] Although *Schiro* is distinguishable on its facts from the instant cases, it has one important similarity: the vendor failed to comply with the Chicago building code. The court held this non-compliance to be a breach of contract since, in the court's opinion, the municipal code was a tacit part of every contract. The principle used to support this argument was:

> [T]he law existing at the time and place of the making of the contract is deemed a part of the contract, as though expressly referred to or incorporated in it.[31]

Both *Javins* and *Spring* relied on this rule to incorporate the housing code as an implied term of the lease. Although this rule is well-established,[32] it has been criticized as artificial, since the rationale of the rule is that the court is "merely construing the contract in accordance with the intention of the parties."[33] "[T]o assume first, that everyone knows the law and second, that everybody thereupon makes his contract with reference to it and adopts its provisions as terms of the agreement is indeed to pile a fiction upon a fiction."[34] Therefore, this rationale is tenuous since the presumption of incorporation might be rebutted by inquiry into the actual intent of the parties. However, neither court relied on this principle exclusively; they have advanced other arguments in support of their holdings.

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29. This has been shown to be an ineffective method of enforcing code compliance. *See* Diamond Housing Corp. v. Robinson, 257 A.2d 492 (D.C. Cir., 1969).

30. 18 Ill. 2d 538, 165 N.E.2d 286 (1960). The case involved the sale of land and the construction of a building thereon; the relief sought was specific performance.

31. *Id.* at 544; 165 N.E.2d at 290.

32. 17 AM. JUR. 2d Contracts §257, at 654-56; Ill. Bankers Life Ass'n v. Collins, 341 Ill. 548, 173 N.E. 465 (1930); Economy Fuse & Mfg. Co. v. Raymond Concrete Pile Co., 111 F.2d 875 (7th Cir. 1940); 12 I.L.P. ch. 8, §§229, 230.

33. Schiro v. W.E. Gould & Co., 18 Ill. 2d 538, 544, 165 N.E.2d 286, 290 (1960).

34. WILLISTON, CONTRACTS, §615, at 692.

COMMON LAW BASIS

The court in *Spring* considered persuasive *Javins'* argument that "the common law itself must recognize the landlord's obligation to keep his premises in a habitable condition."[35] The court, therefore, adopted this part of the *Javins* decision as a supplemental rationale for implying a warranty of habitability in the leases of urban dwellings. This rationale is comprised of three interdependent considerations. First, the factual assumptions upon which the "no-repair" rule rested are no longer valid; second, the priniciples formulated in recent consumer protection cases are apposite to urban residential leasing transactions; third, the current state of the housing market militates for abandonment of the old rule.

The "no-repair" rule was well-suited to the agrarian economy from which it originated. The social structure of that period was predicated upon the possession of land; possession of the soil is what the tenant bargained for.[36] The dwelling, if the leasehold contained one at all, was of incidental value, for the "jack of all trades" farmer was amply capable of providing his own shelter, heat, and light and of making any necessary repairs. However, the changed circumstances of our urban socio-economic structure nullify the validity of these assumptions. The modern urban lessee, not depending upon the soil for his livelihood, has little or no interest in the land, which may be three or thirty stories below him. His exclusive concern is for a place suitable for living. Further, the latter-day lessee usually has a single, specialized trade and lives in a building far more complex than dwellings of the past. He, therefore, lacks the skill to make repairs like his agrarian counterpart. Even if the tenant does have the requisite expertise, he is hindered from making the necessary repairs by other factors. He often does not have access to the area of the building where corrections are needed. Also, because of his lack of a long-term interest in the building, he is precluded from obtaining the financing that major restoration requires.[37]

The second consideration offers the tenant protection equivalent to that received by the consumer of goods. The purchaser of chattels is

35. 428 F.2d at 1077.
36. *See generally* Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969) [hereinafter cited as Quinn & Phillips]; 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW, 122-23 (6th ed., 1934).
37. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

safeguarded by implied warranties of fitness and merchantability.[38] Both *Spring* and *Javins* noted that these warranties have been extended to a growing range of transactions, including the sale of new houses[39] and the rental of chattels.[40] The application of these principles to urban leases is appropriate since, the landlord is, in effect, the seller of a product.[41] Furthermore, the doctrine of *caveat emptor* has become a fiction when applied to leases of urban multiple unit residences. The rule was originally based on the rationale that the prospective tenant was able to ascertain any defects in the property and protect his interests through express covenants.[42] Because of the complex nature of modern apartments, the average tenant cannot make an intelligent inspection and discover all the defects. As *Lemle v. Breeden* noted: "[A] prospective lessee, such as a small businessman, cannot be expected to know if the plumbing or wiring are adequate. . . ."[43] Therefore, a tenant must rely on the skill and honesty of the landlord in much the same way that a purchaser of an automobile relies on the manufacturer and dealer.[44] This responsibility to maintain the premises rightfully rests on the landlord rather than the tenant because the former's commercial enterprise affords him "much greater opportunity, incentive and capacity to inspect and maintain the condition of the building."[45]

Other principles underlying consumer protection are the seller's ability to spread the cost of the improved product throughout the industry and the consumer's ability to procure a readily available substitute for the non-conforming product.[46] In light of these principles the consumer protection rationale may be counterproductive to the

38. *See* Jaeger, *Warranties of Merchantability and Fitness for Use*, 16 RUTGERS L. REV. 493 (1962); UNIFORM COMMERCIAL CODE §§2-314, 2-315.

39. *See*: Weck v. A.M. Sunrise Construction Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Waggoner v. Midwestern Development, Inc., 154 N.W.2d 803 (S.D. 1967); Bethlahmy v. Bechtal, 91 Idaho 55, 415 P.2d 698 (1969); Jaeger, *The Warranty of Habitability*, 47 CHGO.-KENT L. REV. 1 (1970).

40. Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957); *see* Citrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965).

41. *Supra* note 21.

42. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931), 20 DEPAUL L. REV. 955 (1971).

43. 51 Hawaii at 433, 462 P.2d at 474, quoting Reste Realty Corp. v. Cooper, 53 N.J. 444, 452, 251 A.2d 268, 272 (1969). The court in *Lemle* also considered the leasing transaction to be essentially the sale of a product and therefore found that a warranty of habitability should be implied in a lease.

44. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), citing Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 375, 161 A.2d 69, 78 (1960).

45. *Id.*

46. 84 HARV. L. REV. 729, 733-34 (1971); 65 MICH. L. REV. 869, 874 (1967).

protection of the lower income urban residential tenant. There is evidence that strict code enforcement is normally followed by a reciprocal increase in rent.[47] Further, rather than comply with the requirements of the housing code, many landlords may find it more economical to board up their buildings and withdraw them from the market.[48] Confronted with such a situation, potential investors may also be dissuaded from entering the market. Because there is no substitute for housing, the net effect would be to substantially increase the present shortage of adequate housing.

The third basis for implying the warranty of habitability is a policy decision necessitated by the present housing situation. Due to racial and class discrimination,[49] the shortage of housing[50] and the pervasive use of standardized form leases,[51] the lower income tenant is in an highly unequal bargaining position in the leasing transaction;[52] he is, in effect, in a "take it or leave it" situation. Another aspect of the urban housing situation which reaffirms the need for change is the dramatic social impact that poor housing has. It is not deleterious just to life in the ghetto, but also has adverse repercussions in all strata of our society.[53] While these arguments alone do not sufficiently substantiate the imposition of a warranty, they manifest the necessity of ameliorating the inequities of the urban leasing transaction and the need to raise the standard of housing for lower income tenants.

COVENANTS: DEPENDENT OR INDEPENDENT?

For Emma Little to prevail in this action, the court had to find that Jack Spring, Inc.'s alleged failure to substantially comply with the building code, his breach of the implied covenant of habitability, was a

47. Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968); Quinn & Phillips, *supra* note 36, at 258.

48. Quinn & Phillips, *supra* note 36, at 258; REPORT BY THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, 427-73 (1968).

49. PRESIDENT'S COMMITTEE ON URBAN HOUSING, A DECENT HOME 96 (1968); NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 18-19 (1968).

50. *See generally* PRESIDENT'S COMMITTEE, *supra* note 49.

51. 2 R. POWELL, *supra* note 7, § 221(1) at 183 n.13.

52. *See* Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), 2 R. POWELL, *supra* note 7, §221(1) at 183; PRESIDENT'S COMMITTEE, *supra* note 49.

53. A. SCHORR, SLUMS AND INSECURITY (1963); Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079-80 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). The Wisconsin Supreme Court expressly recognized this argument in the decision of Pines v. Perssion, 14 Wis.2d 590, 596, 111 N.W. 409, 411 (1961): "Permitting landlords to rent 'tumble-down' houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners."

valid defense in a forcible entry and detainer action. Under property law precepts, however, "liability for rent continues so long as the tenant is in possession,"[54] and the duty to pay rent is independent of the landlord's duty to fulfill his covenants.[55] Therefore, a breach of the lessor's obligation to repair the premises traditionally has not been a defense in a suit for possession. The tenant's only recourse was to sue for damages, or recoup in an action for rent.

The independent nature of covenants is well-entrenched in Illinois law.[56] In *Truman v. Rodesch*[57] the lessor expressly covenanted in the lease to comfortably heat the premises. The court held the landlord's breach of this covenant was no defense to a forcible entry and detainer action since "[t]he covenant to pay rent was not upon condition that plaintiff comfortably heat said premises, but was a separate and independent covenant."[58] Indeed, the lack of authority for the tenant's position in the *Spring* case that these covenants are bilateral and mutually dependent was evidenced by her inability to cite any Illinois decisions in support of this precept and by her candid acknowledgment that she was seeking for a change in the established law of leasehold conveyances.[59]

To overcome these obstacles the *Spring* court relied on an examination of the specific wording of the Forcible Entry and Detainer Act.[60] The act enables the tenant to introduce as a defense only those matters which are "germane" to the issue of the right to possession.[61] The court noted that the landlord was entitled to possession only if possession was "unlawfully withheld", and that possession was "unlawfully withheld" if rent was due. The court then concluded that a finding that rent was due depended on whether or not the landlord had breached his implied covenant of habitability, and that, therefore, the alleged breach was "germane" to the issue of possession. However, as aforementioned, under traditional landlord-tenant law the tenant's duty to pay rent is not contingent on the landlord's performance of his express or implied covenants.

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54. Auto Supply Co. v. Scene-In-Action Corp., 340 Ill. 196, 201-02, 172 N.E. 35, 38 (1930).
55. 1 AM. LAW, *supra* note 9, §311 at 203.
56. Geiger v. Brown, 167 Ill. App. 534 (1912); Truman v. Rodesch, 168 Ill. App. 304 (1912).
57. 168 Ill. App. 304 (1912).
58. *Id.* at 306.
59. Jack Spring, Inc. v. Little, No. 41730 (Ill., filed Nov., 1970), *rev'd on rehearing*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972).
60. ILL. REV. STAT. ch. 57 (1967).
61. *Id.* §5.

The *Spring* decision offers a number of additional arguments to support its divergence. First, the court points to the trend toward the determination of the liabilities and rights of the litigants in one, rather than multiple proceedings.[62] Since the tenant could sue for damages in a separate action or could recoup in an action for rent,[63] he should therefore be entitled to raise the breach as a defense in an action for possession. The second and more compelling argument is that the summary nature of the proceeding has already been largely abrogated by recent civil practice.[64] The landlord is often unable to summarily recover the premises and thereby mitigate his loss of rental income through substitution of a paying tenant for the defaulting one.[65] Instead, the proceeding can be substantially delayed by the joinder of claims for rent[66] and by the tenant's request for trial by jury.[67] Therefore, permitting the tenant to raise the breach as a defense to a forcible entry and detainer action would cause little burden to the already altered and expanded proceeding.

The court also relied on its earlier decision in *Rosewood Corp. v. Fischer*[68] as authority to support its proposition that the issue of whether or not the landlord breached his duty to maintain the premises is "germane" to the issue of possession. *Rosewood* involved a forcible entry and detainer action against purchasers of homes on contract. In allowing the defendant-purchasers to raise the defense that the contracts were unconscionable, the court held that since the plaintiffs' right to possession has its origin in an installment contract for the purchase of real estate by the defendant, "matters which go to the validity and enforceability of that contract are germane or relevant to the determination of the right to possession."[69] The principle of this case on its face is inapplicable to *Spring* since it involved a contract of purchase and not a lease. Indeed, *Rosewood* expressly limited the impact of its decision to contract sales of land: "[T]he contract purchaser is not only faced with the loss of possession but unlike the tenant, . . . is likewise faced with the loss of equity accumulated by payments made on the contract."[70] It is submitted

62. Miller v. DeWitt, 37 Ill. 2d 273, 226 N.E.2d 630 (1967); Muhlbauer v. Kruzel, 39 Ill. 2d 226, 234 N.E.2d 790 (1968).
63. Rubens v. Hill, 213 Ill. 523, 72 N.E. 1127 (1905); Sely v. Stafford, 924 Ill. 610, 120 N.E. 539 (1918).
64. Bell v. Tsintolas Realty Co., 430 F.2d 474 (D.C. Cir. 1970).
65. *Id.*; Quinn & Phillips, *supra* note 36.
66. ILL. REV. STAT. ch. 57 §5 (1967).
67. *Id.* §11a.
68. 46 Ill. 2d 249, 263 N.E.2d 833 (1970).
69. *Id.* at 257, 263 N.E.2d at 838.
70. *Id.*

that *Rosewood* could have been used more effectively if the court in *Spring* had developed the contract aspect of a lease more fully. If the court had carried the contract theory to its logical conclusion, finding the breach "germane" would have been simply a matter of stating that under the law of contracts the performance by one party of his promise is contingent upon the performance by the other party.

THE IMPLICATIONS OF *Jack Spring, Inc. v. Little*

The decision in *Spring* leaves many questions unanswered. First, it failed to resolve the issue of whether or not a landlord can disclaim his implied warranty by an express statement to the contrary in the lease. To permit a landlord to so disclaim his responsibility to maintain the premises would be inconsistent with one of the underlying bases of the holding: that the urban leasing transaction has put the tenant in an unequal bargaining position.[71] *Javins* recognized this and stated that any agreement which would shift this responsibility from the landlord would be void and unenforceable.[72] The absence of a similar statement by the *Spring* court has opened a possible avenue for the landlord to short circuit the major thrust of the decision by expressly disclaiming any warranty of habitability.[73] Second, the court offers no means to prevent a tenant from withholding rent and then using defects which were unkown to the landlord as a defense to an action for possession, thus enabling the tenant to live rent-free for a period. This problem could be remedied though, by requiring the tenant to give the landlord notice of the defect and an opportunity to correct it, before the tenant would be allowed to withhold.[74]

Similarly related is the fear expressed in the dissenting opinion that by allowing tenants to claim a breach of the implied warranty as a defense in a forcible entry and detainer action, the courts will be inundated by "numerous frivolous, trivial, and spurious claims" as a tactic to postpone dispossession. One check against bad faith claims,

71. *Supra* note 52.
72. 428 F.2d at 1082, n.58.
73. The companion case of Sutton & Peterson, Inc. v. Price, 50 Ill.2d 351, 280 N.E.2d 208 (1972), involved a written lease in which the landlord expressly disclaimed the duty to repair and maintain the premises. The court held that it was a triable issue of fact as to whether or not the disclaimer precluded the existence of an implied warranty. Therefore, the court held that the trial court had erred in striking it as a defense.
74. Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

however, is inherent in the *Spring* scheme of withholding. If the court finds that the lessor has substantially complied with the building code, the tenant will lose possession. Therefore, there is a penalty for guessing wrong which will in turn force the tenant to weigh the seriousness of the violation before he withholds. This system, however, may have limited efficacy in promoting code enforcement for two reasons. First, the threat of dispossession may inhibit many tenants from raising legitimate claims. Second, landlords may be encouraged to postpone repairs by the possibiity that the trier of fact will deem the violations insufficient to justify rent withholding.

Another means of eliminating dilatory claims is to require the tenant to pay the rent into a court administered escrow as it becomes due. In *Bell v. Tsintolas,*[75] the same court that decided *Javins* acknowledged the possibility of such an escrow, but cautioned that the escrow be used sparingly. The court commented on the incongruity of requiring a tenant who is eligible to proceed "in forma pauperis" to pay a substantial sum of money before he can raise housing code violations as a defense. This "defense bond" would appear to be inconsistent with the segment of the *Spring* decision which held an appeal bond in a forcible entry and detainer action to be an unconstitutional deprivation of the right to appeal for those who are unable to pay.[76] The United States Supreme Court in *Lindsey v. Normet*[77] has taken a much less restrictive posture in regards to the payment of rent during the continuance of a suit for possession. The Court noted that while an exorbitant bond as was required in the *Lindsey* case would be unconstitutional, it would be permissible to require a tenant to pay into the escrow all rent then due and accruing during the pendency of the proceedings. It would be no injustice to any tenant, regardless of his financial means, to pay the rent he would otherwise have had to pay if there had been no legal acton.[78]

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75. 430 F.2d 474 (D.C. Cir. 1970).
76. 50 Ill. 2d 351, 280 N.E.2d 208 (1972).
77. Lindsey v. Normet, 405 U.S. 56 (1972). The Court also held that the Oregon Forcible Entry and Wrongful Detainer Statute, ORE. REV. STAT. §§105.105-105.160, which treated the tenant's duty to pay rent and the landlord's duty to maintain the premises as independent covenants and barred the tenant from raising the breach of the latter as a defense, was not an unconstitutional denial of due process or equal protection under the fourteenth amendment.
78. It should be noted that although an escrow eliminates some problems, it creates additional ones. It raises questions as to the time when the landlord will be entitled to receive the escrowed rent, as to the percentage of the escrow he will receive and as to what guarantees there will be to insure that the landlord will use the money to repair the building.

The court in *Spring* held that the landlord would fulfill his implied warranty of habitability by "substantially" complying with pertinent provisions of the building code, but it failed to delineate the parameters of "substantial compliance". The *Javins* decision offers no assistance in the definition of this term, although the court did point out that "one or two minor violations standing alone which do not affect habitation are *de minimis* and won't entitle the tenant to withhold rent."[79] A similar question left unanswered by the *Spring* court is whether or not a substantial but partial breach will entitle the tenant to withhold rent. *Javins* recognizes the partial breach as entitling the tenant to withhold the rent. If a court determines the breach to be partial, *Javins* held that the lessee would be allowed to retain possession provided he pay the withheld rent minus a pro rata amount equivalent to his deprivation of suitable living.[80] Through a restrictive interpretation of the *Spring* decision a much harsher alternative could result from the determination of partial breach. Under present law if the tenant is in default of any portion of the rent, he is subject to dispossession.[81] Therefore, upon a finding of partial breach, the tenant would technically be in default of a portion of the rent and could thereby lose possession. These and other considerations will have to be resolved to give the *Spring* decision any degree of workability. It would appear, however, that these problems are not insurmountable and that they can be resolved by thoughtful case decision or appropriate legislation.

In spite of the confusion that will initially be caused by the decision, *Spring* has brought much needed change to landlord-tenant relations. By treating covenants in a lease as bilateral and dependent, and thereby enabling the tenant to raise the breach of such covenants as a defense to an action for possession, the court has given the tenant an alternative to constructive eviction, a remedy which can prove extremely harsh in its consequences. The basis for the doctrine of constructive eviction is closely analogous to actual physical eviction by the landlord; the landlord is said to have "harassed the tenant to such an extent that leaving the premises becomes the only feasible alternative."[82] The interference of the lessor which constitutes constructive eviction is "any act . . . which renders the lease un-

79. 428 F.2d at 1082, n.63.
80. *Id.* at 1083.
81. Quinn & Phillips, *supra* note 36, at 234; Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).
82. Quinn & Phillips, *supra* note 36, at 235.

availing to the tenant or deprives him of the beneficial enjoyment of the premises."[83] However, such actions alone are not sufficient to terminate the lease and absolve the tenant of the duty to pay rent. The rule of constructive eviction further requires the tenant to actually abandon the premises within a reasonable time after giving notice that the premises are uninhabitable.[84] This requirement of abandonment is based on the notion that "[a] tenant cannot claim uninhabitability and at the same time continue to inhabit",[85] in spite of the fact that the apartment may have faulty plumbing, broken windows, sporadic heat, and be infested with rodents and vermin. It is the requirement of abandonment which vitiates constructive eviction as an adequate remedy for the aggrieved tenant. "Abandonment is always at the risk of establishing sufficient facts to constitute constructive eviction or the tenant will be liable for breach of the rental agreement. The tenant is also forced to gamble on the time factor, as he must abandon within a reasonable time or be deemed to have waived the defect."[86] An even greater criticism of this remedy rests in the realities of the modern urban housing situation: a lessee may be unable to abandon the apartment because he is impeded by the critical housing shortage from finding a new residence.[87] Furthermore, the low income tenant is confronted with the additional problem that even if he could locate another place to live, the costs of moving might prove prohibitive.[88]

A second accomplishment of the *Spring* holding is that it will substantially improve enforcement of the housing codes. The need for better enforcement is clearly present as administrative enforcement of code compliance has often proved to be ineffective,[89] due largely to reliance on the criminal process as a means of enforcing compliance.[90] This procedure has proven inadequate for several reasons: the lack of sufficient administrative machinery and resources; the high incidence

83. Auto Supply Co. v. Scene-In-Action Corp., 340 Ill. 196, 201, 172 N.E. 35, 37 (1930).
84. 2 R. POWELL, *supra* note 7, §225(3) at 239.
85. Lemle v. Breeden, 51 Hawaii 426, 435, 462 P.2d 470, 475 (1969), quoting Two Rector St. Corp. v. Bein, 266 App. Div. 73, 76, 234 N.Y.S. 409, 412 (1929).
86. Lemle v. Breeden, 51 Hawaii 426, 435, 462 P.2d 470, 475 (1969); *see also* Auto Supply Co. v. Scene-In-Action Corp., 340 Ill. 196, 200, 172 N.E. 35, 37 (1930).
87. Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); 40 FORDHAM L. REV. 123, 127 (1971).
88. *See* 1968 WASH. U.L.Q. 461, 473; 40 FORDHAM L. REV. 123, 127 (1971).
89. Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1255 (1966); Quinn & Phillips, *supra* note 36, at 249.
90. Gribetz & Grad, *supra* note 89, at 1275-81; Quinn & Phillips, *supra* note 36, at 239-42.

of adjournments, which have enabled landlords to postpone repairs without incurring additional penalties; the hesitancy of the courts to consider violations of the building code authentic criminal offenses warranting jail sentences and steep fines;[91] and the fear by political officials of alienating property owners through strict code enforcement.[92] Rent withholding will eliminate these inadequacies. Through this method of private enforcement, every tenant will in effect become a private building inspector. Furthermore, the loss of rental income is the one penalty which will most likely insure that the premises will be brought into compliance, for without rent the business enterprise of the landlord cannot long survive.

The third accomplishment of the *Spring* decision is that it has broadened the scope of defenses available to a tenant in a forcible entry and detainer action. Traditionally the tenant has been precluded from raising the defense of a breach of covenant, whether express or implied,[93] or from contesting the issue of the landlord's title to the premises.[94] By construing the lease as a contract, presumably these, and all other defenses to the enforceability of that contract, will be available as "germane" defenses. However, by its failure to expressly adopt the contract approach, *Spring* has injected uncertainty as to the extent the contract rationale should be employed in subsequent decisions. It is possible that in the future the courts will carry this rationale to its logical conclusion, and give the tenant the full scope of remedies available to other aggrieved parties to a contract: damages, recission, reformation and specific performance.[95] Such an interpretation would greatly enhance a tenant's protection by giving him a wide range of alternatives through which he can resolve his grievances.

In spite of the court's failure to resolve certain important issues, *Jack Spring, Inc. v. Little* is significant as it constitutes a major step toward the elimination of the inequities which dominate the modern urban leasing transaction.

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91. *See* Gribetz & Grad, *supra* note 89, at 1275-79.
92. *Id.*
93. 1 AM. LAW, *supra* note 9; 24 I.L.P. ch. 11, §455, at 658-59.
94. 36A C.J.S.; Forcible Entry & Detainer §27, at 992; 1 AM. LAW, *supra* note 9, §3.65 at 136.
95. *See e.g.*, Lemle v. Breeden, 51 Hawaii 426, 436, 462 P.2d 470, 475 (1969).