

ERNIE G. CHANDLER and )  
EVA CHANDLER, )  
 )  
Plaintiffs/Appellants, ) Appeal No.  
 ) 01-A-01-9603-CV-00124  
v. )  
 )  
CECIL J. JOHNSON and ) Wilson Circuit  
BARBARA JOHNSON, ) No. 9270  
 )  
 )  
Defendants/Appellees. )

**FILED**

**August 30, 1996**

**Cecil W. Crowson  
Appellate Court Clerk**

COURT OF APPEALS OF TENNESSEE  
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CIRCUIT COURT FOR WILSON COUNTY  
AT LEBANON, TENNESSEE

THE HONORABLE BOBBY CAPERS, CHANCELLOR

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AFFIRMED AND REMANDED

O P I N I O N

This is an appeal by plaintiffs/appellants, Ernie G. and Eva Chandler, from the trial court's order granting the motion for summary judgment of defendants/appellees, Cecil J. and Barbara Johnson, and dismissing plaintiffs' complaint.

The facts out of which this case arose are as follows. On 30 September 1993, Mr. Chandler entered into a lease with defendants to lease a building located in Lebanon, Wilson County, Tennessee. The lease was for a specific building, and defendants specifically reserved their rights to the property around the building. Defendants purchased the property at a foreclosure sale some period of time before the parties entered into the lease. The property included three commercial buildings which previous occupants had used as a car dealership and a body shop. After defendants purchased the property, they decided to lease each building separately. They contacted the City of Lebanon and had separate electrical meters installed for each building.

Mr. Chandler testified at his deposition that he had several conversations with Mr. Johnson prior to entering into the lease. Mr. Chandler testified that he specifically asked Mr. Johnson if the electrical system was up to codes and that Mr. Johnson assured him it was. He also testified that he was told by Mr. Johnson that he did not need to purchase insurance for six months if that would help him in getting his business started. According to plaintiffs' proof, Mr. Johnson also told Mr. Chandler that he would keep the electricity in his name so that Mr. Chandler would not have to pay the \$500.00 deposit.

Prior to leasing the building, Mr. Johnson gave Mr. Chandler

an opportunity to inspect the premises as often and for as long as he wished. Mr. Chandler exercised this right and inspected the building. He admitted that a key was available so he could inspect the building at any time before signing the lease. The record also revealed that Mr. Chandler was a sophisticated and well-educated businessman with degrees in both business and criminal justice. He also had extensive experience operating numerous profitable business enterprises.

After Mr. Chandler moved into the building, he was electrocuted and suffered serious personal injuries. On 14 March 1995, plaintiffs filed a complaint against defendants. In the complaint, plaintiffs alleged that the electrocution resulted from a combination of two events. First, it was raining and water had entered the building and was standing in Mr. Chandler's office. Second, as Mr. Chandler sat in a chair with his feet in the water, he leaned backward and his head touched an electrical outlet. He suffered a severe electrical shock when his head came into contact with the outlet. Plaintiffs further alleged that defendants were liable for his injuries because the building's electrical system was defective and because defendants failed to repair the condition of the land immediately adjacent to the leased premises despite Mr. Chandler notifying them of the problem.

On 14 August 1995, defendants filed a motion for summary judgment. Defendants alleged that the "as is" and exculpatory clauses precluded plaintiffs' claims. The trial court heard oral argument on 4 October 1995. Thereafter, the court made the following findings:

After reviewing the entire record and hearing the arguments of counsel for the parties, the Court was of the opinion that an issue of fact exists as to whether or not the defendant was guilty of negligence and, if so, whether the negligence proximately caused the plaintiffs' injuries and damages. The Court was further of the opinion that

the issue of fact concerning the defendant's negligence was immaterial in light of the "as is" and indemnity provisions of the Lease Agreement and that the defendants were, therefore, entitled to a judgment as a matter of law.

Plaintiffs appealed and presented the following two issues which we discuss together.

A. Did the trial court err when it granted Summary Judgment on behalf of Defendants when it held that exculpatory and indemnification provisions of the lease precluded Plaintiff's claim, when Plaintiff alleged that the cause of his injury occurred because Defendant failed to repair the land surrounding the leased premises which Plaintiff did not control under the lease?

B. Did the trial court err when it granted Summary Judgment on behalf of Defendants when it held that the "as is", exculpatory and indemnification provisions of the lease precluded Plaintiffs' claim. [sic]

Summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.03 (Supp. 1995). This court reviews the decision below de novo applying the same Rule 56 analysis as did the trial court. **Gonzales v. Alman Constr. Co.**, 857 S.W.2d 42, 44-45 (Tenn. App. 1993). One who files a motion for summary judgment has the burden of establishing that there are no genuine issues of material fact and that the law entitles the moving party to a judgment. **Byrd v. Hall**, 847 S.W.2d 208, 215 (Tenn. 1993). After the moving party makes a properly supported motion, the burden shifts and the nonmoving party must "set forth specific facts, not legal conclusions, by using affidavits or the discovery materials listed in Rule 56.03, establishing that there are indeed disputed, material facts creating a genuine issue that needs to be resolved by the trier of fact and that a trial is therefore necessary." **Id.** In addition, Rule 56 expressly provides that "an adverse party may not rest upon

the mere allegations or denials of the adverse party's pleading. . . .” Tenn. R. Civ. P. 56.05 (Supp. 1995). “A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed.” *Byrd*, 847 S.W.2d at 215. A genuine issue exists when “a reasonable jury could legitimately resolve that fact in favor of one side or the other.” *Id.*

Plaintiffs asserted in their brief that defendants “altered the electrical system by setting in a separate meter base at the premises.” We find nothing in the record to support this contention. To the contrary, the undisputed facts are that the only thing defendants did was to contact the utility company to install the meters. There is no evidence that they did any work to the building or that any electrical work was done to the building after they purchased the property.

The lease agreement entered into between the parties and its terms are undisputed. The lease provided: “Lessee has inspected said premises and by the execution of the Lease accepts same in its present condition. Lessee is to maintain and to make all repairs to the building, including the roof and outside walls, at Lessee's expense.” The lease also required:

Lessee, at Lessee's own cost and expense, shall comply promptly with all laws, rules and orders of all federal, state and municipal governments or department code specifications for alterations, repairs and additions which may be applicable to the leased premises, and shall likewise promptly comply with the requirements of the issuer of any insurance policy concerning the demised premises.

As to the electrical and utility systems, the lease provided: “The Lessee covenants and agrees to maintain the electrical system and utility system at Lessee's expense. Lessee to take such systems in their 'as is' condition.”

The lease also contained two separate exculpatory provisions which insulated defendants from liability to plaintiffs for any reason. The clauses were as follows:

12) INDEMNITY AND INSURANCE. Lessee shall indemnify Lessor against and hold Lessor harmless from any and all claims or demands for loss of or damage to property or for injury or death to any person from any cause whatsoever while in, upon, or about the demised premises during the term of this lease or any extension thereof.

. . . .  
20) INDEMNIFICATION. Lessee shall indemnify and hold harmless Lessor and Lessor's agents, successors and assigns, from and against all injury, loss, claims or damage (including attorney fees and disbursements), to any person or property arising from, related to, or in connection with the use, and occupancy of the leased premises. All property of Lessee in or about the premises shall be kept and stored at Lessee's sole risk and Lessee shall hold Lessor harmless from any claims arising out of damages to the same.

Plaintiffs contended that the parties entered into various other agreements regarding the subject property before executing the written lease agreement. The written lease, however, provides as follows:

(d) This lease embodies the entire agreement and understanding between the parties, and supersedes all prior negotiations, agreements and understandings. Any provision of this lease may be modified, waived or discharged only by an instrument in writing signed by the party against which enforcement of such modification, waiver or discharge is sought.

. . . .  
(g) Neither Lessor nor any agent of Lessor has made any representations, warranties or premises with respect to the premises except as herein expressly set forth.

When construing the meaning of an "as is" clause in a lease for commercial real property, this court stated:

Essentially an "as is" clause means that the buyer or lessee is purchasing or leasing the goods or property as it is in its present state or condition. This generally implies that the property is taken with whatever faults it may possess and implies that the seller or lessor is released of any obligation to reimburse the purchaser or lessee for losses or damages that result from the condition of the goods or property.

**Jaffe v. Bolton**, 817 S.W.2d 19, 25 (Tenn. App. 1991). This court further stated that when property is leased "as is" both parties are charged with knowledge of the existence of any problems including code violations. **Id.** Considering the above law and facts, defendants are not liable to plaintiffs for any alleged defects, including problems with the electrical system, for the following reasons: 1) the lease provided that Mr. Chandler was leasing the property "in its present condition"; 2) Mr. Chandler accepted the electrical system "as is"; and 3) Mr. Chandler exercised his right to inspect the premises prior to entering into the lease agreement.

Next, plaintiffs claimed that summary judgment was improper despite the existence of the exculpatory clauses. Their first argument was that the clauses were ambiguous. It is well settled in this state that a landlord may, by stipulation in a commercial lease agreement, exempt himself from liability for any damage caused by defects in the leased premises. **See Gilson v. Gillia**, 45 Tenn. App. 193, 210-11, 321 S.W.2d 855, 863 (1958); **Robinson v. Tate**, 34 Tenn. App. 215, 227-31, 236 S.W.2d 445, 450-51 (Tenn. App. 1950). In the instant case, Mr. Chandler agreed to indemnify defendants and to hold them harmless "from any and all claims or demands for loss or damaged property or for injury or death to any person from any cause whatsoever." Although plaintiffs argued that the exculpatory provisions of the lease were ambiguous, they failed to offer any proof by affidavit or otherwise that they did not understand or comprehend the exculpatory language of the lease agreement before they entered into it. Thus, plaintiffs failed to satisfy their burden as to this issue.

Plaintiffs' second argument is more complex. To explain, they claimed that a cause of the injury was the condition of the

adjacent real property which allowed water to enter the building. They then pointed out that the adjacent real property was not part of the leased premises. Plaintiffs relied on **Summers Hardware and Supply Co. v. Steele**, 794 S.W.2d 358 (Tenn. App. 1990), and argued that the exculpatory clauses did not apply to the areas not included in the leased premises. Unfortunately for plaintiffs, this argument is without effect. It is our opinion, unlike that of the trial court, that plaintiffs failed to establish defendants' liability. Thus, plaintiffs could not recover even if the exculpatory provisions were not in the lease.

Tennessee law "does not place upon [a commercial] landlord the obligation of an insurer or warrantor by contract, nor does it impose the extreme duty of constant care and inspection." **Glassman v. Martin**, 196 Tenn. 595, 597, 269 S.W.2d 908, 909 (1954).

The common law of landlord liability in Tennessee has long been established. In this state, a landlord is liable to a tenant on the ground of negligence, not of contract, for an injury resulting from an unsafe or dangerous condition of leased premises that was in existence at the date of the lease, if the landlord by the exercise of reasonable care should have known, or for a greater reason, if he had actual knowledge of the condition of the premises; provided, however, that as of the date of the accident the tenant did not have knowledge or could not by the exercise of reasonable care have had knowledge of such condition. However, the landlord is not liable in tort for dangerous conditions or premises leased to the tenant arising after the delivery of possession to the tenant.

**Maxwell v. Davco Corp.**, 776 S.W.2d 528, 531-32 (Tenn. App. 1989).

In **Bobo v. Harris**, 1994 WL 71531 (Tenn. App. 1994), the plaintiff, a lessee of commercial property, sued the lessor for damages sustained as a result of alleged problems with the building's electrical system. **Id.** at \* 1. The trial court granted summary judgment in favor of the defendant/lessor. The western section held that, under Tennessee law, a landlord is not liable in tort for the dangerous condition of the premises leased to the tenant



when the condition arises after delivery to or possession by the tenant. Because the plaintiff in **Bobo** failed to offer any proof that a defect existed at the time the parties entered into the lease agreement, the western section affirmed the trial court. *Id.* at \*2-\*3.

Our review of the record reveals that it contained nothing which would support a judgment against defendants who were commercial lessors of property. First, there was no proof of the existence of any defect or problem with the electrical system or the adjacent real property at the time the parties executed the lease. Moreover, the evidence failed to establish that defendants had any knowledge of a dangerous condition or the existence of any defect at the time the parties entered into the lease agreement.

As to the electrical system, plaintiffs asserted that defendants "altered the electrical system by setting in a separate meter base at the premises." We find nothing in the record to support this contention. To the contrary, the undisputed facts are that the only thing defendants did was to contact the utility company to install the meters. There is no evidence that they did any work to the building or that any electrical work was done to the building after they purchased the property.

As to the adjacent real property, plaintiffs not only failed to establish that water leaked into the building prior to the execution of the lease or that defendants had knowledge of such an occurrence, but they also failed to establish that the condition of the real property caused the water to enter the building. First, plaintiffs did not offer any evidence regarding whether this had happened in the past or regarding defendant's knowledge. Second, they relied upon certain unsworn allegations in the complaint and

Mr. Johnson's deposition testimony to establish that the condition of the land caused water to enter the building. Under Tennessee Rule of Civil Procedure 56.05 the opponent of a properly supported motion for summary judgment is prohibited from resting upon the mere allegations or denials in the pleadings. Instead, the rule requires opponents to set forth specific facts showing that there is a genuine issue for trial by introducing affidavits or other forms of admissible evidence. Tenn. R. Civ. P. 56.05 (Supp. 1995). Plaintiffs' other form of evidence, Mr. Johnson's deposition, failed to create a genuine issue of fact. Specifically, Mr. Johnson testified that Mr. Chandler told him that water was coming into the building. He then testified that this had never happened before and that the parties never determined the cause of the leak prior to the accident. Plaintiffs failed to establish the existence of a genuine issue of material fact by contradicting this testimony.

Following our review of this record, we are of the opinion that the trial court correctly granted summary judgment in favor of defendants. Therefore, it results that the judgment of the trial court is affirmed with costs on appeal assessed to the plaintiffs/appellants, Ernie G. and Eva Chandler. The cause is remanded to the trial court for any further necessary proceedings.

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SAMUEL L. LEWIS, JUDGE

CONCUR:

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BEN H. CANTRELL, JUDGE

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WILLIAM C. KOCH, JR., JUDGE