

STATE OF INDIANA)
)ss:
COUNTY OF MARION)

MARION SUPERIOR COURT
CIVIL DIVISION 10
CAUSE NO. 49D10-0003-CP-449

MID-AMERICA MANAGEMENT CORPORATION)
d/b/a SPINNAKER APARTMENTS and)
TRAVERLERS PROPERTY CASUALTY, as subrogees,)
Plaintiffs,)
vs.)
CHAD NICKLE and DAVINA MEEK,)
Defendants.)

ORDER DENYING PARTIES' MOTIONS FOR SUMMARY JUDGMENT

I. STATEMENT OF CASE

Plaintiffs Mid America Management Corporation (“Landlords”), and its insurer seek damages from Defendants Chad Nickle and Davina Meek (“Tenants”) for fire damage to rented apartment. Tenants move for summary judgment for lack of causation, and claim coverage under Landlord’s insurance policy as “implied insureds.” The Court finds disputes of material fact, and holds Tenants are not covered by Landlord’s policy.

II. ISSUES

Are there undisputed issues of fact whether Tenants caused the fire?

Should tenants’ negligence be covered under Landlord’s casualty insurance policy?

III. FACTS AND PROCEDURAL HISTORY

Tenants co-signed a lease with Landlord on April 27, 1997, to rent an apartment.

The lease states:

“3...The security deposit shall be refunded only if: ... (c) the apartments and its contents are found, upon inspection, to be in good, clean condition with no unusual damage, ordinary wear and tear expected...

4. In the event...security deposit does not cover all rent due and all damages and expenses,..Owner shall be entitled to collect such....damages in any lawful manner....

9 c. In the event the apartment shall be rendered untenable by fire, explosion or other casualty, Owner may...repair the apartment....move Resident into another apartment....or terminate this Lease....

d. owner is not an insurer of Resident’s person or personal property.Resident will carry such insurance as resident deems necessary therefore. Resident agrees that Owner....shall not be liable for any damage to personal property of Resident....for any reason whatsoever....

e. ...Resident agrees....to quit and deliver up the apartment and its appliances and equipment at the end of the term of this lease in as clean a condition as they were on the date of first possession, ordinary wear and tear excepted.”

On April 3, 1998, fire occurred at the apartment caused by a toaster left “on.”

The apartment damage is covered by a casualty policy from subrogating co-plaintiff Traveler’s Property Casualty. The policy insures damages to property only and does not indicate any coverage for negligence of any party. In addition, the policy states: “This policy does not insure against loss caused directly or indirectly by . . . acts . . . of any person . . . “

Any negligence of Tenant Davina Meek is covered by a policy of insurance from Westfield Insurance Company, including liability for damages to rented property.

Tenants moved for summary judgment on June 15 and August 15, 2001. Tenant Davina Meek submitted unanswered Requests for Admissions and purported Answers to Interrogatories from Tenant Chad Nickel. The Court granted Landlord's motion to strike this material, based on an affidavit of Nickel. There is no other designated material or evidence regarding causation or liability of either tenant for the fire.

Tenants also argue they are "implied insureds" of Landlord's casualty policy above, and so damages for their negligence, if any, cannot be recovered.

IV. LAW

The Court may enter summary judgment if there is no issue of material fact and the moving party is entitled to judgment as a matter of law. T.R. 56 (C). The movant must establish the "absence of any genuine issue of fact as to a determinative issue." Jarboe v. Landmark Community Newspaper, Inc. (1994), Ind., 664 N.E.2d 118,123. If there is sufficient evidence to establish the elements of a determinative defense, the burden shifts to the plaintiff to make a sufficient showing to establish the existence of a genuine issue for trial regarding such defense. Shell Oil Co. v. Lovold Co. (1998), Ind., 705 N.E.2d 981. All facts and reasonable inferences are construed in favor of the non-movant. Wright v. Carter (1993), Ind., 622 N.E.2d 170.

An insurance company is prohibited from suing its own insured to recover money paid out under its policy, also known as the "Anti-Subrogation Rule." South

Tippecanoe School Building Corporation vs. Shambaugh & Son (1979), Ind.App., 395 N. E. 2^d 320.

Currently, there is no Indiana law whether the Anti-Subrogation Rule precludes a landlord from recovery for tenant's negligence. But approximately twenty states, including some federal decisions, have adopted various rationales finding a tenant may be covered.

The most often cited case is the controversial Sutton vs. Jondahl (1975), Okla. App., 532 P. 2nd 478. It reasons a tenant is *automatically* co-insured by a landlord's property/casualty insurance policy, absent an expressed agreement to the contrary. The Court said:

Both landlord and tenant have an insurable interest in the rented premise . . . Basic equity and fundamental justice upon which the equitable doctrine of subrogation is established requires that when fire insurance is provided for a dwelling it protects the insurable interest of all joint owners, including the possessory interest of a tenant, absent an express agreement by the latter to the contrary . . . [T]he tenant actually paid the premium as part of the monthly rental . . . it would not likely occur to a reasonably prudent tenant that the premises were without fire insurance protection or if there was such protection it did not inure to his benefit that he would need to take out another fire policy to protect himself from any loss during his occupancy.

532 P.2d at 482.

The Oklahoma court concluded that a company providing fire property coverage "should not be allowed to shift a fire loss to an occupying tenant even if the latter negligently caused it . . . For it to conclude otherwise is to shift the insurable risk assumed by the insurance company from it to the tenant – a party occupying an

substantially different position that from a fire causing third party not in privity with the insured landlord.” 532 P 2nd at 482.

A second group of jurisdictions holds a tenant will be covered for negligently causing a fire if the lease expresses the parties’ intent in *clear and unequivocal language*.

These courts pose public policy concerns contrasting with Sutton vs. Jondahl, *supra* .:

Prosser and Keeton on the Law of Torts, Section 68 (5th addition 1984), states the general principles involved: parties may “expressly agree in advance that the defendant is under no obligation of care for the benefit of the plaintiff and should not be liable for the consequences of conduct which would otherwise be negligent,” but because “public policy” disapproves of exculpating agreements and derogation of tort liability, an agreement should be so interpreted only if it is quite explicit.

Britton vs. Wooten (1991), Ky., 817 S.W. 2nd 443.

A third middle ground states a tenant’s liability for fire negligence is determined by reading the lease “as a whole” to find the parties’ intent. Indeed, the Illinois Supreme Court wrote:

Although a tenant is generally liable for fire damage caused to the leased premises by his negligence, if the parties intended to exculpate the tenant from negligently caused fire damage, their intent will be enforced . . . [T]he lease between the land owner and the tenant must be interpreted as a whole so as to give effect to the intent of the parties.

Dix Mutual Insurance Company vs. Laframboise (1992), Ill., 597 N.E. 2nd 622.

But despite this logic, that Court still concluded, like Sutton vs. Jondahl: “. . . the tenant, by payment of rent, has contributed to the payment of insurance premium, thereby gaining the status of co-insured under the insurance policy. Both the landlord and tenant intended that the policy would cover any fire damage to the premises no matter who

caused it, and to conclude otherwise would defeat the reasonable expectations of the parties.” Id. at 626.

The dissenting opinion of Illinois Justice Heiple in Dix Mutual Insurance Company vs. Laframboise, supra. at 628, is much more helpful. Like the lease between Landlord and Tenants *here*, the dissent finds, “The only exculpatory language of any kind is in favor of the landlord which provides . . . the tenant assumes the risk for his own personal property . . .” In addition, Justice Heiple rejects the notion that payment of rent co-insures a tenant for negligence: “That assumption is as gratuitous as saying that the payment of rent included maid service and clean linens.” Most importantly, the dissenting opinion strikes a significant distinction between landlord property insurance and negligence of a tenant:

It is also worth noting that fire insurance is, generically speaking, casualty insurance. Since the landlord owns the building, he is the person at risk if the building burns down for whatever cause, be it lightning, faulty wiring, a bad furnace, or the negligent conduct of any person. Conceptually, liability insurance is different than casualty insurance. Liability insurance covers a person for his own negligent conduct. Regarding liability, the lease in this case clearly exculpated the landlord for liability for damage caused to the tenant’s personal property. No similar language exculpated the tenant for negligently damaging the landlord’s premises.

597 N.E.2d at 628.

Remarkably, Indiana’s neighbors have all decided whether a landlord’s insurance covers a tenant’s negligence for an apartment fire. Britton vs. Wooten, supra., Dix Mutual Insurance Company vs. Laframboise, supra., United States Fire Insurance Company vs. Phil-Mar Corporation (1956), 166 Ohio 85; New Hampshire Insurance Group vs. Labombard (1986), Mich.Ct.App., 399 N.W. 2^d 527. Indeed, they all support,

in varying degrees, the second and third positions shown above, that is, the tenant's negligence is covered by the landlord *only* if expressed in the lease *specifically*, or "as a whole."

Nevertheless, Indiana law is not entirely bereft of guidance. On one hand, Indiana courts have not ruled, like Oklahoma and other states, a tenant is an "implied insured" of a landlord's insurance policy. But another implied right of a tenant, the "implied warranty of habitability", and the nature of an Indiana lease, are clearly analyzed in Johnson vs. Scandia Associates (1999), Ind., 717 N.E.2d 24. First, the Court states an Indiana lease is clearly grounded in the law of contract. As Justice Shepard notes:

When a landlord enters a lease agreement with her tenant, she voluntarily confers certain rights upon the tenant, such as possession and quiet enjoyment for a specific term. Restatement (Second) of Property (Landlord and Tenant) §§ 1.2, 4.3 (1977). She does this in consideration of the tenant's promise to pay rent, not to waste the property, not to use it for illegal purposes, and not to holdover beyond the term . . . The landlord agrees to legal relationship after balancing costs and benefits, and the same is true for the tenant. The parties may agree on additional rights or assume special obligations, but each has just one duty under the contract – to perform as promised.

717 N.E.2d at 29.

Damages are then allowable only when the particular injury is "within the parties' contemplation during contract formation." Id. at 31. So, an implied right of a tenant does not automatically apply in every lease, but must be "proven through evidence of the parties' course of dealing or performance and by evidence of ordinary practices in the trade." Id. at 32. Tort law will always impose a duty of reasonable care balanced between each parties' comparative fault. I.C.34-51-21. Therefore, recovery for *negligence*, whether personal injury, fire damage or the like, is independent of *contract*

considerations under Indiana landlord-tenant law. Of course, negligence coverage can be contracted, but not otherwise assumed unless agreed by the parties. Id. at 29.

The general issue here is apparently not novel. In the 19th Century, even the United States Supreme Court spoke about the relationship between a landlord and a tenant's fire negligence. In Liverpool and London Globe Insurance vs. Gunther, 116 U.S. 113 (1885), the negligence of a tenant was no defense for a landlord improperly renting property and losing casualty coverage. On the other hand, Indiana found an insurance company must pay fire damages to a landlord, despite the tenant's negligence, because it waived certain policy language under contract law. Ohio Farmer's Insurance vs. Vogel (1905), 166 Ind. 239, 76 N.E. 977. Overall, the law of contract clearly establishes how a tenant's negligence affects a landlord.

Under Indiana law, contract provisions must be interpreted to "harmonize," rather than conflict, if possible. If a contract is clear and unambiguous, the words will be given their ordinary meaning. If the intent of the parties is apparent, the courts shall require the parties to perform accordingly. McLinden vs. Coco (2002), Ind.App., 765 N.E.2d 606.

V. ANALYSIS

Disputes of Material Fact Prohibit Summary Judgment

All three parties here move for summary judgment regarding causation and fault. There is no designated material or evidence from any party showing material facts are undisputed. The record only supports an undisputed cause of the fire: a toaster left "on," but no indication *who* left it "on." Neither defendant has put forth an adequate showing of any absence of any genuine issue of fact regarding fault. There are purported discovery

materials, and an opposing affidavit, but nothing else upon which to conduct any substantive legal analysis. Therefore, the parties' motions for summary judgment regarding fault are not sufficient. Jarboe v. Landmark Community Newspaper, Inc., supra.

The Lease and Landlord's Insurance Policy Do Not Cover Tenant's Negligence

First, there is no specific or explicit language in the lease regarding Tenant's negligence. But Landlord's casualty policy is clear: there is no coverage for "acts" of any other person. Taken plainly, this language must exclude liability coverage for Tenants and their actions. Britton vs. Wooten, supra., McLinden vs. Coco, supra.

Next, the lease "as a whole" shows no intent of Landlord and Tenants to cover Tenant's negligence. Instead, the relevant provisions prove the opposite. For example, Landlord may recover its property damages from Tenant beyond the amount of the security deposit. In addition, Landlord is not liable for any damage to Tenant's personal property. Most importantly, Landlord is "not an insurer of [Tenant]'s person . . . "A harmonious interpretation of the lease "as a whole" leaves only one conclusion: Tenants are responsible for their own negligence. McLinden vs. Coco, supra. Moreover, under Indiana law, there is no evidence of the parties' course of dealing or ordinary practices in the trade that supports the coverage of Tenants' negligence under Landlord's policy. Johnson vs. Scandia Associates, supra.

Finally, Tenants argue they are "implied insureds," regardless of the lease, and are protected by the Anti-Subrogation Rule, under Oklahoma's Sutton vs. Jondahl. This Court approves of Sutton vs. Jondahl's first premise: "the principle of subrogation was

begotten of a union between equity and her beloved – the natural justice of placing the burden of bearing a loss where it *ought* to be.” 532 P.2d at 481. So, whether Tenants should be protected against subrogation for their negligence requires an equitable review.

First of all, Sutton vs. Jondahl argues fundamental justice means a landlord’s corporate insurance company should cover individual tenants because both have an “insurable interest” in the property. There is merit to any argument that seeks equality under the law. But our Indiana case, Johnson vs. Scandia Associates, likewise compares considerations of implied obligations and landlord-tenant lease language:

. . . a warranty of habitability . . . would undoubtedly prompt landlords to purchase additional insurance, spreading the risk of harm more broadly. Landlords would, of course, attempt to pass along increased insurance costs to tenants by raising rents. Increased leasing costs might also cause conversion of some properties from residential uses and outright abandonment of others. This would shrink the supply of affordable housing, which could have potentially adverse social effects and would, of course, be borne by society’s poorest renters.

717 N.E.2d at 30.

The effect of forcing landlords to cover tenants’ negligence may result in an adverse effect upon public housing and the public interest. All in all, Sutton vs. Jondahl misstates the equities by claiming both landlord and tenant have an “insurable interest.” In Indiana, a lease is *contract*, not a fee interest. Johnson vs. Scandia Associates, *supra*.

Next, a landlord’s casualty insurance policy should not cover the negligence of a tenant because it confounds contract law and tort. As shown above, an Indiana lease is a contract between landlord and tenant. A casualty insurance policy is a contract to repair damage to property. Tort liability is separate and distinct from these two contracts and cannot logically be inferred unless specifically agreed or intended. Johnson vs. Scandia

Associates, supra. at 29; Britton vs. Wooten, supra. Confusion is clearly the result of any holding to the contrary.

Finally, this Court can do no better than further quote Justice Heiple's thoughtful dissent from Dix Mutual Insurance Company vs. Laframboise, supra.:

In general, I believe that the public is better served if negligent actors are held responsible for the damage or injury they cause. While I would agree that parties to a lease may agree to exculpate a tenant for negligent conduct which damages the premises and that a lease may be drawn so as to regard the tenant as a co-insured, I cannot agree that the lease in this case contemplated any such thing. Further, I cannot agree that the mere payment of rent in the absence of other language should operate to exculpate a tenant who negligently causes damage to the premises.

597 N.E.2d at 630

This Court respectfully concurs. The burden of Tenant's negligence ought to be borne by Tenants.

VI. CONCLUSION

The Tenants have not made sufficient showing of any absence of undisputed material facts regarding the determinative issue of fault.

The Court finds no coverage for Tenant's negligence in the lease, either by specific language, or taken as a whole. Landlord's insurance policy specifically does not cover Tenant's negligence.

The Court finds equitable considerations preclude coverage for Tenants' negligence as "implied insureds" under Landlords casualty policy.

VII. ORDER

The parties' motions for summary judgment are denied.

Dated this 15th day of May, 2002.

David J. Dreyer, Judge
Marion Superior Court

c: counsel of record