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# Landlord Implicitly Warrants that Commercial Premises Suited for Inteded Use; Tenant's Duty to Pay Rent Dependent upon Landlord Honoring Implied Warranty.

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# RECENT DEVELOPMENTS

**LANDLORD TENANT—IMPLIED WARRANTY OF SUITABILITY—LANDLORD IMPLICITLY WARRANTS THAT COMMERCIAL PREMISES SUITED FOR INTENDED USE; TENANT'S DUTY TO PAY RENT DEPENDENT UPON LANDLORD HONORING IMPLIED WARRANTY.** *Davidow v. Inwood North Professional Group*, 747 S.W.2d 373 (Tex. 1988).

Dr. Joseph Davidow entered into a lease agreement with Inwood North Professional Group for use of a doctor's office for five years at $793.26 per month. The lease agreement obliged Inwood North to furnish, among other things, air conditioning, security, electricity, and maintenance for the property. After the lease agreement was executed and Dr. Davidow commenced practicing medicine on the premises, he began experiencing substantial problems with the office. The premises were not cleaned or maintained. The roof frequently leaked, causing staining, mildew, and great inconvenience to the doctor and his patients. The air conditioner often cooled at eighty-five degrees, and the hot water heater did not work. The electricity was once shut off for days because Inwood North was late in paying the electric company. The premises were infested with rodents and other pests. Finally, while Dr. Davidow was still practicing medicine at the leased office, he experienced several burglaries and acts of vandalism. Not surprisingly, Dr. Davidow found it difficult to practice medicine at the office, moved out, and quit paying rent prior to the expiration of the lease.

Inwood North sued Dr. Davidow for the unpaid rent under the lease. In response, Dr. Davidow alleged various affirmative defenses and counterclaimed for damages incurred. The trial court held that Inwood North take nothing and Dr. Davidow be granted $9,300.00. The court of appeals reversed, holding that the implied warranty of habitability was not applicable to commercial leases. The court of appeals further held the covenant to pay rent was independent of Inwood North's covenant to maintain the premises, leaving Dr. Davidow liable for the unpaid rent. The Texas Supreme Court reversed the court of appeals, holding a lessor of commercial property implicitly warrants the leasehold will be suited for its intended use. Further,

the tenant's liability for rent is dependent upon the landlord's performance under the implied warranty.

Historically, the landlord has been in a superior position in relation to the tenant for two reasons. The covenant to pay rent was construed independently of the landlord's covenants and the tenant was forewarned by the caveat emptor rule. *See* Note, *The Implied Warranty Of Habitability In Texas: A Development Long Overdue In Texas Landlord-Tenant Law*, 16 Hous. L. Rev. 225, 225-26 (1978)(landlord's advantage over tenant due to caveat emptor and covenants being construed independently). *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, 225-58 (1969)(author discusses problems in law that favor landlord and possible solutions). Courts construed the tenant's covenants independent of the landlord's covenants preventing the tenant from terminating rental payments even though the premises became uninhabitable. *See, e.g., Cottrell v. Carrillon Associates, Ltd.*, 646 S.W.2d 491, 494 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.)(covenant to repair and covenant to pay rent are independent); *Ravkind v. Jones Apothecary, Inc.*, 439 S.W.2d 470, 471 (Tex. Civ. App.—Houston [1st Dist.] 1963, writ ref'd n.r.e.)(covenant to pay rent independent of covenant to repair); *Ammons v. Beaudry*, 337 S.W.2d 323, 324 (Tex. Civ. App.—Fort Worth 1960, writ ref'd)(tenant required to pay rent even though landlord breached covenant to repair). *See generally*, Greenfield and Margolies, *An Implied Warranty of Fitness in NonResidential Leases*, 45 Alb. L. Rev. 855, 859-865 (1981)(author discusses independent covenants in lease agreements). Additionally, due to the caveat emptor doctrine, the tenant took the premises as he found them. *See Walling v. Houston & T.C.R. Co.*, 195 S.W. 232, 237 (Tex. Civ. App.—Dallas 1917, writ ref'd)(under caveat emptor doctrine tenant takes premises as found absent agreement to contrary); *see also Greater Southwest Int'l Airways, Inc. v. Arlington Executive Air, Inc.*, 432 S.W.2d 740, 744 (Tex. Civ. App.—Fort Worth 1968, no writ)(tenant takes premises as found). Accordingly, the caveat emptor doctrine prevented implied warranties in lease agreements. *See, e.g., Perez v. Raybaud*, 76 Tex. 191, 192, 13 S.W. 177, 178 (Tex. 1890)(no implied warranty that leased premises suitable for use or occupation absent fraud); *Archibald v. Fidelity Title & Trust Co.*, 296 S.W. 680, 682 (Tex. Civ. App.—Eastland 1927, no writ)(no implied warranties exist absent fraud allowing doctrine of caveat emptor to apply).

However, Texas courts over the last three decades have narrowed the scope of caveat emptor, paving the way for the implied warranty of habitability. *See* Note, *The Implied Warranty of Habitability in Texas: A Development Long Overdue in Texas Landlord-Tenant Law*, 16 Hous. L. Rev. 225, 226-28 (1978)(author discusses exceptions to the caveat emptor rule). One of the first exceptions to the caveat emptor doctrine is the covenant of quiet

enjoyment, which is implied in the landlord-tenant relationship. *See id*; *see also* 1 AMERICAN LAW OF PROPERTY §§ 3.47 (A.J. Casner ed. 1952). Texas courts have defined a breach of the covenant of quiet enjoyment as any material act by the lessor which substantially interferes with the tenant's use and enjoyment of the leased premises. *Richker v. Georgandis*, 323 S.W.2d 90, 95-96 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.). In 1968, the Texas Supreme Court in *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968), carved out another exception to the caveat emptor rule. *See Humber*, 426 S.W.2d at 555. The *Humber* court held that a builder of a new home implicitly warrants that the home is "constructed in a good workmanlike manner and suitable for human habitation." *Id.* The Texas Supreme Court, in *Kamarath v. Bennett*, 568 S.W.2d 658 (Tex. 1978), created another exception to the caveat emptor doctrine by introducing the implied warranty of habitability. *See Kamarath*, 568 S.W.2d at 660-61. The *Kamarath* court held that in a residential lease "there is an implied warranty of habitability by the landlord that the apartment is habitable and fit for living." *Id.* at 561 (court also implicitly recognized tenant's duty to pay rent is dependent upon landlord's performance under implied warranty). However, it was not until *Davidow v. Inwood North Professional Group*, that the Texas Supreme Court extended the implied warranty of suitability to commercial leases.

Commercial and residential leases historically have been treated differently because it was thought the commercial tenants had more sophistication and bargaining power than their residential counterparts. *See generally* Clocksin, *Consumer Problems in the Landlord-Tenant Relationship*, 9 Real Prop. Prob. & Tr. J. 572, 527 (1974)(analysis of unequal bargaining power of residential tenant); *see also Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir. 1970)(residential tenant often placed in take-or-leave position due to lack of sophistication); *See generally* Note, *Landlord-Tenant — Should a Warranty of Fitness be Implied in Commercial Leases?*, 13 Rutgers L.J. 91, 110-12 (1981)(author discusses distinctions between commercial and residential tenants). By extending the implied warranty of suitability to commercial leases, the Texas Supreme Court recognized that there was actually little difference between the residential tenant and the commercial tenant. *See Davidow*, 747 S.W.2d at 376-77 (court stated distinctions between commercial tenants and residential tenants were minor at best). Therefore, the court found no valid reason to extend the implied warranty of habitability to residential leases but not to commercial leases. *See id.* By so doing, the Texas Supreme Court boldly became one of the first jurisdictions to extend the implied warranty of habitability to commercial leases. *Cf. Reste Realty Corp. v. Cooper*, 251 A.2d 268, 273 (N.J. 1969)(extended the implied warranty of habitability to commercial leases). *See generally* Note, *Modernizing Commercial Lease Law: The Case for an Implied Warranty of Fitness*, 19 Suffolk U.L. Rev. 929, 947-48 (1985)(author discusses extension of implied warranty of habitability to commercial leases). Thus, a commercial

landlord now implicitly warrants that the leased premises are free from all latent defects which might interfere with the tenant's intended use of the property, and that the leased premises will remain in a condition that is suitable for the intended use of the property. *See Davidow*, 747 S.W.2d at 377. Put simply, the premises must be suitable for the tenant's intended use and remain suitable for this use until the lease expires.

Usually, a breach of the implied warranty of suitability is a question of fact to be determined by the circumstances of each case. *See id.* In determining whether a breach of this warranty has occurred, the *Davidow* court listed several factors for consideration:

> the nature of the defect; its effect on the tenant's use of the premises; the length of time defect persisted; the age of the structure; the amount of the rent; the area in which the premises [is] located; whether the tenant waived the defects; and whether the defect resulted from any unusual or abnormal use by the tenant.

*Id.* (identical considerations listed by *Kamarath* court when considering breach of implied warranty of habitability in residential leases).

If a breach of the implied warranty of suitability has occurred, the tenant is justified in abandoning the premises and discontinuing the rent. *See id.* The court thereby alleviates the inequity of tenants having to pay rent even though the premises become untenable for its intended use. *Compare Cameron v. Calhoun-Smith Distributing Co.*, 442 S.W.2d 815, 816 (Tex. Civ. App.—Austin 1969, no writ)(premises not suitable for intended use but tenant still required to pay rent) *with Davidow*, 747 S.W.2d at 377 (tenant pays rent only if premises suitable for intended use). Additionally, since the tenant's covenants are mutually dependent upon the landlord's covenants, the tenant may choose to remain on the premises and stop paying rent until the breach of the warranty is remedied. *See Davidow*, 747 S.W.2d at 375-377 (tenant's and landlord's covenants now mutually dependent).

Furthermore, if a breach of the implied warranty of suitability has occurred, the tenant can bring an action against the landlord under the Texas Deceptive Trade Practices — Consumer Protection Act (hereinafter DTPA). *See* Tex. Bus. & Com. Code Ann. § 17.50(2) (Vernon 1987)(breach of any implied warranty allows consumer cause of action). If the tenant can establish consumer status under the DTPA, a breach of warranty action under the DTPA will most likely be the tenant's best choice due to the availability of treble damages and attorney's fees. *See id.* at § 17.50(b),(d) (Vernon 1987)(successful plaintiff receives two times first $1,000 plus actual damages, attorneys fees and court costs; if knowing violation actual damages can be trebled). The tenant must establish the existence of a warranty, that is, that the warranty has not been disclaimed or waived, and that the warranty has been breached. *See, e.g., La Sara Grain Co. v. First Nat'l Bank of Mercedes*, 673 S.W.2d 558, 565 (Tex. 1984)(warranty must be established

independently of DTPA because DTPA does not create warranties); *Singleton v. LaCoure*, 712 S.W.2d 757, 760 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.)(implied UCC warranties may be disclaimed or waived, eliminating DTPA cause of action for breach); *Building Concepts, Inc. v. Duncan*, 667 S.W.2d 897, 903 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.)(any implied warranty waived by express provisions of contract eliminates DTPA cause of action).

Because a breach of the implied warranty of suitability justifies the tenant's termination of rent payments and suit under the DTPA, commercial landlords and tenants should be concerned about the possibility of eliminating this warranty by a disclaimer or waiver. At one time an implied common law warranty could be waived or disclaimed by language that was free and clear from doubt. *See G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392, 393 (Tex. 1982)(the provision "no . . . warranties, expressed or implied" held free and clear from doubt thereby disclaiming implied warranty). However, in this era of increasing consumer protection, it is unclear whether common law implied warranties may be disclaimed. *See Melody Homes Manufacturing Company v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987)(implied warranty for service performed in good and workmanlike manner may not be disclaimed or waived). In *Melody Homes*, the Texas Supreme Court stated that "it would be incongruous if public policy required the creation of an implied warranty, yet allowed the warranty to be disclaimed and its protection eliminated . . . ." *Id.* The *Melody Homes* Court overruled the clear and free from doubt rule expressed in *G-W-L* to the extent that it conflicted with the opinion. *See id.* After the *Melody Homes* decision, it is not entirely clear whether other implied warranties may be disclaimed. *See id.* (*Melody Homes* court creates uncertainty whether *Humber* warranty can be disclaimed). A broad reading of the *Melody Homes* decision would seem to state that implied warranties may no longer be disclaimed. *See id.*

Unlike the *Melody Homes* decision, the *Davidow* Court suggested that the implied warranty of suitability may be disclaimed or waived. *See Davidow v. Inwood North Professional Group*, 747 S.W.2d 373, 377 (Tex. 1988). For example, the *Davidow* court stated that if the parties to the lease expressly contract that the tenant will make certain repairs, then the provisions of the lease agreement will govern. *Id.* (since court used language of certain repairs unlikely that blanket disclaimer allowed). Additionally, the *Davidow* court listed the possibility of the tenant waiving the defects as one of the factors to consider when determining whether a breach of the implied warranty of suitability occurred. *See id.* In light of the *Melody Homes* decision, it would seem that if the court did not want the implied warranty to be disclaimed or waived, the court would have expressly stated that disclaimer or waiver of the warranty is not permitted. *Compare Melody Homes Mfg. Co.*, 741 S.W.2d at 355 (although disclaimer or waiver issue not before court, implied

warranty may not be disclaimed or waived) *with Davidow*, 747 S.W.2d at 374-78 (court did not state whether disclaimer or waiver of new implied warranty permitted).

In conclusion, the *Davidow* court eliminated the commercial landlord's superior position in relation to the tenant's when entering into and operating under a commercial lease by creating the implied warranty of suitability in commercial leases. A tenant may now stop paying rent when the premises becomes unsuitable for its intended use and, if the warranty has not been disclaimed or waived, sue under the DTPA. The feasibility of disclaiming or waiving this warranty is not entirely clear, since the *Melody Homes* decision does not make clear whether common law implied warranties may now be disclaimed or waived. However, in *Davidow*, the Texas Supreme Court indicates that the implied warranty of suitability may be disclaimed or waived. Additionally, now that the commercial tenant's covenants and the landlord's covenants are mutually dependent, a tenant may remain on the premises and stop paying rent once a breach of the warranty has occurred until such breach is cured.

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