THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0111, Amy Babchyck & a. v. Leonard E. Carlson, Executor of the Estate of Jean Drake, the court on February 4, 2005, issued the following order:

Having considered the briefs and oral arguments of the parties, the court concludes that a formal written opinion is not necessary for the disposition of this appeal. We affirm in part, vacate in part and remand.

This appeal arises from two landlord-tenant actions by the plaintiffs, Amy Babchyck and James Dorr (tenants), against the landlord, Jean Drake. Leonard E. Carlson, the executor of Drake's estate, was substituted as the defendant in this appeal. The defendant appeals two orders of the Plymouth District Court (Samaha, J.) finding that the landlord had willfully violated RSA 540-A:3 (Supp. 2004) and RSA 540-A:2 (1997) and awarding $27,000 in statutory damages to the tenants.

The following facts were found by the court or are evident from the record. In April 2003, the tenants entered into a lease with the landlord to rent her home from May 1, 2003, to April 30, 2004. Prior to the lease, the landlord had lived in the premises being leased. Because of medical problems, the landlord was unable to properly maintain the property and decided to lease it to the tenants. The landlord moved to Massachusetts to live with her father so that he could care for her. According to the landlord, the tenants paid a low rent because they agreed to maintain the premises because of the landlord's medical condition. To reflect this arrangement, the following language was inserted into the lease:

> Tenants agree to help keep the property in good condition. [The tenants] agree to do work (or contract to have work done) after consulting Landlord, and Tenants also agree to do the work as a favor to Landlord, less the cost of materials, if they do the work themselves[.] The Landlord must agree to [the] work before any work is performed, and the cost of the materials will be deducted from the rent.

In August 2003, the tenants first complained to the landlord about the quality of the water. The tenants testified, however, that the water had been brown and unusable since they moved in. On November 17, 2003, the tenants sent a letter by certified mail to the landlord listing problems with the rental

property, which included, among other things, the quality of the water. Prior to sending the letter, the tenants had water tests performed, which revealed the presence of E. coli and coliform in the water.

On December 1, 2003, the tenants filed a petition under RSA 540-A:4, II (Supp. 2004) alleging that the landlord's failure to provide potable water violated RSA 540-A:3. The landlord testified that she did not receive the water test results until December 11, 2003, after which she arranged to have the water treated. On December 19, 2003, the landlord had Gilford Well Company chlorinate the well. As part of the treatment process, the faucets needed to be turned on so that the chlorine could move through the pipes. Because the tenants were not home when Gilford Well Company performed the treatment, the tenants agreed that they would follow the instructions to flush the water through the pipes. The tenants later ran all the faucets in the house, which caused the septic system to overload and back-up into the basement. The landlord, who was seriously ill at the time, did not follow up on the treatment or perform additional tests to determine whether the water was potable after the chlorination process.

Following a hearing on December 23, 2003, the trial court found that the landlord had violated RSA 540-A:3 by failing to provide potable water. The trial court ordered the landlord to perform new water tests and perform follow-up treatment, if necessary, to restore the water.

That same day, the tenants hand-delivered a letter to the landlord advising her of the continuing water problem along with other complaints about the habitability of the premises. The tenants also filed another petition under RSA 540-A:4, II alleging that the landlord violated RSA 540-A:3 and RSA 540-A:2 by failing to address various ongoing problems including the sewage leaking into the basement that resulted from running the faucets and problems with the propane furnace.

The tenants subsequently filed a motion for contempt alleging that the landlord had made no attempts to restore potable water. At a hearing on January 6, 2004, the landlord admitted that she had not taken any action to restore potable water because she had been ill. The landlord testified, however, that the tenants had refused to let her boyfriend into the house to try to rectify the problem.

Following a hearing on January 20, 2004, the trial court found that the landlord had "failed to make good faith attempts to solve the ongoing water problem" and awarded the tenants $27,000 in statutory damages pursuant to RSA 540-A:4 and RSA 358-A:10, I (1995). The trial court also ruled on the tenants' December 23 petition and found that the lease did not exonerate the landlord from failing to properly remedy the problems alleged by the tenants.

Thus, the trial court ruled that the landlord's failure to address the tenants' complaints violated RSA 540-A:3 by "willfully causing, directly or indirectly, the interruption or termination of heat and sewerage." The trial court further ruled that the landlord's failure to act violated RSA 540-A:2 by "willfully breaching the warranty of habitability and the covenant of quiet enjoyment by violating RSA 48-A:14, (Housing Standards), sections I, II, III, IV, VI, VII, VIII, and XI." The court ordered the landlord to "take action to restore and maintain heat and sewerage to the premises, and to remedy all violations of RSA 48-A:14, (Housing Standards)." The court did not award damages for the December 23 petition and instead ruled that the tenants would only be entitled to damages in the event that the landlord failed to remedy all of the violations noted within the order.

On appeal, the landlord argues that the trial court erred in finding that she willfully interrupted the tenants' water, sewerage and heat in violation of RSA 540-A:3. RSA 540-A:3 provides, in pertinent part, that "[n]o landlord shall willfully cause, directly or indirectly, the interruption or termination of any utility service being supplied to the tenant," including water, heat, or sewerage. Because the trial court failed to make factual findings to support its ruling that the landlord willfully violated RSA 540 A:3, we vacate and remand.

In its December 23 order, the trial court made a finding that the landlord "has violated RSA 540-A:3 (I) [sic]," thus implicitly finding that the landlord had acted willfully. The trial court, however, did not discuss which facts it relied upon in making this determination, nor did the court make an express finding that the landlord acted willfully.

Likewise, in its January 21, 2004 order, the trial court made a finding that, "[b]ased on the evidence presented," the landlord "has violated RSA 540-A:3" because of the problems with the heat and the septic. Again, the trial court did not discuss which facts it relied upon in making this determination. In addition, the trial court did not discuss the landlord's testimony that the tenants may not have been operating the furnace correctly, that the furnace had been serviced as scheduled or that the landlord had her boyfriend contact a septic company to fix the problems with the sewerage in the basement, but the tenants failed to call the septic company to schedule an appointment. Because it is not clear from the record which facts the trial court relied upon in finding that the landlord violated the statute or that the landlord acted willfully, we vacate and remand for further factual findings.

Finally, the landlord argues that the trial court erred in ruling that the lease did not obligate the tenants to make the necessary repairs. We agree with the trial court that the lease did not exonerate the landlord from addressing the problems complained of by the tenants. See Leardi v. Brown, 474 N.E.2d 1094, 1100 (Mass. 1985); see also Hilder v. St. Peter, 478 A.2d 202,

208 (Vt. 1984) (holding that the implied warranty of habitability cannot be waived by a written provision of the lease or by oral agreement).

Affirmed in part; vacated in part; and remanded.

BRODERICK, C.J., and NADEAU, DALIANIS, DUGGAN and GALWAY, JJ., concurred.

Eileen Fox,
Clerk

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