Washington and Lee Law Review

Volume 17 | Issue 1 Article 7

Spring 3-1-1960

Enforceability Of Exculpatory Clauses In Realty Leases

ENFORCEABILITY OF EXCULPATORY CLAUSES IN REALTY LEASES

Rules of law are rarely self-evident, but are rather the product of conflicting policies and considerations. A graphic example of this proposition is the dilemma created when one seeks by contract to avoid liability for negligence in the future. Judicial policy in favor of freedom of contract is, of course, well-established. However, equally well-entrenched in the law is the proposition that one should be held to a standard of reasonable care and should not be relieved from liability by a transaction that encourages careless behavior.

Exculpatory contracts have arisen out of various relationships, such as those between bailor and bailee,[1] innkeeper and guest,[2] telegraph company and sender,[3] and landlord and tenant.[4] It is with reference to this last relationship that the law regarding the enforceability of exculpatory contracts is most uncertain and conducive to results appearing less than just. The problem was brought into sharp focus in the recent Illinois case of *O'Callaghan v. Waller & Beckwith Realty Co.*[5]

During the acute housing shortage that followed World War II,[6] Virginia O'Callaghan rented a suite of rooms in an apartment house owned by the Waller & Beckwith Realty Company. The plaintiff was subsequently injured when she fell while crossing the paved courtyard between the garage and her apartment. She brought an action[7] for damages, alleging that her injuries were caused by the negligent maintenance of the pavement by the defendant realty company. The defendant contended that the action was barred by an exculpatory clause in the plaintiff's lease.[8] At the trial level, the jury returned a

---

sex offense, such as statutory rape or adultery, and when both offenses involve the same persons. A good case may be made for the relaxation of the rule in such a case because the prior offense shows the relationship and mental attitude of the parties. 9 Wash. & Lee L. Rev. 86 (1952). See also Annot., 167 A.L.R. 565 (1947).

[1]Annot., 175 A.L.R. 8, 110 (1948).

[2]Id. at 149.

[3]Id. at 42.

[4]Id. at 83.

[5]15 Ill. 2d 436, 155 N.E.2d 545 (1958).

[6]"[H]ousing shortages were so acute that 'waiting lists' were the order of the day, and gratuities to landlords to procure shelter where common." 155 N.E.2d at 547.

[7]Actually, the plaintiff died while this action was pending, and her administrator prosecuted the suit.

[8]The clause, as reported in the opinion of the Illinois Appellate Court, 146 N.E.2d 198, 199-200, provided: "Neither the lessor nor his agents shall be liable to the lessee (nor shall rent be abated) for injury to person or damage to or loss of

verdict for the plaintiff in the amount of $14,000, whereupon the defendant appealed. The Appellate Court reversed,[9] and, in the opinion herein discussed, the Supreme Court of Illinois affirmed the reversal, holding that the exculpatory clause constituted a complete bar to the action. This decision, with a vigorous two-judge dissent, points up the diverse treatment given this problem by different courts, employing varying degrees of logic and justice. Prior to the *O'Callaghan* decision, there were roughly three approaches to the problem.

The view taken by the large majority of courts is that there are two questions: (1) Was there a *disparity of bargaining power* in the plaintiff at the time the lease was executed? (2) Is there a *public interest* in the relationship, upon which the exculpatory clause in the lease impinges? If either of these questions is answered affirmatively, the contractual disclaimer of liability should not act as a bar to the plaintiff's recovery.[10] The majority of courts conclude as a matter of law that neither question can be affirmatively answered when the exculpatory provision occurs in a lease of realty.[11] These courts say that stipulations between landlord and tenant regarding who will bear the risk of loss or injury "are not matters of public concern.

---

property wherever located from any cause or for damage claimed for eviction actual or constructive; this provision includes particularly but not exclusively all claims arising from the building or any part thereof being or becoming out of repair . . . , or from any act of neglect of Lessor or his agents . . . ."

[9]15 Ill. App. 2d 349, 146 N.E.2d 198 (1957).

[10]Courts have answered either or both of these questions affirmatively, and hence imposed liability, when the exculpatory contract arose out of the following relationships: bailor and bailee, Hotels Statler Co. v. Safier, 103 Ohio St. 638, 134 N.E. 460 (1921); innkeeper and guest, Oklahoma City Hotel Co. v. Levine, 189 Okla. 331, 116 P.2d 997 (1941); telegraph company and sender, Primrose v. Western Union Tel. Co., 154 U.S. 1 (1894).

[11]E.g., Inglis v. Garland, 19 Cal. App. 2d Supp. 767, 64 P.2d 501 (1936); King v. Smith, 47 Ga. App. 360, 170 S.E. 546 (1933); Simmons v. Columbus Venetian Stevens Bldgs., Inc., 20 Ill. App. 2d 1, 155 N.E.2d 372 (1958); Franklin Fire Ins. Co. v. Noll, 115 Ind. App. 289, 58 N.E.2d 947 (1945); Cobb v. Gulf Ref. Co., 284 Ky. 523, 145 S.W.2d 96 (1940); Manaster v. Gopin, 330 Mass. 596, 116 N.E.2d 134 1953); J. W. Grady Co. v. Herrick, 288 Mass. 304, 192 N.E. 748 (1934); Clarke v. Ames, 267 Mass. 44, 165 N.E. 696 (1929); Mackenzie v. Ryan, 230 Minn. 378, 41 N.W.2d 878 (1950); Weirick v. Hamm Realty Co., 179 Minn. 25, 228 N.W. 175 (1929); Gralnick v. Magid, 292 Mo. 391, 238 S.W. 132 (1921); Wood v. Security Mut. Life Ins. Co., 112 Neb. 66, 198 N.W. 573 (1924); Kirshenbaum v. General Outdoor Adv. Co., 258 N.Y. 489, 180 N.E. 245 (1932); Burnett v. Texas Co., 204 N.C. 460, 168 S.E. 496 (1933); Manius v. Housing Authority, 350 Pa. 512, 39 A.2d 614 (1944); Cannon v. Bresch, 307 Pa. 31, 160 Atl. 595 (1932).

However, even the broadest exculpatory clause will not relieve the landlord from the consequences of his affirmative negligence. Spangler v. Hobson, 212 Ala. 105, 101 So. 828 (1924); Dickey v. Wells, 203 Ill. App. 305 (1917); Rolfe v. Tufts, 216 Mass. 563, 104 N.E. 341 (1914).

Moreover, the two stand on equal terms; ... either may equally well accept or refuse entry into the relationship...."[12]

A second approach to the problem is that adopted by New Jersey and the District of Columbia. The New Jersey case of *Kuzmiak v. Brookchester, Inc.*[13] involved a tenant who was injured on a stairway negligently constructed by the defendant landlord. In a suit for damages the defendant contended that the action was barred by an exculpatory clause in the lease. The New Jersey court, in holding that the clause did not bar the action, took judicial notice of a housing shortage and concluded that the element of unequal bargaining power was present. The court noted that " 'relative bargaining strength, although the most convenient touchstone, does not furnish an infallible basis of prediction in each and every case.... The example par excellence is the relationship of landlord and tenant. While once a relationship of equals, it has very definitely changed during the last few years into one in which the landlord occupies a superior position....' "[14] Similarly, the District of Columbia case of *Kay v. Cain*,[15] although holding that the exculpatory clause did not apply to the type of negligence complained of, stated that even if the clause had applied, it would have been no obstacle to recovery in light of a then current housing shortage which in itself created a disparity of bargaining power.[16]

The third, the most unequivocal view, is that taken by New Hampshire. Pursuant to a broad policy against exculpatory contracts in all contexts, the New Hampshire court, in *Papakalos v. Shaka*,[17] without regard to the considerations of public interest and unequal bargaining power, made the blanket statement that a landlord may not in any case relieve himself from the common law duty to employ due care.

This, then, was the judicial climate at the time the *O'Callaghan* case was argued. On the one hand, there is "the inconsistency that society should work through many years to establish the rights and obligations of the parties to a legal relationship and, once those price-

[12]Kirshenbaum v. General Outdoor Adv. Co., 258 N.Y. 489, 180 N.E. 245, 247 (1932).

[13]33 N.J. Super. 575, 111 A.2d 425 (1955).

[14]111 A.2d at 431.

[15]154 F.2d 305 (D.C. Cir. 1946).

[16]"The acute housing shortage in and near the District of Columbia gives the landlord so great a bargaining advantage over the tenant that such an exemption might well be held invalid on grounds of public policy." Id. at 306.

[17]91 N.H. 265, 18 A.2d 377 (1941).

less principles are established, that people could throw them away in the name of freedom of contract and submit themselves to the very hazards and dangers from which those principles were established to protect them."[18] On the other hand, there is sanctity of contract, an obstacle summarily disposed of by courts which look with disfavor upon exculpatory clauses.[19]

Faced with these conflicting arguments, the *O'Callaghan* court reacted strangely. There seems to have been little or no bargaining power in the plaintiff; there was a widespread housing shortage,[20] and the record plainly showed that had the plaintiff quibbled about terms, the apartment would not have been rented to her.[21] Also, she would have been confronted with the same clause in virtually every urban lease in use at the time. Thus, even if it is conceded that there is no public interest in the *ordinary* landlord-tenant relationship, does not the fact that vast numbers of people are being systematically deprived of their common law rights when no practical alternative is open to them, *create* such public interest as is necessary to empower a court to reach a just result? In this instance the position of landlord assumes the same monopolistic characteristics inherent in that of a carrier or a telegraph company. However, the Illinois court rejected this argument, not on the basis of any of the three aforementioned views, but because in its opinion "the subject is one that is appropriate for legislative rather than judicial action."[22] In this—the court's justification for its own inaction—lies the key to the problem. "Judicial determination of public policy," reasons the court, "cannot readily take account of sporadic and transitory circumstances."[23] But is the judiciary not better equipped than the legislature to deal with a crisis no less desperate for its suddenness? Courts effectively deal with parties before them, while legislative relief often proves slow and cumbersome. Moreover, this type of legislative action operates prospectively

[18]Simmons v. Columbus Venetian Stevens Bldgs., Inc., 20 Ill. App. 2d 1, 155 N.E.2d 372, 379 (1958).

[19]See note 10 supra. Mr. Justice Holmes, dissenting in Adkins v. Children's Hospital, 261 U.S. 525, 568 (1923), said that "pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts."

[20]See note 6 supra.

[21]155 N.E.2d at 550.

[22]Id. at 547.

[23]Ibid. Evidently feeling bound by a statement in Simmons v. Columbus Venetian Stevens Bldgs., Inc., note 18 supra, a case which admitted that the plaintiff was under tremendous economic coercion and yet held him to be barred, the court said that "public policy cannot be determined on the hardship of an individual case."