

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Perry M. Buckner III, Circuit Court Judge

Case No. 2019-001884

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Jun 11 2020

SC Court of Appeals

Gary L. Mole, as Personal Representative
of the Estate of Eddie Mole, Deceased Appellant,

v.

Kramer Apartments, LLC Respondent.

INITIAL BRIEF OF APPELLANT

Clarissa Warren Joyner
1259 Amelia Street, Suite A
Orangeburg, SC 29115
(803) 534-8393 Telephone
(803) 534-7885 Facsimile
Attorney for Petitioner

Other Counsel of Record:
H. Ford Thrift, Esquire
Morgan S. Templeton, Esquire
Attorneys for the Respondent
P.O. Box 1200
Charleston, SC 29402

TABLE OF CONTENTS

Table of Authorities 3

Statement of Issues on Appeal..... 4

Statement of the Case..... 5

Standard of Review 5

Statement of the Facts 8

ARGUMENTS

I. The Trial Court erred in granting Summary Judgment by finding that no evidence exists to support the existence of an exception to the no duty rule..... 10

II. The Trial Court erred in granting Summary Judgment by finding that Respondent owes no duty to the Appellant based on contract 12

III. The Trial Court erred in granting Summary Judgment by finding that Decedent’s attack was unforeseeable..... 13

IV. The Trial Court erred in granting Summary Judgment by finding that Plaintiff’s Affidavit was invalid and should not be considered by the Court..... 15

CONCLUSION..... 16

TABLE OF AUTHORITIES

Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003).

Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004)

Cramer v. Balcore Property Management, Inc., 312 S.C. 440, 441 S.E.2d 317 (1994).

Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005)

Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004).

Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485 (2005)

Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005)

Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003).

Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005)

Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003), cert. denied (Apr. 7, 2005)

STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT BY FINDING THAT NO EVIDENCE EXISTS TO SUPPORT THE EXISTENCE OF AN EXCEPTION TO THE NO DUTY RULE?
- II. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT BY FINDING THAT RESPONDENT OWES NO DUTY TO APPELLANT BASED ON CONTRACT?
- III. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT BY FINDING THAT DECEDENT'S ATTACK WAS UNFORSEEABLE?
- IV. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT BY FINDING THAT PLAINTIFF'S AFFIDAVIT WAS INVALID AND SHOULD NOT BE CONSIDERED BY THE COURT?

STATEMENT OF THE CASE

This wrongful death action was brought by Appellant, Gary L. Mole, as the personal representative of the deceased, Eddie Mole. This action arises out of the death of Eddie Mole (the “Decedent”), who was attacked on October 28, 2015, at the apartment complex known as the Holly Street East Apartments (the “Apartments”). It is undisputed that Respondent Kramer Apartments, LLC (“Defendant”) owns and operates the Apartments and that both the Decedent and his Assailant resided at the Apartments.¹ Plaintiff Gary Mole, as the personal representative of the Decedent’s estate, brought this action against Respondent by filing its Summons and Complaint on September 19, 2018 alleging that Respondent was negligent in failing to maintain the Decedent’s Apartment by remedying a defect in the Decedent’s apartment door that facilitated multiple break-ins, including the events which resulted in his death, by failing to exercise ordinary care to keep the premises safe, by failing maintain, inspect, secure, patrol and manage the premises, and by failing to evict the Assailant.

After considering the Motion for Summary Judgement filed by Defendant without supporting affidavits, the Affidavit of Gray Mole along with Exhibits A through N attached thereto, and memorandum in support of and in opposition to the motion as well as oral arguments presented at the hearing, the Court granted Respondent’s motion for summary judgment.

STANDARD OF REVIEW

The standard which governs the trial court under Rule 56(c), *SCRCP* is that summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pittman v. Grand Strand Entm’t, Inc., 363 S.C. 531,

¹ Although not a tenant, the Assailant was listed as a “designated occupant” on the lease agreement of another tenant.

611 S.E.2d 922 (2005). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005). If triable issues exist, those issues must go to the jury.

Moreover, summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), *SCRCP*; Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485 (2005); In deciding a Rule 56 motion, the court must view all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party. Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003), cert. denied (Apr. 7, 2005) (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004).

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent

cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Rife, 363 S.C. at 214, 609 S.E.2d at 568.

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004).

STATEMENT OF THE FACTS

Respondent, Kramer Apartments, LLC, was the owner and operator of the Holly Street East Apartments. Eddie Mole became a tenant of Holly Street East Apartments in 2010. His lease was renewed automatically every year up until his death. Eddie Mole's lease agreement precluded Eddie Mole from making repairs at his apartment. Specifically, the lease had the typed section relating to repairs crossed out, and a hand-written notation next to it stating, "no repairs by tenant".

Eddie Mole's apartment was burglarized twice prior to the break-in on October 28, 2015 which lead to his death. The first break-in occurred on April 18, 2014 and the second break in occurred on July 16, 2014. The first break-in on April 18, 2014 was facilitated by the door supplied by Kramer Apartments which they precluded Decedent from repairing or altering. The suspect easily entered Eddie Mole's apartment by breaking the glass out which was part of the front door. After taking the glass out, he then was able to reach in, turn the knob and open the front door and enter. The second robbery on July 16, 2014 was also facilitated by the front door installed by Kramer Apartments.

On January 18, 2012, the owner of Kramer Apartments, Harry Kramer, filed a police report for burglary of one of the units at Kramer Apartments, and he reported that he was driving by the unit and saw glass on the ground which was from the front door glass which had been broken allowing easy entry into the unit.

On October 28, 2015, Maurice Mitchell, who was allowed the reside at Kramer Apartments with his girlfriend, Nadine Robinson, despite his violent and felonious history, was able to fatally wound Eddie Mole after gaining access to his apartment by breaking out the same

window in the door which was adjacent to the lock and which had been used in the prior two robberies of Eddie Mole in 2014.

Kramer Apartments also allowed the violent, known criminal who murdered Eddie Mole to continue to reside with his girlfriend, Nadine Robinson, on the premises despite his repeated violation of the lease. Nadine Robinson's lease agreement specifically lists Maurice Mitchell as an occupant of her unit despite his extensive criminal record for Common Law Robbery in 2008, Strong Arm Robbery in 2008, Discharging a Firearm into a Vehicle While Occupied in 2014, and Failure to Stop for Blue Light in 2015. In 2014, Maurice Mitchell committed Domestic Violence at Kramer Apartments against his girlfriend, Nadine Robinson. The rental agreement specifically provides in paragraph twelve (12) that the "tenant, or any member of tenant's family, guest or other person under the tenant's control, shall conduct themselves in a manner that will not disturb other Tenant's and neighbors' peaceful enjoyment of the premises." Further, the lease provides that, "tenant, or any member of tenant's family, guest or other person under the tenant's control, **shall not** engage in or facilitate criminal or drug related activities," and "any such violation constitutes a substantial violation of the Lease and a material noncompliance with the Lease and is grounds for termination of tenancy and eviction from the premises. Despite notice of Maurice Mitchell's reputation in the community for doing drugs and being a violent criminal as well as his record which corroborates his dangerous and violent past, Kramer Apartments allowed him to remain on the property and never sought to evict him in compliance with their own lease. Maurice Mitchell also discharged a Firearm into a Vehicle While Occupied while residing at Kramer Apartments, and he failed to Stop for Blue Light while residing at Kramer Apartments. In 2014, Maurice Mitchell also committed Domestic Violence at Kramer Apartments against his girlfriend, Nadine Robinson, and the police responded and arrested him at Kramer Apartments. He was

however allowed to remain on the premises and no action was taken against him to evict him from the property even though the lease agreement specifically precludes criminal or drug activity and states his conduct was a substantial violation of the lease. The lease even states that this provision is for the protection of other tenants and neighbor's peaceful enjoyment of the premises. Kramer's failure to enforce and comply with its own lease agreement lead to Maurice Mitchell's close proximity to Eddie Mole and his ability to break into his apartment through a defective door.

ARGUMENTS

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BY FINDING THAT NO EVIDENCE EXISTS TO SUPPORT THE EXISTENCE OF AN EXCEPTION TO THE NO DUTY RULE.

Respondent, Kramer Apartments, LLC, was the owner and operator of the Holly Street East Apartments. Eddie Mole became a tenant of Holly Street East Apartments in 2010. His lease was renewed automatically every year up until his death. Eddie Mole's lease agreement precluded Eddie Mole from making repairs at his apartment. Specifically, the lease had the typed section relating to repairs crossed out, and a hand-written notation next to it stating, "no repairs by tenant".

The evidence presented in this case unquestionably creates issues of material fact. There is a genuine issue as to whether Kramer assumed a duty to repair the defective door by contractually precluding Mr. Mole from repairing the door pursuant to his lease. There is a question and triable issue of fact regarding whether the physical condition of the premises leased from Defendant by Eddie Mole contributed to the criminal activity which lead to his death. South Carolina courts do impose on landlords a duty of care relating to the condition of the leased residential premises. Exceptions to a landlord's general immunity derived from the landlord's superior knowledge of and ability to maintain the premises' structural integrity. Landlords are liable for injuries caused

by defects in the common premises. A second exception from general immunity arises because the landlord knew of a latent defect in the premises but did not disclose or remedy that defect. The windowed door which allowed easy access for Mr. Mitchell to break in Mr. Mole's apartment was specifically known by Mr. Kramer and Kramer apartments as he had made a police report regarding this condition in 2012 and he was aware of a prior burglary of Mr. Mole's apartment by this exact method. Therefore, triable issues of fact exist because Kramer Apartments undertook repairs to the door which was a known source of easy entry, but it failed to properly secure and repair the door. There is a question of fact as to whether Kramer Apartments is therefore negligence in making the insufficient repairs to the door. There is also a question of fact about Kramer's violation of the lease by allowing Maurice Mitchell to remain on the property after repeated criminal acts which specifically violated the lease.

Maurice Mitchells' access to the Eddie Mole's unit was the direct result of Kramer Apartments actions in failing to maintain a common area, the door, which it precluded Eddie Mole from altering, repairing or upgrading. This in tandem with Kramer Apartment's allowing Maurice Mitchell to continue to live on the premises despite his extensive criminal activity both on the premises and away from the premises caused Eddie Mole to be a target for Maurice Mitchell's crimes. Kramer had exclusive control over these conditions which are lead directly to Maurice Mitchell's ability to enter the premises and murder Eddie Mole. Eddie Mole's door was an actionable defect, and the crime occurred at the very door Kramer Apartments refused to properly fix. Kramer Apartments retained not just superior ability to control this defective windowed door, it maintained sole ability, as it prevented Eddie form repairing the door. This defective door foreseeably enhanced the risk of criminal activity. Kramer Apartments has actual knowledge of

both the ease at which this defective door could be compromised as well as actual knowledge of criminal activity on the premises.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BY FINDING THAT RESPONDENT OWES NO DUTY TO APPELLANT BASED ON CONTRACT.

On October 28, 2015, Maurice Mitchell, who was knowingly allowed the reside at Kramer Apartments with his girlfriend, Nadine Robinson, despite his violent and felonious history, was able to fatally wound Eddie Mole after gaining access to his apartment by breaking out the same window in the door adjacent to the lock which had been used in the prior two robberies of Eddie Mole in 2014.

Kramer Apartments also knowingly allowed the violent, known criminal who murdered Eddie Mole to continue to reside with his girlfriend, Nadine Robinson, on the premises despite his repeated violation of the lease. Nadine Robinson's lease agreement specifically lists Maurice Mitchell as an occupant of her unit despite his extensive criminal record for Common Law Robbery in 2008, Strong Arm Robbery in 2008, Discharging a Firearm into a Vehicle While Occupied in 2014, and Failure to Stop for Blue Light in 2015. In 2014, Maurice Mitchell committed Domestic Violence at Kramer Apartments against his girlfriend, Nadine Robinson. The rental agreement specifically provides in paragraph twelve (12) that the "tenant, or any member of tenant's family, guest or other person under the tenant's control, shall conduct themselves in a manner that will not disturb other Tenant's and neighbors' peaceful enjoyment of the premises." Further, the lease provides that, "tenant, or any member of tenant's family, guest or other person under the tenant's control, **shall not** engage in or facilitate criminal or drug related activities," and "any such violation constitutes a substantial violation of the Lease and a material noncompliance

with the Lease and is grounds for termination of tenancy and eviction from the premises. Despite notice of Maurice Mitchell's reputation in the community for doing drugs and being a violent criminal as well as his record which corroborates his dangerous and violent past, Kramer Apartments allowed him to remain on the property and never sought to evict him in compliance with their own lease. Maurice Mitchell discharged a Firearm into a Vehicle While Occupied while residing at Kramer Apartments, and he failed to Stop for Blue Light while residing at Kramer Apartments. In 2014, Maurice Mitchell also committed Domestic Violence at Kramer Apartments against his girlfriend, Nadine Robinson, and the police responded and arrested him at Kramer Apartments. He was however allowed to remain on the premises and no action was taken against him to evict him from the property even though the lease agreement specifically precludes criminal or drug activity and states his conduct was a substantial violation of the lease. The lease even states that this provision is for the protection of other tenants and neighbor's peaceful enjoyment of the premises. Kramer's failure to enforce and comply with its own lease agreement lead to Maurice Mitchell's close proximity to Eddie Mole and his ability to break into his apartment through a defective door.

Kramer also allowed rampant drug activity at the apartment. Cocaine and Marijuana were regularly sold out of Kramer Apartments by a police officer.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BY FINDING THAT DECEDENT'S ATTACK WAS UNFORSEEABLE.

Kramer Apartments knew about the lack of structural integrity of the windowed door they placed on Eddie Mole's apartment. This was a defect in the common premises maintained by Kramer, and Kramer specifically precluded Eddie Mole from fixing, improving or upgrading the

door pursuant to its hand-written notation on his lease agreement. Therefore, only Kramer had the power to make necessary repairs to the door and they failed to do so. Kramer was on notice of the door's propensity to be easily compromised by the window pane being removed and the knob only turned to gain easy entry into the apartment because Harry Kramer observed this as early as 2012, and Eddie Mole's two prior burglaries were both facilitated by this defective door. Instead of securing the door, Kramer cheaply and negligently replaced the lock on the broken door and placed plexiglass in the windowpane area after each robbery, and did not even replace the door or fix the broken windowpane. Kramer had specific knowledge of the insufficiency of the windowed door which had been repaired by them in a substandard way. Kramer Apartments took no steps, which were all within their power since they specifically precluded Eddie Mole from repairing or replacing the door, to minimize the predictable risk to Eddie Mole after the first two break-ins and similar break-in of which they were on notice of since Mr. Kramer was the first person to observe and report a burglary facilitated by the defective door.

Under South Carolina law, when a landlord assumes to act, even though under no obligation to do so, he becomes subject to the duty to act with due care. *See Cramer v. Balcore Property Management, Inc.*, 312 S.C. 440, 441 S.E.2d 317 (1994). By specifically precluding Eddie Mole from making repairs, Kramer Apartments assumed the responsibility to adequately repair Mr. Mole's door, a common area, after the two robberies which preceded his death. Although not automatic by nature of the relationship, a landlord's duty may arise under particular circumstances. *Cramer I*, 312 S.C. at 443 n.1, 441 S.E.2d at 319 n.1. This duty which Kramer Apartments assumed arose by contract when it placed in the lease agreement that no repairs could be made by the tenant and struck through the written provision which would have allowed the tenant to arrange for professional assistance in the event repairs. The law states that a duty may

arise by contract. *Cramer I*, 312 S.C. at 442, 441 S.E.2d at 318. A lease is a contract, and Kramer contracted with Mr. Mole to make necessary repairs by specifically precluding him from making repairs or employing professionals to do so on his behalf. Here, Kramer's actions in failing to properly repair the door which presented a foreseeable risk known by Kramer since 2012, increased the risk of Eddie Mole's injuries. Although his assailant approached him in the parking lot area, he was able to force his way into the apartment door before he brutally attacked Mr. Mole.

Maurice Mitchells' access to the Eddie Mole's unit was the direct result of Kramer Apartments actions in failing to maintain a common area, the door, which it precluded Eddie Mole from altering, repairing or upgrading. This in tandem with Kramer Apartment's allowing Maurice Mitchell to continue to live on the premises despite his extensive criminal activity both on the premises and away from the premises caused Eddie Mole to be a target for Maurice Mitchell's crimes. Kramer had exclusive control over these conditions which are lead directly to Maurice Mitchell's ability to enter the premises and murder Eddie Mole. Eddie Mole's door was an actionable defect, and the crime occurred at the very door Kramer Apartments refused to properly fix. Kramer Apartments retained not just superior ability to control this defective windowed door, it maintained sole ability, as it prevented Eddie form repairing the door. This defective door foreseeably enhanced the risk of criminal activity. Kramer Apartments has actual knowledge of both the ease at which this defective door could be compromised as well as actual knowledge of criminal activity on the premises.

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BY FINDING THAT PLAINTIFF'S AFFIDAVIT WAS INVALID AND SHOULD NOT BE CONSIDERED BY THE COURT.

The Respondent's motion for summary judgment should have been denied. Gary Mole's affidavit opposing the motion for summary judgment was made upon personal knowledge, set forth such facts as would be admissible in evidence, and showed that Mr. Mole was competent to testify to the matters stated in the Affidavit.

There is a dispute as to the conclusions and inferences to be drawn from the facts stated in his Affidavit. Additionally, there remain genuine issues of material facts. These are fatal to a motion for summary judgment and Respondent's motion should have been denied. Contradictory factual allegations raised by Respondent about whether Appellant was authorized to repair the door and whether Kramer made any insufficient repairs to the door raise a genuine issue of material fact, in and of themselves. South Carolina law is clear, summary judgment must be denied if there is a dispute as to conclusions and inferences drawn from indisputable facts. If the Respondent cannot even agree on the inferences and conclusions to be drawn from the alleged insufficient repairs to the door, then surely there is no basis for summary judgment.

CONCLUSION

The Respondent has failed to meet the standard for summary judgment under South Carolina case law and the South Carolina Rules of Civil Procedure. Genuine issues of material fact remain and the grant of summary judgment to Respondent should be reversed.

June 11, 2020

s/ClarissaWarren Joyner
Clarissa Warren Joyner
1259 Amelia Street, Suite A
P.O. Box 1724
Orangeburg, S.C. 29116-1724
(803) 534-8393

ATTORNEY FOR APPELLANT