LANDLORD-TENANT—REMEDIES—TENANT'S RIGHT TO RENT DEDUCTION FOR REPAIR EXPENDITURES—*Marini v. Ireland,* 56 N.J. 130, 265 A.2d 526 (1970).

The legal adage caveat emptor, once a safety zone for many sellers under the common law, has lost much of its effect in recent years. Legislation such as the *Uniform Commercial Code* has greatly reduced those areas where a seller may be relieved of liability by pleading caveat emptor. As a result of this de-emphasis of the "buyer beware" attitude, consumer protection has increased rapidly.[1] Recently, the New Jersey Supreme Court, in *Marini v. Ireland,*[2] made another dent in the shield of the seller by extending consumer protection to the landlord-tenant relationship.

On June 25, 1969, the defendant, a tenant of the plaintiff, discovered a crack in the bathroom bowl, which caused a large amount of water to accumulate on the floor of the bathroom. Defendant attempted to notify the plaintiff but was not able to contact him. Therefore, on June 27, defendant hired a plumber to repair the leak. This repair, which cost $85.72, was paid for by the defendant, and when the rent for July fell due, defendant sent plaintiff the difference along with a copy of the repair bill and a receipt indicating payment. Plaintiff refused to accept this partial payment and demanded the full rent of $95 as established under the terms of the lease. Defendant refused to pay anything more than the $9.28 difference. Plaintiff then started a summary dispossess action in the county district court, the jurisdiction of that court in this matter being solely statutory.[3] At the trial, the judge held that the case was purely legal in nature and that equitable defenses were not permissible, *i.e.*, the written terms of the lease must control. Since there was no express covenant to repair contained in the lease, the trial judge ruled that plaintiff was under no duty to repair, and consequently defendant was in default. Plaintiff was given judgment for possession and defendant was or-

---

1 *See* 1 SETON HALL L. REV. 208 (1970).

2 56 N.J. 130, 265 A.2d 526 (1970).

3 N.J. STAT. ANN. § 2A:18-53 (Supp. 1969) provides:

> Any lessee or tenant at will or at sufferance, or for a part of a year, or for 1 or more years, of any houses, buildings, lands or tenements, and the assigns, undertenants or legal representatives of such tenant or lessee, may be removed from such premises by the county district court of the county within which such premises are situated, in an action in the following cases:
>
> . . . .
>
> (b) Where such person shall hold over after a default in the payment of rent, pursuant to the agreement under which the premises are held.

dered to pay the $85.72 withheld from the July rent plus the August rent, which defendant had refused to pay because of the pending dispossess action.

On appeal, a stay of judgment was granted pending a hearing scheduled for September 23, 1969. However, before the case could be heard, the supreme court certified the case on its own motion.[4] The supreme court saw fit to consider the case at that point because of the unique question of appealability presented in light of the statute which restricts appeals of dispossess actions to questions of jurisdiction.[5]

It was defendant's contention that the county district court could only acquire jurisdiction if there was a default. This point was not disputed. But defendant claimed that there was no default in payment of rent because the $85.72 allegedly withheld was not owing. If there was no default, in a sense a question of fact, there was no jurisdiction. However, plaintiff argued that since defendant admitted not paying the full amount due, there was a default, with the only issue being the amount due, a meritorious issue which may not be appealed under the statute.[6]

The supreme court reasoned that a default is not merely rent due and unpaid. A default exists only when rent is due, unpaid, and *owing*.[7] If the tenant does not owe the money allegedly withheld, there is no default, and consequently the county district court's jurisdiction may be challenged.[8] The question is whether a tenant may

---

4 *See* N.J.R. 2:12-1.

5 N.J. STAT. ANN. § 2A:18-59 (1952) provides:

> Proceedings had by virtue of this article shall not be appealable except on the ground of lack of jurisdiction. The landlord, however, shall remain liable in a civil action for unlawful proceedings under this article.

Generally, four facts must be alleged in order to vest the county district court with jurisdiction. The complaint (originally affidavits were used) must state that a landlord-tenant relationship exists; that a *default* in payment of rent has allegedly occurred; that a distraint is not an adequate remedy; and that three days written notice has been given demanding payment or repossession. *See* Fowler v. Roe, 25 N.J.L. 549, 550 (Sup. Ct. 1856). In Vineland Shopping Center, Inc. v. DeMarco, 35 N.J. 459, 464, 173 A.2d 270, 273 (1961) the court stated:

> The established principle is that the trial court [has] jurisdiction if there [is] evidence from which it could find a statutory basis for removal. If that test is met, the judgment must be affirmed even though it is otherwise infected with error.

6 N.J. STAT. ANN. § 2A:18-59 (1952).

7 56 N.J. at 139, 265 A.2d at 531.

8 In connection with the point that a default cannot exist if the money is not owing, the court proceeded:

disprove the alleged default by means of an equitable defense. The trial court did not think so, and there was some precedent for its decision.[9] The supreme court, however, ruled that equitable defenses are proper subjects for consideration at the trial level.[10] Indeed, the supreme court stated that when an equitable defense goes to the issue of jurisdiction, refusal by the county district court to entertain the defense is appealable and not in derogation of the statute.[11] In so holding, the court overruled *Peters v. Kelly*,[12] which held that a defendant's evidence of faulty heating could not be heard in an effort to justify refusal to pay rent.

Marini points out that a defendant may test the jurisdiction of the county district court twice, once at the pleading level by challenging the sufficiency of the facts in the complaint, and finally after all the evidence is in. If the plaintiff has not adduced sufficient evidence to support the default alleged in the complaint, an attack on the court's jurisdiction is in order, whether the reason be equitable or legal.

It should be observed that in dispossess actions, according to *Marini,* the jurisdictional issue and the merits of the case, although separate in concept, are provable by the same evidence. Facts introduced by the defendant to show that there is no default serve a dual purpose. If the trial court finds that a default does or does not exist, the jurisdictional question as well as the factual issues are passed upon. The court stated:

> [O]ur cases have hewed a line separating the "jurisdictional" issue from the meritorious issue. . . . Whatever "jurisdiction" means in

---

> Thus a tenant's evidence in substantiation of a defense that there is no default, *or that the default is not in the amount alleged by the landlord,* is admissible on the jurisdictional issue. (emphasis added)

56 N.J. at 139, 265 A.2d at 531. This latter defense would appear to contradict the court's previous reasoning. Would not the county district court be recognizing that a default exists if the defendant merely contends that the "default is not in the amount alleged by the landlord"? Does *Marini* intend to imply that if a landlord's complaint alleged a default in an amount larger than he is *entitled* to, he loses his jurisdictional basis for the action?

9 Peters v. Kelly, 98 N.J. Super. 441, 237 A.2d 635 (App. Div. 1968). This case recognized that tenants may face problems in getting a landlord to make repairs. However, the court viewed the problem as one to be solved by the legislature.

10 Duncan v. Malcomb, 234 Ark. 146, 351 S.W.2d 419 (1961); Vineland Shopping Center, Inc. v. DeMarco, 35 N.J. 459, 469, 173 A.2d 270, 275 (1961); *see also* Carteret Properties v. Variety Donuts, Inc., 49 N.J. 116, 124, 228 A.2d 674, 678 (1967).

11 N.J. STAT. ANN. § 2A:18-59 (1952).

12 98 N.J. Super. 441, 237 A.2d 635 (App. Div. 1968).

> other settings, here it uniquely connotes the existence of one of the factual situations delineated in *N.J.S.A.* 2A:18-53.[13]

Thus, *Marini* demonstrated that the restriction on appeal in summary dispossess actions is no real obstacle to the tenant since the evidence introduced on the merits will also affect the jurisdiction. It would seem that *Marini* has rendered N.J. STAT. ANN. § 2A:18-59 ineffective to a large extent.

Under N.J. STAT. ANN. § 2A:18-60,[14] a case may be removed from the county district court to the superior court if it is of "sufficient importance." Once a case has been removed to superior court, there is no longer any restriction as to which issues may be appealed. *Marini* saw no logical reason why a case which has not been removed should be treated differently than one which has. The court noted that this statute provides no guidelines as to what is of "sufficient importance." Since every case is "important" to the parties involved, the court commented, all cases could be removed to superior court under the statute. Thus, *Marini* implies that 2A:18-60, with its vague requirements, when read in conjunction with 2A:18-59, renders the latter ineffective.[15]

Having held that equitable as well as legal defenses may be heard, and that these defenses go to jurisdiction as well as to the merits of the case, the court had to determine if the defendant had any right to deduct the cost of the repairs from the rent. Was the defendant entitled, under the lease, to have these repairs done by the landlord?

Historically, a lease was considered in the same class as a sale of an interest in real estate in that the buyer was given no warranties of any kind. Once a grantee accepted a deed, caveat emptor controlled.[16] Now, a lease of premises for residential purposes contains a covenant that the premises are habitable, and this covenant may be implied as

---

13 56 N.J. at 138-39, 265 A.2d at 530 (citing Vineland Shopping Center, Inc. v. DeMarco, 35 N.J. at 464, 173 A.2d at 273 (1961)).

14 The statute provides:

> At any time before an action for the removal of a tenant comes on for trial, either the landlord or person in possession may apply to the superior court, which may, if it deems it of sufficient importance, order the cause transferred from the county district court to the superior court.

15 *See* Academy Spires, Inc. v. Jones, 108 N.J. Super. 395, 404, 261 A.2d 414, 417 (L. Div. 1970) for an example of the court's treatment of a request to transfer under N.J. STAT. ANN. § 2A:18-60 (1952).

16 Michaels v. Brookchester, Inc., 26 N.J. 379, 382, 140 A.2d 199, 201 (1958); *see* Bauer v. 141-149 Cedar Lane Holding Co., 24 N.J. 139, 145, 130 A.2d 833, 837 (1957). These cases recognize the old common law principle but consider that attitude to be outmoded and unfair.

well as expressed.[17] Further, leases now tend to be construed as contracts,[18] and under contract law the intentions of the parties will be looked at to determine the meaning.[19] Applying these concepts to the case at hand, *Marini* held that the landlord was obliged to make "vital" repairs, even though the lease did not contain an express covenant to repair. It has been held that a covenant to repair must be expressly contained in a lease.[20] *Marini* has broken with that line of thought by permitting such a covenant to be implied.[21] As the court stated:

> A covenant in a lease can arise only by necessary implication from specific language of the lease or because it is indispensable to carry into effect the purpose of the lease. In determining, under contract law, what covenants are implied, the object which the parties had in view and intended to be accomplished, is of primary importance.[22]

The court also noted that covenants should not be implied simply because they are just and reasonable, but rather because the parties must have intended them.[23] In connection with this the court stated:

---

17 Buckner v. Azulai, 251 Cal. App. 2d 1013, 59 Cal. Rptr. 806 (1967); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969). In Pines v. Perssion, 14 Wis. 2d 590, 596, 111 N.W.2d 409, 412 (1961) the court stated:

> To follow the old rule of no implied warranty of habitability in leases would . . . be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*. Permitting landlords to rent "tumbledown" houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners.

18 *See* 3 G. THOMPSON ON REAL PROPERTY §§ 1110-12 at 377-88 (1959 Replacement by J. Grimes).

19 La Freda v. Woodward, 125 N.J.L. 489, 15 A.2d 798 (Ct. Err. & App. 1940); Ready v. Texaco, Inc., 410 P.2d 983 (Wyo. 1966). *La Freda*, although recognizing that leases are contracts with the parties' intentions to be considered, is a good example of the gradual liberalization in permitting implied covenants. Earlier courts were not inflexible against finding implied covenants in leases, but they were very strict. Today, as in *Marini*, courts tend to construe leases in a light more favorable to the tenant. *See* Reste Realty Corp. v. Cooper, 53 N.J. at 452, 251 A.2d at 272 (1969).

20 Rene's Restaurant Corp. v. Fro-Du-Co Corp., 137 Ind. App. 559, 210 N.E.2d 385 (1965); McCrory Corp. v. Nacol, 428 S.W.2d 414 (Tex. Civ. App. 1968); Goldstein v. Corrigan, 405 S.W.2d 425 (Tex. Civ. App. 1966).

21 Covenants to repair have been implied where certain express covenants in the lease provide clear evidence that the covenant to repair must have been implicit; for example, a covenant which reserves to the landlord the right to enter to make repairs upon the premises and provides that the tenant may not obtain an abatement or diminution of rent by making repairs. Michaels v. Brookchester, Inc., 26 N.J. 379, 140 A.2d 199 (1958).

22 56 N.J. at 143, 265 A.2d at 533.

23 *Id.* However, *Marini* tends to relax the requirement beyond its own preaching. In

> In a modern setting, the landlord should, in residential letting, be held to an implied covenant against latent defects, which is another manner of saying, habitability and livability fitness. . . . It is a mere matter of semantics whether we designate this covenant one "to repair" or "of habitability and livability fitness."[24]

Thus, *Marini* has stripped away the rhetoric or technicalities which may have prevented other courts from holding a landlord responsible for repairs under an implied covenant.

It is important to note that the supreme court, in ruling on *Marini*, confined its opinion so as to apply only to those particular fact situations where the lease is for residential purposes and the repairs are such that failure to repair would render the demised premises uninhabitable.[25] Implied warranties to repair have not been confined to residential letting only. In *Reste Realty Corp. v. Cooper*,[26] the supreme court found that an implied covenant to repair can exist under a lease of commercial offices, but in that case constructive eviction was the defense to abandonment of the premises, not a defense to justify deducting the cost of repairs from rent due. The requirement in *Marini* that the repairs must be vital and essential to habitability is a valid determination. However, future litigation based on *Marini* will find it necessary to determine just what is and what is not a "vital" repair, and that may not be easy. For example, is new paint on an old or cracked wall a vital repair? How about replacement of a bedroom doorknob or a broken window? These repairs may be necessary, but can they be considered vital within the meaning of *Marini*?[27]

Allowing repair costs to be deducted from rent due is not a novel policy per se. It has been allowed where there was an express covenant to repair.[28] The tenant had a choice of remedy, either vacate, or re-

---

reality, the court is finding an implication which the plaintiff did not wish to imply, but rather what the court feels he should have intended to imply.

24 56 N.J. at 144, 265 A.2d at 534.

25 *See* Smith v. M.P.W. Realty Co., 423 Pa. 536, 225 A.2d 227 (1967), which states that a landlord does not ordinarily warrant that the premises are tenantable. However, the court concedes that this general proposition is relaxed when the needed repairs are for facilities within the control of the landlord, such as heating and plumbing. (Is a bathroom bowl within the control of the landlord?)

26 53 N.J. 444, 251 A.2d 268 (1969).

27 *See* Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (Essex Cty. Dist. Ct. 1970).

28 Cases cited note 20 *supra*. These cases recognize the right of a tenant to deduct repair costs from the rent, provided there is an *express* covenant to repair. These cases probably would not permit an abatement or setoff under an implied warranty. *See also*

pair the premises and then sue the landlord for the repair costs. In *Marini*, the court went one step further by allowing a tenant the opportunity to recover repair costs under an implied covenant to repair.[29] Grasping the reality of the situation, the court stated:

> It is of little comfort to a tenant in these days of housing shortage to accord him the right, upon a constructive eviction, to vacate the premises . . . . Rather he should be accorded the alternative remedy of terminating the cause of the constructive eviction . . . . This latter course of action is accompanied by the right to offset the cost of such repairs as are reasonable . . . .[30]

A collateral point considered in *Marini* is whether the obligations of a lease are dependent or independent of each other. There is much authority for the proposition that covenants in a lease are generally independent, and a breach by one party only creates a right to sue on that breach.[31] However, there is also authority for the contractual approach that covenants are either dependent or independent according to the intentions of the parties.[32] It is a case by case consideration.[33] *Marini* follows this latter philosophy and holds that

---

Richard Paul, Inc. v. Union Improvement Co., 59 F. Supp. 252 (D. Del. 1945); Hosang v. Minor, 205 Cal. App. 2d 269, 22 Cal. Rptr. 794 (Dist. Ct. App. 1962).

[29] If . . . a landlord fails to make the repairs and replacements of vital facilities necessary to maintain the premises in a livable condition . . . the tenant may cause the same to be done and deduct the cost . . . from future rents. . . . *This does not mean that the tenant is relieved from the payment of rent so long as the landlord fails to repair. The tenant has only the alternative remedies of making the repairs or removing from the premises upon such a constructive eviction.* (emphasis added)

56 N.J. at 146, 265 A.2d at 535. Consider the recent case of Academy Spires, Inc. v. Brown, 111 N.J. Super. 447, 268 A.2d 556 (Essex Cty. Dist. Ct. 1970) in light of the above quote. Relying on *Marini*, *Academy Spires* allowed the defendant-tenant a 25% abatement in rent as just compensation for the plaintiff-landlord's failure to supply heat, hot water and elevator service. Defendant deliberately withheld three months rent because of the landlord's failure to perform in accordance with the terms of the lease. Taking *Marini* one step further, *Academy Spires* held that the defendant was not obliged to make the repairs himself under the circumstances. The court ruled that in situations where a single tenant or a few tenants in a multiple dwelling must, out of necessity, rely on the landlord to make certain repairs, they would be entitled to a diminution of rent as damages resulting from the landlord's failure to perform. Such a ruling, if upheld by a higher court, might take the tenant self-help philosophy of *Marini* to a dangerous extreme.

[30] 56 N.J. at 146, 265 A.2d at 535.

[31] Bolon v. Pennington, 6 Ariz. App. 308, 432 P.2d 274 (1967); Goldsmith v. Tub-O-Wash, 199 Cal. App. 2d 132, 18 Cal. Rptr. 446 (Dist. Ct. App. 1962); Ready v. Texaco, Inc., 410 P.2d 983 (Wyo. 1966).

[32] Medico-Dental Building Co. v. Horton & Converse, 21 Cal. 2d 411, 132 P.2d 457 (1942); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969).

[33] Higgins v. Whiting, 102 N.J.L. 279, 280, 131 A. 879, 880 (Sup. Ct. 1926):

> [I]t is said that covenants are to be construed as dependent or independent ac-

where the parties intended that the premises be used as a residential dwelling, they must also reasonably intend that certain covenants contained in the lease, express or implied, be dependent. In *Alexander's Department Stores, Inc. v. Arnold Constable Corp.*,[34] the court stated that there is necessarily a mutual covenant, whether express or implied, of extreme good faith by each party, both as to interpretation and performance of the lease agreement. It would appear that *Marini* is correct in deciding that the tenant is entitled to withhold rent if the landlord fails to perform a covenant so vital as to affect the health and welfare of his tenant. If for no other reason than that stated in the above quote *(i.e.,* the housing shortage), covenants of this nature should be considered dependent, notwithstanding cases such as *Bell v. Kemp*,[35] which held that payment of rent is a condition, not a covenant. Moreover, *Reste's* holding that breach of any dependent covenant is to be deemed failure of consideration[36] is further justification for allowing a tenant to withhold payment of rent.

Marini has done much to increase the tenant's lawful remedies against disinterested landlords. It has given new dimension to the scope of review under 2A:18-59 by expanding the area covered by "jurisdiction." It has firmly established the permissibility of equitable defenses to dispossess actions. It has permitted covenants to repair to be implied—a most significant development. It confirms the right of a tenant to make reasonable repairs and deduct the cost from rent by construing covenants to be dependent. However, the court is careful to point out that it does not wish to stifle reasonable dispossess actions, nor does it seek to place the landlord at a distinct disadvantage. The court suggests that whenever a dispossess action is delayed, the tenant be required to deposit the full amount of unpaid rent so as to protect

cording to the intention and meaning of the parties and the good sense of the case. Technical words should give way to such intentions.

. . . .

In the present case, the covenant to pay rent and the covenant to heat the apartment are mutual and dependent.

Contra, Richard Paul, Inc. v. Union Improvement Co., 59 F. Supp. 252 (D. Del. 1945). *See also* Marcus v. Great American Tea Co., 61 R.I. 238, 200 A. 534 (1938), which also held that a tenant may be entitled to an abatement in the amount he is injured by the landlord's breach. *But see* Reporting Corp. v. Deshere, 4 N.J. Misc. 65, 131 A. 635 (Sup. Ct. 1926), which held that a tenant in possession may not set up constructive eviction, nor may he withhold rent because the landlord may have breached the covenant. *Marini* and *Reste* appear to have overruled this latter case.

34 105 N.J. Super. 14, 25, 250 A.2d 792, 798 (Ch. 1969).

35 419 S.W.2d 55 (Mo. 1967); *accord,* Richard Paul, Inc. v. Union Improvement Co., 59 F. Supp. 252 (D. Del. 1945).

36 *See also* Groh v. Koner's Bull Pen, Inc., 221 Cal. App. 2d 611, 34 Cal. Rptr. 637 (Dist. Ct. App. 1963).

the landlord if he should prevail.[37] In addition, an application for stay of judgment pending appeal should not be granted as a matter of course, but only after careful consideration.[38] *Marini* is a well-reasoned, well-researched opinion which will hopefully stir other jurisdictions to reevaluate their tenant remedies.

Robert A. Marks

[37] New York has enacted into law what *Marini* recommends to its lower courts. N.Y. REAL PROP. ACTIONS LAW § 755 (McKinney 1963) requires all tenants to deposit the full amount of rent allegedly in default before any stay of judgment may be had.

[38] 56 N.J. at 147, 265 A.2d at 535.