

## **“Supreme Court Decision: The Implied Warranty of Habitability in the Commercial Context”**

**By Nicholas J. Klein, Esq.**

This article follows the January-February 2022 CCIM article which addressed a pending case. Now the Supreme Court has made a decision. Bour Enterprises, LLC, a commercial property owner, sued 4520 Arville, its commercial tenant for damages resulting from the tenant’s early termination of the lease and failure to pay amounts owed under the lease agreement. Tenant raised arguments and counterclaims arguing that their breach of the lease was due to landlord’s constructive eviction - that is, failure to maintain the commercial premises in a “habitable” condition by failing to remedy unsanitary conditions in the warehouses. Tenant argued that the commercial lease, similar to a residential lease, contained an “implied warranty of habitability.”

There are some courts in other states that have found that a commercial landlord has an obligation to maintain a commercial property in a “habitable” condition. However, on September 16, 2022, in an unpublished opinion, the Nevada Supreme Court affirmed the Bour Enterprises case that the implied warranty of habitability remains a claim that only residential tenants can make against landlords of residential properties.

In its short decision, the Nevada Supreme Court emphasized that Nevada law explicitly provides in NRS 118A, the Nevada Residential Landlord and Tenant Act, a warranty of habitability for residential tenants. NRS 118C, the Nevada Commercial Landlord and Tenant Act, does not contain such a warranty. Further the Court reasoned that even if there were an implied warranty of habitability in all commercial leases, the terms of the lease at issue clearly outlined that the problems tenant complained of were tenant’s own responsibility to repair and maintain.

NRS 118C.200 does include a list of obligations imposed upon a commercial landlord including not turning off utilities a tenant pays directly to the utility company, not removing doors, windows, or furnishings, and not changing the door locks or excluding a tenant except in certain cases. Further, NRS 118C.200 provides that the terms of a commercial lease supersede NRS 118C.200 where there may be any conflict. As you may all know, the law often views commercial lease agreements as binding contracts between two sophisticated parties with few restrictions on the terms they may agree to, and this case affirms that notion.

In the Bour Enterprises case, the Nevada Supreme Court found the following language to clearly place the burden on the tenant: **[Tenant must] keep the premises...in good order, condition and repair [regardless of] whether or not the need for such repairs occurs as the result of [Landlord's] use, [or] any prior use” of the premises.**

The lease in Bour Enterprises additionally contained a clause whereby tenant “assumed all responsibility for the condition of the premises.

What do we learn from the Bour Enterprises case? First, commercial parties need sharp contract drafting that dictates which matters are the responsibility of each party. Second, commercial landlords should review their lease agreements in light of the intended use and tenant. Third, commercial landlords should update any form leases to ensure that it has language that corresponds to the decisions of the local jurisdiction and new case law. In other words, if commercial parties desire to place the habitability obligation upon the landlord, such obligation must be in the lease.

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*Nicholas J. Klein is an attorney with the Las Vegas law firm Marquis Aurbach (“MAC”). He can be reached at (702) 382-0711 or by visiting the firm’s website at [maclaw.com](http://maclaw.com).*