

Saunders v Bohari

2012 NY Slip Op 31126(U)

April 25, 2012

Supreme Court, Queens County

Docket Number: 12319/2010

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

CLARA SAUNDERS, AS ADMINISTRATRIX
CTA OF THE GOODS, CHATTELS AND
CREDITS OF LOUISE BOHARI, DECEASED,
AND CLARA SAUNDERS, INDIVIDUALLY,
Plaintiffs,

Index
No. 12319 2010

Motion
Date January 31, 2012

- against -

NIKOL BOHARI AND LINDENWOOD
VILLAGE SECTION D COOPERATIVE
CORPORATION,
Defendants.

Motion
Cal. No. 38

Motion
Seq. No. 2

The following papers numbered 1 to 15 read on this motion by plaintiffs to strike the pleadings of defendant Nikol Bohari and for summary judgment against defendant Bohari and defendant Lindenwood Village Section D Cooperative Corporation (Lindenwood); and on this cross motion by Lindenwood for summary judgment dismissing the complaint and for summary judgment on its cross claim against defendant Bohari.

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Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

A stock certificate signed by officers of Lindenwood on August 25, 1988, certified that “Louise and/or James Bohari” owned 210 shares of the common stock of Lindenwood, a cooperative corporation. Pursuant to their ownership of the issued shares, Louise Bohari and her husband James Bohari occupied apartment 2M of the cooperative apartment building owned by Lindenwood at 151-31 88th Street, Howard Beach, New York. James Bohari died on June 13, 1997, leaving a last will and testament appointing his granddaughter, defendant Bohari, as executrix of the will. The court has not been given any proof that letters testamentary were issued to Nikol Bohari, although the office manager deposed on behalf of defendant Lindenwood testified that she had seen a copy of such letters.

On June 20, 1997, the officers of Lindenwood executed a new stock certificate naming Louise Bohari as the owner of 210 issued shares of the cooperative corporation. Louise Bohari continued to reside in apartment 2M until her death on April 23, 2008. She died testate, naming her daughter and only child, plaintiff Clara Saunders, as the sole beneficiary under her last will and testament. Letters of administration c.t.a. were issued to Clara Saunders by the Surrogate’s Court, Queens County, on March 31, 2010. Following her mother’s death, Clara Saunders continued to pay the maintenance charges on the apartment.

In this action to recover damages for conversion and negligence, it is alleged that, on or about November 30, 2009, defendant Bohari wrongfully took possession of the household furniture and other personal property of plaintiffs that remained in apartment 2M. It is further alleged that defendant Lindenwood was negligent in allowing defendant Bohari to gain access to apartment 2M.

At the outset, the part of the motion that is to strike the answer of defendant Bohari is denied. Plaintiffs have not made a clear showing that defendant Bohari’s failure to submit to deposition was willful or contumacious so as to warrant the drastic remedy of striking a pleading (*see Caval v City of New York*, 89 AD3d 885 [2011]; *ACME ANC Corp. v Read*, 55 AD3d 854 [2008]; *Kuzmin v Visiting Nurse Serv. of N.Y.*, 22 AD3d 643 [2005]).

With respect to the part of the motion for summary judgment against defendant Bohari, “[c]onversion is the ‘unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner’s rights’ ” (*Vigilant Ins. Co. of Am. v Housing Auth. of the City of El Paso, Tex.*, 87 NY2d 36, 44 [1995], quoting *Employers’ Fire Ins. Co. v Cotten*, 245 NY 102, 105 [1927]; *see Hamlet at Willow Creek Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 113 [2009]; *Soviero v Carroll Group Intl., Inc.*, 27 AD3d 276 [2006]). It encompasses any act of dominion or control wrongfully exerted over another’s personal property that is inconsistent with, or seriously interferes with, that person’s rights in the property (*see Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; *Goldstein v Guida*, 74 AD3d 1143 [2010]; *Petty v Barnes*,

70 AD3d 661 [2010]). A wrongful intention to possess the property of another is not an essential element of a conversion if the owner has been deprived of the property by the wrongdoer's unauthorized act in assuming possession and control (*General Elec. Co. v American Export Isbrandtsen Lines, Inc.*, 37 AD2d 959 [1971]; see *Key Bank v Grossi*, 227 AD2d 841 [1996]; *Spodek v Liberty Mut. Ins. Co.*, 155 AD2d 439 [1989]).

Plaintiffs have established a prima facie case of conversion against defendant Bohari by demonstrating their legal ownership or immediate superior right to possession of the household furnishings and other personal property in the cooperative apartment, and that defendant Bohari exercised an unauthorized dominion over these items to the exclusion of plaintiffs' rights by taking and carrying away the property (see *Hamlet at Willow Creek Dev. Co.*, 64 AD3d at 113-114; cf. *Castaldi v 39 Winfield Assocs.*, 30 AD3d 458 [2006]; *Batsidis v Batsidis*, 9 AD3d 342 [2004]). In addition to the proffered evidence showing plaintiffs' rights to the personal property, defendant Bohari admitted converting the property in the apartment to her possession in a verified third-party complaint that was filed with the court.

Defendant Bohari did not submit any opposition to plaintiffs' motion, and the assertion made in the third-party complaint and as an affirmative defense in her answer that she acted in good faith and upon the advice of counsel is insufficient to defeat the motion. Neither good faith nor mistake nor ignorance of another's interest in the property is a defense to a claim of conversion (see *Wright v Bank of the Metropolis*, 110 NY 237 [1888]; *New York City Tr. Auth. v New-York Historical Socy.*, 167 Misc 2d 31, 35 [1995], *affd* 237 AD2d 419 [1997]). In any event, to the extent defendant Bohari's claim of good faith is based on a provision in James Bohari's last will and testament purporting to bequeath to Louise Bohari a life estate in the cooperative apartment and directing that upon her death the apartment be sold and the proceeds paid to defendant Bohari, said claim of good faith would fail since another provision in the same will bequeathed all of James Bohari's *household furniture* to Louise Bohari. Furthermore, inasmuch as Louise Bohari occupied the apartment for almost 11 years after her husband's death, the claim of good faith is belied by the failure to make any inquiry regarding the personal property remaining in the apartment before exercising dominion over it. Based on the above, defendant Bohari has failed to raise an issue of fact.

The part of the motion that is for summary judgment against defendant Lindenwood and the cross motion by Lindenwood for summary judgment are, respectively, denied. Negligence is the failure to exercise the degree of care that a reasonably prudent person would exercise in the same situation (*Bello v Transit Auth. of New York City*, 12 AD3d 58 [2004]). A prima facie case of negligence requires proof of a breach of a duty owed by the defendant to the plaintiff and injury proximately relating therefrom (see *Solomon v City of New York*, 66 NY2d 1026 [1985]). Whether a particular consequence of a party's act was foreseeable is relevant to a finding of proximate cause (see *Derdiarian v Felix Contr. Corp.*,

51 NY2d 308 [1980]). The issues of foreseeability and legal causation, and the question of negligence itself, generally are for the fact finder to resolve (*see Kriz v Schum*, 75 NY2d 25, 34 [1989]; *Gurmendi v Perry St. Dev. Corp.*, 93 AD3d 635 [2012]). This case does not warrant a departure from that general rule.

It is undisputed that defendant Bohari gained access to the subject apartment by having the locks on the door changed, but issues of fact exist as to whether Lindenwood allowed Bohari to have a locksmith change the locks or whether a Lindenwood employee changed the locks, and whether Lindenwood was negligent in either event. While the Lindenwood office manager stated in her affidavit and her deposition testimony that defendant Bohari hired a locksmith, she also stated that Lindenwood permitted Bohari to do so. Plaintiffs have submitted a copy of an affidavit made by defendant Bohari in which she denies retaining a locksmith and asserts that an employee of defendant Lindenwood changed the locks and removed property from the apartment at her request. Bohari's affidavit was prepared in opposition to Lindenwood's cross motion. Although the court rejected the affidavit as untimely since it was submitted after the final submission of the motion and cross motion, plaintiffs properly offered in their timely filed reply papers the copy of the affidavit that had been served on them.

To whatever degree Lindenwood allowed or facilitated defendant Bohari's access to the apartment, there are also issues of fact as to whether the cooperative corporation acted in a reasonably prudent manner under the circumstances or breached a duty of care owed to plaintiffs in the actions it took. Contrary to Lindenwood's contention, it cannot be determined as a matter of law that Lindenwood exercised due care by relying upon the documents supplied by defendant Bohari to conclude that she was entitled to access to the apartment of decedent Louise Bohari. Lindenwood's evidence shows that defendant Bohari presented its office manager with a copy of James Bohari's last will and testament and letters testamentary issued thereon to defendant Bohari, together with a letter from her attorney, dated September 26, 2009, stating that Bohari was seeking a sale of the apartment and requesting information as to Lindenwood's requirements and procedures. The documents did not include proof of ownership of the shares related to apartment 2M, and there is no evidence that Lindenwood searched its corporate records to confirm the record owner. The stock certificates issued by Lindenwood indicate a co-ownership by James and Louise Bohari of 210 corporate shares as of August 25, 1988, and an individual holding of 210 shares by Louise Bohari as of June 20, 1997. A determination of the nature of the interest held by James and Louise Bohari and as to whether the shares evidenced by the certificate in Louise Bohari's name were properly issued to her, individually, by Lindenwood in 1997 are not necessary to the resolution of the issues herein. A review of its own corporate records, however, should have shown Lindenwood the ownership interests of Louise Bohari from 1988 until her death in 2008 and identified her as the sole record owner of the shares at the

time of her death. Under all of the circumstances, factual issues exist as to whether Lindenwood acted reasonably in response to defendant Bohari's requests, whether the corporation was negligent in failing to make further inquiry, and whether plaintiffs' losses were a foreseeable result of Lindenwood's acts or omissions.

Defendant Lindenwood's cross claim against defendant Bohari seeks indemnification and contribution. Inasmuch as any liability imposed on Lindenwood herein will not be vicarious liability but will be for its own negligent acts or omissions, Lindenwood is not entitled to indemnification (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]; *Mas v Two Bridges Assoc.*, 75 NY2d 680, 690 [1990]; *D'Ambrosio v City of New York*, 55 NY2d 454, 460 [1982]). Any determination on the claims for contribution must await an apportionment of fault by the trier of fact (CPLR 1401; *see generally Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21, 23 [1985].)

Accordingly, the branch of plaintiffs' motion for an order striking the pleadings is denied. However, to the extent that defendant Bohari has not yet appeared for a deposition in this case, and to the extent that plaintiffs' do not now waive the right to depose her, defendant Bohari shall appear for deposition within 30 days after service upon her of a copy of this order with notice of entry, at a time and place mutually agreed upon. Failure by defendant Bohari to appear for an EBT within that time frame will preclude her from testifying at trial with respect to the issue of damages. The branch of the motion that is for summary judgment against defendant Bohari on the issue of liability for conversion is granted as to the items identified in plaintiffs' bill of particulars. The issue of damages will be determined at the trial of the remaining cause of action. The branch of the motion that is for summary judgment against defendant Lindenwood, and the cross motion by Lindenwood are, respectively, denied.

Dated: April 25, 2012

J.S.C.