

Ovcharenko v 65th Booth Assocs.

2013 NY Slip Op 34014(U)

October 17, 2013

Supreme Court, Queens County

Docket Number: 16342/11

Judge: Janice A. Taylor

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Short Form Order

ORIGINAL

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR , IAS Part 15
Justice

-----x
KHRYSTYNA OVCHARENKO

Plaintiff(s),

Index No.: 16342/11

Motion Date: 5/24/13

- against -

Motion Cal. No.:
78, 79

Motion Seq. No:
1, 2

65TH BOOTH ASSOCIATES, 65-38 OWNERS
CORP., RAMESH SARVA, Individually and
OMAR GOKSELL,

Defendant(s).

-----x

FILED
OCT 22 2013
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 - 28 read on this motion by the plaintiff for an order granting summary judgment on the issue of liability and dismissal of defendants Ramesh Sarva d/b/a 65th Booth Associates, Ramesh Sarva, Individually and Omar Goksell's counterclaims; a cross-motion by defendants Ramesh Sarva d/b/a 65th Booth Associates, Ramesh Sarva, Individually and Omar Goksell for an order granting summary judgment and dismissing the complaint against them; and a motion by defendant 65-38 Owners Corp. for an order granting summary judgment and dismissal of the complaint and cross-claims against it.

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Upon the foregoing papers it is ORDERED that the motions and cross-motion are considered together and decided as follows:

This is an action for wrongful eviction, conversion and intentional infliction of emotional distress. In her complaint,

** MODIFIED - SEE APPELLATE ORDER FILED 10-13-15*

plaintiff alleges that she was a sub-tenant at a cooperative apartment located at 65-38 Booth Street, Apt. 3A, Rego Park, New York, that defendant 65-38 Owners Corp. ("65-38 Owners") is the owner of the building, that defendant Ramesh Sarva d/b/a 65th Booth Associates ("65th Booth Associates") is a shareholder/tenant and sub-leased the apartment to plaintiff and that she negotiated said lease with defendant Ramesh Sarva ("Sarva"). Plaintiff further alleges that, on or about April 15, 2011, she was wrongfully evicted from the subject apartment, that the locks were changed and that she was denied access to the premises. Finally, plaintiff asserts that, when she was ultimately allowed access to the apartment, her personal possessions previously housed inside were gone and have never been returned to her.

This action was commenced on July 12, 2011 by the filing of a summons and complaint. Defendant 65-38 Owners Corp. joined issue by service of a verified answer dated August 9, 2011. Defendants Ramesh Sarva d/b/a 65th Booth Associates, Ramesh Sarva, individually, and Goksell Omer s/h/a Omar Goksell ("Omer") joined issue by service of a verified amended answer with counterclaims dated August 26, 2011¹.

Plaintiff now moves, pursuant to CPLR §3212, for summary judgment on the issue of liability and dismissal of the defendants 65th Booth Associates, Sarva and Omer's counterclaims. Defendants 65th Booth Associates, Sarva and Omer cross-move, pursuant to CPLR §3212, for summary judgment and dismissal of the complaint against them. Defendant 65-38 Owners Corp. also moves, pursuant to CPLR §3212, for summary judgment and dismissal of the complaint and counterclaims against it.

It is well-settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (*see Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]). Failure to make such a showing requires denial of the motion.

CPLR §3212(b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding as a matter of law, that the cause of action or defense has no merit. The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant (*see, Grivas*

¹ It is noted that the parties submit only a verified amended answer of defendants Ramesh Sarva d/b/a 65th Booth Associates, Ramesh Sarva, Individually and Omar Goksell. No verified answer has been submitted with these motions and cross-motion, nor has same been filed with the Queens County Clerk.

v. Grivas, 113 A.D.2d 264, 269 [2d Dept. 1985]; Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp., 76 A.D.2d 68 [4th Dept. 1980]; Parvi v. Kingston, 41 N.Y.2d 553, 557 [1977]).

Defendant 65-38's Motion for Summary Judgment

Defendant 65-38 Owners now moves for summary judgment and dismissal of the complaint against it. The defendant asserts that it had no involvement with the eviction of the plaintiff. In support of this motion, defendant 65-38 Owners submits, *inter alia*, the pleadings, the Verified Bill of Particulars, the deposition transcripts of the parties, a copy of the relevant sub-lease agreement.

It is uncontested that defendant 65-38 Owners was not a party to plaintiff's sublease with defendant 65th Booth Associates. In his deposition, defendant Sarva testified that he received information from an agent of defendant 65-38 Owners that, on or about April 15, 2011, plaintiff vacated the apartment in violation of the building's rules, that the movant intended to fine defendant Sarva or 65th Booth Associates for plaintiff's move and that, upon receiving this information, he deemed plaintiff to have abandoned the apartment and had the locks to the property changed. Defendant Sarva further testified that it was defendant Omer, an employee of 65th Booth Associates, who physically changed the lock.

In opposition to the instant motion, both plaintiff and defendants Sarva, 65th Booth Associates and Omer aver that defendant 65-38 Owners may be responsible for plaintiff's damages because it was 65-38 Owners who wrote a letter advising of plaintiff's alleged move. However, none of the opposing parties states that defendant 65-38 Owners actually changed the locks or directed defendants Sarva, 65th Booth Associates or Omer to do so. Additionally, no party has presented evidence that defendant 65-38 Owners took any actions to inflict mental distress upon the plaintiff or to convert her property for its personal use. Thus, no evidence has been presented as to any damages incurred by the plaintiff caused by the actions, or inactions, of defendant 65-38 Owners. Accordingly, defendant 65-38 Owners' motion for summary judgment is hereby granted and the complaint and any cross-claims are dismissed against this defendant.

Plaintiff's Motion for Summary Judgment

Plaintiff also moves, pursuant to CPLR §3212, for summary judgment on the issue of liability on her first, second and third causes of action. Plaintiff also seeks dismissal of defendants 65th Booth Associates, Sarva, individually, and Omer's counterclaims.

a. Plaintiff's First Cause of Action

Plaintiff's first cause of action states that plaintiff was unlawfully evicted from her apartment. In order to prevail on an action for wrongful eviction pursuant to New York Real Property Actions and Proceedings Law ("RPAPL") §853, a plaintiff must prove that he or she was "disseized, ejected or put out of real property in an unlawful manner or that, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means" (RPAPL §853).

In the instant action, plaintiff asserts that, in April, 2011, the locks to her apartment were changed by the defendants and that she was denied access to the subject premises. In support of her motion, plaintiff relies on the pleadings and on the deposition of defendant Sarva. A review of the subject sublease reveals that plaintiff was entitled to possession of the apartment from September 1, 2010 to August 30, 2011. In his deposition, defendant Sarva testified that, after he was informed by defendant 65th Booth Associates that plaintiff had vacated the building, he directed defendant Omer to change the locks to the apartment. Defendant Sarva also testified that, he never personally received notice from plaintiff that she intended to surrender the apartment, nor did he ever commence an action to evict the plaintiff from the apartment. Moreover, defendants submit no evidence that defendant Omer, acting as defendants 65th Booth Associates' agent, was not the person who changed the lock and physically dispossessed plaintiff from the property. Thus, plaintiff has established that she was entitled to possession of the apartment and that she was wrongfully deprived of possession of the apartment by defendants 65th Booth Associates and Sarva and Omer. Accordingly, that portion of plaintiff's motion which seeks summary judgment on the issue of liability of plaintiff's first cause of action is granted as against defendants 65th Booth Associates and Sarva and Omer.

b. Plaintiff's Second Cause of Action

Plaintiff's second cause of action states that plaintiff has suffered emotional distress as a result of defendants' actions. New York courts have ruled that a plaintiff in an action for intentional infliction of emotional distress must prove that an extreme and emotional conduct the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; causation, and severe emotional distress (see, *Howell v. New York Post Co., Inc.*, 81 NY2d 115 [1993]; *Klein v. Metropolitan Child Protective Services, Inc.*, 100 AD3d 78 [2d Dept. 2012]). The behavior which causes the emotional distress need not be a specific

act, but must be an action, or series of actions, which is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Howell v. New York Post Co., Inc.*, *supra*; *Philip v. Urgent Home Care*, 103 Ad3d 786 [2d Dept. 2013]; *Cenxon-Decarlo v. Mount Sinai Hospital, et al.*, 101 AD3d 924 [2d Dept. 2012]).

In the instant action, plaintiff has failed to demonstrate that the actions of the defendants were so outrageous or extreme that they went beyond the bounds of decency (see, *Howell, supra*). Plaintiff has also failed to demonstrate that no triable issues of fact remain as to the extent of her emotional distress. Thus, the plaintiff has failed to demonstrate her entitlement to summary judgment on her second cause of action. Accordingly, that portion of the instant motion which seeks summary judgment on plaintiff's second cause of action is denied.

c. Plaintiff's Third Cause of Action

Plaintiff's third cause of action alleges that the defendants unlawfully converted her property for their own use. The tort of conversion has been defined as the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights" (*State of New York v. Seventh Regiment Fund, Inc.*, 98 NY2d 249 [2002] quoting *Employee's Fire Insurance Company v. Cotton*, 245 NY 102 [1937]).

In her complaint, plaintiff alleges that, prior to the alleged unlawful eviction, she stored her personal possessions inside of the apartment, that she did not remove these possessions, that she was denied access to the apartment and, upon having her access to the property restored, her personal possessions were all missing. In opposition to the instant motion, defendants Sarva, 65th Booth Associates and Omer rely on the depositions of defendant Sarva and of non-party witness Mohamed Elgoarany. In his deposition, Mr. Elgoarany states that the subject apartment was empty when he entered in May, 2011. In his deposition, defendant Sarva states that, due to his belief that plaintiff had already vacated the apartment, he directed defendant Omer, an employee of defendant 65th Booth Associates to secure the apartment and to change the locks. Thus, triable issues of fact remain as to the whereabouts of plaintiff's possessions and as to the actions taken regarding these possessions by the defendants. Accordingly, that portion of plaintiff's motion which seeks summary judgment on her third cause of action for conversion is denied.

Defendants Sarva, 65th Booth Associates and Omer's Cross-Motion for Summary Judgment

Defendants Sarva, 65th Booth Associates and Omer's cross-move for summary judgment and dismissal of the complaint against them. Pursuant to CPLR §3212(a), if no date is set by the court, a summary judgment motion must be made no later than 120 days after the filing of the Note of Issue, except with leave of court with good cause shown (see, *Miceli v State Farm Mut. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648 [2004]; *Rivera v Toruno*, 19 AD3d 473 [2005]; *Thompson v Leben Home for Adults*, 17 AD3d 347 [2005]).

Plaintiff in this action filed her Note of Issue on November 29, 2012. Thus, the parties' time to move for summary judgment expired on or about March 29, 2013. A review of the instant cross-motion reveals that it contains no affidavit of service, that the affidavit of defendant Ramesh Sarva contained therein is dated May 14, 2013 and that the cross-motion was filed with this court on May 15, 2013. In reply to the cross-motion, defendants' counsel requests that the instant application be deemed timely. However, this court will not consider a request made for the first time in a reply affirmation. Accordingly, defendants Sarva, 65th Booth Associates and Omer's cross-motion seeking summary judgment is denied as untimely.

Plaintiff's Motion to Compel Discovery and Defendants Sarva, 65th Booth Associates and Omer's Cross-Motion to Compel Discovery

Plaintiff and defendants Sarva, 65th Booth Associates and Omer's now move and cross-move, respectively, for an order, pursuant to CPLR §3124, compelling the production of outstanding discovery. However, in order to prevail on discovery-related motions, and cross-motions, an affirmation of good faith specifically delineating the conversations between counsel in an attempt to comply with the above directive is required. The affirmation must indicate the time, place and nature of the consultations between attorneys, the issues discussed, and what resolutions, if any were made (see, 22 N.Y.C.R.R. §202.7 [a], [c]). No such affirmation is annexed to the instant motion or cross-motion. Thus, those portions of plaintiff's motion and defendants Sarva, 65th Booth Associates and Omer's cross-motion which seek to compel discovery are denied. Accordingly, it is,

ORDERED, that defendant 65-38 Owners Corp.'s motion for summary judgment is granted. The complaint and all cross-claims are hereby dismissed as against this defendant. It is further,

ORDERED, that plaintiff's motion for summary judgment on the

issue of liability on her first cause of action is granted as against defendants Sarva, 65th Booth Associates and Omer. It is further,

ORDERED, that the portion of plaintiff's motion which seeks summary judgment on her second and third causes of action and defendant Sarva, 65th Booth Associates and Omer's cross-motion for summary judgment and dismissal of the complaint are denied in their entirety. Finally, it is,

ORDERED, that those portions of plaintiff's motion and defendants Sarva, 65th Booth Associates and Omer's cross-motion which seek to compel the production of outstanding discovery are also denied. The foregoing is the decision and order of this court.

Dated: October 17, 2013



JANICE A. TAYLOR, J.S.C.

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* MODIFIED - SEE
APPELLATE ORDER
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