Schwartz v Hotel Carlyle Owners Corp.
2014 NY Slip Op 32114(U)
August 7, 2014
Sup Ct, New York County
Docket Number: 150229/2012
Judge: Ellen M. Coin

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MURRAY SCHWARTZ, Index No. 150229/2012

Plaintiff,

-against-

HOTEL CARLYLE OWNERS CORPORATION, THE CARLYLE LLC, THE CARLYLE, A ROSEWOOD HOTEL, NEW WORLD DEVELOPMENT CO., ALEXANDRA E. TSCHERNE, and GREG DINELLA,

Defendants.

HOTEL CARLYLE OWNERS CORPORATION, Index No. 157070/2012

Plaintiff,

-against-

MURRAY SCHWARTZ,

Defendant.

ELLEN M. COIN, A.J.S.C.:

In the first action listed above, plaintiff Murray Schwartz (Schwartz), a tenant-shareholder of Hotel Carlyle Owners Corporation (Hotel), alleges that notwithstanding major damage to his apartment, the defendants engaged in a cover-up of the extent of the damage and destroyed his personal property in the apartment. As originally brought, the complaint pled six causes of action.

On September 12, 2012, this Court issued a decision and order granting in part defendants' motion to dismiss the complaint, leaving intact the First Cause of Action for breach of

contract as against the defendant Hotel only; the Second Cause of Action for breach of fiduciary duty only as against defendant Alexandra E. Tscherne (Tscherne); the Fourth Cause of Action for conversion; and the Fifth Cause of Action for trespass (except for the dismissed punitive damages claim). Defendants now move for summary judgment dismissing the balance of the complaint.

The underlying facts

It is uncontested that on or about July 19, 2011, water entered plaintiff's apartment through no fault of his own[1], causing major damage to the ceilings, walls, wall coverings, and floors. Nor do the parties dispute that as a result of the leak, plaintiff's apartment suffered mold, or that removal of asbestos from the walls and flooring was required.

Plaintiff claims that although Tscherne, the Hotel's Director of Residences, notified him of the existence of the leak on or about July 19th, she understated the damage, telling him that there was a "small water leak" in the apartment above that of Schwartz, causing a "small stain at the corner of [his] ceiling." (Affidavit of Murray Schwartz, sworn to March 7, 2014, ¶6 at 3).

Following discovery of the leak, the Hotel's Director of Engineering had painters remove wallpaper from Schwartz'

[1]Schwartz, who maintains other residences in California and Amagansett, New York, was not at the hotel at the time of the leak.

apartment, and Tscherne had the carpet removed and sent to an antique rug specialist for cleaning and storage. On August 3, 2011, the Hotel retained 711 NY Painting and Decorating Company Incorporated (NY Painting) to repair the leak and to estimate the cost to replace and install the wall covering damaged by the leak.

On August 11, 2011, Tscherne, responding to an email from Schwartz, advised him that within the past two days, wallpaper in the living room had begun to show signs of damage "here and there." She also told him that the ceiling and walls were still drying and would take another week and a half to two weeks to dry. Since Tscherne's initial report was of a "small water leak," Schwartz became suspicious that she had misrepresented the extent of the damage. The following day, August 12, 2011, Schwartz' friend, Tina Schaberg, inspected the apartment at his request. Schaberg found plaster ankle deep on the floor, furniture removed, wet drapery and furniture thrown on the bed, and the balcony door off its frame. Schwartz immediately notified his insurer, Chubb, of the incident, and directed Tscherne to stop all work on the apartment.

Thereafter, in October or November, 2011, All Pro Cleaning and Restoration Services, Inc. (All Pro), retained by Chubb for Schwartz, commenced its work in the apartment to mitigate the damage caused by the leak. Following mitigation, including

remediation of mold and asbestos, All Pro continued with restoration work in October 2012.

Discussion

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to summary judgment as a matter of law. (CPLR §3212; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). Once the movant has met its obligation, the burden shifts to the party opposing the motion to demonstrate either that material issues of fact exist or that even undisputed facts do not entitle the movant to judgment as a matter of law. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d at 562). The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). The motion must be denied if there is any doubt as to the existence of a triable issue of fact. (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Breach of contract

The elements of a claim for breach of contract include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages. (*Harris v*

Seward Park Hous. Corp., 79 AD3d 425, 426 [1st Dept 2010]). In this case there is no issue as to the existence of the contract (the Proprietary Lease between plaintiff and the Hotel), and plaintiff alleges his performance under the Lease. Plaintiff claims that the Hotel breached provisions of the Proprietary Lease, including breach of its duty to maintain and operate the building as a first class residence; breach of the provision for quiet enjoyment; breach of its covenant that if the apartment were damaged as a result of the Hotel's acts, to effect repairs or replacement at its own expense; and breach of the provision for abatement of rent in the event that the apartment was rendered wholly untenantable.

The Hotel contends that it is not in breach, but attempted to do everything that it was required to do under the Proprietary Lease. The Hotel contends that as it made good faith efforts to meet its contractual obligations and was only prevented by Schwartz from completing them, this cause of action should be dismissed. Alternatively, it argues that Schwartz cannot show that he was damaged, in that he has been fully compensated for all losses by Chubb.

Schwartz predicates the first part of his claim for breach of contract upon the inadequacy of Tscherne's initial notice to him. He contends that her advice to him failed to comply with the notice requirement in the Proprietary Lease (Lease, Ex. E to

the affidavit of James F. Burke dated January 24, 2014, ¶1.1 at 5). However, the adequacy of Tscherne's notice is not itself an issue, as the requirement for notice under this provision is on the Lessee (Schwartz) and not on the Lessor (the Hotel). To the extent that the claim for breach of contract is predicated on inadequacy of notice, it fails.

To establish a breach of the covenant of quiet enjoyment, a tenant must show either an actual or constructive eviction. (*Grammar v Turits*, 271 AD2d 644, 645-646 [2d Dept 2000], citing *Herstein Co. v Columbia Pictures Corp.*, 4 NY2d 117, 121 [1958]). A constructive eviction occurs where the Landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the leased premises. (*Id.*, citing *Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970]).

Schwartz alleges that upon discovering the leak, the Hotel exacerbated the situation by, *inter alia*, destroying his personal property. As a result, he urges, he was effectively evicted from his own apartment. Although it is the movant, the Hotel fails to counter this contention. Thus, Schwartz has raised issues of fact as to whether the Hotel's alleged wrongful acts substantially and materially deprived him of the beneficial use and enjoyment of the apartment. (*Bostany v Trump Org. LLC*, 88 AD3d 553, 554 [1st Dept 2011]; *Granirer v Bakery, Inc.*, 54 AD3d 269, 272 [1st Dept 2008]).

Schwartz concedes that he seeks no damages from the Hotel for amounts paid by his insurer, Chubb. Instead, he seeks consequential damages for his loss of use and enjoyment of the apartment, the diminution in value of the apartment, the cost of items he reported stolen for which he will receive no compensation from Chubb, and the cost to redecorate the apartment.

The Hotel correctly notes that paragraph 1.3(a) of the Proprietary Lease requires only that it repair or replace the walls, floors, ceilings and pipes of the apartment, but specifically exempts that Hotel from responsibility for the contents of the apartment, including fixtures, furnishings, furniture or decorations. Thus, to the extent that Schwartz seeks consequential damages for such items pursuant to the Proprietary Lease, he is barred from doing so under this provision.

As to Schwartz' claim for loss of use, the Hotel notes that he has received amounts from Chubb, his insurer, in compensation. In addition, the Hotel abated Schwartz' obligation to pay maintenance through April 2012. However, Schwartz claims that it was the Hotel's refusal to permit All Pro to continue its work until October 2012 that prolonged his constructive eviction from the apartment. He alleges that additional work still remains to be done, including restoration of crown molding, installation of

parquet flooring; purchase and installation of wallpaper; and the ordering and delivery of furnishings to replace those damaged. Further, he claims that the stress of the events at the Carlyle precludes his ever returning there, supported by the undated and unattested letter of his physician. (Ex 22 to the Schwartz Aff.).

To the extent that Schwartz claims constructive eviction based on the alleged danger to his physical health, he has failed to support it with affidavit proof. Thus, this aspect of his breach of contract claim is dismissed. However, his claim that the Hotel impeded his ability to make the apartment habitable raises an issue of fact as to the extent of his damages for his claim of breach of the covenant of quiet enjoyment and breach of the provision for abatement of rent for the period from May 2012 to a date after October 2012, precluding summary judgment on this aspect of his breach of contract claim.

Breach of fiduciary duty

The elements of a cause of action to recover damages for a breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct. (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]).

In support of his contention that defendant Tscherne, the Hotel's Director of Residences, owed him a fiduciary duty, Schwartz alleges that they had "a long time close personal

relationship...." (Schwartz Aff ¶6 at 3). He claims that he and Tscherne socialized frequently outside the context of her employment at the Hotel; that she would stay with him at his beach house in the Hamptons for a week at a time, four to five times per summer over a five-year period; that she visited him at his California residence; and that they had a sexual relationship. (Schwartz Deposition at 109-111, 115, 118-119; Ex H to Burke Aff.). However, Schwartz concedes that Tscherne had to ask his permission in order to use the beach house in his absence, that she had no access to his personal financial information, no power of attorney or access to his bank account, and was never entrusted with his money or property. (Schwartz Dep. at 114-116, 124; Ex H to Burke Aff).

"A fiduciary relationship...exists only when a person reposes a high level of confidence and reliance in another, who thereby exercises control and dominance over him [or her]." (*People v Coventry First LLC*, 13 NY3d 108, 115 [2009]; *Marmelstein v Kehillat New Hempstead*, 11 NY3d 15, 21 [2008][two essential elements of a fiduciary relation are de facto control and dominance]). "[I]t is essential that a plaintiff articulate specific facts that will allow a court to distinguish a viable claim of breach of fiduciary duty from nonactionable seductive conduct." (*Marmelstein* at 21-22). Schwartz fails to show that Tscherne was in control of him or that she was dominant over him

in any respect. Indeed, his deposition testimony suggests the opposite: that it was he who was the party in control, allowing her, for example, to go to his beach house only in his presence or with his permission. (Schwartz Dep at 114; Ex H to Burke Aff).

Moreover, the hallmark of a fiduciary relationship is "undivided and undiluted loyalty." (*Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989]). At all times in their relationship Schwartz knew that Tscherne was employed by the Hotel as its Director of Residences. As a sophisticated businessman[2], Schwartz had to know that however close their personal friendship had grown, Tscherne's duty of loyalty was to the Hotel as her employer. (*Duane Jones Co. v Burke*, 306 NY 172, 188 [1954]; *cf. Holzer v Mondadori*, 40 Misc3d 1233(A) *6 [Sup Ct, New York County 2013]["Plaintiffs are wealthy, sophisticated individuals who understand that counterparties to a transaction are not fiduciaries because their economic interests are, by definition, not aligned."]). Schwartz fails to allege facts to show that Tscherne had no such duty to her employer, but, instead, only to him. Having failed to establish the existence of a fiduciary relationship, plaintiff's Second Cause of Action for breach of fiduciary duty falls.

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[2]Schwartz is the former President and CEO of Merv Griffin Enterprises (Compl., ¶16 at 5; Ex. A to Burke Aff.).

Conversion and trespass

"The tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner." (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]).

A trespass is an intentional physical entry onto the property of another without justification or permission. (*Woodhull v Town of Riverhead*, 46 AD3d 802, 804 [2d Dept 2008]; *Corsello v Verizon NY, Inc.*, 77 AD3d 344, 357 [2d Dept 2010]).

Plaintiff's allegations in support of his claims for conversion and trespass raise myriad factual issues requiring a trial. He alleges the theft of specific items of property within the apartment at a time when the Hotel was concededly on the scene to investigate and to begin to attempt to remedy the leak. He alleges that defendants moved furniture, drapery and personal effects, throwing them into his bedroom while still soaking wet, thus further destroying and damaging them, and leaving them susceptible to mildew. Further, he shows that wallpaper was removed from his apartment without notice to him, and that defendant Tscherne stated that she did not want plaintiff to know the extent of the damage. While Schwartz has not quantified a monetary value for the missing/destroyed property, the issue of its value is one of the extent of damage, not the existence of

damage. Thus, he has shown facts sufficient to require a trial of his claim for conversion.

Regarding his claim for trespass, Schwartz alleges that the Hotel wrongfully admitted Michael Schwartz to his apartment in 1998, an incident which the Hotel admits occurred. However, the other facts he offers in support of his claim that the individual defendants were renting out his apartment in his absence (cigarette butts on the patio; Tscherne's inquiries as to when he would be in residence) are too insubstantial to require a trial of this issue, and the Michael Schwartz incident, without more, is barred by the statute of limitations in the absence of any proof that such conduct continued (CPLR §214).

However, Schwartz' other allegations circumstantially demonstrate that defendants did not have his permission to be on the premises for the purpose of destroying his apartment. These allegations are sufficient to require a trial of whether defendants are liable for trespass.

In light of the foregoing, it is

ORDERED that the motion for summary judgment is granted to the extent of dismissing (1) so much of the First Cause of Action as is predicated on (a) the inadequacy of notice, (b) damage to the contents of plaintiff's apartment, and (c) danger to plaintiff's physical health, and (2) the Second Cause of Action for breach of fiduciary duty; and such causes of action are

hereby dismissed; and the balance of the motion is denied.

Dated: August 7, 2014

ENTER:

Ellen M. Coin, A.J.S.C.