

**Tunne v Halpern**

2014 NY Slip Op 32753(U)

October 21, 2014

Sup Ct, New York County

Docket Number: 450873/2014

Judge: Peter H. Moulton

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
PRESENT: Hon. Peter H. Moulton PART 57  
*Justice*

MARK TUNNE

INDEX NO. 450873/2014

MOTION DATE \_\_\_\_\_

v.

MOTION SEQ. NO. 001

GERALD P. HALPERN, ESQ., -  
EXECUTOR FOR THE ESTATE OF  
FRED ZEISS, et. al

MOTION CAL. NO. \_\_\_\_\_

Cross-Motion:  Yes  No

Defendant City Marshal Thomas Bia ("Bia") moves to dismiss plaintiff's complaint as against him on the following grounds: 1) failure to state a cause of action based on the existence of a warrant of eviction with an indemnity provision signed by Bia and Landlord Gerald P. Halperin ("Landlord"), and 2) on the basis of the doctrine of qualified immunity.

**BACKGROUND**

The Civil Court of the City of New York ("Civil Court") issued a warrant of eviction commanding Bia, a City Marshal, to remove plaintiff from an apartment located at 225 East 10th Street, Apt. 5A New York, NY 10003 ("the apartment"). Plaintiff was subsequently served with notices of eviction dated May 15, 2010, January 8, 2013, and April 27, 2013. Although plaintiff admits to receiving the notices, plaintiff states that he vacated the apartment on January 16, 2013 based on the January 8, 2013 notice of eviction, and because when he called the Landlord after leaving, plaintiff claims that he was told that the Landlord "would arrest [p]laintiff for criminal trespass if [p]laintiff was discovered inside the building" where he had previously resided. Plaintiff subsequently discovered that Bia did not execute the

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

warrant of eviction on January 16, 2013, the date that he vacated the apartment. Plaintiff asserts that Bia failed to notify plaintiff that the apartment had not been pad-locked on January 16, 2013, and therefore that plaintiff could have still resided there between January 16, 2013 and April 27, 2013. On May 9, 2013, Bia took an inventory of the belongings in the apartment before leaving it, locking the door behind him. Plaintiff alleges that plaintiff's belongings were either damaged during or after Bia executed the warrant of eviction. Plaintiff also claims that Bia performed an improper inventory omitting several items while executing the warrant of eviction and, along with the other defendants, may have converted various items belonging to plaintiff.

#### ARGUMENTS

In his complaint plaintiff states that Bia failed to inform plaintiff that the apartment was not pad-locked between January 16, 2013 and April 27, 2013, a period in which plaintiff resided at a veteran's homeless shelter, but could have resided in the apartment. Moreover, in his complaint plaintiff states that Bia failed to follow proper procedure when taking an inventory of plaintiff's belongings left within the apartment. Plaintiff further states that Bia, along with the other defendants, may have lost, destroyed, or converted various items within the apartment belonging to plaintiff.

Bia, in support of his motion, states that he bears no responsibility for a tenant's property when, as in here, he performed a legal possession. Bia cites The New York City Marshals Handbook of Regulations governing the conduct of city marshals ("Marshals Handbook"). As Bia points out, the Marshals Handbook makes a distinction between a marshal's duties during an eviction and a legal possession. In an eviction, both the tenant and his personal property are removed from the premises, whereas in a legal possession the tenant is removed from the premises and his property remains under the control and care of the landlord as bailee for the tenant (*see* Marshals

Handbook, Chapter 4, § 6-4). To deliver legal possession, a marshal does not remove personal property but rather changes the locks to the premises and obtains the signature of the landlord on the back of the warrant, acknowledging possession (*id.*).

Section 6-4 goes on to state as follows: "If the landlord indicates that he desires mere possession of the property rather than having the premises delivered to him in 'broom clean' condition, upon giving possession of the tenants premises to the landlord, the landlord or his representative must endorse...the warrant" (*id.*). Such an endorsement contains the following language: "Possession of the tenants premises with the contacts intact is hereby acknowledged. The landlord accepts responsibility for all the property on the premises, releases the Marshal from liability, and agrees to save the Marshal harmless from any action resulting from the enforcement of this warrant" (*id.*). Based on the aforementioned provisions, Bia states that he cannot be held liable for any property within the apartment that was either lost, destroyed, or converted. Bia further states that he performed a proper inventory of plaintiff's belongings. Finally, Bia states that as a city marshal, he is absolved from suit by the doctrine of qualified immunity.

#### DISCUSSION

Bia seeks to dismiss plaintiff's complaint based on plaintiff's failure to state a cause of action. Although not specifically mentioned by Bia, plaintiff maintains in reply that the motion cannot be granted because Bia had a duty to inform plaintiff about any delay or cancellation in executing the warrant of eviction. Although juries determine whether and to what extent a particular duty was breached, it is for the courts to determine whether any duty exists (*see Espinal v. Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002]). When deciding whether or not a duty exists, the Court of Appeals has emphasized an approach that balances a number of policy considerations and factors, including reasonable expectations of the parties and society generally, the

proliferation of claims, and the likelihood of unlimited liability (*see Gilson v. Metropolitan Opera*, 5 NY3d 574 [2005]). In applying those principles in *Gilson*, the Court held that a theater operator had no duty to escort obviously infirm patrons to their seats to protect other patrons from injury, since imposing such a duty would place undue burdens beyond the limits of the duty to maintain the premises in a reasonably safe condition (*id.* at 580).

Under the Marshals Regulations a marshal must serve a tenant with a notice of eviction before an eviction can take place (*see Marshals Handbook*, Chapter 4, § 5-1). A marshal must wait at least three (3) business days after service of the notice of eviction before evicting the tenant (*id.*). If a notice of eviction is mailed, the tenant may be evicted on the sixth business day following the date on which the notice was mailed (*id.*). The notice itself must also be dated, and the date of the notice may not be earlier than the mailing date (*see Marshals Handbook*, Chapter 4, § 5-3). If, after the marshal has served the notice of eviction, the eviction or legal possession is not conducted within thirty days of the earliest date on which it could have been conducted, or if a court temporarily stays the eviction and does not expressly waive the requirement of a new notice, the marshal, before proceeding with an eviction, must send a new notice of eviction, by regular mail (*see Marshals Handbook*, Chapter 4, § 5-4). However, the Marshals Handbook has no provision stating that marshals are required to notify tenants about whether a warrant of eviction has been executed on a particular date. In fact the only party a marshal is required to notify in such a circumstance is the City of New York Department of Investigation ("Department"), not a tenant (*see Marshals Handbook Regulations*, Chapter 4, § 6-1).

Here, plaintiff received all the notices he was entitled to receive. Plaintiff's argument that Bia was also required to notify him that the warrant of eviction was not executed between January 16, 2013 and April 27, 2013 is unpersuasive. Plaintiff cites no case or statute imposing such a requirement. Plaintiff also could have easily

ascertained this information himself. In fact, the Department encourages tenants to contact marshals to confirm eviction dates prior to the execution of a warrant (*see* City of New York Department of Investigation Frequently Asked Questions, <http://www.nyc.gov/html/doi/html/marshals/evictions.shtml> [accessed Oct. 20, 2014]). Here, plaintiff admits to calling the Landlord after he vacated the apartment, and being told that the Landlord “would arrest [p]laintiff for criminal trespass if [p]laintiff was discovered inside the building” where he had previously resided. Plaintiff states that plaintiff interpreted that to mean that the warrant of eviction had been executed and that he was no longer able to reside at the apartment. Plaintiff does not, however, state that he called Bia to confirm the information that he had received. Plaintiff was capable of calling Bia prior to and after vacating the apartment in order to confirm that the warrant had been executed. The fact that plaintiff failed to do so is not a sufficient reason for this court to impose an additional duty on Bia when no such duty presently exists. The court therefore finds that Bia had no duty to inform plaintiff about a cancellation or delay in executing the warrant of eviction. To impose an additional notification duty on marshals, as plaintiff suggests, would be both inappropriate and impractical. Moreover, as in *Gilson*, it would impose an undue burden on marshals beyond the limits of what necessarily must be done in order to ensure that they perform the requirements of their job in an able fashion.

Bia maintains that plaintiff’s complaint fails to state a cause of action regarding improper inventory procedures and losing, destroying, or converting various items within the apartment belonging to plaintiff. When considering a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR § 3211[a][7], a court must accept the facts as alleged in the complaint as true, and afford a plaintiff the benefit of every possible inference (*see Nonnon v. City of New York*, 9 NY3d 825 [2007]; *see also Korinsky v. Rose*, 129 AD3d 1307 [2d Dept. 2014]). The court may only determine whether the facts as alleged fit within any cognizable legal theory

(*Nonnon*, 9 NY3d at 827). Dismissal is warranted if the facts, as alleged, cannot provide a plaintiff with legal relief (*id.*).

Here, Bia correctly points out that he performed a legal possession. A warrant of eviction containing an endorsement was signed by the Landlord's representative, thereby rendering Bia's duties in executing the warrant to those for a legal possession rather than an eviction. Bia asserts that the Landlord accepted responsibility and liability for all property in the apartment after Bia executed the warrant and vacated the apartment, leaving it locked behind him. Bia further asserts that once that process was completed, Section 6-4 of the Marshals Handbook forestalls plaintiff from pursuing claims directly against him.

However, the fact that a marshal may seek indemnification from a landlord for lost or damaged property in an apartment after a legal possession warrant is executed does not extinguish a plaintiff's right to assert claims directly against a marshal. Here, plaintiff can assert a claim against Bia and Bia can subsequently seek indemnification from the Landlord should plaintiff prevail in the lawsuit. Thus the existence of an indemnification provision within the warrant of eviction does not forestall plaintiff from asserting claims directly against Bia.

Plaintiff's allegations also raise questions as to whether Bia may have conducted an incomplete inventory and lost, damaged, or converted plaintiff's belongings prior to locking the apartment. Indeed, paragraphs 50 through 53 of plaintiff's complaint state that when the warrant of eviction was executed, numerous items within the apartment were either unaccounted for or stolen. Such factual allegations cannot be resolved, as a matter of law, by Bia's assertions that the Landlord accepted responsibility and liability for all property in the apartment *after* Bia executed the warrant. Nothing in Bia's reply affidavit addresses plaintiff's allegations that Bia stole or destroyed plaintiff's belongings *prior* to or *after* pad-locking the apartment. As such, Bia has not presented sufficient legal support to defeat the factual issues raised

in plaintiff's complaint regarding his alleged incomplete inventory and alleged conversion.

Finally, Bia is not absolved from suit by operation of the doctrine of qualified immunity. The doctrine of qualified immunity protects government officials performing discretionary functions from suit provided that their conduct does not violate a clearly established statutory right (*see Liu v. New York City Police Dept.*, 216 AD2d 67, 68 [1st Dept. 1995]; *see also Korinsky v. Rose*, 120 AD3d 1307 [2d Dept. 2014]). The doctrine balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield those same officials from harassment, distraction, and liability when they perform their duties reasonably (*see Liu*, 216 AD2d at 68). As such, a government official, including a city marshal, may be held liable for damages negligently caused in the course of executing a valid order of seizure (*see Cla-Mil E. Holding Corp. v. Medallion Funding Corp.*, 6 NY3d 375 [2006]).

Here, Bia has not established that the doctrine of qualified immunity applies. Bia does not cite any cases in his motion papers suggesting that city marshals are entitled to qualified immunity under the circumstances presented herein. In support of his motion Bia only cites cases that generally allude to the application of the doctrine of qualified immunity to select government officials without referencing how such immunity could extend to city marshals performing evictions. Moreover, defendant fails to state what discretionary function, if any, he was exercising when executing the warrant of eviction that would entitle him to such immunity. When executing the warrant of eviction, Bia was tasked with sending notices to plaintiff informing him about the eviction, conducting an inventory of the contents of the apartment, and pad-locking the apartment to prevent plaintiff from re-entering. None of those duties required Bia to exercise a discretionary function. Nor does Bia, in his motion papers, assert that any of those functions required the exercise of discretion.

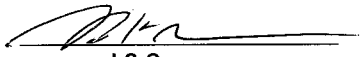
Bia was not tasked with deciding whether or not the court-ordered warrant of eviction was appropriate or any similar charge that would have required him to exercise his judgment. The doctrine of qualified immunity exists, in part, to insulate government officials from the fear of lawsuits when they have to make necessary judgment calls within their discretion as part the job that they are tasked with. Where a government official performs a function that does not require the exercise of discretion, the doctrine is inapplicable. Bia was not exercising a discretionary act when evicting plaintiff, and therefore has failed to show that the doctrine of qualified immunity absolves him from suit. Instead, factual issues exist with respect to whether or not he negligently converted plaintiff's belongings to his own use, and whether he improperly inventoried those belongings. Upon the foregoing papers, it is hereby

ORDERED that Bia's motion to dismiss plaintiff's complaint for failure to state a cause of action, is granted in part only to the extent that the portion of the complaint that alleges that Bia is liable for failing notify plaintiff as to the cancellation of the execution of the warrant of eviction or for failing to serve proper notices of eviction, is dismissed. It is further,

ORDERED that plaintiff and defendants, accompanied by principal parties to this suit, appear for a settlement conference with the court on Wednesday December 10, 2014 at 11:00 AM. The parties are directed to confirm attendance by e-mailing hkingo@nycourts.gov and afield@nycourts.gov with each party copied to the e-mail correspondence.

This Constitutes the Decision and Order of the Court.

Dated: 10/21/14  
New York, New York

  
J.S.C.  
PETER H. MOULTON

- 1. Check one: .....  Case Disposed  Non-Final Disposition
- 2. Check as Appropriate: ..... Motion is:  Granted  Denied  Granted in Part  Other