

Harding v Cowing

2015 NY Slip Op 30701(U)

April 30, 2015

Supreme Court, New York County

Docket Number: 157506/14

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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GILLIAN R. HARDING,

Plaintiff,

-against-

Index No.
157506/14

ESTATE OF MARIE A. COWING and FIRSTSERVICE
RESIDENTIAL NEW YORK, INC.,

Defendants.
-----x

DONNA MILLS, J. :

Defendants Estate of Marie A. Cowing (Estate) and FirstService Residential New York, Inc. (FirstService) move, pursuant to CPLR 3211 and 3212, for the dismissal of all causes of action in the complaint against FirstService, for the dismissal of the third and fifth causes of action against Estate, and for summary judgment granting Estate's first counterclaim as to liability.

This is a landlord and tenant action. Plaintiff is a former tenant of the premises owned by Estate located at 138 East 78th Street, New York, New York. Plaintiff leased the premises on August 12, 2013. In her complaint, plaintiff alleges that since the beginning of the tenancy, Estate failed to deliver basic services and make necessary repairs pursuant to the lease. Subsequently, plaintiff refused to pay rent. Estate thereafter commenced a summary non-payment eviction proceeding in Civil Court, New York County. Pursuant to a stipulation of settlement, the parties agreed that plaintiff would vacate the premises, escrow the rent due and commence, without prejudice, an action against defendants in this court. Estate claims that FirstService is its managing agent, an assertion disputed by plaintiff.

The complaint includes five causes of action. The first cause of action alleges breach of

the warranty of habitability; the second cause of action alleges violation of section 234 of Real Property Law; the third cause of action alleges breach of quiet use and enjoyment; the fourth cause of action seeks a rent abatement; and the fifth cause of action seeks punitive damages on the ground that the failure to repair and provide proper services resulted in the infliction of severe emotional distress. All of the causes of action are brought against both defendants.

Defendants move to dismiss all the causes of action against FirstService because they contend that it is a disclosed agent of Estate, and not a party to the lease. Defendants submit a copy of the lease, which expressly provides that Estate is the owner “c/o FirstService Residential New York, Inc. as Agent.” The lease was executed by plaintiff as tenant and by “B CKIL as agent” in the owner space. It is not clear what or who B CKIL is, although this entity executed the lease several days after plaintiff did. Defendants argue that the lease clearly designates FirstService as an agent of Estate. They also argue that plaintiff and Estate are the only parties that executed the lease. Therefore, they conclude that FirstService cannot be held liable for the contractual claims asserted by plaintiff.

Defendants seek the dismissal of the third cause of action against Estate on the ground that a claim for breach of quiet enjoyment cannot be brought in the absence of an actual or constructive eviction. They argue that plaintiff failed to allege such an eviction in her complaint. With respect to the fifth cause of action, involving punitive damages, defendants aver that New York does not recognize an independent cause of action for punitive damages. In addition, defendants state that plaintiff has failed to allege conduct so wanton and egregious as to merit such an extreme penalty.

Defendants seeks summary judgment on Estate’s first counterclaim, which demands

unpaid rent due through August 2014, in the amount of \$17,400. They request that this court grant judgment on the issue of liability at this time. Defendants contend that there is no dispute that plaintiff has not paid her rent to Estate.

In opposition, plaintiff argues that there is an issue of fact as to whether FirstService is a disclosed agent of Estate and not liable for claims in this suit. She claims that Estate does not exist in any significant way and that FirstService cannot be a disclosed agent for a non-existent principal. She avers that she never received a copy of the lease while occupying the premises and she believes that a representative of FirstService, not a representative of Estate, signed the lease. Plaintiff has a copy of Estate's management agreement and the designated manager in that contract is J.A.L. Management Corp. This agreement, by express terms, terminated on June 30, 1995. Plaintiff states that there is no other management agreement in Estate's possession. If FirstService is found not to be Estate's disclosed agent, plaintiff contends that privity may exist between herself and FirstService as to liability.

Plaintiff does not comment on the motion for dismissal of the third cause of action against Estate. She comments on the motion for dismissal of the fifth cause of action. Plaintiff claims that the complaint does not assert an independent cause of action for punitive damages. Moreover, plaintiff asserts that her claim is for intentional infliction of emotional distress, and describes conduct which is sufficiently severe to merit such relief. According to plaintiff, until discovery has been completed, it would be premature to dismiss this cause of action.

Plaintiff opposes summary judgment on Estate's counterclaim, contending that granting this motion, even on the ground of liability, would violate the terms of the stipulation of settlement, which provides that the escrowed rent money will not be released until there is a final

adjudication and/or settlement of this action. Plaintiff accuses Estate of trying to circumvent the express language of this document.

In reply, defendants argue that plaintiff has provided insufficient evidence to oppose a motion for summary judgment. In addition, they state that plaintiff has failed to provide proof of her complaints about lease violations, or medical proof regarding her claim of emotional distress. Thus, they contend that plaintiff has failed to raise any issues precluding the dismissal of the third and fifth causes of action brought against Estate.

Defendants assert that FirstService does not have privity of contract with plaintiff with respect to the lease, because the lease specifically identifies FirstService as an agent of Estate. Regarding the management agreement, defendants argue that FirstService acquired J.A.L. Management after it had become a subsidiary of another entity, Cooper Square Reality. Defendants claim that they continue to adhere to the terms of the original management agreement. Thus, they state that FirstService cannot be held liable to plaintiff for any contractual claims or legal fees.

As for the counterclaim, defendants argue that the stipulation of settlement does not affect this case where there is no dispute as to plaintiff's liability to Estate for unpaid rent arrears.

“Summary judgment is a drastic remedy, to be granted only where the moving party has ‘tender [ed] sufficient evidence to demonstrate the absence of any material issues of fact’ and then only if, upon the moving party’s meeting of this burden, the non-moving party fails ‘to establish the existence of material issues of fact which require a trial of the action [citation omitted]’” *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012).

The court shall first determine whether or not to dismiss FirstService from this action.

An agent of a disclosed principal has no personal liability under a contract entered into by the principal. See *Cruz v NYNEX Info. Resources*, 263 AD2d 285, 291 (1st Dept 2000). Defendants state that FirstService assumed the duties of J.A.L. Management in the now-expired management agreement with Estate. There is no indication of any subsequent or current written agreement between the parties.

The court holds that Estate has provided sufficient proof that FirstService is its agent. The lack of a written management agreement does not violate the statute of frauds because there is no conveyance of real property involved. FirstService is simply performing the duties of an agent of a landlord. Since FirstService is a disclosed agent of Estate in the lease, and not a party to the lease, it is not liable for plaintiff's claims. Therefore, the court shall dismiss FirstService from this action.

The third cause of action concerns breach of quiet enjoyment. A cause of action for a breach of quiet enjoyment requires an actual or constructive eviction. However, plaintiff remained in the premises until the parties entered the stipulation of settlement which terminated Estates's suit in Civil Court. Plaintiff has not shown evidence of any type of eviction. See *Jacobs v 200 E. 36th Owners Corp.*, 281 AD2d 281, 281 (1st Dept 2001). Since plaintiff has not even addressed this issue in the opposition papers, the court shall grant dismissal of this cause of action.

Plaintiff claims she has alleged a cause of action for punitive damages based on the intentional infliction of emotional damages. Plaintiff appears to be conflating a cause of action with the remedy of punitive damages. There is no separate cause of action for punitive damages. See *Weir Metro Ambu-Serv. v Turner*, 57 NY2d 911, 912 (1982).

If plaintiff is seeking damages for intentional infliction of emotional damages, she has failed to state a cause of action. This cause of action requires a showing conduct “so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency [internal quotation marks and citation omitted].” *Ruggiero v Contemporary Shells*, 160 AD2d 986, 987 (2d Dept 1990). Plaintiff has not shown such behavior. Such a cause of action would be dismissed.

If plaintiff is seeking punitive damages for alleged breaches of the lease, she is bound to other standards. “[P]unitive damages are not recoverable in an ordinary breach of contract case, as their purpose is not to remedy private wrongs but to vindicate public rights [citation omitted].” *Reads Co., LLC v Katz*, 72 AD3d 1054, 1056 (2d Dept 2010). Punitive damages are sometimes available where the conduct associated with the breach of contract is first actionable as an independent tort for which compensatory damages are ordinarily available, and is sufficiently egregious to warrant the imposition of punitive damages. *See Reads Co., LLC* at 1057. In this case, plaintiff has not alleged any independent tort in connection with her claim for emotional distress, only referring to the alleged breach of the warranty of habitability. Despite the allegation of reckless conduct on defendants’ part, plaintiff has not alleged any tortious activity in any specific detail. Plaintiff has clearly not alleged sufficient grounds for the imposition of punitive damages. Therefore, the court shall grant the dismissal of this cause of action.

The court shall not grant judgment on the counterclaim on the issue of liability. There is still a possibility that plaintiff can demonstrate a good reason for not paying the rent, specifically if she shows that Estate had previously violated the lease. Moreover, the stipulation of

settlement provides that the rent money be kept in escrow pending the final adjudication and/or settlement of this case, which has not occurred.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint against defendant FirstService Residential New York, Inc. is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of this Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continues against the remaining defendant; and it is further

ORDERED that defendants' motion to dismiss the third and fifth causes of action in the complaint against defendant Estate of Marie A. Cowing is granted; and it is further

ORDERED that defendants' motion to grant summary judgment on defendant Estate of Marie A. Cowing's first counterclaim on the issue of liability is denied.

DATED: 4/30/15

ENTER:



DONNA M. MILLS, J.S.C.
J.S.C.