

Tunne v Halpern
2017 NY Slip Op 32302(U)
October 27, 2017
Supreme Court, New York County
Docket Number: 450873/2014
Judge: Jennifer G. Schechter
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NYSCEF DOC. NO. 391

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

-----x
MARK TUNNE,

Index No. 450873/2014

Plaintiff,

Mot. Seq. No. 018

-against-

GERALD P. HALPERN et al.,

Defendants,
-----x

JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3212, defendant New York City Marshal Thomas J. Bia (Bia) moves for summary judgment dismissing the complaint against him. Plaintiff Mark Tunne (Tunne) cross-moves for summary judgment. Bia's motion is granted and Tunne's cross-motion is denied.

Background

After lengthy court proceedings and appeals, Housing Court's award of a final judgment of possession to Tunne's landlord was affirmed in December 2012. Tunne received a notice of eviction, made an inventory of what was in his apartment and vacated the premises on January 16, 2013 at 8:00 AM (Affirmation in Support of Motion [Supp], Exs H [Tr] at 29-30, I). Tunne's January 2013 inventory list reflected that, in addition to furniture, such as a sofa bed and a futon, he was leaving 4 boxes that contained clothes, kitchenware, CD's

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and DVD's as well as an unopened 24-inch flat-screen television and a "black trash bag full of papers, magazines and books" (Supp, Ex I).

For months, Tunne returned to the building and picked up his mail. On April 27, 2013--more than three months after he left his apartment--Tunne was surprised to receive a notice in the mail informing him that he would be evicted on May 9, 2013 (Tr at 32). That day, he used his apartment key, which he still had, unlocked the apartment door and observed that everything was just the way he had left it in January (Tr at 33). He testified that he subsequently "went to the apartment virtually every day" up until possibly May 8th (*id.* at 34). He did not, however, go to the apartment on May 9th--the day that Bia turned over possession of the apartment and all of its contents to the landlord (*id.* at 34).

On May 9, 2013, before turning possession of the apartment over to the landlord, Bia prepared an inventory of the contents of the apartment. Bia's inventory form lists things that one might find in an apartment. Handwritten on the form are additional possible items such as a play station an x-box or a flat tv. There is no marking near any of those items indicating that they were found in the apartment. Bia's inventory reveals that he did, however, find some of the same

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furniture that appears on Tunne's inventory. Near fouton and wood cabinet, Bia made markings, confirming that those items were in the apartment. Bia also indicated that there was minimal clothing and "dishes/pots" in the apartment (Supp, Ex F).

On May 12th, Tunne saw the dispossession notice (Tr at 33). Almost a year later, in February 2014, he received a copy of Bia's inventory list that was "written and signed off by Rod Feldman" (Supp, Ex A at ¶ 49).

To this day, due to financial constraints, Tunne has not accessed his possessions, which the landlord transferred to a storage facility. Tunne thus does not have first-hand knowledge of which of his possessions remain in storage.

This Action

Tunne commenced this action in 2014. He asserts that "many various items belonging to [him] were not acknowledged and inventoried by Mr. Feldman" and he is "severely distressed over the forever loss of all his furniture, clothes, electronic equipment, miscellaneous items, and personal, sentimental properties that have no price tag" (Supp, Ex A at ¶¶ 50-51).

As relevant here, Tunne alleges that Bia is liable to him for (1) negligently failing to perform a complete inventory of his property, (2) stealing or converting his property and (3) failing to perform a complete inventory "opening the door to allow unknown parties to steal and convert undocumented properties so they could convert [his] properties for their own enrichment" (Tunne Affidavit in Opposition and in Support of Cross Motion [Opp] at ¶ 31).

In his 2014 complaint, Tunne pleads that "one chief electronic item believed to have been stolen by Mr. Feldman or an employee of City Marshall Bia, or by an unknown third party was [his] brand new, flat screen (manufactured by Sharp) 20-inch television set that was a Christmas gift [and] was never used" (Supp, Ex A at ¶¶ 52-54). He also alleges that electronics "along with a massive collection of music CD's and a used second-hand stereo sound system" are items unaccounted for on the inventory list (Supp, Ex A at ¶¶ 52-54). He claims that the inventory he took in January 2013 "contradicts Mr. Feldman's list and the Inventory record held in the custody of [Bia's] office" (Supp, Ex A at ¶ 50).

At his August 2015 deposition, Tunne testified under oath that he had made a mistake--presumably in both his earlier 2013 inventory (which stated that the television was 24

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inches) and in his earlier 2014 complaint (which set forth that the television was 20 inches)--and his missing flat-screen television "wasn't 24 [inches], it was [a] 32 inch" that he received in November 2012 for which he had made a swap with his friend in Oakland. Tunne testified that he had sent his friend a used DVR and DVR station and in exchange his friend sent him a "32-inch unopened Sharp TV that he no longer wanted" (Tr at 68-70).

Bia now moves for summary judgment. In support of the motion, he swears that upon entry into the apartment to perform a legal possession he "noticed that it was strewn with trash and had very few contents . . . there was no electronic equipment and a minimal amount of clothing" (Bia Aff at ¶ 4). He explains:

"My inventory is a pre-printed list upon which I indicate whether or not the items listed on that pre-printed list were in a particular tenant's apartment. Over time I have handwritten different items that are frequently found in a tenant's apartment and added it to my pre-printed list. However, if there is no indication to the column to the right that a type of item is listed there actually existed then there was none of that kind in the apartment. My inventory does list a few small pieces of furniture and a minimal amount of clothing. . . . What the court sees on the inventory that I did do are the only items that were in fact in the apartment" (id. at ¶¶ 5-6 [emphasis added]).

Because there is no evidence that contradicts Bia's account, his motion is granted and the action against him is dismissed.

Analysis

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues(see *Glick & Dolleck v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012])). The burden is on the movant to make a prima facie showing of entitlement to judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any disputed material facts. Once the movant has made this showing, the burden then shifts to the opponent to establish, through competent evidence, that there is a material issue of fact that warrants a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986])).

In an October 21, 2014 decision and order, in addressing the sufficiency of the complaint, the court concluded that plaintiff's allegations raised questions as to whether Marshall Bia conducted an incomplete inventory and lost,

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damaged or converted plaintiff's belongings prior to or after locking the apartment and that these factual allegations could not be resolved as a matter of law by Bia's assertions that the landlord accepted responsibility and liability *after* Bia executed the warrant (Oct 21, 2014 Decision and Order at 6). The court stated that nothing "in Bia's affidavit addresses plaintiff's allegations that Bia stole or destroyed plaintiffs belongings *prior* 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" (*id.* at 6-7).

In support of his summary judgment motion, however, which is not simply about the sufficiency of plaintiff's allegations but rather focuses on the proof, Bia submitted an affidavit in which he swears that his inventory was complete. He swears that the only items in the apartment when he was there were listed on the inventory. There is no allegation by plaintiff, moreover, that what appears on the inventory was not placed in storage.¹

¹Nor can there be any such allegation as Tunne is unsure of what property of his is in storage.

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In response to this admissible evidence, Tunne does not raise a triable issue. Significantly, he had notice that the eviction was proceeding on May 9th but was not present in the apartment. Indeed, it appears to be one of the only days in May prior to the dispossession that he was not there. Tunne does not know that there was no trash strewn in the apartment when Bia was there because he was not there and there is no evidence to the contrary. Tunne does not know that more of his property was in the apartment when Bia was there because he was not there and there is no evidence contradicting Bia's sworn testimony.

Tunne maintains that there "is no policy that [prohibited] Marshal Bia from contacting [him] by telephone as he [performed] his inventory" (Opp at ¶ 47). The fact is, however, that Bia was under no duty to do so. Nor did Bia have any obligation to take pictures of the premises (Opp at ¶¶ 61, 167). Tunne, who was not in the apartment on the date and at the time of the eviction, cannot attest to the apartment's contents when Bia was there and he has not presented any evidence to contradict Bia's sworn account.

Tunne's cross-motion for summary judgment is denied as he has not made a showing that he is entitled to judgment as a matter of law.

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Accordingly, it is

ORDERED and ADJUDGED that the motion for summary judgment of defendant New York City Marshal Thomas J. Bia is granted and the complaint is dismissed in its entirety against him and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that defendant New York City Marshal Thomas J. Bia shall serve a copy of this Order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158) who are directed to mark the Court's records to reflect the change in the caption herein; and it is further

ORDERED that the cross-motion by Mark Tunne is denied in its entirety.

This is the decision and Order of the court.

Dated: October 27, 2017