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ARKANSAS COURT OF APPEALS

DIVISION III
No. CA09-1380

	Opinion Delivered December 15, 2010
MARY GURLEN, JUSTIN REEVES, & BONNIE BUSH-BOUDIEB APPELLANTS	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SIXTH DIVISION [CV 2009-535]
V.	HONORABLE TIMOTHY D. FOX, JUDGE
HENRY MANAGEMENT, INC., d/b/a HENRY CORPORATION, INC. APPELLEE	REVERSED & REMANDED

DAVID M. GLOVER, Judge

Appellants Mary Gurlen, Justin Reeves, and Bonnie Bush-Boudieb[1] (collectively "Gurlen") appeal the order of the Pulaski County Circuit Court granting summary judgment to appellee, Henry Management, Inc., d/b/a Henry Corporation, Inc. ("Henry"). We agree that the trial court erred in granting summary judgment to Henry, and we reverse and remand for the trial court to enter summary judgment in favor of Gurlen.

The facts in this case are not in dispute. Gurlen signed a six-month lease on September 1, 2006, for an apartment in the Plaza Towers. Henry was the agent for the owners of Plaza Towers. Gurlen was initially storing some of her own personal property, as well as some of the personal property of her two adult children, in an off-site storage facility. When she

[1]Reeves and Bush-Boudieb are Gurlen's adult children.

inquired about on-site storage, she was told by the property manager, Robbie Sherman, that there were storage facilities in the basement of Plaza Towers and that she could store her property there. Sherman told Gurlen that her property was as safe there as anywhere—the key to the room where the storage bins were located had to be checked out through the office, and the tenants placed their own locks on their individual bins. Gurlen was not charged a storage fee—Henry was in the process of deciding how much to charge for the bins. Gurlen moved her property into two storage bins, but she did not inform Sherman which units she was using. Sherman stated that once it was decided to start charging for the storage bins, notices were put up to inform residents that they needed to tell management which storage bins they were using; Gurlen did not see the notices. Sherman said that he knew Gurlen was going to put her things in some of the storage bins because she had told him that she was going to do so, but he did not know when she placed her possessions in the bins. Henry hired a contractor by the name of Rick Cook to clean out the storage bins. In cleaning out the bins, Cook used a list prepared by Sherman of which units were unclaimed and which units were being used by residents. Gurlen's name was not on either list, and her property was removed. When Gurlen informed Sherman that her property had been removed, he admitted that her storage bins had not been placed on the list of occupied units. Although Cook had been told to throw away the items from the storage bins, after Sherman related to him that Gurlen's bins had been cleaned out by mistake, Cook was able to recover a small portion of Gurlen's possessions; however, much of her property was never recovered.

Gurlen filed suit against Henry, alleging negligence, conversion, and replevin. Henry answered and filed a motion for summary judgment. Gurlen also filed her own motion for summary judgment. The trial judge granted summary judgment to Henry, and Gurlen appeals.

Normally, summary judgment is to be granted only when it is clear that there are no genuine issues of material fact to be litigated and the party is entitled to judgment as a matter of law. *RWR Properties, Inc. v. Young*, 2009 Ark. App. 332, 308 S.W.3d 183. However, when both parties agree on the facts and have filed cross-motions for summary judgment, the appellate court's only determination is whether the appellee was entitled to judgment as a matter of law. *Jones v. Juanita S. Woods Family Ltd. P'ship*, 95 Ark. App. 326, 236 S.W.3d 573 (2006). A trial court's conclusion on a question of law is given no deference on appeal, *Murphy v. City of West Memphis*, 352 Ark. 315, 101 S.W.3d 221 (2003), and questions of law are reviewed de novo. *Brown v. Pine Bluff Nursing Home*, 359 Ark. 471, 199 S.W.3d 45 (2004).

Henry argues that the trial court was correct in granting it summary judgment based upon the language contained in the lease agreement Gurlen signed on September 1, 2006, concerning risk of loss. This language stated

> Resident shall hold Lessor harmless against all damages, accidents, and injuries to person or property caused by or resulting from or in connection with his use and occupancy of the premises during the term of this lease, or while Resident is occupying same. Resident further agrees that Lessor shall not be liable in damages on account of personal injury or loss occasioned by or from any boiler, plumbing, gas, water, steam or other pipes of sewerage, or the bursting, leaking or running of any boiler, cistern, tank, washstand, water closet or waste pipe, in, above, upon or about said premises, nor for any damage occasioned by water, snow or ice being upon or

> coming through the roof, skylight, trapdoor, or otherwise nor for any defect in electric wiring, and service thereof; nor by reason of any defect latent, or patent, in, around or about said premises, or on account of strikes, nor for any damages arising from acts of neglect of co-residents or other occupants of the apartment project or any owners of [sic] occupants of adjacent or contiguous property.
>
> *All personal property placed in the leased premises, or in the storerooms or in any other portion of said premises or any place appurtenant thereto, shall be at risk of the Resident, or the parties owing [sic] the same and Lessor shall in no event be liable for the loss, theft or damage to such property or for any act or negligence of any co-resident or servants of the Resident or occupants, or of any other person v soever [sic] in or about the premises.* Resident hereby releases or [sic], its successors and assigns, from any and all claims and damages which may arise out of any accidents or injuries to Resident, a member of his family, or guests that may occur in connection with the use of the swimming pool, recreational facilities or central laundry facilities. Resident acknowledges that in using same, he hereby assumes himself, the members of his family and guests, any and all risks from any accident in connection with the use thereof and agrees that Lessor shall not be liable for any injuries sustained by Resident or such persons in connection with such use.
>
> In the event any employee of Lessor renders services or assistance (such as parking, washing or delivering of automobiles, handling of furniture or other articles, cleaning of the demised premise, or any other service) to, for or at the request of the Resident, his family, employees or guests, then for the purpose of such service or assistance, such employee of the Lessor shall be deemed the agent of the Resident, regardless of whether or how payment is arranged for such service and Lessor is hereby expressly relieved from any and all liability in connection with such service and any associated injury or damages to persons or property.

(Emphasis added.)

Henry contends that this provision absolves it of any liability for the loss of Gurlen's property in the storeroom because all personal property placed in the storeroom is placed there at the risk of the tenant. It further contends that liability is negated because of the last paragraph in the above-quoted provision, because any individuals involved in the removal of Gurlen's property were explicitly acting as Gurlen's agent, not Henry's agent. Gurlen argues

that the words in the lease, which must be construed against Henry as the author of the lease, do not cover the intentional acts by Henry in requesting Cook to break off her locks on her storage bins and throw her property away and argues that the lease provision is an exculpatory provision that attempts to excuse not only Henry's own negligence but also its intentional act of removing her property. We agree with Gurlen.

In *Plant v. Wilbur*, 345 Ark. 487, 47 S.W.3d 889 (2001), our supreme court held that there is strong disfavor for exculpatory contracts exempting a party from liability due to public-policy concerns encouraging the exercise of care, and that such contracts are to be strictly construed against the party relying upon them. Furthermore, while such exculpatory provisions are not *per se* invalid, "the contract must at least clearly set out what negligent liability is to be avoided." 345 Ark. at 493, 47 S.W.3d at 893 (quoting *Farmers Bank v. Perry*, 301 Ark. 547, 787 S.W.3d 645 (1990)).

While the language of the lease places the risk of loss, theft, or damage to property in the storerooms on the tenant, nothing is said in the lease agreement about intentional actions undertaken by Henry. Clearly, this loss was not brought about by the actions of a third person or by an act of God, but directly as a result of Henry's actions of hiring a person to clean out the storage bins and leaving Gurlen's name off the list of occupied storage bins not to be disturbed, even though the property manager knew that Gurlen's property was stored there.

Conversion is a common-law tort action for the wrongful possession or disposition of another's property. *Buck v. Gillham*, 80 Ark. App. 375, 96 S.W.3d 750 (2003). Conversion

is committed when a party wrongfully commits a distinct act of dominion over the property of another which is inconsistent with the owner's rights. *Id*. The intent required is not conscious wrongdoing but rather an intent to exercise dominion or control over the goods that is in fact inconsistent with the plaintiff's rights. *Id*. Henry's agent, Robbie Sherman, instructed Cook to remove the items from the storage units. While this removal of Gurlen's property was not an act of conscious wrongdoing, there obviously was an intent to exercise dominion and control over Gurlen's property, as it was removed and disposed of. Gurlen's property would not have been removed from her storage bins except at the direction of Henry to do so. This is conversion, and Gurlen is entitled to summary judgment on this issue.

Henry argues that it did not exercise dominion and control over Gurlen's property, and to the extent any other individuals removed her property, they were acting as her agent, not Henry's agent. This argument is not persuasive. There was no request by Gurlen that anyone move her property from her storage bins; rather, it was at the explicit request of Henry that Gurlen's property was removed.

The summary judgment in Henry's favor is reversed, and this case is remanded for the trial court to enter summary judgment in Gurlen's favor. Recognizing there will have to be a hearing for Gurlen to present evidence on the issue of her damages, we express no opinion on the amount, if any, of damages to which Gurlen may be entitled.

Reversed and remanded.

VAUGHT, C.J., and HART, J., agree.