Thacker v Malloy
2021 NY Slip Op 32875(U)
December 23, 2021
Supreme Court, Kings County
Docket Number: 510025/2017
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23rd day of December 2021.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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GAIL THACKER, Index No. 510025/2017

Plaintiff,

-against- DECISION AND ORDER

THOMAS MALLOY, Motions Sequence #7, #8

Defendant.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)	
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	197-212, 219-241,
Opposing Affidavits (Affirmations)	213-218, 243-256,
Reply Affidavits (Affirmations)	260-261,
Memorandum of Law and other documents	257, 260, 261, 262, 263, 264, 265, 266,

After a review of the papers and oral argument, the Court finds as follows:

Plaintiff, Gail Thacker (hereinafter "the Plaintiff"), commenced this action to recover for various causes of action including breach of contract, replevin, conversion, unjust enrichment, an accounting, intentional infliction of emotional distress and forgery. The Plaintiff alleges in her Verified Complaint that the Defendant unlawfully evicted her from her rent stabilized apartment located at 407 Humboldt Street, Apt. 4L, Brooklyn, New York (the "Premises"). The Plaintiff contends that the Defendant forged her signature as part of this effort and thereafter destroyed or otherwise seized possession of her personal property. On October 26, 2017, this Court issued a Decision and Order wherein this Court granted "the Defendant's application to the extent that it

seeks to dismiss the First Cause of Action and portions of the Second Cause of Action that seek to restore the Plaintiff to the subject premises, to otherwise restore the Plaintiff to her tenancy, or seek another apartment in its stead."

The Plaintiff now moves (motions sequence #7) for an order pursuant to CPLR 3212 granting her partial summary judgment on the issue of liability related to her causes of action for replevin (second cause of action), conversion (third cause of action) and unjust enrichment (fourth cause of action). The Plaintiff contends that summary judgment should be granted as the Defendant has admitted that he changed the locks at the Premises prior to the date the parties had agreed would be the Plaintiff's last day of possession. As a result, the Plaintiff argues that the Defendant bears liability in relation to the causes of action for replevin, conversion and unjust enrichment as a matter of law and it is only the issue of damages that must await trial.

The Defendant opposes the motion and moves for separate relief. In opposition, the Defendant argues that the Plaintiff's motion fails to address a prior order that dismissed the first cause of action and portions of the second cause of action. What is more, the Defendant contends that the Plaintiff has failed to meet her *prima facie* burden regarding her causes of action for replevin, conversion and unjust enrichment since the Plaintiff has not shown that any of her property remained in the Premises when the Defendant purportedly took possession. The Defendant also moves (motion sequence #8) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the Plaintiff's complaint in its entirety. The Defendant contends that the causes of action for replevin and conversion are barred as a result of the prior agreement between the parties in relation to Plaintiff vacating the Premises. As to the Plaintiff's claim for unjust enrichment, the Defendant argues that there is no allegation that Defendant is using any personal property of the Plaintiff for his own benefit, which, Defendant contends, is a necessary element of an action for unjust enrichment. As to the cause of action for an accounting (fifth cause

of action), the Defendant argues that he does not have a fiduciary relationship with the Plaintiff and that proper notice was not provided to satisfy this claim. As to the Plaintiff's cause of action for intentional infliction of emotional distress (sixth cause of action), the Defendant argues that the Plaintiff has not shown that she actually suffered severe emotional distress. Finally, as it relates to the Plaintiff's cause of action for forgery (seventh cause of action), the Defendant argues that this cause of action should be dismissed because there was no prejudice to the Plaintiff regarding the two alleged acts of forgery.

As an initial matter, the Court finds that the Plaintiff has not made a viable application to revisit this Court's Decision and Order issued on October 26, 2017. The October Decision and Order served to dismiss the Plaintiff's First Cause of Action and portions of the Second Cause of Action that seek to, *inter alia*, restore the Plaintiff to the subject Premises. The Plaintiff's motion (motion sequence #7) is not identified as one seeking reargument pursuant to CPLR 2221. However, in portions of the Plaintiff's attorney affirmation and memorandum of law, the Plaintiff seeks to reargue the above referenced decision. The Court notes that as part of a Decision and Order dated June 5, 2018, it previously denied an application made by the Plaintiff pursuant to CPLR 2221. What is more, the Court once again addressed this issue as part of a Decision and Order issued on November 1, 2019. As part of that Decision and Order the Court found that the Plaintiff's application was untimely. Accordingly, that application is denied.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "should only be employed when there is no doubt as to the absence of triable issues of material fact." *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341, 320 N.E.2d 853[1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. See

Sheppard-Mobley v. King, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N..E.2d 572 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 A.D.3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994]. However, "[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case..." if they can show "...that the defendant's negligence was a proximate cause of the alleged injuries." *Tsyganash v. Auto Mall Fleet Mgmt., Inc.*, 163 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2d Dept 2018]; *Rodriguez v. City of New York*, 31 N.Y.3d 312, 320, 101 N.E.3d 366, 371 [2018].

Motion Sequence #7

Turning to the merits of the Plaintiff's motion (motion sequence #7), the Court finds that there is an issue of fact regarding what if any of her property the Plaintiff claims the Defendant

was or continues to be in possession of. As such, the Court is prevented from granting the Plaintiff summary judgment in relation to her claims for replevin, conversion and unjust enrichment. The Plaintiff contends that the Defendant acknowledges that he changed the locks at the Premises prior to the date that the parties agreed she would leave the Premises. The Plaintiff contends that in doing so, the Defendant took exclusive possession of her property. The Plaintiff also contends in her Memorandum of Law that the "Plaintiff need only show that Defendant abrogated to himself exclusive possession and control over her personal property, and never again allowed her access to it, regardless of the value of that personal property." What is more, the Plaintiff, by her Attorney's Affirmation, contends that the issue of whether there was any personal property left in the Premises is not necessary for a determination of summary judgment in her favor. However, the Plaintiff acknowledges (Plaintiff's Motion, Attorney Affirmation, Paragraph 4) that "that the parties' factual dispute over what was in her apartment – whether it was full of her artwork and possessions, as she claims, or whether it was empty because she had already completely moved out, or full of trash, as Defendant has variously claimed – must await trial."

However, even assuming, *arguendo*, that the Defendant acknowledged taking possession of the apartment in violation of a prior agreement by the parties, which he does not, the Court finds that there are issues of fact regarding what property, if any, remained at the Premises after the Defendant took possession of the Premises. As part of the Plaintiff's affidavit, the only reference to property is in Paragraph 17 where the Plaintiff states that "only after I was approached on my last attempt to get back into my apartment by a neighbor who told me that he saw Defendant empty my apartment and destroy all my possessions, did Defendant serve his Order to Show Cause, Exhibit C, on the apartment which he knew he had locked me out of and then secure a default judgment in housing court." This statement by the Plaintiff, even assuming its admissibility, is the

only statement by the Plaintiff regarding personal property that remained at the Premises after she was prevented from re-entering her apartment.

As it relates to the Plaintiff's second cause of action for replevin, a Plaintiff "must establish that the defendant is in possession of certain property of which the Plaintiff claims to have a superior right." *Nissan Motor Acceptance Corp. v. Scialpi*, 94 AD3d 1067, 1068, 944 N.Y.S.2d 160, 162 [2d Dept 2012]; see also *Melrose Credit Union v. Matatov*, 187 AD3d 1009, 1012, 134 N.Y.S.3d 53, 56 [2d Dept 2020]; *Se. Fin., LLC v. Broadway Towing, Inc.*, 117 AD3d 715, 715, 984 N.Y.S.2d 606, 607 [2d Dept 2014]. The Plaintiff has both failed to (1) identify the personal property she indicates remained at the Premises, and (2) prove that property was removed by the Defendant. Similarly, as it relates to an action for conversion, "a plaintiff must show (1) legal ownership or an immediate right of possession to a specific identifiable thing and (2) that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's right." *Giardini v. Settanni*, 159 AD3d 874, 875, 70 N.Y.S.3d 57, 58 [2d Dept 2018]. Finally, "[t]o prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Old Republic Nat. Title Ins. Co. v. Luft*, 52 AD3d 491, 491, 859 N.Y.S.2d 261, 262 [2d Dept 2008].

Moreover, the Defendant has raised material issues of fact relating to these three causes of action. The Defendant in his affidavit contends that he and the Plaintiff entered into an agreement by which she would vacate the Premises "by the end of May, 2014 in exchange for a payment of $10,000.00." The Defendant also states that sometime thereafter he spoke to the Plaintiff who told him that she "would be out over the Memorial Day weekend rather than on exactly May 31st." The Defendant then stated that he was at the building at or around Memorial Day, entered the building "knocked on the door from the hallway, but got no answer from within the apartment she had

rented, but which certainly now had looked empty from the window, so I tried turning the doorknob and it was unlocked and opened." The Defendant states that he went into the apartment and "[t]he apartment was empty, the floor looked like it had been broom swept, but certainly not scrubbed, and there were three keys on the stove." He then stated that "[t]he keys left behind on the stove were the front door of the building, the apartment key, and the mailbox key. I took this to be the surrender of the apartment to me, and I believe any landlord would have." (See Defendant's Opposition, Defendant's Affidavit, Paragraphs 4 through 11). This testimony raises a material issue of fact as to whether any of the Plaintiff's personal property remained at the Premises at that time and whether the Defendant removed and/or kept any of the Plaintiff's property. Accordingly, the Plaintiff's motion (motion sequence #7) is denied.

Motion Sequence #8

Turning to the merits of the Defendant's motion for summary judgment as it relates to the Plaintiff's second and third causes of action for replevin and conversion, the Court finds that there are issues of fact regarding whether the Defendant took possession of any property belonging to the Plaintiff. The Defendant argues that these causes of action should be dismissed as they are barred by the purported agreement between the parties. The Defendant contends that the agreement was that the Plaintiff would vacate the Premises in exchange for the sum of $10,000.00. The Defendant contends that the fact that the parties entered into this agreement, that the apartment was left vacant, and that he is not in possession of any of the Plaintiff's property is sufficient to dismiss these causes of action as a matter of law. As stated above, as part of his affidavit, the Defendant states that when he entered the apartment after the Plaintiff allegedly vacated the Premises "[t]he apartment was empty, the floor looked like it had been broom swept, but certainly not scrubbed, and there were three keys on the stove." However, a review of the termination

agreement reflects that it does not address the possibility that Plaintiff's personal property may have been left at the Premises. Further, although the Defendant stated that the apartment "was empty", the Defendant does not specifically state no personal property remained. The Plaintiff also contends in her affidavit, annexed in support of her own motion (paragraphs 3, 12, 21), that she never agreed to leave, that the agreement was against her will and that the landlord cashed her rent checks after she had vacated the apartment. Further, there is a question as to whether this apparent out of Court surrender agreement was enforceable. *See Grasso v. Matarazzo*, 180 Misc. 2d 686, 687, 694 N.Y.S.2d 837, 839 [App. Term, 2d Dept, 1999].

Turning to the merits of the Defendant's application to dismiss the Plaintiff's fourth cause of action for unjust enrichment, the Court finds that it should not be dismissed. As an initial matter, the Defendant argues that the Plaintiff's fourth cause of action is for both unjust enrichment and constructive trust given that the Plaintiff's complaint states in paragraph 89 under the fourth cause of action for Unjust Enrichment that "[i]t is against equity and good conscience to permit the Defendant to retain what is sought to be recovered, and Plaintiff seeks the imposition of a constructive trust upon such items or their equivalent in value and the immediate return thereof to Plaintiff." The Defendant contends that the Plaintiff cannot satisfy that aspect of a constructive trust claim that provides that a party made a transfer in reliance thereon a fiduciary relationship with another party. *See Gargano v. Morey*, 165 AD3d 889, 890, 86 N.Y.S.3d 595, 598 [2d Dept 2018]. The Court finds that there is no indication of a "legally cognizable transfer in reliance" on any promise by the Defendant. *See Doxey v. Glen Cove Cmty. Dev. Agency*, 28 A.D.3d 511, 512, 813 N.Y.S.2d 743, 744 [2d Dept 2006]. What is more, the contractual relationship that had existed between the Plaintiff and Defendant in the instant matter does not satisfy the requirement that a fiduciary relationship existed between plaintiff and defendant. *See Cuomo v. Mahopac Nat. Bank*, 5 AD3d 621, 622, 774 N.Y.S.2d 779, 780 [2d Dept 2004].

However, insofar as the Plaintiff alleges that property was taken and that the Defendant may still have possession of it, the claim is not duplicative of the actions for replevin and conversion. These actions relate to a current possessory interest by the Defendant. In bringing a cause of action for unjust enrichment "[a] plaintiff must show that (1) the other party was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Alan B. Greenfield, M.D., P.C. v. Long Beach Imaging Holdings, LLC*, 114 A.D.3d 888, 889, 981 N.Y.S.2d 135, 137 [2d Dept 2014]. "An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790, 967 N.E.2d 1177, 1185 [2012]. Here the contract is silent on the issue.

However, since there remains an issue of fact as to the taking, the Plaintiff should not be restricted to claims only relating to personal property currently in the Defendant's possession. To the extent that the Defendant has taken Plaintiff's personal property, no longer possesses it and the contract is silent on the issue, the Plaintiff should not be deprived of the equitable claim of unjust enrichment.

Turning to the merits of the Plaintiff's fifth cause of action for an accounting, the Court finds that the Defendant has met his *prima facie* burden regarding the Plaintiff's claim for an accounting. "The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." *Lawrence v. Kennedy*, 95 AD3d 955, 958, 944 N.Y.S.2d 577, 580 [2d Dept 2012], *quoting Palazzo v. Palazzo*, 121 AD2d 261, 262, 503 N.Y.S.2d 381, 382 [1st Dept 1986]. Instead of a mere contractual relationship "a plaintiff must make a 'showing of 'special circumstances' that could have transformed the parties' business relationship to a fiduciary one ... such as control by one party of the other for the good of

the other." *AHA Sales, Inc. v. Creative Bath Prod., Inc.,* 58 AD3d 6, 21–22, 867 N.Y.S.2d 169, 181 [2d Dept 2008]. The Court finds that the existence of a fiduciary duty is absent in this case. Accordingly, Plaintiff has not asserted a viable claim for an accounting.

The Court finds that the Defendant has met his *prima facie* burden as it relates to the Defendant's application to dismiss the Plaintiff's sixth cause of action for intentional infliction of emotional distress. The Defendant argues that the conduct alleged in the complaint, even if true, does not satisfy the high standard set forth in making a claim of intentional infliction of emotional distress. "The tort of intentional infliction of emotional distress has four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." *Bernat v. Williams*, 81 AD3d 679, 680, 916 N.Y.S.2d 614, 615 [2d Dept 2011]. The Defendant correctly contends that summary judgment dismissing the Plaintiff's claim regarding intentional infliction of emotional distress is appropriate given that the alleged conduct of the Defendant does not raise to the very high level required to maintain this cause of action. The complained of conduct must be "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Klein v. Metro. Child Servs., Inc.,* 100 A.D.3d 708, 710, 954 N.Y.S.2d 559, 562 [2d Dept 2012], quoting *Murphy v. Am. Home Prod. Corp.,* 58 N.Y.2d 293, 448 N.E.2d 86 [1983].

In opposition, the Plaintiff fails to raise a material issue of fact that would prevent the Court from denying the Defendant's motion as it relates to this cause of action. While the Plaintiff maintains that a cause of action for intentional infliction of emotional distress is a fact-specific claim, the Plaintiff does not address how "the alleged improper conduct was not so outrageous or extreme as to support a cause of action alleging intentional infliction of emotional distress." *Video*

Voice, Inc. v. Loc. T.V., Inc., 156 A.D.3d 848, 850, 68 N.Y.S.3d 475, 477 [2d Dept 2017]; *see also Petkewicz v. Dutchess Cty. Dep't of Cmty. & Fam. Servs.*, 137 A.D.3d 990, 990–91, 27 N.Y.S.3d 264, 266 [2d Dept 2016].

The Court finds that the Defendant has failed to meet his *prima facie* burden regarding the Defendant's application to dismiss the Plaintiff's claim of forgery. "Forgery is the 'fraudulent making of a writing to the prejudice of another's rights ... or the making *malo animo* of any written instrument for the purpose of fraud and deceit.'" *Matter of Hersh*, 198 AD3d 763 [2d Dept 2021], *quoting Marden v. Dorthy*, 160 N.Y. 39, 53, 54 N.E. 726, 730 [1899]. Moreover, "[i]t is clear from these definitions that "forgery" is but one species of 'fraud.'" *Piedra v. Vanover*, 174 A.D.2d 191, 194, 579 N.Y.S.2d 675, 677 [2d Dept 1992]. The Defendant contends that the Plaintiff's cause of action for forgery should be dismissed since the documents that were allegedly forged were either to her benefit or had no prejudicial effect. The Plaintiff's claims (see Plaintiff's Verified Complaint, Paragraphs 100-103) that the Defendant forged her signature on a document allegedly showing that Plaintiff requested Defendant to change the locks on her apartment, which document the Defendant purportedly showed to the police. The Plaintiff also alleges that the Defendant forged Plaintiff's signature on a deposit check in order to deposit $10,000 into Plaintiff's account. The Defendant contends that the actions alleged were not prejudicial to the Plaintiff. However, a review of the Defendant's affidavit finds no reference to either of these allegations by the Plaintiff with any specificity in order to support the Defendant's application to dismiss the forgery claim. Moreover, the Plaintiff explains in her Verified Complaint that her cause of action for forgery is based upon the allegation that "Defendant repeatedly engaged in acts of forgery to deceive others into believing that Plaintiff had authorized, or consented to, acts of Defendant that were designed to further his malicious scheme to unlawfully evict Plaintiff from her apartment." The Plaintiff further alleges that "Defendant forged Plaintiff's signature on a document purporting to show that

Plaintiff requested Defendant to change the locks on her apartment." As a result, the Court finds that the Defendant has failed to meet his *prima facie* burden regarding the Defendant's application to dismiss the Plaintiff's claim of forgery.

Based on the foregoing, it is hereby ORDERED as follows:

The Plaintiff's motion (motion sequence #7) is denied.

The Defendant's motion (motion sequence #8) is granted solely to the extent that the Plaintiff's causes of action for an accounting (fifth cause of action) and intentional infliction of emotional distress (sixth cause of action) are hereby dismissed. All other relief sought is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.