Filed 9/25/12 Allen v. Giles CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MICHAEL ALLEN, Plaintiff and Appellant, v. JASON GILES et al., Defendants and Respondents.	B226823 (Los Angeles County Super. Ct. No. SC099414)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norman Tarle, Judge. Reversed.

Credence E. Sol; Pine & Pine, Norman Pine for Plaintiff and Appellant.

Yoka & Smith, Peter W. Felchlin, Timothy R. McCormick for Defendants and Respondents.

INTRODUCTION

Plaintiff and appellant Michael Allen leased a house in Malibu, California, to defendants and respondents Jason and Rebecca Giles. When the Gileses stopped paying rent and moved out of the property prior to the expiration of the lease term, Mr. Allen brought an action for breach of contract. The jury returned a verdict for the Gileses. The jury found that Mr. Allen had failed to do all, or substantially all, of the significant duties the lease required him to do without such performance having been excused. Following the verdict, the trial court awarded the Gileses their attorney fees. On appeal, Mr. Allen contends that the jury's verdict is not supported by substantial evidence, and the award of attorney fees was error because the Gileses were barred from recovering their attorney fees by their refusal to participate in pre-litigation mediation. We asked the parties to address whether Mr. Allen's alleged material breaches of the lease were breaches of obligations that were dependent or independent of the Giles's' obligations to pay rent and to return the property at the end of the lease to the condition it was in at the start of the lease and, if the obligations were independent or otherwise, whether the verdict form was inadequate. Because the special verdict inadequately considered the nature of the parties' obligations under the lease, we reverse the judgment.

BACKGROUND

The Gileses moved into Mr. Allen's rental house in Malibu, California, on June 1, 2005. They signed the lease to rent Mr. Allen's house eight days later on June 9, 2005. The original lease term was to be for the period from June 1, 2005, to June 30, 2006. Apparently at the time the Gileses signed the lease, they and Mr. Allen agreed, at Mr. Giles's request, to extend the lease term by one year so that it ended on June 30, 2007. The monthly rent under the lease was $8,000.

Lease Provisions and Facts Relevant to those Provisions

Paragraph 10: "Condition of the Premises"

Subparagraph "C" of Paragraph 10 of the lease stated that the Gileses were to provide Mr. Allen with a list of items that were damaged or not in working condition when they moved into the property. By the terms of the lease, the list was an acknowledgment of the condition of the property and not a contingency of the lease. Mrs. Giles provided Mr. Allen with the required list within a few days after the Gileses moved in. The list identified numerous perceived deficiencies in the property.

At trial, the Gileses testified about the property's deficiencies at the outset of the lease. The Gileses corrected some of the deficiencies at their own expense, with Mr. Allen's approval, such as replacing the dishwasher and drapes. They corrected other deficiencies at their own expense, without Mr. Allen's approval, such as replacing the mailbox, repairing an air conditioning unit, and installing a new garage door opener. In at least one instance, the Gileses and Mr. Allen together paid for the cost to correct a deficiency when they split the cost of new carpeting. Apparently referring to the items on the list, Mr. Giles testified that "for the month and a half or two that [Mr. Allen] was there," Mr. Allen "mostly" fixed the deficiencies he said he would fix. Mr. Allen testified that he tried to correct the items on Mrs. Giles's list because he wanted happy tenants.

Paragraph 27: "Tenant's Obligations Upon Vacating Premises"

Subparagraph "A" of Paragraph 27 of the lease provided that the Gileses were to return the property to Mr. Allen at the end of the lease in the same condition as it had been in at the start of the lease. The Gileses admitted at trial that they made a number of alterations to the property, including the installation of two cement pads that supported a hot tub and a playhouse and the removal of a built-in wine rack, and did not return the property to its original condition.

Addendum

1. Mr. Allen's Access to the Property

An addendum to the lease contained a provision that stated that "Landlord + tenants will agree to at least 24 in advance to timing of access to property, access will not be unreasonably withheld." Mr. Giles testified that the notice provision was added to the lease to stop Mr. Allen's practice of arriving at the property unannounced to perform construction work. The parties agree that the notice provision required Mr. Allen to give the Gileses 24 hours' notice before accessing the property.

On May 30, 2006, a deputy sheriff served Mrs. Giles with legal documents that indicated that the California Coastal Commission had a lien on Mr. Allen's house and that the house was going to be sold at auction on July 27, 2006. Mrs. Giles spoke with an attorney and learned that Mr. Allen did not own the house.[1] Concerned that her family would be evicted, Mrs. Giles did not pay the August rent.

On August 6, 2006, Mrs. Giles was home with her children when Mr. Allen arrived without advance notice. Mr. Allen testified that he went to the property to collect the overdue rent. According to Mrs. Giles, Mr. Allen was "very, very angry and agitated," and banged on the door. Mrs. Giles opened the door a little and spoke to Mr. Allen in an effort to calm him or to cause him to leave. Mr. Allen pushed on the door in an effort to enter the house. Mrs. Giles pushed back, closing and locking the door. Mr. Allen denied that the tried to push open the door.

Mr. Allen's conduct terrified Mrs. Giles. Mrs. Giles called Mr. Giles and their attorney. Mr. Giles returned home and observed damage to the door. Mr. Allen denied that he damaged the door. The Gileses hired armed security for three or four days because Mrs. Giles was afraid to stay at the house by herself. Mr. Giles sought a

---

1 A grant deed dated July 3, 2003, granted Mr. Allen's house to Transamerica Property and Investment, Inc. (Transamerica). Mr. Allen testified that he owned the house notwithstanding the deed, that he executed the deed on the advice of an attorney, and that he was Transamerica's president and sole stockholder.

restraining order.[2] In the request, Mr. Giles described Mr. Allen's alleged conduct and stated that Mr. Allen used profane language and said he was "gonna get us." The restraining order was never served on Mr. Allen. Mrs. Giles never saw Mr. Allen on the property again. Around that time, the Gileses began to look for a new place to live.

On August 10, 2006, Mr. Allen's lawyer served the Gileses with a three-day notice to pay rent or quit. Mrs. Giles testified that she attempted to pay rent for August by mailing the rent check as she always had, but the envelope was returned marked "Return to sender, unclaimed." Mrs. Giles testified that neither she nor Mr. Giles wrote a rent check to Mr. Allen for September or October 2006. The Gileses remained in the house until October 1, 2006. According to Mr. Allen, the Gileses did not pay rent after July 2006.

2. Mr. Allen's Mail Hold

The lease addendum also contained a provision that stated that "Landlord will place his mail on postal hold." Mr. Giles testified that the mail hold provision was added to the lease because he did not want to give Mr. Allen a reason to come onto the property unannounced. Mrs. Giles testified that she and Mr. Giles were private persons, and she did not want another person to have access to her mail. The house's mailbox was accessed with a key. When the Gileses moved into the house, they were not given a key to the mailbox. They hired a locksmith to "re-key" the mailbox. The Gileses did not give Mr. Allen a key to the mailbox. When the Gileses continued to receive Mr. Allen's mail, Mrs. Giles told Mr. Allen that "it was unacceptable to receive his mail." Mr. Allen admitted at trial that he did not place his mail on hold.

---

[2] Mrs. Giles testified that she sought the restraining order. The request itself, however, reflects that Mr. Giles sought the order.

Procedure

Mr. Allen filed a breach of contract action seeking recovery of past and future rent and property damage. The jury was given a special verdict based in part on CACI No. VF-300. The first question on the verdict form asked the jury if a valid lease had been formed between Mr. Allen and the Gileses. The jury found that a valid lease had been formed and proceeded to the second question. The second question asked if Mr. Allen had done all, or substantially all, of the significant things that the lease required him to do. The jury found that Mr. Allen had not performed as the lease required and proceeded to the third question. The third question asked if Mr. Allen had been excused from having to do all, or substantially all, of the significant things that the lease required him to do. The jury found that Mr. Allen's performance had not been excused. Having found Mr. Allen's lack of performance unexcused, the verdict form instructed the jury to stop, not answer any additional questions on the verdict form, and have the presiding juror sign the verdict form.

The Parties' Contentions

Mr. Allen contends that the jury's verdict is not supported by substantial evidence because he did not materially breach the lease when he failed to place a hold on his mail and when he went to the property seeking payment of rent without giving 24 hours' notice. Mr. Allen further contends that the special verdict was defective because it failed to distinguish between the parties' obligations under the lease that were dependent and independent. Further, Mr. Allen contends that the jury could not have found that he breached the implied covenant of quiet enjoyment because the trial court did not instruct the jury on that theory. The Gileses claim that the jury could have found that Mr. Allen materially breached the lease by failing to place a hold on his mail, by coming onto the property without 24 hours' notice and behaving poorly, and by failing to remedy all of the deficiencies in the property's condition at the beginning of the lease that Mrs. Giles identified in her list. Although not clear, the Gileses also appear to contend that the jury could have found that Mr. Allen materially breached the lease because he did not own the

property. The Gileses also contend that the evidence supports the jury's verdict based on a violation of the implied covenant of quiet enjoyment even if the trial court did not instruct on that theory.

DISCUSSION

A. Standards of Review

We review a jury's factual findings for substantial evidence. (*Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 500–501.) That is, we review the entire record to determine whether substantial evidence supports the judgment. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) In so doing, we "view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. . . ." (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.) "'Substantial evidence' is not synonymous with 'any' evidence; rather, it means the evidence must be of ponderable legal significance, reasonable, credible, and of solid value." (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 958.) If the record contains substantial evidence to support the judgment, we must affirm, even if there is substantial contrary evidence which would support a different judgment. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874.)

"[A] special verdict's correctness is analyzed as a matter of law and therefore subject to de novo review. [Citation.]" (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092.) On appeal, we do not imply findings of fact in favor of the prevailing party when the jury returned a special verdict. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285.) "This rule stems from the nature of a special verdict and its '"recognized pitfalls,"' namely, that it requires the jury to resolve all of the controverted issues in the case, unlike a general verdict which merely implies findings on all issues in one party's favor. [Citations.]" (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 678, fn. omitted.)

B. Relevant Principles

1. Interpretation of the Lease

"A lease agreement is subject to the general rules governing the interpretation of contracts. (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1269 [35 Cal.Rptr.3d 343] (*ASP*).) 'A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.' (Civ. Code, § 1636.) When possible, the parties' mutual intention is to be determined solely from the language of the lease. 'The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," . . . controls judicial interpretation.' (*ASP*, at p. 1269.) 'Interpretation of a contract "must be fair and reasonable, not leading to absurd conclusions. [Citation.]"' (*Ibid.*)" (*Bill Signs Trucking, LLC v. Signs Family Limited Partnership* (2007) 157 Cal.App.4th 1515, 1521.)

"The law sensibly recognizes that although every instance of noncompliance with a contract's terms constitutes a breach, not every breach justifies treating the contract as terminated. [Citations.] Following the lead of the Restatements of Contracts, California courts allow termination only if the breach can be classified as 'material,' 'substantial,' or 'total.' [Citations.]" (*Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987)195 Cal.App.3d 1032, 1051.) "Whether a partial breach of a contract is material depends on 'the importance or seriousness thereof and the probability of the injured party getting substantial performance.' [Citations.]" (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 278.) "Whether a breach is so material as to constitute cause for the injured party to terminate a contract is ordinarily a question for the trier of fact." (*Whitney Inv. Co. v. Westview Dev. Co*. (1969) 273 Cal.App.2d 594, 601; *Brown v. Grimes, supra,* 192 Cal.App.4th at p. 277; *Superior Motels, Inc. v. Rinn Motor Hotels, Inc., supra,* 195 Cal.App.3d at pp. 1051-1052; see also *Insurance Underwriters Clearing House, Inc. v. Natomas Co.* (1986) 184 Cal.App.3d 1520, 1526 ["Ordinarily the issue of materiality is a mixed question of law and fact, involving the application of a legal standard to a

particular set of facts"].) "[I]f reasonable minds cannot differ on the issue of materiality, the issue may be resolved as a matter of law. [Citations.]" (*Insurance Underwriting Clearing House, Inc. v. Natomas Co., supra,* 184 Cal.App.3d at p. 1527.)

The breach of an independent covenant in a contract does not excuse the performance of another independent covenant. (*Verdier v. Verdier* (1955) 133 Cal.App.2d 325, 334.) "The determination of whether a promise is an independent covenant, so that breach of that promise by one party does not excuse performance by the other party, is based on the intention of the parties as deduced from the agreement. [Citation.]" (*Brown v. Grimes, supra,* 192 Cal.App.4th at p. 279.) "To construe covenants as dependent is to work a forfeiture as to one party, and no obligation of a contract is to be regarded as a condition precedent unless made so by express terms or necessary implication. Where a breach is partial and is 'capable of being fully compensated,' the strong tendency is to regard it as insufficient to constitute a defense. [Citation.]" (*Verdier v. Verdier, supra,* 133 Cal.App.2d at p. 334.)

2. The Special Verdict

"[A] special verdict is one where the jury finds the facts, and leaves the judgment to the court. (Code Civ. Proc., § 624.)" (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1347, fn. 7.) "A special verdict presents to the jury each ultimate fact in the case, so that 'nothing shall remain to the Court but to draw from them conclusions of law.' [Citation.]" (*Trujillo v. North County Transit Dist., supra,* 63 Cal.App.4th at p. 285.) The special verdict must present to the jury for its resolution all of the ultimate facts on "every controverted issue *necessary to dispose* of liability." (*Contreras v. Goldrich* (1992) 10 Cal.App.4th 1431, 1434.) "A special verdict is 'fatally defective' if it does not allow the jury to resolve every controverted issue. [Citations.].)" (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 325.)

C. Application of Relevant Principles

1. The Mail Hold

In the addendum to the lease, Mr. Allen agreed to place a hold on his mail. At trial, Mr. Allen admitted that he did not place a hold on his mail. Accordingly, Mr. Allen breached that provision of the lease. Mr. Allen's breach, however, was not material. Mrs. Giles testified that the purpose of the mail hold provision was to preserve her and Mr. Giles's privacy by restricting access to their mail. Mr. Giles testified the purpose of the mail hold provision was to remove from Mr. Allen a reason for coming onto the property unannounced. Shortly after the Gileses moved into the house, they had a locksmith rekey the lock on the mailbox and they did not give Mr. Allen a copy of the new key. Because Mr. Allen did not have access to the mailbox, the Gileses' privacy was maintained and Mr. Allen had no reason to come onto the property unannounced.

The Gileses acknowledge that, standing alone, Mr. Allen's failure to place a hold on his mail was a trivial breach of the lease. They contend, however, that the mail hold breach was not trivial in light of Mr. Allen's other breaches. Apart from identifying those other claimed breaches, the Gileses do not explain how those breaches transformed Mr. Allen's failure to place a hold on his mail from a trivial to a material breach.

2. The Condition of the Premises at the Beginning of the Lease

Paragraph 10, subparagraph "C," of the lease stated, "Tenant will provide Landlord a list of items that are damaged or not in operable condition within 3 (or ___) days after Commencement Date, not as a contingency of this Agreement but rather as an acknowledgment of the condition of the Premises." The purpose of this lease provision was to memorialize the condition of the property at the outset of the lease so that the Gileses were not held responsible for any damage to the property that occurred before they moved in, but were held responsible for any damage after they moved in. Paragraph 10, subparagraph "C," did not call for the Gileses to create a "punch list" of items Mr. Allen was to correct or be deemed in material breach of the lease.

3. Ownership of the Property

The nature of the Gileses' contention with respect to Mr. Allen's ownership of the property is not clear. It appears that the Gileses contend that the jury could have found that Mr. Allen materially breached the contract because he did not own the property. Such a contention is unavailing. The verdict form's first question asked the jury, "Was a valid lease formed between Michael Allen and Jason and Rebecca Giles?" The jury answered that question, "Yes." The jury's finding that a valid lease was formed between Mr. Allen and the Gileses precludes a determination that the jury found that Mr. Allen materially breached the lease because he did not own the property.

4. The August 6, 2006, Incident at the Property

There are two parts to the Gileses' claim that Mr. Allen materially breached the lease when he came onto the property on August 6, 2006. The first concerns Mr. Allen's failure to give 24 hours' notice before coming onto the property. The second concerns Mr. Allen's conduct once on the property.

The Gileses and Mr. Allen understood the provision in the lease addendum that "Landlord + tenants will agree to at least 24 in advance to timing of access to property, access will not be unreasonably withheld" required Mr. Allen to give the Gileses 24 hours' notice before accessing the property. Mr. Giles testified that the purpose of the provision was to prevent Mr. Allen from coming onto the property unannounced to perform construction work.

On August 6, 2006, Mr. Allen went to the property to collect overdue rent without notifying the Gileses 24 hours in advance. The Gileses contend that Mr. Allen's conduct was a material breach of the lease.[3] Under such a theory, anyone other than Mr. Allen could come to and knock on the Gileses' front door, but Mr. Allen would be barred from doing so to request overdue rent without 24 hours' notice. Even if this was a breach by Mr. Allen, it was trivial and not material. The Gileses do not explain how they were

[3] By their failure to pay rent on August 1, 2006, the Gileses were in breach of the lease before Mr. Allen came on the property on August 6, 2006.

harmed by Mr. Allen's failure to give 24 hours' notice before knocking on their door, or why such a failure would justify terminating the contract and excusing the Gileses from paying the rent remaining under the lease or from returning the property to its original condition at the end of the lease term.

There was evidence that once on the property, Mr. Allen conducted himself poorly. There was evidence that angry and agitated, Mr. Allen tried to push his way into the house when Mrs. Giles opened the door to talk to him; and he used profanity and said he was going to "get" the Gileses. Mr. Allen's conduct terrified Mrs. Giles, causing the Gileses to hire security for a short period and Mr. Giles to file a request for a restraining order. Notwithstanding Mr. Allen's conduct, the Gileses remained in the house for nearly two months before moving. During that time, Mrs. Giles did not see Mr. Allen on the property.

The Gileses' complain that Mr. Allen's conduct "was an egregious violation of the provisions of the lease" that permitted the jury to find Mr. Allen in breach, but do not identify any lease provision they claim was violated. Instead, the Gileses' complaint concerns the implied covenant of quiet enjoyment. "Every lease includes an implied covenant of quiet enjoyment protecting the lessee from any act or omission by the lessor which interferes with the lessee's right to use and enjoy the premises for the purposes contemplated by the lease." (*Avalon Pacific-Santa Ana, L.P. v. HD Supply Repair & Remodel, LLC* (2011) 192 Cal.App.4th 1183, 1191.)

The implied covenant of quiet enjoyment and the covenant to pay rent are mutually dependent when a landlord physically evicts the tenant or the landlord's conduct is such that it causes the tenant to vacate the premises—i.e., constructively evicts the tenant. (*Petroleum Collections Inc. v. Swords* (1975) 48 Cal.App.3d 841, 846-847.) In *Petroleum Collections Inc. v. Swords,* the court explained that when a landlord interferes with a tenant's beneficial use of the premises, the tenant may remain in possession of the premises and seek injunctive or other appropriate relief or the tenant can surrender possession of the premises within a reasonable time. (*Id.* at p. 847.) If the tenant remains in possession of the premises, the tenant's obligation to pay rent continues. (*Ibid.*) If the

tenant surrenders possession of the premises, the tenant has been constructively evicted and the tenant is relieved of the obligation to pay rent accruing thereafter. (*Ibid.*) If the tenant does not surrender possession of the premises within a reasonable time after the date the tenant's enjoyment has been interfered with, the tenant is deemed to have forfeited his right to abandon. (*Ibid.*) What constitutes a reasonable period of time is a question of fact for the trier of fact considering all of the circumstances. (*Id.* at pp. 847-848.) "In a great majority of cases abandonment after a month is recognized not to be within a reasonable time." (91 A.L.R.2d 638, § 7, fn. omitted.)

The jury was not instructed on the implied covenant of quiet enjoyment. The Gileses do not cite any case that holds that a jury has a legal basis for finding a party in material breach of a lease based on a legal theory on which the jury received no instructions. If the jury had been instructed properly on the implied covenant of quiet enjoyment, it could have found Mr. Allen in material breach of the lease. The jury also could have found that the Gileses forfeited any claimed constructive eviction based on Mr. Allen's conduct because it was unreasonable for them to remain in the house for nearly two months after the August 6 incident. (*Petroleum Collections Incorporated v. Swords, supra,* 48 Cal.App.3d at pp. 846-848; 91 A.L.R.2d 638, § 7, fn. omitted.) Because a claimed violation of the covenant of quiet enjoyment was not before the jury, the special verdict did not allow the jury to reach these issues, and we will not supply the missing findings of fact by implication. (*Trujillo v. North County Transit Dist., supra,* 63 Cal.App.4th at p. 285.) Because the special verdict failed to present to the jury for its resolution all of the ultimate facts on "every controverted issue *necessary to dispose* of liability," it was fatally defective.[4] (*Contreras v. Goldrich, supra,* 10 Cal.App.4th at p. 1434; *Saxena v. Goffney, supra,* 159 Cal.App.4th at p. 325.)

---

[4] Because we reverse the judgment, which necessarily includes the trial court's post-judgment award of attorney fees to the Gileses as the prevailing parties, we need not address Mr. Allen's argument that the award of attorney fees was error.

DISPOSITION

The judgment is reversed. Mr. Allen is awarded his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.