Filed 8/24/18 Gelbard v. Hummer CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ALLEN W. GELBARD et al., Plaintiffs and Appellants, v. ROSSLYN HUMMER et al., Defendants and Respondents.	B275384 Los Angeles County Super. Ct. No. LC088263

APPEAL from judgments of the Superior Court of Los Angeles County, Huey P. Cotton, Judge. Affirmed.

Fuchs Law Group, John R. Fuchs and Gail S. Gilfillan for Plaintiffs and Appellants.

Baker, Keener & Nahra, Mitchell F. Mulbarger for Defendant and Respondent Rosslyn Hummer.

Gaglione, Dolan & Kaplan, Robert T. Dolan and Amy J. Cooper; Freeman Freeman & Smiley and Dawn B. Eyerly for Defendant and Respondent Eric C. Peterson.

Allen Gelbard and Lisa Du Boise appeal from the trial court's grant of summary judgments in favor of Rosslyn Hummer and Eric C. Peterson, the lawyers for the landlord in an unlawful detainer action against Gelbard and Du Boise. We affirm.

BACKGROUND

In 2008, Gelbard and his partner Du Boise lived on a ranch in Agoura Hills owned by Rodney Unger, Gelbard's former business partner. (Gelbard disputes Unger's right to ownership of the ranch, but that dispute is not an issue in this appeal.) Unger filed an unlawful detainer complaint against Gelbard and Du Boise in May 2008, and Gelbard and Du Boise were evicted in October 2008. Unger, as landlord, was represented by Peterson and Hummer, a partner and an associate at the same law firm.

The eviction led to a long and bitter dispute. Gelbard and Du Boise filed a 10-count complaint in January 2010, including a conversion claim against Unger, Hummer, Peterson, and others. The conversion claim alleged the eviction was unlawful, and Unger and his agents Hummer and Peterson had refused to return Gelbard's and Du Boise's personal property, which Unger, Hummer, and Peterson took, sold, transferred, and converted. After a series of demurrers and amendments, Gelbard and Du Boise filed a fourth amended complaint, and Hummer and Peterson filed a special motion to strike. (Code Civ. Proc., § 425.16.)[1] The trial court denied the motion and this court affirmed, holding that the alleged acts of conversion did not constitute protected activity. (*Gelbard v. Hummer* (May 28, 2014, B244330) (*Gelbard I*) [nonpub. opn.].)

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[1] All future statutory references are to the Code of Civil Procedure, unless otherwise indicated.

1. **The 9th Amended Complaint**

More than five years after the filing of the initial complaint, a seven-count ninth amended complaint (NAC), filed September 8, 2015, included a 31-page cause of action for conversion against Unger, Hummer, Peterson, and others. As relevant to this appeal, Gelbard and Du Boise alleged Hummer would not allow them to take anything but their four dogs on the day they were evicted. Hummer and Peterson, acting on behalf of Unger, then inventoried all their personal property, including legal and other documents, and committed numerous violations of section 1174 and Civil Code section 1965 in failing to return the personal property, including by not sending written statutory notice, by not making a proper written demand for payment for storage and removal, and by hiring a property manager with specific instructions not to allow Gelbard and Du Boise to return to the ranch. Gelbard and Du Boise made multiple written demands for return of the property under Civil Code section 1965, subdivision (a), but Peterson and Hummer refused to comply.

The property Gelbard and Du Boise left behind included eleven horses, which Hummer and Peterson did not care for adequately. Hummer and Peterson also improperly cooperated with the trustee in Gelbard's Chapter 7 bankruptcy, wrongfully removing vehicles from the ranch and turning them over to the trustee. Hummer and Peterson did not allow Gelbard and Du Boise to redeem their large collection of guns and ammunition. Hummer and Peterson acted maliciously and illegally in refusing to surrender the personal property that remained at the ranch following the eviction, while they were "rummaging through, disposing of and otherwise stealing,

diverting and converting" Gelbard's and Du Boise's legal files. Hummer and Peterson had overseen the packing of personal property into "10 or more overstuffed trash bags," which were taken off the ranch by a van. Du Boise's valuable jewelry had been stolen. On October 31, Gelbard and Du Boise were allowed to remove only large items of personal property. On November 1, when Gelbard's son was allowed to remove certain vehicles, Hummer and Peterson did not allow him access to the ranch for other property, improperly demanding payment of $6,848.92 allegedly for the cost of the inventory, which Hummer and Peterson later claimed was for the costs of storage and removal of the personal property, without properly designating the costs under the statutes.

Gelbard and Du Boise believed that Hummer advised them they had until November 28 to remove their personal property. They appeared at the ranch as agreed on November 20, and took some guns out of the large gun safe. They had also arranged for the packing of their personal property on November 21 and for a professional mover to remove the heaviest safe, but on that day Hummer and Peterson advised them through the property manager that Unger had changed his mind and they could not remove their personal property unless they paid the $6,848.92. On November 24, Hummer and Peterson, "acting on behalf of themselves and as agents" for the law firm and Unger, unlawfully broke into the largest safe, turned over some firearms to the sheriff, and acting on behalf of themselves and the law firm, stole and converted approximately 60 firearms, some of which were delivered to a third-party firearms dealer for storage and/or private sale, in violation of Civil Code section 1988. In spite of a letter from Gelbard's and Du Boise's attorney listing

Hummer's and Peterson's "multiple willful violations of CCP § 1174 and Civil Code § 1965" by failing to provide them a legitimate opportunity to retrieve their personal belongings, Hummer and Peterson continued to deny access, and "selectively removed" some of the packed boxes from the property and moved other boxes to a garage on the ranch.

"Although Hummer was the primary attorney acting for Unger . . . in the unlawful detainer action . . . Peterson was closely, directly and intimately involved in virtually every aspect of the acts and omissions alleged herein." Gelbard and Du Boise did not learn the identities of the persons acting as agents of Hummer and Peterson to deny them their personal property until 2011 and 2012.

Despite their repeated requests, no property had been returned, and Gelbard and Du Boise believed that Hummer and Peterson had "sold, transferred and otherwise diverted and/or converted" their personal property. Hummer and Peterson were liable even without a showing that they personally removed, possessed, or stole the property because their conduct and their agents' conduct was an assumption of control or ownership over the property. Their refusal to allow Gelbard and Du Boise to remove their property constituted conversion.

Gelbard and Du Boise claimed compensatory damages for the alleged conversion in excess of $500,000; damages for emotional distress; a constructive trust on the personal property; and punitive damages.

2. **The Motions for Summary Judgment**

Unger settled with Gelbard and Du Boise. Peterson and Hummer filed separate motions for summary judgment on November 23 and 24, 2015, arguing they could not be liable for

conversion based on violations of section 1174 or Civil Code section 1965 because they were not the landlord, and Gelbard and Du Boise did not comply with the statutes. Gelbard and Du Boise filed oppositions, and Hummer and Peterson filed replies.

The trial court issued a 13-page tentative ruling granting summary judgment. The court found "a triable issue of fact at the very least regarding whether defendants complied with their obligations under CCP § 1174," including whether, under that section and Civil Code section 1965, Gelbard and Du Boise timely made a written request for return of the property and were allowed a timely opportunity to retrieve it, and whether reasonable accommodations were made to allow retrieval of the firearms. The failure to allow Gelbard and Du Boise to retrieve the property as provided by the statute, and the failure to make reasonable accommodations to retrieve the firearms, could constitute conversion. Nevertheless, "the only wrongful conduct that plaintiffs can identify is possible violation of a statute that does not apply to defendants. CCP § 1174 and [Civil Code section] 1965 apply to 'landlords.' Plaintiffs do not even address this fatal argument directly." The court found "no evidence that the attorneys knew that anyone was stealing plaintiffs' property or otherwise converting it. The plaintiffs have not identified any breach of duty running from defendants to them." The court found no triable issue on aiding and abetting, and concluded: "In sum, while there may have been some violation of CCP § 1174 and [Civil Code section] 1965, there is no triable issue of fact regarding whether Hummer or Peterson can be held liable for conversion based upon those violations."

After a hearing on March 1, 2016, on March 30 the trial court entered judgments for Hummer and Peterson, incorporating its tentative ruling granting summary judgment. After notice of entry for Peterson on April 12 and for Hummer on April 19, Gelbard and Du Boise filed timely notices of appeal.

DISCUSSION

We review the grant of summary judgment de novo, deciding independently whether the undisputed facts warrant judgment for Hummer and Peterson as a matter of law, and viewing the evidence in the light most favorable to Gelbard and Du Boise, as the nonmoving parties. (*Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1050.) As the moving parties, Hummer and Peterson bear the burden of showing that Gelbard and Du Boise have not established, and cannot reasonably expect to establish, the elements of their conversion cause of action, or that there is a complete defense to the cause of action. (*Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1449.) Once that burden is met, the nonmoving parties' opposition must identify specific facts in evidence, not just allegations in the pleadings, showing there is a triable issue of material fact as to the cause of action. (*Ibid.*) We consider all the evidence in the moving and opposition papers except evidence to which objections have been made and properly sustained, and review evidentiary rulings de novo. (*Id.* at pp. 1451-1452.)

1. The statement in the earlier appeal is not law of the case

The unpublished opinion affirming the denial of Hummer and Peterson's anti-SLAPP motion concluded that the alleged acts of conversion did not constitute protected activity, and declined to decide whether Hummer and Peterson established a

probability that they would prevail on the merits. (*Gelbard I*, *supra*, B244330.) The court added this footnote: "Hummer and Peterson argue that they cannot be liable for conversion because the obligations under section 1174 and Civil Code section 1965, regarding the disposition of personal property after a tenant has vacated the premises, apply only to a landlord and are inapplicable to a landlord's agent. We conclude to the contrary that regardless of the extent of the statutory obligations, an attorney acting as agent for another can be liable to the owner of personal property for conversion if the attorney committed wrongful acts constituting conversion, as plaintiffs here allege. An agent is personally liable to a third party for wrongful acts committed in the course of the agency. (Civ. Code, § 2343; *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 68-69.)" (*Gelbard I*.) Gelbard and Du Boise argued in the trial court, and argue here, that this footnote is law of the case, and means that Hummer and Peterson, as agents of the landlord, could be personally liable for conversion based entirely on statutory violations. As did the trial court, we reject this argument.

Under the law of the case doctrine, " ' "the decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case." ' " (*Sargon Enterprises, Inc. v. University of Southern California* (2013) 215 Cal.App.4th 1495, 1505.) "Although the doctrine does not apply to points of law that might have been determined, but were not decided in the prior appeal, the doctrine does extend to questions that were implicitly

determined because they were essential to the prior decision." (*Ibid.*)

" '[T]he point relied upon as law of the case must have been *necessarily involved* in the case.' " (*Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 498.) The opinion in the prior appeal stated, "we need not decide whether plaintiffs established a probability of prevailing on the merits." (*Gelbard I*, *supra*, B244330.) The footnote, which addressed the merits, is not law of the case. And in any event, the footnote does not state that the attorneys could be liable for conversion based on statutory violations, but that they could be liable "if [they] committed wrongful acts constituting conversion, as plaintiffs here allege." (*Ibid.*) The prior opinion involved the fourth amended complaint, which is not in the record on this appeal. Gelbard and Du Boise allege in the ninth amended complaint that Hummer and Peterson, "acting on behalf *of themselves*" and as agents for their law firm, "stole approximately 60 firearms," repeatedly state that Hummer acted "for herself" as well as on behalf of others, and accuse the attorneys of stealing $500,000 in personal property, including "rummaging through, disposing of and otherwise stealing, diverting and converting" Gelbard's and Du Boise's legal files. (Italics added.) As we explain below, we agree that if there were evidence Hummer and Peterson, during the time they acted as Unger's agents, also acted on their own behalf in committing wrongful acts that constituted conversion regardless of the statutes, they could be liable for conversion. And we also agree with the trial court in this case that Gelbard and Du Boise did not provide evidence that Hummer and Peterson acted on their own behalf in committing acts that would constitute conversion.

Given the statutes and the law of conversion, summary judgment was appropriate.

2. **Section 1174 and Civil Code section 1965 apply to landlords, not their agents**

Section 1174 and Civil Code section 1965 describe the respective obligations of a landlord and tenant after a lawful eviction regarding personal property left behind on the premises, granting landlords immunity from liability when they follow the statutes' dictates to dispose of the property. Section 1174, subdivision (g) requires the landlord to store the personal property "in a place of safekeeping" until it is released under subdivision (h), or disposed of under subdivision (i). Subdivision (h) requires the landlord to release the personal property pursuant to Civil Code section 1965. Subdivision (i) requires that property not released under subdivision (h) be disposed of under Civil Code section 1988, which requires a public sale by competitive bidding for property the landlord reasonably believes has a resale value of more than $700. If the landlord follows this procedure, the landlord is not liable to the tenant. (§ 1174, subd. (k)(1).)

Civil Code section 1965, subdivision (a) describes the procedure the tenant must follow to secure return of the tenant's personal property, and the obligations of the landlord. "A residential landlord shall not refuse to surrender, to a residential tenant . . . any personal property not owned by the landlord which has been left on the premises after the tenant has vacated the residential premises and the return of which has been requested by the tenant or by the authorized representative of the tenant if all of the following occur." (Civ. Code, § 1965, subd. (a).) Subdivision (a)(1) requires the tenant to request in

writing within 18 days the surrender of the personal property, including a description of the property and the tenant's mailing address. Subdivision (a)(2) requires that the landlord have control or possession of the property when the written request is received. Under subdivision (a)(3), before the landlord surrenders the property and upon a written demand by the landlord, the tenant must tender payment of "all reasonable costs associated with the landlord's removal and storage of the personal property." The landlord's written demand must be mailed to the tenant's mailing address, as provided in the tenant's written request, within five days of that request, and the demand must itemize the nature and amount of each charge. (Subd. (a)(3).) The tenant under subdivision (a)(4) then must agree with the landlord on a reasonable time to claim and remove the property (not later than 72 hours after tendering payment for removal and storage). A landlord who complies with all the provisions of the statute is immune from liability for giving the property to another person (subd. (d)), but a landlord who retains the property in violation of the statute is liable to the tenant in a civil action. (Subd. (e).) "The remedy provided by this chapter is not exclusive and shall not preclude either the landlord or the tenant from pursuing any other remedy provided by law." (Subd. (f).)

If a tenant complies with the procedure set out in Civil Code section 1965, and the landlord does not release the property, the landlord may be liable for any other legal remedy, including conversion. (Civ. Code, § 1965, subds. (e), (f).) The question before us is not whether a material question of fact exists as to whether the landlord, Unger, failed to comply with section 1174 and Civil Code section 1965 and is therefore liable

for conversion. Unger has settled with Gelbard and Du Boise and is no longer a defendant. The question is whether Hummer and Peterson, Unger's attorneys and agents, can be held personally liable for conversion based on Unger's noncompliance with the statute.

"The relationship of attorney and client is one of agent and principal. . . . If activities of a nonlawyer in the same circumstances would render the nonlawyer civilly liable . . . , the same activities by a lawyer in the same circumstances generally render the lawyer liable." (*Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone*, *supra*, 107 Cal.App.4th at p. 69.) The general principles of agency liability apply here. If in the course of their agency for Unger, Hummer and Peterson's activities violated the statutes, Unger, as the landlord, would be liable. But because the statutes create a duty *for landlords*, the agents of the landlord, whether lawyers or nonlawyers, cannot on their own be civilly liable for statutory violations. In *Otanez v. Blue Skies Mobile Home Park* (1991) 1 Cal.App.4th 1521, the statute in issue stated: " 'A landlord shall not with intent to terminate the occupancy under any lease . . . of property used by a tenant as his residence willfully cause, directly or indirectly, the interruption or termination of any utility service furnished the tenant . . . .' " (*Id.* at p. 1525.) The trial court granted summary judgment in favor of the landlord and the landlord's property managers, who undisputedly were not landlords, after a tenant sued under the statute for interruption of utility services. (*Id.* at pp. 1523-1524.) "The statute provides only that a 'landlord' shall not willfully cause termination of utility service. No mention is made of the landlord's property managers. Nevertheless, Otanez argues the managers as agents of the

landlord are liable . . . . [¶] Here the acts of the managers were not wrongful in their nature. The acts are wrongful only if they are proscribed by statute. Because [the statute] does not apply to persons other than landlords, we can see no basis for holding the managers liable." (*Id.* at p. 1526.)

3. **Gelbard and Du Boise did not identify material questions of fact regarding whether Hummer and Peterson committed the tort of conversion on their own behalf**

Gelbard and Du Boise sued Hummer and Peterson for the tort of conversion. " 'Conversion is generally described as the wrongful exercise of dominion over the personal property of another. [Citation.] The basic elements of the tort are (1) the plaintiff's ownership or right to possession of personal property; (2) the defendant's disposition of the property in a manner that is inconsistent with the plaintiff's property rights; and (3) resulting damages. [Citation.]' " (*Regent Alliance Ltd. v. Rabizadeh* (2014) 231 Cal.App.4th 1177, 1181.) Conversion is a strict liability tort, so the intent of the alleged convertor is immaterial. (*Ibid.*) A defendant who prevents the owner from taking possession of his property may be liable for conversion. (*Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 550.) The interference with the owner's dominion must be serious and more than a mere intermeddling. (*Id.* at p. 551.)

The statutes govern how a landlord may lawfully exercise dominion over the personal property of a tenant who is evicted. Under section 1174, subdivision (g), the landlord may store the personal property until it is released under Civil Code section 1965. Although a landlord who stores a former tenant's personal property exercises control and possession over the property (the

first element of conversion), this is not wrongful if the landlord complies with the statutes. Under Civil Code section 1965, the tenant must make a written request for return of the property, and if the landlord makes a written, itemized demand for the costs of storage of the property, the tenant must pay the costs of storage before the landlord must surrender the property. If the tenant fully complies with the statute and the landlord nevertheless retains the property, he will be subject to civil suit under the statute or any other legal remedy, such as conversion. And if the landlord's agents—here, the attorneys—converted the property on their own behalf without regard to the statutes (for example, by pocketing jewelry or a gun, removing a horse and boarding it elsewhere, or otherwise exercising wrongful dominion), they could be directly liable for conversion.

Gelbard and Du Boise alleged in the ninth amended complaint that Hummer and Peterson "act[ed] on behalf of themselves" in taking possession of the personal property left on the ranch. In their motions for summary judgment, Hummer and Peterson argued there was no evidence they committed conversion, including as undisputed facts that they never personally took possession of any of the property or received any proceeds. Peterson added that he never directed anyone else to take possession of the property, and Hummer stated the same "with the exception of the firearms." Peterson and Hummer stated it was undisputed that they never received a written demand for the return of personal property, or an offer to tender storage costs despite Hummer's demand, complying with section 1174 or Civil Code section 1965. When Hummer instructed the security personnel to open the firearm safe and remove the weapons, she had not received a proper demand or payment for

storage costs, believed the weapons had been abandoned, and was concerned about fires in the area and the fire hazard attendant to storage of ammunition on the property. She arranged (with clearance from Gelbard's bankruptcy trustee) for the weapons to be transferred to a federally licensed firearms dealer for auction.

This shifted the burden to Gelbard and Du Boise to identify facts in evidence showing a triable issue of material fact as to conversion. (*Pipitone v. Williams*, *supra*, 244 Cal.App.4th at p. 1449.) In opposition, Gelbard and Du Boise agreed that it was undisputed that Hummer caused an accounting firm to inventory the property they left behind, but disputed that she had a statutory right to do so, so that taking the inventory itself constituted conversion. They also disputed that they did not make a valid statutory demand, or that they were required to pay any costs for the care and feeding of the horses while kept on the property, calling the demand for $6,848.92 "illegal" in part because the property was not stored off-site.[2] Gelbard and Du Boise disputed Hummer's statement that she was concerned

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[2] An older version of section 1174 required the landlord to inventory all personal property left on the premises before removal or storage on the premises, and entitled the enforcing officer to costs. (*Gray v. Whitmore* (1971) 17 Cal.App.3d 1, 14.) Practice guides continue to recommend such an inventory. (10 Miller & Starr, Cal. Real Estate (2018), § 34:216; Friedman et al., Cal. Prac. Guide: Landlord-Tenant (The Rutter Group 2017) ¶¶ 9:595 to 9:596.) The landlord is entitled to compensation for storage on or off the premises ("if the property is stored on the [landlord's] premises, to the fair rental value of such premises"). (*Gray*, at p. 16; *Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 451.)

about fire danger as "preposterous," disputed her statement that she believed they had abandoned the safe and the firearms as "preposterous" and "perjurious," and disputed that they had not made proper demands for the return of the property under the statutes. The sale of the guns by the gun dealer was not permitted by the statutes. As to Hummer and Peterson's liability for conversion beyond statutory violations, Gelbard and Du Boise disputed that Hummer and Peterson did not possess any property from the ranch, without citing any evidence of such possession.

Absent any evidence that Hummer and Peterson committed conversion, the trial court properly granted summary judgment. Even viewing the evidence in the light most favorable to Gelbard and Du Boise, they have not identified specific facts in evidence constituting conversion by Peterson and Hummer independent of possible violations of the statutes under which only the landlord, Unger, can be held liable. Lacking such evidence, Gelbard and Du Boise's arguments on appeal regarding conspiracy or aiding and abetting also fail.

We therefore need not address Peterson's argument on appeal that no evidence showed he was sufficiently involved (or, as a partner, supervised associate Hummer) so as to be liable for the events surrounding the management and disposition of the property.

4. **The trial court was correct not to admit the Unger declaration into evidence**

At his deposition on October 8, 2014, Unger refused to answer any questions about attorney advice regarding the handling of the property, on the ground of attorney-client privilege. Nevertheless, on January 27, 2016, shortly after

settling with Gelbard and Du Boise, Unger signed a declaration in support of Gelbard and Du Boise's opposition to Hummer and Peterson's motions for summary judgment. Unger stated he was badly represented by Hummer and Peterson and was considering filing a malpractice suit. He prefaced his description of his interactions with the lawyers during and after the unlawful detainer by saying, "I recognize, of course, that because I am testifying against Hummer, Peterson and [their firm] in this Declaration, I am thereby agreeing to waive the attorney-client privilege."

Even reviewing this evidentiary ruling de novo (*Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 368), we conclude the trial court was correct. Unger asserted his attorney-client privilege and refused to answer questions in his deposition about Hummer's and Peterson's advice regarding the personal property. The trial court properly did not allow into evidence Unger's declaration waiving that privilege regarding the same subject (after he had settled with Gelbard and Du Boise). When evidence sought at a deposition is withheld on the basis of the attorney-client privilege, "the trial court had the power to preclude at the [later] hearing the use of any evidence withheld [from the opposing party] at deposition." (*In re Marriage of Hoffmeister* (1984) 161 Cal.App.3d 1163, 1171.)

DISPOSITION

The judgments are affirmed. Rosslyn Hummer and Eric C. Peterson are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

LAVIN, Acting P. J.

KALRA, J. *

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.