Filed 9/17/13 Mirzaie v. Yale Management Services CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ALFRED MIRZAIE, Plaintiff and Appellant, v. YALE MANAGEMENT SERVICES, INC., Defendant and Respondent.	B241139 (Los Angeles County Super. Ct. No. BC470024)

APPEAL from an order of the Superior Court of Los Angeles County. Ruth Ann Kwan, Judge. Dismissed.

Law Offices of T. Matthew Phillips and T. Matthew Phillips for Plaintiff and Appellant.

Sturgeon & Wehbe and Allen Sturgeon for Defendant and Respondent.

Appellant Alfred Mirzaie (appellant) appeals from the superior court order denying his third motion for preliminary injunction against his landlord, respondent Yale Management Services, Inc. (respondent). Appellant alleges that respondent's agents unlawfully entered his apartment to conduct a "unit inspection," in violation of Civil Code section 1954 and will continue to do so if not legally prohibited.

We dismiss the appeal as moot.

FACTUAL AND PROCEDURAL BACKGROUND

I. The underlying dispute

For approximately 20 years, appellant rented an apartment from respondent in Los Angeles.[1] Appellant enjoys sole and exclusive possession of the unit. Respondent manages apartment buildings, including the building to which appellant's unit belongs.

The dispute between appellant and respondent arose on Sunday, September 11, 2011, when respondent posted a notice of intent to enter ("Notice"), pursuant to Civil Code section 1954,[2] on the front door of appellant's apartment. Respondent's Notice

---

1 There is no indication of any written lease agreement in effect, or of one in existence in the past.

2 Civil Code section 1954 provides (in pertinent part):

"(a) A landlord may enter the dwelling unit only in the following cases:

"(1) In case of emergency.

"(2) To make necessary or agreed repairs, decorations, alterations or improvements, supply necessary or agreed services . . . .

"(3) When the tenant has abandoned or surrendered the premises.

"(4) Pursuant to court order.

"(b) . . . .

"(c) The landlord may not abuse the right of access or use it to harass the tenant.

"(d)(1) Except as provided in subdivision (e), or as provided in paragraph (2) or (3), the landlord shall give the tenant reasonable notice in writing of his or her intent to enter and enter only during normal business hours. The notice shall include the date, approximate time, and purpose of the entry. The notice may be . . . left on, near, or under the usual entry door of the premises in a manner in which a reasonable person would discover the notice. Twenty-four hours shall be presumed to be reasonable notice in absence of evidence to the contrary. . . .

"(2) . . . .

scheduled a "unit inspection" of appellant's residence for Tuesday, September 13, 2011, between the hours of 10:00 a.m. and 4:00 p.m.

On Monday, September 12, 2011, appellant called respondent's agent, William Clayman, to protest the planned inspection of his unit. Clayman informed appellant that the inspection was required to check his smoke detectors. Appellant told Clayman that if respondent entered his home the following day, he would "'absolutely, positively' file suit for invasion of privacy."

On Monday, September 12, 2011, following the phone call, appellant e-mailed respondent reiterating his lack of consent for the scheduled inspection and stated that there were no leaks or broken windows to inspect. Respondent did not respond to this e-mail.

On Tuesday, September 13, 2011, at 3:45 p.m., respondent's agents Clayman and Tom Horton arrived at appellant's home to perform the scheduled inspection. Appellant told the agents that he did not consent to their entry but allowed them to complete the inspection "under protest."

Appellant watched the door as the agents entered the apartment. The smoke detectors were found to be in working order and the agents left.

II. Procedural History

On September 21, 2011, appellant filed a complaint against respondent and Richard Kaufman, respondent's owner, for monetary damages and injunction. In this complaint, appellant alleged that respondent's "managing agents: (1) unlawfully sought to enter appellant's apartment, and (2) did unlawfully enter appellant's apartment,

---

"(3) The tenant and the landlord may agree orally to an entry to make agreed repairs or supply agreed services. The agreement shall include the date and approximate time of the entry, which shall be within one week of the agreement. In this case, the landlord is not required to provide the tenant a written notice.

"(e) No notice of entry is required under this section:

"(1) To respond to an emergency.

"(2) If the tenant is present and consents to the entry at the time of entry.

"(3) After the tenant has abandoned or surrendered the unit." (Civ. Code, § 1954.)

thereby violating [appellant's] rights as a tenant and also his constitutional right to privacy."

Appellant contended that respondent's Notice was posted unlawfully. First, he claims the Notice was unreasonable because it was posted on a Sunday, which would be considered outside of normal business hours. Second, the Notice was "unlawful on its face for two reasons: (i) [it] fails to state an 'approximate time' for entry, and (ii) [it] fails to state a 'purpose' for entry." Respondent's Notice stated that the purpose for entry is for "unit inspection," and the scheduled time of entry would be 10:00 a.m. – 4:00 p.m. Appellant contends that those explanations are far too vague to abide by Civil Code section 1954's specificity requirements.

Appellant further contended that respondent's agents unlawfully entered appellant's apartment, thus violating appellant's rights as a tenant and his constitutional right to privacy. Appellant alleged that his rights were violated when he repeatedly protested to the entry of his dwelling, and that he only gave in once respondent's agents acknowledged that his acquiescence did not mean he was consenting to the entry. Appellant noted that while the Notice was dated September 10, 2011, respondent posted the Notice on appellant's door on September 11, 2011. Appellant claims that respondent back-dated the notice to appear to comply with Civil Code section 1954's requirement to provide reasonable notice.

Appellant's first cause of action alleged that his constitutional right to privacy was invaded by respondent's inspection. Appellant claimed this violation occurred because (1) appellant had a reasonable expectation of privacy in his home; (2) respondent intentionally intruded upon his home by scheduling an inspection; (3) appellant was harmed by respondent's intrusion as he was dispossessed of his leasehold; (4) respondent's inspection was a substantial factor in causing appellant's harm; and (5) respondent's intrusion would be highly offensive to any reasonable person. In defense of the final factor, appellant contends that respondent's "only motivation is greed" and "only goal is money." Appellant further asserted that respondent inspects homes in

search of a pretense upon which it may commence an eviction action against appellant, as he is paying a monthly rate far below market price.

Appellant sought an unspecified "award of money damages for the violation of his rights as a tenant, and for the violation of his constitutional right to privacy, and he [sought] a court order halting [respondent's] unfair business practices – 'general inspections.'" Appellant asserted that a preliminary and permanent injunction would serve to benefit respondent's other tenants, based on the assumption that they too were subject to wrongful dispossession of their leaseholds and privacy rights.[3] Appellant also sought an award of costs, expenses, and reasonable attorney's fees "under the parties' lease agreement and under Code of Civil Procedure section 1021.5." Further, appellant sought punitive damages because respondent "'knowingly' and 'intentionally' violated [appellant's] constitutional right to privacy."

A. Appellant's Motion for Preliminary Injunction

On October 7, 2011, appellant filed a motion for preliminary injunction. Appellant asserted that a preliminary injunction should be granted pursuant to Code of Civil Procedure section 526, because he was likely to succeed on the merits, and continuance of such "unit inspections" would cause great or irreparable injury to his constitutional right to privacy. Appellant relied solely upon his own verified complaint as the supporting document to show his likelihood to succeed and the basis upon which he should be granted the injunction.

Respondent opposed appellant's motion on the grounds that "(1) there are no facts to support the motion, (2) [appellant] has no reasonable chance of success on the merits, (3) there is no threat of immediate, irreparable harm, (4) the proposed injunction would apply to non-parties, and (5) the proposed injunction would stop [respondent] from

---

[3] While appellant assumed the injunction would benefit other similarly situated tenants, this initial complaint included no class action claim.

performing safety inspections [on smoke detectors every six months] as required by [Los Angeles Municipal Code section 57.112.07].[4]

B. Appellant's First Amended Complaint

On November 28, 2011, appellant filed his first amended class action complaint for damages and injunction (hereafter "FAC"). Appellant contended that the class action lawsuit represented his claim and the claims of several hundred other tenants, challenging the "ongoing business practice where [respondent] . . . conducts 'unit inspections' of tenants' apartments." Appellant stated that the inspections are per se unlawful pursuant to Civil Code section 1954[5] and thus the violation supports claims of (1) unfair business practices, (2) breach of covenant of quiet enjoyment, and (3) invasion of privacy. Appellant maintained his request for preliminary and permanent injunctions for the unit inspections, as well as for monetary damages.[6]

Appellant claimed respondent's assertion that it had to check the smoke detectors was a pretext for general, unlawful inspections. Appellant contended that even if the smoke detector inspection was the true purpose for the entry, respondent's Notice was still defective "for failure to state the 'smoke-detector' purpose."

C. Appellant's Motion for Preliminary Injunction Denied

On December 6, 2011, appellant moved for a preliminary injunction to prohibit respondent, "now and forever, from violating tenants' civil rights with general unit inspections," based on the facts alleged in the complaint.

---

[4] Los Angeles Municipal Code section 57.112.07, in pertinent part, requires that "[s]moke detectors… shall be maintained in dependable operating condition and tested every six months or as [otherwise] required…. An accurate record of such tests shall be kept by the owner, manager, or person in charge of the property." (Los Angeles Mun. Code, § 57.112.07, subd. (a).)

[5] Appellant cited "[Civil Code] §1945," which is likely a clerical error wherein appellant intended to write ". . . under [Civil Code] §1954."

[6] Appellant sought $47.33, one day's rent as damages for invasion of privacy.

Appellant's motion was denied for several reasons. The court held that appellant's reasons for a preliminary injunction – "based on facts alleged in the complaint" –did not meet the Code of Civil Procedure section 1010 requirement for stating grounds for a preliminary injunction. The court held that even if the grounds were properly stated,[7] the proposal was too broad because the motion failed "to define 'general unit inspections' or limit the scope of the requested injunction."

Second, the court found appellant failed to establish a likelihood of prevailing on the merits (as to respondent as well as to Kaufman). It found insufficient evidentiary facts in the complaint or appellant's declaration to support the grant of an injunction, and found that respondent's agents' declarations show that appellant allowed the inspection and the inspection was required by law.

Third, the court found appellant would not suffer harm if the motion for preliminary injunction was denied.

D. Appellant's Second Motion for Preliminary Injunction Based on First Amended Complaint

In response to the court's denial of appellant's initial motion for preliminary injunction, appellant filed a second motion for a preliminary injunction on December 15, 2011. Appellant stated that he sought an injunction in order "to preserve the status quo" and "to prevent irreparable injury."

Appellant sought to define "general unit inspections" in an attempt to clarify the grounds for properly granting an injunction against respondent's upcoming entry. Appellant sought to "halt all 'general inspections,' including the following sub-categories of 'general inspections': (1) unit inspections . . . and (2) safety inspections." Appellant asserted that both sub-categories were terms coined by respondent but not stated or enumerated in Civil Code section 1954 as lawful reasons for landlord entry. Appellant

---

[7] The court found that for such a request to be properly made, it would have stated that appellant was "seeking a preliminary injunction to prohibit [respondent], now and forever, from violating tenants' civil rights with general unit inspections."

failed to provide any other definition of "general inspection," "unit inspection," or "safety inspection."

Appellant asserted that, pursuant to Civil Code section 1954, the impending scheduled inspection was unlawful harassment. Appellant argued that based on the impending suit and his belief that the initial inspection violated his rights, an injunction should be granted because allowing respondent to repeat that action at a specified time in the future constituted unlawful harassment.

Appellant further indicated that, contrary to respondent's agents' declarations, he did not consent to the initial entry. Appellant emphasized the difference between acquiescence and consent, stating that "if [appellant] barred [respondent's agents] from entry, [appellant] would now be facing an eviction lawsuit."[8] Instead, appellant stated to the agents that he did not consent to their entry, but eventually acquiesced to that entry.

Respondent opposed the motion on the same grounds it asserted in its opposition to the first motion for preliminary injunction.

On January 13, 2012, appellant's second motion for preliminary injunction was denied. On February 21, 2012, the lower court sustained respondent's demurrer to the FAC, with leave to amend. In sustaining the demurrer, the court found that appellant failed to allege sufficient facts to support his claims.

In finding that appellant failed to assert sufficient facts to support the class action claims, the court found that appellant failed to allege facts showing: "(1) there is a reasonable possibility that class action treatment is appropriate; (2) there is a class interest because the phrase 'Unit Inspection' is not clearly defined; and (3) there are enough individuals that suffered similar injuries to [appellant] to warrant class treatment. [Appellant's] conclusory allegations are insufficient." The court found that there were likely to be many aspects to this case that are unique to the circumstances of each tenant, thus each claim should be given individualized treatment.

---

[8] Appellant mentioned a prior "bogus eviction against [appellant]" that occurred in 2003, but failed to provide any further detail or documentation to support this assertion.

The court next found that appellant failed to allege sufficient facts to constitute a cause of action for unfair business practices. Specifically, it found appellant failed to allege facts showing respondent violated Civil Code section 1954 and failed to properly allege damages.

The court also found that appellant failed to allege sufficient facts to constitute a cause of action for breach of the implied covenant of quiet enjoyment. Specifically, appellant "failed to allege facts showing he was actually or constructively evicted from the premises."

Finally, the court found that appellant failed to allege sufficient facts to constitute a cause of action for invasion of privacy. Specifically, appellant "failed to allege facts showing [respondent] violated Civil Code § 1954" and "[appellant's] conclusory allegations are insufficient to establish [respondent] unlawfully intruded into his residence for an improper purpose."

The court set the deadline for appellant to amend his complaint by March 9, 2012.

E. Appellant's Second Amended Class Action Complaint for Damages and Injunction

On March 12, 2012, three days past the court-mandated deadline, appellant filed his second amended class action complaint for damages and injunction ("SAC"). Appellant contended that respondent's demurrer "failed to identify what requisite elements (if any) were missing from any cause of action in the FAC," and that "the court failed to identify any requisite element, on any cause of action, that [appellant] should have pleaded." Appellant further argued that by not making a judicial determination of whether "unit inspections" are lawful under Civil Code section 1954, the judge "abandon[ed] her duties under the Canons of Ethics."

In the SAC, appellant asserted the following nine causes of action (six more than those listed in the FAC[9]): "(1) violation of [Civil Code] § 1954; (2) harassment, [Civil Code] §1954(c); (3) 'unfair business practices,' [Business & Professions Code] § 17200; (4) breach of contract (quiet enjoyment); (5) breach of contract (good faith and fair dealing); (6) invasion of privacy; (7) trespass onto tenants' possessory interests; (8) [respondent] wrongfully influence tenants to vacate; and (9) the owner(s) of his apartment house fail to disclose an address where said owner(s) may be personally served with a copy of this lawsuit, as per [Civil Code] § 1962."

F. Appellant's Third Motion for Preliminary Injunction

On March 21, 2012, appellant filed a third motion for preliminary injunction. Restating the reasoning from his prior motions for preliminary injunction, appellant provided no additional justifications for this third motion for preliminary injunction. Appellant still relied solely upon his verified SAC for this motion.

In his reply to the opposition filed by respondent, appellant contended that "the court did not specify whether March 9 was the date to file or the date to serve," and that appellant's counsel "calendared [March 9] as the day to serve." Appellant further argued that respondent did not suffer any prejudice caused by the late filing of the SAC. Appellant's substantive reply to respondent's opposition merely restated that respondent unlawfully entered appellant's home when respondent did not provide notice of lawful entry.

G. Appellant's Motion for Preliminary Injunction Denied

On April 18, 2012, the lower court denied appellant's third motion for preliminary injunction. As held in the court's ruling on appellant's second motion for preliminary injunction, the court again found that: (1) the proposed injunction was too broad (which appellant failed to rectify in this SAC); (2) appellant failed to establish a likelihood of

---

9 In the FAC, appellant asserted the following causes of action: (1) unfair business practices, (2) breach of covenant of quiet enjoyment, and (3) invasion of privacy. These are listed as causes of action (3), (4), and (6).

prevailing on the merits at trial, and (3) respondent sufficiently showed that appellant would not suffer harm if the preliminary injunction were denied.

H. Respondent's Demurrer is Sustained Without Leave to Amend

On May 11, 2012, the court ruled on respondent's demurrer to the SAC. The court denied respondent's motion to strike appellant's SAC because, while appellant failed to timely file, appellant timely served respondent with his SAC.

The court, on its own motion and pursuant to Code of Civil Procedure section 436, struck the 1st, 2nd, 5th, 7th, 8th, and 9th causes of action and defendant Marshall F. Kramer, as appellant exceeded the scope of amendment by adding six new causes of action and a party to the SAC. The court held appellant exceeded the scope of amendment and failed to seek leave of court before making the additions.

The court sustained respondent's demurrer with respect to the class action claims (the 3rd, 4th, and 6th causes of action) because appellant failed to allege facts sufficient to support them. The court found appellant's "conclusory allegations" insufficient, stating that appellant failed to allege facts showing: "(1) there is a reasonable possibility that class action treatment is appropriate; (2) there is a class interest because the phrase 'unit inspection' is not clearly defined; and (3) there are enough individuals that suffered similar injuries to [appellant] to warrant class treatment." Furthermore, the court found that there were likely to be individualized issues that are better assessed on a case-by-case basis.

The court did not rule on respondent's request for dismissal and no order of dismissal was ever filed.

I. Appeal

On May 8, 2012, appellant filed a notice of appeal from the lower court order denying appellant's Motion for Preliminary Injunction. Appellant did not file a notice of appeal from the sustaining of the demurrer to the SAC, which occurred three days later.

Appellant proceeds under the assumption that prevailing on this appeal alone would provide sufficient cause to reverse the court order sustaining respondent's

demurrer to the SAC. For that reason, appellant argues, he does not appeal the order sustaining the demurrer.

While the appeal was pending, we requested letter briefs from the parties addressing the issue of whether the appeal was moot due to the sustaining of the demurrer to the SAC without leave to amend.

Appellant's letter brief contended that because he filed his notice of appeal before the ruling on the demurrer, his appellate rights had vested. He also contended that in sustaining the demurrer, the trial court was committing the same error, that is, it failed to address the issue of whether a landlord may enter a tenant's dwelling to undertake a general unit inspection, which is not enumerated in Civil Code section 1954.

Respondent's letter brief points out that appellant did not file an appeal from the order sustaining the demurrer. It argues that no effective relief can be granted and the request for the preliminary injunction was based on the SAC which had no remaining causes of action. Neither party indicated in their supplemental brief whether the action had been dismissed.

DISCUSSION

A. Mootness

"A preliminary injunction serves to protect the rights of litigants until there is a determination of the merits of the underlying action, but the injunction is only an adjunct to the main action. (*Korean American Legal Advocacy Foundation v City of Los Angeles* (1994) 23 Cal.App.4th 376, 399.

Since the trial court sustained the demurrer to the SAC, there is no valid cause of action on which the preliminary injunction may be based. The appeal from the denial of the preliminary injunction is moot and must be dismissed. (*Korean American Legal Advocacy Foundation v City of Los Angeles, supra,* 23 Cal.App.4th at p. 399.)

DISPOSITION

The appeal is dismissed as moot. Respondent is entitled to costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **ZELON, J.**