



Outside Counsel

Expert Analysis

Does Fraud Invalidate Consent In the Context of a Trespass Claim?

Under New York law, trespass is an “intentional entry onto the land of another without justification or permission.” *Woodhull v. Town of Riverhead*, 46 A.D.3d 802, 804 (2d Dep’t 2007). Thus, as a matter of law, where a property owner consents to a party entering his property, a trespass claim cannot be maintained. See, e.g., *SHLP Assocs. v. State of N.Y.*, 262 A.D.2d 548, 549 (2d Dep’t 1999). However, when the property owner’s consent is induced through fraud committed by the alleged trespasser, under New York law the property owner’s consent is rendered invalid. For instance, in the seminal case of *Shiffman v. Empire Blue Cross and Blue Shield*, 256 A.D.2d 131 (1st Dep’t 1998), the First Department affirmed the trial court’s

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denial of a motion to dismiss a trespass claim where “it was undisputed that defendants gained entry to plaintiff’s private medical office by having

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a reporter pose as a potential patient using a false identity and bogus insurance card.” Id. The First Department held that these undisputed facts “defeated defendants’ affirmative defense based on consent and implied consent to enter the premises” Id.

What happens, however, when an alleged trespasser enters another’s property with the property owner’s consent, but that consent is induced by fraudulent acts of someone other than the alleged trespasser? Until the New York Supreme Court’s recent decision in the case of *Morgan Home Builders v. Mahy* (New York Sup. Ct., New York Cty., Index No. 656461/2018) in which I represented the defendant and alleged trespasser, Creative Media Marketing (Creative), no New York court had ever squarely addressed the question.

The Alleged Facts

In *Mahy*, the plaintiff, property owner Morgan Home Builders (Morgan) filed a complaint alleging that it “permitted” Creative to “occupy” its property pursuant to a license. Morgan further alleged that it consent-

ed to the license in reliance on fraudulent misrepresentations made by two other defendants that “fees paid in connection with the license” would be paid to Morgan. Morgan alleged that it never received any such fees because the other defendants diverted the fees from Morgan for their own benefit. Seeking to recover the diverted license fee, Morgan brought a variety of claims against the other defendants, including for fraud and breaches of contract and fiduciary duties, but just one claim against Creative for trespass.

Creative’s Legal Arguments For Dismissal

Creative filed a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failing to state a cause of action for trespass. In support of the dismissal motion, Creative argued that Morgan’s admission in its complaint that it “permitted” Creative to “occupy” its property ordinarily required dismissal of the trespass claim as a matter of law; the only issue for the court to determine was whether the other defendants’ alleged fraud vitiated Morgan’s admitted consent.

In the absence of any New York case law directly address-

ing the question, Creative argued that courts in other jurisdictions addressing the issue have often turned to the rubric set forth in §892(b) of the Restatement of Torts for guidance. Section 892(b) sets forth a general rule that “consent to conduct of another is effective for all consequences of the conduct and for the invasion of any interests resulting from it.” Restatement (Second) of Torts §892B (1979) (October 2018 Update). This rule, however, is subject to the narrow exception that if the consent is procured by: (1) a “substantial mistake” that is “known to the other” or (2) “a misrepresentation made ... by the actor,” then the consent is invalid. *Id.* As the Ninth Circuit, citing *Prosser and Keeton on the Law of Torts*, put it in the case of *Tbeofel v. Fary-Jones*, 359 F.3d 1066 (9th Cir. 2009), “an overt manifestation of assent or willingness [of consent] would not be effective ... if the defendant knew, or probably if he ought to have known in the exercise of reasonable care, that the plaintiff was mistaken as to the nature and quality of the invasion intended.”

Additionally, in support of its dismissal motion, Creative pointed out that some courts

do not follow §892(b) of the Restatement, and instead hold that a property owner’s consent for another to enter its property stands as a matter of law even when the alleged trespasser uses fraud to gain entry to the property on false pretenses. For instance, in the case of *Desnick v. ABC*, 44 F.3d 1345, 1351 (7th Cir. 1995), the Seventh Circuit affirmed dismissal of the plaintiff’s trespass claim where certain persons falsely posed as “test patients” in order to induce the plaintiff property owner into permitting them to access a medical treatment center to write a news story about poor medical practices at the center. In affirming dismissal, the Seventh Circuit observed:

The fact is that consent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable or generally ethical or at least lawful reasons to revoke his consent.

Similarly, in *American Transmission v. Channel 7 of Detroit*, 239 Mich. App. 695 (2000), Michigan’s Court of Appeals held that a trespass claim should be dismissed where

even though the defendant “misrepresented her purpose” in entering the plaintiff’s land, the “plaintiff’s consent was still valid because she did not invade any of the specific interests relating to the peaceable possession of land that the tort of trespass seeks to protect.” Likewise, in *Martin v. Fidelity & Casualty Co.*, 421 So.2d 109 (Ala. 1982) Alabama’s Supreme Court held that “an action for trespass ... will not lie unless plaintiff’s possession was intruded upon by defendant without his consent, even though consent may have been given under a mistake of facts, or procured by fraud . . .”

Creative argued, and the New York Supreme Court agreed, that the import of the above legal principles with respect to Morgan’s trespass claim could not be clearer: At a minimum, Morgan’s admitted consent for Creative to occupy its property is valid and requires dismissal of its trespass claim in the absence of any allegations that Creative knew or had reason to know that such consent was procured by fraud. Because Morgan’s complaint was devoid of any such allegations, its trespass claim had to be dismissed.

The Court’s Ruling

On June 28, 2019 the New York Supreme Court, New York County (Hon. Melissa A. Crane) granted Creative’s motion to dismiss the complaint, and entered an order dismissing the trespass claim against Creative for all the reasons Creative argued in its dismissal motion. The court’s dismissal order gave the plaintiff a 20-day deadline to try to “fix” the complaint by adding allegations that Creative knew that the plaintiff’s consent to enter its property was induced by fraud. This deadline passed without the plaintiff attempting to re-plead.

Conclusion

The court’s ruling in *Mahy* makes clear that under New York law, when a property owner’s consent to enter his or her property is induced by fraud which the alleged trespasser did not partake in or have any reason to know about, no trespass claim will lie. This common sense holding enables persons who innocently enter another’s property with the property owner’s permission to rely on the permission he or she received. New York property owners, however,

should take the *Mahy* decision under advisement and be vigilant when it comes to relying on brokers, agents and other third parties in issuing licenses and leases permitting others to enter their land.