

Supreme Court of the State of New York  
Appellate Division: Second Judicial Department

D34398  
H/kmb

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Submitted - February 6, 2012

REINALDO E. RIVERA, J.P.  
DANIEL D. ANGIOLILLO  
JOHN M. LEVENTHAL  
JEFFREY A. COHEN, JJ.

2010-09976

DECISION & ORDER

Anthony “Peppi” Marchello, respondent, v Perfect  
Little Productions, Inc., et al., appellants  
(and a third-party action).

(Index No. 5057/06)

Jones Hirsch Connors & Bull P.C., New York, N.Y. (Richard Imbrogno and Kevin  
M. Ryan of counsel), for appellants.

In an action, inter alia, to recover damages for breach of bailment and negligence, the defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (Murphy, J.), entered June 15, 2010, as granted those branches of the plaintiff’s motion which were for summary judgment on the issue of liability on the causes of action to recover damages for breach of bailment and negligence.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and those branches of the plaintiff’s motion which were for summary judgment on the issue of liability on the causes of action to recover damages for breach of bailment and negligence are denied.

The plaintiff commenced this action, inter alia, to recover damages for breach of bailment and negligence, alleging, among other things, that the defendants negligently failed to preserve certain musical recordings which they were storing on computer hard drives. The plaintiff moved for summary judgment on the issue of liability. In the order appealed from, the Supreme Court, inter alia, granted those branches of the plaintiff’s motion which were for summary judgment on the issue of liability on the causes of action to recover damages for breach of bailment and negligence.

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In support of his motion for summary judgment, the plaintiff established, prima facie, that the defendants were negligent in failing to preserve his musical recordings and committed a breach of a gratuitous bailment (*see Voorhis v Consolidated Rail Corp.*, 60 NY2d 878, 879; *Ramirez v City of White Plains*, 35 AD3d 698). However, in opposition, the defendants raised triable issues of fact as to, among other things, whether the bailment in question was gratuitous or for hire, and as to whether they were free from negligence. Accordingly, the Supreme Court should have denied those branches of the plaintiff's motion which were for summary judgment on the issue of liability on the causes of action to recover damages for breach of bailment and negligence.

We decline the defendants' request to search the record and award summary judgment dismissing the complaint insofar as asserted against the defendant "Valerie Valente."

RIVERA, J.P., ANGIOLILLO, LEVENTHAL and COHEN, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court