SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
----------x
TACHE USA INC.,

Index No. 114886/09

Plaintiff,

-against-

T.S.T. INTERNATIONAL LTD.,

Defendant.
----------x

Charles Edward Ramos, J.S.C.:

Plaintiff Tache USA Inc. (Tache) and defendant T.S.T. International Ltd. (TST) are engaged as wholesalers of polished diamonds and jewels.

Tache commenced this action in October 2009, asserting a claim for goods sold and delivered stemming from its August 2008 sale to TST of 18.07 carats of diamonds. According to the complaint, TST paid a portion of the cost but failed to pay the balance of $165,000, which remained outstanding.

After TST failed to timely answer the complaint, it moved to vacate its default. The Court issued a decision in July 2010 in which it denied TST's motion, in part, to the extent it sought to vacate its default and stay execution of judgment in favor of Tache, and directed the entry of judgment in favor of Tache in the amount of $165,000 with interest, together with $5,000 of attorney's fees and costs. The Court permitted TST leave to serve and file an answer with counterclaims relating to its consignment to Tache of a diamond necklace that Tache wrongfully

retained, in an unrelated transaction.

The action continued as to TST's counterclaims for breach of contract and conversion. As set forth in the affidavit of TST's principle, Tushar Parikh, TST sent Tache a diamond necklace in April 2009 on a consignment basis, at Tache's indication that it knew of a customer who was potentially interested in purchasing it. The necklace contains colored diamonds and has a total diamond weight of 60.27 carats. According to Parikh, he "haggled" with Tache's principle over the value of the necklace, and "agreed upon a price of $225,000" (Parikh Aff., ¶ 6). Tache disputes that such discussion ever took place, and claims that no agreement was made regarding a purchase price because the parties agreed to a consignment arrangement only (Weinman Aff. in Opp., ¶ 5).

The necklace was accompanied by an all-risk memorandum (All Risk Memo), which is purportedly standard in the diamond industry, and sets forth the basic terms of the consignment arrangement (Kinzler Aff., ¶ 4).

The All Risk Memo states that title to the necklace would remain with TST and that Tache would return it immediately upon demand. The All Risk Memo describes the necklace, including carat weight, stones and quality, and states that the "price per carat" is $225,000 (Exhibit A, annexed to the Parikh Aff.).

The All Risk Memo also states the following:

> The Property as listed below is delivered to you at your own risk from all hazards and received by you for examination and inspection only and is to be returned on demand. From the time the property is received by you until it is actually redelivered to and received by T.S.T. International Ltd., at its premises, you bear the risk of loss or damage however caused; and **you will be legally liable to us to the extent of the amount stated below for any loss or damages which may occur**, wether caused by you or not, and whether occurring through your negligence or not. **Your acceptance of the property described herein constitutes your agreement to be bound by the terms and conditions of the memorandum, whether signed by you or not**. Title remains in T.S.T. International Ltd. and before any title can pass, or before any sale or agreement to sell can take place, the item or items selected by you must first be approved by T.S.T. International Ltd., and bill of sale tendered for such item or items. No right or power is conveyed to you to sell, pledge, hypothecate or otherwise dispose of this property regardless of any prior transactions, custom or usage in the trade" (emphasis added) (*Id.*).

TST claims that Tache subsequently acknowledged, orally and in writing, that it had received the necklace, and did not object to the terms of the accompanying All Risk Memo.

Tache showed the necklace to a number of customers, but represents that the highest offer it received was for $125,000; TST purportedly ignored these offers. During the spring of 2009, TST demanded return of the necklace on several occasions, which Tache refused. Tache indicated that it intended to hold onto the necklace until TST paid the outstanding balance of $165,000 stemming from TST's prior purchase of diamonds, which was, by August 2009, nearly one year overdue (Weinman Aff. in Opp., ¶ 9).

On August 29, 2009, TST delivered to Tache an invoice for the necklace and demanded payment of $225,000 (Exhibit B, annexed

to the Parikh Aff.). The invoice also set forth a statement of accounts between the parties, and lists the $165,000 balance that TST owed to Tache (*Id.*). At the time, TST proposed to Tache that it credit itself for the portion of the "purchase price" of the necklace against the outstanding balance that TST owed.

Counsel for Tache purported to reject the invoice, and thereafter, demanded payment for the outstanding balance of $165,000 (Exhibit H, annexed to the Weinman Aff.). Tache reiterated that it intends to hold the necklace as "security for payment of this past due balance" (*Id.*). Shortly thereafter, Tache commenced this action.

TST now moves for summary judgment on its counterclaims for conversion and breach of contract, and seeks damages in the amount of $225,000, which it contends is both the agreed-upon price of the necklace as set forth in the All-Risk Memo, and the value of the item at the time of the conversion.

Discussion

In support of its motion for summary judgment seeking damages in the amount of $225,000, TST asserts that it is undisputed that Tache wrongfully retained possession of TST's necklace despite repeated demands for its return, and the damages it seeks are the agreed-upon price and unobjected-to value at the time of the conversion, as set forth in the All Risk Memo.

Tache does not dispute that it possesses the necklace, but

argues that the purported price of the necklace, $225,000 is not binding upon the consignor for purposes of a sale but merely represents that maximum value of the item in the event that it is lost or damaged. As to the invoice, Tache asserts that it promptly rejected it. In addition, Tache asserts that it is well-settled that damages for conversion are determined based upon the value of the property at the time and place of conversion. Tache argues that TST has failed to make a prima facie showing of the market value of the necklace and thus, is not entitled summary judgment on damages.

A conversion occurs when one "intentionally and without authority assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Demry v Wind,* 82 AD3d 670 [1st Dept 2011]). Generally, the damages for conversion is the market value of the property at the time and place of the conversion, plus interest (*Fantis Foods, Inc. v Standard Importing Co.*, 49 NY2d 317, 325-26 [1980]; *Long Playing Sessions, Inc. v Deluxe Labs., Inc.,* 129 AD 2d 539, 540 [1st Dept 1987). "Market value" is the price at which the goods can be replaced for money in the market (*Ashare v Mirkin, Saltzstein & Gordon, P.C.,* 106 Misc 2d 866 [Sup Ct, Suffolk County 1980], *judgment affirmed as modified on other grounds* 81 AD2d 650 [2d Dept], *affirmed* 54 NY2d 891 [1981]).

Exceptions to the rule that a plaintiff can recover for

conversion according to the value of the property at the time of the conversion are limited (*Corn Exchange Bank v Peabody,* 111 AD 553 [1st Dept 1906]), and generally only apply where the converted item is of highly fluctuating value (*see Will of Rothko,* 56 AD2d 499, 503 [1st Dept], *affirmed* 43 NY2d 305 [1977]), or is without market value, such as a family heirloom or unsellable property (*see Lake v Dye,* 232 NY 209, 214 [1921]).

Here, the facts underlying the counterclaim for conversion are largely undisputed, and will not be reiterated except to the extent that Tache wrongfully exercised control over TST's necklace once TST demanded its return and Tache refused.

Nonetheless, TST has not produced sufficient evidence to demonstrate its damages as a matter of law, namely, the market value of the necklace at the time of the wrongful taking, which occurred in August 2009.

TST's position is that $225,000 is both the agreed-upon price and unobjected-to value at the time of the conversion because it is set forth in the All Risk Memo. However, the All Risk Memo is not unequivocal proof of the market value of the necklace at the time of conversion, although may be *some* evidence (*see e.g. Charles F. Winson v D. Gumbiner, Inc.,* 85 AD 2d 69, 71-72 [1st Dept], *affirmed* 57 NY2d 813 [1982]). TST does not submit any other proof of the market value of the necklace, and otherwise does not contend that it does not have an ascertainable

market value. Where, as here, the converted item has an ascertainable market value, it is necessary that proof be submitted to support a determination of value (*Spartis v Doscas,* 68 NYS 2d 462 [App Term, 1st Dept 1947]; *Reeser v Hill,* 99 AD2d 645 [4th Dept 1984]).

The cases upon which TST rely are entirely inapposite and not controlling of the issue raised in this motion.

For instance, in *Charles F. Winson Gems, Inc.* (85 AD 2d 69), the owner of a piece of jewelry, Fazio, consigned a piece of jewelry to the plaintiff, who, in turn, consigned it to the defendant pursuant to an all risk memorandum which provided that the consignee (defendant) bore the risk of loss or damage to the item "to the extent of $21,500." The defendant subsequently consigned the jewelry to another individual, whereupon it was not returned. Fazio obtained a judgment against the original consignor (plaintiff) for $34,820, the purported actual value of the jewelry, and the plaintiff was awarded a default judgment against defendant in the same amount. The defendant moved to vacate the default, in part, on the ground that the terms of the all risk memorandum limited its liability in the event of loss to the sum of $21,500. Thus, the issue before the court was whether plaintiff's damages for the loss of the item were to be fixed at the actual value of the jewelry or were limited at the value set forth in the all risk memorandum. The court determined that the

all risk memorandum “unequivocally **limited Gumbiner’s [defendant] liability to the extent of the amount set forth** therein for any loss or damages which may occur” (emphasis added).

Here, in contrast, the necklace was not lost or damaged, and the value set forth in the All Risk Memo, while limiting Tache’s liability in the event of loss or damage, does not constitute unequivocal proof of TST’s damages on its conversion claim. Thus, the general rule that in a conversion action, where the property has an ascertainable market value, a party must submit proof of the value of the item at the time of the conversion, is controlling. At to this issue, TST has submitted insufficient proof. Alternatively, TST asserts a claim for breach of contract premised on the contention that the parties consented to the price of $225,000, as set forth in the All Risk Memo which is an enforceable term.

At the outset, the Court notes that a conversion cause of action cannot be predicated on a mere breach of contract, and a contract claim cannot be recast as one for the tort of conversion (*Kopel v Bandwidth Tech. Corp.,* 56 AD3d 320 [1st Dept 2008]).

In any event, TST fails to demonstrate that it is entitled to summary judgment as to damages on its alternative claim for breach of contract. It is undisputed that the necklace was delivered to Tache accompanied by the All Risk Memo which set forth the terms of the consignment arrangement, in which Tache

agreed to be absolutely liable for any loss or damage to the necklace. Nonetheless, TST fails to establish that the parties agreed to a $225,000 value for the necklace. At best, the All Risk Memo is ambiguous as to whether the amount set forth therein was the approved sales price that Tache endeavored to obtain from potential customers or the agreed-upon value of the necklace (*see A. Link Partners, Inc. v Senderowicz,* 2009 NY Misc LEXIS 5286, *20-21 [Sup Ct, NY County 2010]; *Verstandig & Sons, Inc. v Sobel,* 26 Misc 2d 649, 651-53 [Sup Ct, NY County 1960]).

For the foregoing reasons, TST's motion for summary judgment is denied, and the parties are directed to appear for a hearing on damages concerning the market value of the necklace as of August 2009.

Accordingly, it is

ORDERED that defendant's motion for summary judgment denied.

Dated: May 23, 2011

ENTER:

_____

J.S.C.