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SHORT FORM ORDER
SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

MONIQUE FEINBERG.
Plaintiff.

- against -

Sequence No.: 001 & 002
Index No.: 010412/06
XXX

W.M. MOVERS, INC. And ARREDONDO & CO., LLC d/b/a WESTY STORAGE CENTER.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motion and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

The motion by defendants W.M. Movers, Inc. ("Movers") for partial summary judgment to limit liability and the cross-motion by defendant Arredondo & Co., LLC d/b/a Westy Storage Center ("Westy") for summary judgment are both granted for the reasons set forth herein.

Plaintiff commenced this action for $78,469 in alleged damages to household goods. The goods in question were moved on June 4, 2004 from plaintiff's then home to storage rooms owned and operated by Westy in Lake Success, N.Y. On November 17, 2004 the items were moved from Westy's storage rooms/bins to plaintiff's new residence in Manhasset, N.Y. Movers note two bills of lading for the move from Mount Vernon, N.Y. to Westy's (Exhibit G annexed to Westy's motion) and then from Westy's in Lake Success, N.Y. to 34 Fairway Drive in Manhasset, N.Y. (see, Exhibit I annexed to Westy's motion) Movers notes plaintiff initialed the box on both bills of lading indicating that the maximum liability for that shipment of goods to be $2,500.

William Misaray, president of Movers, in his affidavit (following the affirmation of Kenneth R. Feit) stated he informed plaintiff in May 2004 that she had the option of paying an additional charge for a higher level of liability (¶ 3). Misaray indicated plaintiff designated some items to be discarded and some designated to be sent to her son in California. Plaintiff's items were moved to Westy storage in Lake Success, N.Y. As noted by Movers, plaintiff in her

deposition acknowledged she signed the bill of lading and initialed the valuation section on both June 4, 2004 and November 17, 2004 (see, Exhibit D, pgs. 97, 98 annexed to Movers' motion). Movers notes plaintiff paid Movers' charges and signed both bills of lading indicating that the shipment was received in "good condition" on both the June 4, 2004 bill of lading (see, Exhibit G annexed to Movers' motion) and the November 17, 2004 bill of lading (see, Exhibit I annexed to Movers' motion). Movers denies it damaged or misplaced any of plaintiff's property, and it contends the $2,500 limitation is fully valid and enforceable. Misaray also states Movers were not given the keys to the locks on the plaintiff's storage rooms/bins.

Westy notes plaintiff utilized four "bins" or rooms for storage and the storage agreements (for each room) indicated plaintiff had to get her own insurance for the contents of the rooms with no claims permitted against Westy (see, Exhibit D annexed to Westy's cross motion). Westy also notes no issues of damage or theft set forth by plaintiff when she signed the "vacate authorization" form. Westy had to give plaintiff three days prior written notice before vacating the rooms/bins. Plaintiff as per the agreement had her own lock for each storage room (see, Exhibit D, annexed to Westy's cross motion, "rules and regulations, access by Westy and occupant" and "end of term agreement").

Plaintiff stated she did not make her last homeowner's insurance premium, and her homeowner's policy was cancelled (see, Exhibit D, pg. 31-32 annexed to Movers' motion).

In order to avoid the application of an agreed-upon limitation of liability, a shipper/bailor of goods must establish a true conversion in that the non-delivery of the goods resulting from the carrier's affirmative willful or intentional misconduct (Art Masters Associates, Ltd. v. United Parcel Service, 77 N.Y.2d 200).

In the absence of any competent showing that the alleged non-delivery of a plaintiff's item resulted from any "affirmative wrongdoing" on the part of the defendant carrier or its employees, the carrier is entitled to the benefit of its contractual and tariff provisions limiting liability for the loss (Rifkin v. Pologeorgis Furs, Inc., 160 Misc.2d 256).

Here, there was no evidence presented by plaintiff to establish willful or intentional misconduct on the part of the Movers or its employees.

A plaintiff's affidavit submitted in opposition to a motion for summary judgment containing new assertions about the incident in issue, if deemed designed to raise feigned factual issues in order to avoid the consequences of a summary judgment motion, i.e., prevent a summary disposition, is inadequate to defeat the summary judgment motion (Yan Quan Wu v. City of New York, 42 A.D.3d 451). As to Movers, plaintiff's affidavit that she did not remember signing/initialing the documents with Movers (see, plaintiff's affidavit, ¶ 5) does not raise issues of fact to defeat Movers' motion since it contradicts her deposition testimony (see, Exhibit D, pgs. 54-56 annexed to Movers' motion).

Employee theft will not vitiate a limitation of liability in a contract of carriage; only a claim that the carrier converted plaintiff's goods for its own use can vitiate such a clause (Art Masters Associates, Ltd. v United Parcel Service, *supra*).

A carrier is entitled to the benefit of a contractual limitation upon its liability for non-delivery unless the shipper establishes that the non-delivery resulted from the carrier's affirmative wrongdoing (Art Masters Associates, Ltd. v United Parcel Service, *supra*). Plaintiff has not offered any indication of affirmative wrongdoing as to Movers' conduct or that of its employees.

Here, the record indicates that plaintiff initialed the documents limiting Movers' maximum liability to $2,500. Thus, Movers' motion for partial summary judgment as to the maximum liability in that amount is granted.

The court will now consider the cross-motion of Westy.

As a bailee, a warehouse is required to exercise reasonable care so as to prevent loss of or damage to property and to refrain itself from converting materials left in its care (I.C.C. Metals, Inc. v. Municipal Warehouse Co., 50 N.Y.2d 657). A warehouse unable to return bailed property either because it has lost the property as a result of negligence or because it has converted the property will be liable for full value of the goods at the time of the loss or conversion unless the parties have agreed to limit the warehouse's potential liability (I.C.C. Metals, Inc. v. Municipal Warehouse Co., *supra*).

Absent a statute or public policy to the contrary, a contractual provision absolving a party from its own negligence will be enforced (Sommer v. Federal Signal Corp., 79 N.Y.2d 540). Clearly, Westy informed plaintiff that any loss to the contents of the rooms/bins with plaintiff's own locks could be secured by plaintiff (by her own funds or by an insurance policy obtained by the plaintiff). The agreement clearly signed by plaintiff indicated plaintiff was to hold Westy harmless. There is nothing in the record that would negate the impact of that agreement.

When a party signs a form agreeing to be bound by a security agreement, the fact that the party later testified that he or she did not read the form, the party would still be bound by the security agreement irrespective of the testimony of the party that he or she did not read the agreement and was not aware of its terms (Gullman v. Chase Manhattan Bank, N.A., 73 N.Y.2d 1).

Thus, plaintiff had her lock/combination to the room/bin, had signed and initialed a form to hold Westy harmless for all claims against it and had agreed, if she so decided to have or continue insurance coverage, to protect her household items in storage as a self insurer or by having an insurance policy and so indicated by initialing the line below "Value of occupant's property, insurance" (see Exhibit D, annexed to Westy's cross motion; see Exhibit D, pg. 55, 56 annexed to Mover's motion).

Here, plaintiff signed each of the four rental agreements (for the bins/rooms), and she initialed the paragraph indicating she was aware she was relying on her own insurance as well as holding Westy harmless as to theft and losses (see Exhibit E, pgs. 99-100 annexed to Westy's cross-motion).

Yosir Biaidi, a Westy employee, testified that there were dates on the vacate authorization that pre-dated plaintiff's stated date of November 17, 2004 vacating the bins/rooms (see, Exhibit D, pgs. 9-14 of an abbreviated deposition annexed to plaintiff's affirmation in opposition). All other indications (records from Movers, plaintiff's deposition, etc.) that plaintiff's vacating the bin occurred on November 17, 2004 when Movers removed the items from the bins.

Although plaintiff notes that occupancy agreements indicate a possible earlier "vacate" date than November 17, 2004 (see, Exhibit D annexed to Westy's cross-motion), plaintiff stated she was present in November, 2004 when the bins were vacated from Westy's bins to Movers' custody (see, Exhibit D, pg. 52 annexed to Movers' motion). There is no indication by plaintiff that those dates prior to November 17, 2004 indicate her items were "vacated" or in any way taken before November 17, 2004 when the items were transferred to Movers for their transport to plaintiff's new residence.

Here, there is no physical evidence to show what happened to the allegedly missing property such as a shortage disclosed on taking inventory (*see,* WestCom Corp. v. Greater New York Mutual Insurance Co., 41 A.D.3d 224). Westy notes plaintiff made no reported claim that any of the property that had been in the bin had been lost or stolen from the Westy bins/rooms. Westy states plaintiff commenced this action more than two years after she, plaintiff, vacated the bins/rooms in November, 2004.

Plaintiff had her locks on the storage rooms/bins in Westy's and only plaintiff kept the keys thereto (Exhibit D, pgs. 10, 66, 67 annexed to Movers' motion).

A warehouse owner is not liable for theft of items kept in a self-storage room where the owner of the items had his own lock on the door of the windowless storage room and he did not furnish the warehouse owner with a key, and the parties had a hold harmless agreement (Levy v. Morgan Brothers Manhattan Storage Co., Inc., 204 A.D.2d 695). This is exactly the situation between Westy and plaintiff.

Here, Westy relies upon the "Hold Harmless Agreement" (see, Exhibit D annexed to Westy's cross-motion). Unambiguous documentary evidence was sufficient to demonstrate Westy's entitlement to judgment as a matter of law with the burden shifting to plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of material fact which requires a trial of the action (Levy v. Morgan Brothers Manhattan Storage company, *supra*). Plaintiff has not done so.

Further, the relationship created through a rental agreement for storage space at a self-

storage facility was one of lessor and lessee, and not bailor and bailee, and thus no assumption of negligence from any loss of stored goods would attach (Ross v. Tuck-It-Away, Inc., 180 A.D.2d 428).

As noted, it is uncontroverted that plaintiff had her own locks to gain access to the bins/rooms, and there is no indication that Westy had the keys to the bins/rooms (Levy v. Morgan Brothers Manhattan Storage Company, Inc., *supra*).

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (Alvarez v. Prospect Hosp., 68 N.Y.2d 320). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (Miller v. Journal-News, 211 A.D.2d 626). Thus, the burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (Ayotte v. Gervasio, 81 N.Y.2d 1062).

Both Movers and Westy have met their respective burden and the motions are granted. Based upon the foregoing, the complaint is dismissed as asserted against defendant Westy and any liability herein as against defendant Movers is limited to the sum of $2,500.00.

In accordance with §202.13(h) of the Uniform Civil Rules for the Supreme Court and County Court, and it appearing that the amount of damages sustained by Plaintiff may be less than those demanded in the complaint and it appearing that the Nassau County District Court would have had jurisdiction of the matter but for the amount of damages demanded, it is:

ORDERED, that the above-entitled action be, and it is hereby removed from the Supreme Court and transferred to the Nassau County District Court to be heard, tried and determined as if originally brought therein pursuant to the provisions of CPLR 325(d) *[see generally Fordham Road Storage Partners, LLC v. Long Delosa Construction Group, Ltd.*, 195 Misc.2d 674 (Sup.Ct. Bronx Co. 2003), and it is further

ORDERED, that the Clerk of Nassau County shall transfer to the Clerk of the District Court of the County of Nassau, all papers in this action now on file with the County Clerk and the Clerk of the District Court of the County of Nassau upon service of a copy of this order and upon delivery of the papers of this action to said clerk by the County Clerk of the County of Nassau shall issue to this action a District Court Index Number without the payment of any additional fees and it is further

ORDERED, that upon issuance of the District Court Index Number, the Clerk of the District Court shall mail notification to the parties as to the next scheduled appearance of the action before the District Court and it is further

ORDERED, that any motions pending at the time of removal and transfer shall be assigned, calendared and heard in the District Court and the parties shall file copies of any pending motion papers with the Clerk of the District Court together with a copy of this order.

So Ordered.

A.J.S.C.

Dated: May 30, 2008