

Martin v Citibank, N.A.
2008 NY Slip Op 33398(U)
December 15, 2008
Supreme Court, New York County
Docket Number: 101082/06
Judge: Emily Jane Goodman
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PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 101082/2006
MARTIN, PETER
VS.
CITIBANK, N.A.
SEQUENCE NUMBER : 002
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

s motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

at Paid

is decided for

FILED
DEC 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/15/08

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

RECORDED BY HILU LUTULLI RECORDED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X

PETER MARTIN,
Plaintiff,

-against-

Index No.: 101082/06

CITIBANK, N.A.,
Defendant.

-----X

EMILY JANE GOODMAN, J.S.C.:

FILED
DEC 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff seeks to recover for alleged property losses from a bank safe deposit box that was leased to him by the defendant bank. The bank moves for an order, pursuant to CPLR 3212: (i) reducing plaintiff's damages claim to no more than \$42,500.00; (ii) dismissing plaintiff's claims for damages for the loss of foreign and domestic currency; and (iii) dismissing plaintiff's other claims for damages as speculative and hypothetical. In the alternative, defendant seeks, pursuant to CPLR 3126, to preclude plaintiff's offer of evidence of the value of the purportedly missing items.

Plaintiff alleges that on or about August 23, 2004, defendant failed to protect and guard his valuables, and wrongfully permitted an unauthorized third party access to his safe deposit box (the box), which resulted in a loss of the items therein. Plaintiff alleges damages of \$400,000.00. The two causes of action of the complaint are labeled as breach of contract and negligence. The parties agree that they entered into a rental agreement for the box (the Agreement). Plaintiff testified that, due to a concern that his then-friend might gain access to the box, he inventoried the contents of it in June 2004, and nothing was missing, but that when he opened the box again, in September 2004, it was empty.

The Agreement contains a provision that the box lessee could not give the key to anyone not authorized to have access. It also contains a provision limiting defendant's liability to 500 times the box's annual rent (Liability Limitation Provision), and a lessee acknowledgment that the box is not for the storage of domestic or foreign currency or coin.

Defendant argues that it is entitled to summary judgment dismissing plaintiff's claim for recovery of currency because the Agreement specifically prohibits the storage of domestic or foreign currency or coin. The relevant language provides:

Contents of Box-You understand and acknowledge that the Box is intended to provide storage only for securities, jewelry, precious metals and valuable papers. You acknowledge that the Box is not intended to store, by way of example without limitation, such things as domestic or foreign currency or coin.

A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978], *rearg denied* 46 NY2d 940 [1979]). Every term of a contract must be given effect and meaning, and "reasonable effort must be made to harmonize all of its terms" (citation omitted and internal quotation marks omitted) (*Village of Hamburg v American Ref-Fuel Co. of Niagara*, 284 AD2d 85, 89 [4th Dept], *lv denied* 97 NY2d 603 [2001]). "In cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language" (*Jacobson v Sassower*, 66 NY2d 991, 993 [1985]).

Defendant, a well known bank which presumably has expertise in currency, did not provide the affidavit of an expert or other evidence addressing whether the Krugerrands (which the record reveals are made of gold), or the double eagle gold coins that plaintiff claims were

stored in the box, are “such things as domestic or foreign currency or coin” as opposed to precious metals. In interpreting this phrase, the case of *Uribe v Merchants Bank of N.Y.*, (91 NY2d 336, 340 [1998]), which construed language in a safe deposit lease, is instructive. In that case, the Court discussed the principles of “ejusdem generis (of the same kind)” and “inclusion unius est exclusio alterius (the inclusion of one is the exclusion of another).” In construing whether that the phrase “valuable papers” included cash, the Court noted that the term “valuable papers” was listed among the terms “securities, jewelry...and precious metals only” and that the lease omitted terms such as “cash,” “currency,” “legal tender” or “paper money.” The rationale of *Uribe* instructs that the defendant’s use of the term “coin” together with the phrase “domestic or foreign currency” indicates that the both “currency” and “coins” relate to a domestic or foreign country’s medium of exchange (*see also Biase v Commercial Union Ins. Co. of New York*, 53 Misc 2d 45 [Civ. Ct., NY County 1967] [discussion of the difference between “coins” when removed from circulation as a medium of exchange and collected by numismatist versus “money”]).¹ The Court should not have to- and in fact is not permitted to- research outside the record to ascertain the nature of the items at issue. Thus, whether the gold Kruggerrands and double eagle gold coins constitute precious metals (which may be stored in the box), or rather, constitute “such things as domestic or foreign currency or coin” (which may not be stored) is an issue for trial (*see Hua Chen v Bank of N.Y.*, 35 AD3d 664, 665 [2d Dept 2006] [“The nature and attributes of the lost items in question present issues of fact, necessitating a trial”]).

The \$8,000.00 in cash that plaintiff claims was in the box is currency, and a provision

¹The term currency is defined as “[a]n item (such as a coin, government note, or banknote) that circulates as a medium of exchange.” Black’s Law Dictionary, 7th ed. at 338.

prohibiting the deposit of currency is enforceable (*Uribe v Merchants Bank of N.Y.*, 239 AD2d 128 [1st Dept 1997], *aff'd* 91 NY2d 336 [1998]). Plaintiff testified that he received the page of the Agreement concerning currency restrictions, and defendant is entitled to partial summary judgment motion on this issue.

Defendant contends that the court must reduce the damages alleged in the complaint to no more than \$42,500.00, in accordance with the Agreement's Liability Limitation Provision. Plaintiff submits his deposition testimony that the bank did not give him two pages of the Agreement, one of which contains the Liability Limitation Provision, and that he would not have signed an agreement with such a limitation (*see* Pl. Op., Martin Tr., at 24, 27, 31-32). Furthermore, allowing plaintiff, the non-moving party, the benefit of reasonable inferences, and viewing his testimony in a light most favorable to him, as is required on summary judgment (*Pol v Our Lady of Mercy Med. Ctr.*, 51 AD3d 430, 431 [1st Dept 2008]), he testified that those pages were not in defendant's bank file. While defendant argues that plaintiff may not avoid the Agreement by his failure to read it or to recall its contents, this assertion is predicated on the assumption that plaintiff was provided with the entire Agreement. Furthermore, questions about plaintiff's credibility, raised by the page numbers on the Agreement, present a fact issue necessitating denial of the motion.

Defendant argues that plaintiff cannot substantiate his loss, and that his claim rests on speculation that defendant must have allowed someone access to the box. Defendant further argues that plaintiff cannot support a conclusion that anyone other than he gained access to the box, and merely speculates that it was his former friend. In opposition, plaintiff submits the testimony of defendant's employee, Terence Morris, that a bank signature card record is

“presumably missing” (Pl. Op., Morris Tr., at 44-45). Plaintiff maintains that this testimony demonstrates that the bank destroyed its own record showing the identity and dates of all of those who accessed the box, necessitating denial of the motion.

Defendant argues that there is no missing signature card, and that the access cards that the defendant has produced show all of the visits to the box during the relevant period. Defendant states that Morris identified an unsigned bank signature for the box, dated January 12, 2001, and a bank signature card that was signed by plaintiff on August 30, 2001, but ascribed no significance to the unsigned card, other than that it did not contain plaintiff’s signature. Defendant further states that Morris explained that the reverse sides of the produced signature cards contain an access record that plaintiff signed when he sought access to the box, on June 11, 2004 and September 1, 2004. Defendant maintains that plaintiff admitted that nothing was missing from the box until after June 11, 2004, and that he did not discover the alleged loss until September 1, 2004, and that the access records produced by the bank demonstrate that no other individuals were admitted to the box between those dates. Defendant’s counsel contends that the access record related to a signature card that the bank produced is the only document plaintiff signed when he accessed the box, and all that is relevant to the period of the alleged loss. Hence, he concludes, the signed access record the bank produced is the only document anyone else seeking access to the box in 2004 would have signed.

In addition to testifying that a signature card was missing, Morris testified that signature cards contain the dates and names of persons who accessed the box (*see* Pl. Op., Morris Tr., at 44-46). He also testified that the bank had a practice and procedure of stapling multiple signature cards for a box together, and not to separate stapled cards, but that one of the original signature

cards that the bank produced at the deposition had staple holes in it, with nothing attached to it (*id.*). Morris also read a statement from the bank's procedure documents that "the signature card is the bank's record of all occasions on which the box was accessed" and that "[t]his is critical to protecting the assets of the customer" (*id.* at 72-75). This evidence raises an issue of fact as to whether there is a missing access record, and, coupled with plaintiff's testimony that his belongings were missing from the box, a fact issue as to whether defendant permitted unauthorized access to plaintiff's box.

The court notes that the complaint makes clear that plaintiff's claim is that someone accessed the box without authorization. While defendant moved for summary judgment of this claim on the ground that it is based on speculation, with its moving papers it did not provide copies of the access records, in its possession, that its counsel concludes demonstrate that only plaintiff accessed the box. Instead, defendant submitted arguments about potential gaps in plaintiff's proof, which is insufficient for purposes of meeting its burden (*Fromme v Lamour*, 292 AD2d 417 [2d Dept 2002] [stating that a party to must affirmatively demonstrate the merits of its defense and not merely point to gaps in the opposing party's proof], and did not afford plaintiff the opportunity to address defendant's contentions concerning the cards. While Morris's transcript about the missing card would benefit from additional clarification, courts have many times stated that summary judgment should be denied where a fact issue is even arguable.

Defendant also moves to preclude plaintiff's offer of evidence of the value of the purportedly missing items. Defendant complains that plaintiff, with late discovery responses, continually inflated and expanded the list of missing items, and has not responded to defendant's request for a continued deposition about the additional items he claims were stolen. Defendant

argues that plaintiff admits that he does not have appraisals, or other evidence, to substantiate the value of the items he claims were taken from the box.

Plaintiff states that he has fully responded to all discovery demands, and that discovery in this case has been closely supervised by this court. A more accurate statement is that he has not always timely responded to discovery demands, and that court supervision was required because of both parties' conduct. Defendant, however, does not point to an outstanding discovery order or demand for documents, even in response to plaintiff's contention that there are none. In an earlier motion, the court addressed discovery issues brought to its attention by defendant. Defendant did not thereafter, or here, move to compel plaintiff to provide additional discovery, and its single letter requesting a continued deposition of plaintiff about additional items in the box is not sufficient to support defendant's application for relief that would essentially end this case. Despite defendant's reply assertion that this portion of its motion should be granted as unopposed, plaintiff's counsel specifically disputes the contention that plaintiff did not comply with defendant's discovery demands (Hansen Aff., ¶¶ 13-15).

Furthermore, while, at trial, plaintiff will clearly need to prove the value of each of the items he claims was taken from the box, a movant on summary judgment carries the burden of eliminating material issues of fact with admissible evidence.² Defendant has not done so with mere argument about plaintiff's ability to provide evidence to prove his claim at trial (*Fromme v Lamour*, 292 AD2d 417, *supra*). Trial, and not summary judgment, is also where defendant may challenge plaintiff's credibility about the police reports, and its concerns about plaintiff's

²The source of defendant's contentions that plaintiff has no evidence of the value of the allegedly missing items is not clear. Nor is it clear that plaintiff will be unable to prove the value of some of the allegedly missing items through expert testimony.

allegedly expanding list of stolen items (*see Uribe*, 239 AD2d 128, *supra*; *Glassman v Wachovia Bank, N.A.*, 16 Misc 3d 1135[A], 2007 NY Slip Op 51699[U] [Sup Ct, NY County 2007]).

Accordingly, it is

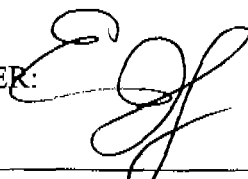
ORDERED that defendant's motion for partial summary judgment is granted to the extent that plaintiff's claim that defendant is liable for the loss of \$8,000.00 in cash from plaintiff's safe deposit box is dismissed, and defendant's motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

This Constitutes the Decision and Order of the Court.

Dated: December 15, 2008

ENTER:



J.S.C.

EMILY JANE GOODMAN

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