

**J.B. Intl., LLC v Molina, Inc.**

2008 NY Slip Op 33405(U)

December 16, 2008

Supreme Court, New York County

Docket Number: 108093/05

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. SHIRLEY WERNER KORNREICH

PRESENT: \_\_\_\_\_

PART 54

Justice

Index Number : 108093/2005

JB INTERNATIONAL, LLC

vs

MOLINA, INC.

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE 8/21/08

MOTION SEQ. NO. 2

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

1
2
3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED

DEC 19 2008

COUNTY CLERK'S OFFICE NEW YORK

Dated: 12/16/08

HON. SHIRLEY WERNER KORNREICH  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

----- X  
J.B. INTERNATIONAL, LLC,

Plaintiff,

Index No.: 108093/05

-against-

DECISION  
and ORDER

MOLINA, INC., d/b/a MOLINA FINE JEWELERS,

Defendant.

----- X  
KORNREICH, SHIRLEY WERNER, J.:

**FILED**  
DEC 19 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

This action arises out of a missing 10.04 carat diamond ring or about December 13, 2004, plaintiff J.B. International LLC (JBI) shipped to defendant Molina, Inc. d/b/a Molina Fine Jewelers (Molina), for sale on consignment, a package allegedly containing the missing ring and a pair of diamond earrings. The package was received by Molina on or about December 15, 2004. Sometime in January 2005, JBI called Molina to inquire about the ring only to find out that it was missing. The ring was valued at \$172,117.80. As a result of the loss, JBI was reimbursed by its insurance carrier, Underwriters at Interest (UI), in the amount of \$167,117.80. In consideration for this reimbursement, JBI executed a Subrogation Receipt with UI pursuant to which JBI agreed to subrogate to UI "all of the rights, claims and interest which the undersigned may have against any person or corporation liable for the loss...and authorized [UI] to sue, compromise or settle in [JBI's] name." Consequently, on or about June 8, 2005, UI commenced this action, in JBI's name, to recoup from Molina the value of the lost ring. Molina now moves, pursuant to CPLR § 3212, for summary judgment to dismiss the action on the ground that no material issues of fact exist. Plaintiff opposes.

I. *Facts*

In support of its motion, Molina offers, *inter alia*, the examinations before trial of Jonathan Birnbach, Danya Song, Brent Nichols, Lukas Janczewski and Lucas Amelung.

Plaintiff's president Jonathan Birnbach averred the following. JBI's business entails buying and selling diamonds. These diamonds are bought and sold either as loose pieces or as jewelry. As president, Mr. Birnbach is responsible for overseeing all of JBI's activities including its finances and determining which stones are purchased, cut, polished and turned into jewelry. In the business relationship between JBI and Molina, Molina would call JBI and ask it to send over diamonds either as loose stones or in jewelry form. JBI would then ship the order to Molina for sale on a consignment basis. Thus, if Molina sold any of the order, JBI would bill them in full for the cost of sale. If not, JBI would return it and no money would change hands. When a diamond was sent out on a consignment basis JBI created two documents to track the stone. A memorandum, which is the written agreement to send the stone out on consignment, and a shipping log. JBI would reconcile any diamonds it sent out on consignment by calling the store or business in possession of the diamond to see if it had been sold. If the diamond was sold, JBI would then bill the store for the sale. If not, JBI would either request that it be returned or see if the store wished to retain the diamond and attempt to complete the sale.

Mr. Birnbach described the shipping process as follows:

I get a phone call from a customer asking for a particular item. We agree to which item it is and then we discuss how its going to get there. We will talk about who is paying for the shipments. At that point, I make the memo, which means I write in the computer, I create this memorandum, it goes to the printer and then it goes to someone in the back office who will actually put that memorandum together. So they get this document, they print out the certificates that go with this document, and then they pull the items from the various places where the items can be. Rings go in one place, earrings in another, and

they'll pull it together. They'll pull the items, certificate the documentation, put it into a coin envelope, which is a shipping envelope with the items with the memos, which highlights how the stones should be shipped and that goes in front of the shippers who will actually take it, put into the package and create the log and all that. From there it goes, at the end of the day the messenger takes it to the various places where they have to be shipped.

EBT of Jonathan Birnbach at pp. 61-62. The diamonds are actually pulled from two separate places before they are readied for shipping. Items are either pulled from the diamond room or from one of two safes. The safe containing all of the loose stones and rings is located in Mr. Birnbach's office, and the safe containing all of the jewelry is in "Udi's" office. Only five of JBI's employees, including Mr. Birnbach, had access to the diamond room and each safe.

Mr. Birnbach averred that on December 13, 2004, Lucas Amelung from Molina called him and asked for a pair of diamond earrings and a "ten carat cushion" diamond ring to be shipped on consignment to Molina for next day delivery. Therefore, he drafted Consignment Memo No. 40333 for the ring (Memo 40333) and Consignment Memo No. 40338 for both the ring and earrings (Memo 40338). Each consignment memo was offered by Molina in support of its motion. Defendant's Exhibit F. In pertinent part, each consignment memo contains the following provision:

The merchandise described below is delivered to [Molina] on memorandum, at [Molina's] risk from all hazards, regardless of the cause of the loss or damage, only for examination by prospective purchasers, upon the express condition that all such merchandise shall remain the property of [JBI] and shall be returned on demand, in full in its original form. Until the merchandise is returned and actually received by [JBI], [Molina is] fully responsible therefor, and, in the event of damage or loss, whether caused by [Molina] or another, whether or not under [Molina's] control, [Molina] will indemnify [JBI] immediately by payment of the stated value which represents the extent of the actual loss and is not intended to constitute a price for the sale of the merchandise...Receipt of the merchandise constitutes [Molina's] agreement to the forgoing terms which represent the entire contract with respect to the merchandise herein described and which cannot be varied by oral statements, dealings with respect to other

merchandise or any contrary custom or trade.

*Id.* at 63.

At the time of the incident, Danya Song was in charge of shipping for JBI. Before items were placed in her box for shipping, they would be pulled and placed inside of a shipping envelope along with a copy of each particular consignment/memorandum agreement and any pertinent GIA certificates. The individual or individuals who pulled the items were not necessarily those who ended up doing the actual shipping. The package was then stapled or scotch taped shut. On the outside of the package would be a copy of the consignment memo. Once the item was shipped, this consignment memo was removed and kept in a file with the other original records. There were no video or security cameras in the shipping area. Mr. Birnbach believes that Ms. Song shipped the items at issue since her name appears on the shipping label. Mr. Birnbach does not know who pulled either the ring or the earrings prior to shipment.

Mr. Birnbach further averred that sometime in January 2005, one of his employees called Molina to inquire as to the status of the pieces. He stated that Molina first said they would "get back" to him but later revealed they could not locate the ring. Mr. Birnbach testified that usually stores and business do not call JBI to confirm receipt of any items that are sent on consignment. The store will only call if they did not receive the package. On this issue, he stated:

Normally someone would call and say what happened...we get phone calls every day from people who are saying how come I didn't get the ring in on time, how come you shipped it registered mail instead of overnight. You get the negative parts, you don't get the positive parts, because the positive parts run at a 95 percent efficiency rate.

So the idea the he [Molina] didn't call us up is also my view of why it did get there.

*Id.* at 109. He averred that JBI received no calls from Molina after the package was shipped.

Danya Song averred that she worked at JBI for 4 ½ months beginning in August 2004. Her duties included administrative tasks such as answering the phone as well as her involvement in shipping and receiving. Ms. Song stated that the shipping procedure went as follows. Mr. Birnbach would give her a memo regarding which items were to be shipped. Next, someone would pull the items and make sure they matched the items listed in the memo. She would then place the items in a shipping envelope with a copy of the appropriate GIA certificate and memorandum. Ms. Song next would create an excel shipping log to track the items. Following creation of the shipping log, she would fill out a Brink's shipping label writing in all of the addressees and any other information pertinent to the particular shipment so it could be tracked properly. Brink's was the company JBI used to ship any packages valued at over \$25,000. A copy of the shipping label would be filed in one of her drawers. The package would then be sealed and placed in a "hard carton, reigister[ed] mailbox" for delivery.

Ms. Song testified that she remembers shipping the items referenced in Memo's 40333 and 40338 on December 13, 2004. In particular, she recalls this shipment due to the "big monster ring. It was a big cushion ring. Big, Big...I remember it was very thick on the profile view, so it was hard to put in the envelope." Ms. Song recalled placing the ring in a white envelope which had JBI's name and address on the outside. She also remembers packaging the earrings because they were "nice" with "Pave setting[s]." According to Ms. Song, separate envelopes containing each item were placed inside of a shipping box. These were the only two items sent out for delivery in this particular package. In pertinent part, she elaborated on the details surrounding the shipment:

I remember particularly because I had to write the Brink's slip twice because [Mr. Birnbach] added the ring later on that date and I had to ask him how much I have to change the value of the insurance, and he said, make sure this amount returned. I said okay, and I had to put – I'm very particular when I write any writing, so I had to add it, the number of the other memo...

I exactly remember how I put it in...I remember the ring was very big and ugly and I [was not] impressed by the piece, But I had to put it in...I know how I did it, and I had to write twice for the [Brink's slip]...

I did put it in plastic bag with tissue paper...wrapped it up nicely in order to protect the piece.

EBT of Danya Song at pp. 43-44, 66-67, 78. She does not remember who pulled the missing ring but does recall that each piece was packaged several hours apart. She confirmed Mr. Birnbach's testimony that it was her handwriting on the Brink's shipping label. Ms. Song did not recall having conversations with anyone from Molina regarding the package either prior to or after December 13, 2004.

Brent Nichols was in charge of defendant Molina's shipping and receiving. In December 2004, fellow Molina employees Lucas Amelung, Matt Critchley and Miguel Ramirez worked alongside him. In terms of each persons responsibilities, Mr. Amelung served as the "buyer per se," Mr. Critchley was in inventory processing and Mr. Ramirez did processing as well as shipping and receiving. Mr. Nichols averred that he knew about all of the items received on consignment, because he was responsible for opening all of the packages. Diamonds received by Molina on consignment always came with a memo attached. According to Mr. Nichols, he never called a vendor who sent Molina diamonds on consignment to confirm receipt.

At the time of the incident, Mr. Nichols testified, Messrs. Amelung and Molina were the only two people at Molina who acquired diamonds. Of the two, Mr. Amelung called the vendors

to secure delivery of the stones. Mr. Amelung was also responsible for determining when particular items that were received on consignment should be returned. Mr. Nichols speculated that if an item sent for delivery on consignment was not received either Mr. Amelung or Mr. Molina would call and inquire as to the status of the stone.

According to Mr. Nichols, Molina's procedures for receiving jewelry in December 2004, was as follows. When items were received via Brink's, he would not sign the shipping label to confirm delivery. This is because at this stage of the shipment, the Brink's label is "hard to read." Rather, he would sign for and receive a copy called a "Transfer Delivery Sheet" which is a sheet provided by Brink's to sign for the package. Those authorized at Molina to sign for packages besides Mr. Nichols included Messrs. Amelung, Critchley and Ramirez as well as Lukas Janczewski and Steven Jause.

Mr. Nichols testified that Mr. Amelung signed for the package in question on December 14, 2004. He specifically remembers the package arriving at Molina because he stamped the memo applicable to the earrings. Mr. Nichols further avers that after packages are signed for the next step is to bring them to a design table inside the inventory room so they could be opened. In this particular instance, Mr. Nichols stated that Mr. Amelung brought the package into the inventory room to open it. He also stated that Mr. Janczewski was present when the package was opened. No other packages were being opened at the time. According to Mr. Nichols, Molina's procedure for opening packages was:

We would make sure, obviously that there was somebody in the room with you opening it. Obviously, you would cut open the plastic or whatever it came in.

You would open the box. You would riffle through the box and make sure, sometimes they bubble wrap it, sometimes there is peanuts, it depends on the vendor.

You would make sure the box was totally empty. Most jewelry places send you an envelope and they put the memo, whatever it may be in the envelope.

After you pull out the box, pull out the envelope, make sure everything is out of the box, set the box aside and then you would look at the invoice or memo, see if it matches close to the description of what the item is and then we would stamp it and then another guy watching you would stamp how it came.

Part of Mr. Nichols responsibilities also included checking the package to make sure it had not been tampered with. After the package was opened, its contents were logged in and handed over to one of Molina's processors for entry into the company's central computer system. Messrs. Amelung, Critchley and Ramirez were responsible for processing the pieces. Each piece was also photographed. In this instance, Mr. Nichols stated he stamped the memo and Mr. Janczewski stamped the Brink's bill. When he opened the package, Mr. Nichols recalls a box was inside. The box contained an envelope. Inside the envelope was a pair of "big...exotic" diamond earrings. He was not sure if the contents were photographed but he stated that they "should have been." There were no signs that the package from JBI had been tampered with.

Lukas Janczewski worked in Molina's security department, and his responsibilities included the delivery and pick up of jewelry as well as opening packages in coordination with the inventory department. Mr. Janczewski stated that Mr. Amelung was in charge of inventory. He further stated that it was not Molina's practice to call a vendor to confirm receipt of items sent to it via consignment. In addition, vendors would usually not call Molina to confirm that a package had been received. He was not aware of any instances where items requested by Molina on consignment were not received. With regard to the receipt of packages, Mr. Janczewski stated it was Molina's policy to strictly follow the company's procedure list. He averred that those authorized to sign for packages included himself, along with Mr. Amelung, Mr. Nichols and Mr.

Ramirez. Mr. Janczewski testified that when a package was received via Brink's, it was not Molina's procedure to sign the air bill to confirm delivery. Rather, each side signed for and received a copy of the Transfer Delivery Sheet. Next, the package would be taken to the inventory area for opening and tampering inspection. The package was then placed on a table to be opened and logged in. The items were logged in by shipping vendor based upon the number of bags contained in each package. The log in here had nothing to do with the actual contents of the package. Mr. Janczewski stated the contents were:

put on a padded tray...[Where] you look at it first to make sure there's no direct damage and then its given to an inventory or control person. In that case it was Lucas Amelung or Miguel Ramirez that does the inputting in the system and they go through it a little bit finer.

They look for damage, if it's like chipped or anything else...

Then they open up the Clarity we used back then. First of all, it's a memo or in inventory, like, ours, if we purchased it and they put it in the cost.

They make the retail cost, put in the description of the goods. Then it goes back to another tray and it's photographed.

Mr. Janczewski emphasized that items sent to Molina on consignment were always photographed and that he did not remember a single instance photography did not take place. Following photography, the items were priced, tagged and placed out for sale.

Mr. Janczewski first indicated that he did not specifically remember the package received from JBI on December 14, 2004. He subsequently testified that he was present when the package was received. He did not remember what the package looked like but did recall that Brink's delivered it. He also said that Mr. Amelung received the package since his signature appeared on the signed Transfer Delivery Sheet. Mr. Janczewski confirmed that he initialed the Transfer

Delivery Sheet upon delivery. Mr. Janczewski next stated that Mr. Amelung brought the package into the inventory area, placed it on a table and opened it. He was present when the package was opened. He could not remember exactly what was inside the package except to say that the contents were "[w]hatever we signed. I mean, I signed off on whatever it says on that piece of paper there, diamond rings...I mean, I know from what was signed and that was in the box. We wouldn't have written the description if it wasn't in there." He recalled a memorandum being inside the Brink's box but couldn't remember if it was on the outside of the jewelry. He also did not recall if there was an envelope inside of the box containing the jewelry. Mr. Janczewski did not know what Mr. Amelung did with the contents of the package after it was opened.

In addition, Mr. Janczewski stated that he found out about the missing ring from Mr. Amelung. Mr. Amelung allegedly told him to quickly look through the display cases and vault in an attempt to locate the ring.

Lucas Amelung was Molina's director of acquisition. His responsibilities included visiting trade shows and working with vendors to acquire loose stones and jewelry on consignment. He indicated that approximately 80% of his job duties went towards acquiring loose stones. Mr. Amelung did not recall making or receiving calls from or to vendors regarding jewelry that was set to be delivered to Molina on consignment. He could not recall if Molina had a procedure in place as to what would happen if it made a request for a stone on consignment which was not delivered. He also could not recall a single instance where a stone he requested was not delivered.

With regard to Molina's procedure for receiving packages, Mr. Amelung testified that

when a package arrived, it would usually be signed for by those employees in inventory. He only signed for packages on rare occasions and could not recall if he confirmed its contents with the corresponding requests he had made. Mr. Amelung also stated he did not know what a Transfer Delivery Sheet was.

With regard to inspecting packages, Mr. Amelung averred that it was "pretty obvious" if a package had been tampered with since it came in a plastic bag. He stressed that he rarely signed for any packages. On this issue, and the subsequent process that followed, Mr. Amelung stated:

But again, I want to stress I only sign for very few packages because it's only if there was nobody available from the guys that open the packages...

I would sign for it and I would...put it in the safe. Or if one of the guys was there I would give it to them...

You know, what I can tell you is that I signed for a number of packages, very few, and I would check if the bag was not tampered with.

And I would give it to the guys who were responsible for it. If the guys weren't there, what I generally would do is put it in the safe under lock and key. And I'd give it to them when they would come in. *I would never open a package.* (Emphasis added).

EBT of Lucas Amelung at pp. 36-37; *see also Id.* at 43. Mr. Amelung was clear that during his time at Molina, he never opened any packages that were delivered and never stood next to anyone else while they were opening packages. Mr. Amelung elaborated:

A. There was a room where I was – where my desk was. There was – I mean, there is a room, as I told you and described, it's about the size of this room. It's about 12 by 15 by 8, 9.

My desk was in one corner and the packages would typically be opened, if that's what your referring to, at the other corner of the room...

Q. Now when packages were opened at the counter in the room where your offices were – where your office was, were you ever standing at the counter?

A. No.

Q. Is there a reason why you never stood at the counter?

A. Because I never opened any packages...

Q. And my question was: Is there a reason why you never stood at the counter?

A. Because I was busy and doing my work, sitting at my desk...The other reason is that there was no reason to be there either.

*Id.* at 47-48.

Mr. Amelung did not have any recollection of the package at issue. He also testified that he had no knowledge of the missing diamond ring and averred that he did not remember receiving a 10-carat diamond ring from JBI on December 14, 2004. He also had no recollection of making a request for the earrings from JBI, that were received that same day. In addition, Mr. Amelung stated that it was "most probably Lucas Janczewski" who alerted him that the ring was missing. He did not recall what his actions were when he found out the ring was missing and did not remember searching for the missing ring.

## II. *Conclusions of Law*

It is well established that summary judgment may be granted only when it is clear that no triable issues of fact exist. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Friends of Animals, Inc. v. Associated Fur Mfts., Inc.*, 46 N.Y.2d 1065, 1067 (1979). A failure to make a *prima facie* showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 1063 (1993). If a *prima facie* showing

has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez, supra*, 68 N.Y.2d at 324; *Zuckerman, supra*, 49 N.Y.2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in a light most favorable to the party opposing the motion. *Martin v. Briggs*, 235 A.D.2d 192, 196 (1<sup>st</sup> Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgement motion. *Zuckerman, supra*, 49 N.Y.2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

Here, Molina has not made out a *prima facie* case entitling it to summary judgment. At best, the proffered deposition testimony provides a conflicting account as to what happened to the missing ring. Accordingly, it is

ORDERED that defendant Molina, Inc., d/b/a Molina Fine Jewelers' motion for summary judgment is denied.

DATE: December 16, 2008  
New York, NY

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