

<b>Kazanjian Bros, Inc. v Rima Invs. Corp.</b>
2009 NY Slip Op 31026(U)
May 1, 2009
Supreme Court, New York County
Docket Number: 602265/05
Judge: Edward H. Lehner
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EDWARD H. LEHNER

PART 19

Index Number : 602265/2005  
**KAZANJIAN BROS.**  
 vs.  
**RIMA INVESTORS**  
 SEQUENCE NUMBER : 003  
 SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

this 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

motion is decided in accordance

with accompanying memorandum decision

**FILED**

MAY 05 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: MAY 01 2009

*[Handwritten Signature]*  
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 19

-----X  
KAZANJIAN BROS, INC.,

Plaintiff,

Index No. 602265/05

-against-

DECISION AND ORDER

RIMA INVESTORS CORP.,

**FILED**  
MAY 05 2009

Defendant

COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
EDWARD H. LEHNER, J:

Before the court is a motion by defendant Rima Investors Corp. ("Rima") for summary judgment dismissing the complaint. In the complaint, plaintiff, Kazanjian Bros, Inc. ("Kazanjian"), a jewelry concern located in Los Angeles, California, alleges that on December 4, 2003, it shipped a 16.43 carat diamond to Rima, its long time business associate in New York. Rima denies receiving the diamond.

Michael Kantor ("Kantor"), the manager of Kazanjian's diamond division, testified that in November, 2003, he advised Ali Khazaneh ("Khazaneh"), a principal at Rima, that the actress Jennifer Tilly expressed an interest in purchasing the 16.43 carat diamond and that he was sending the diamond to Rima because he wanted Khazaneh to forward the diamond to a particular third party jeweler to have a customized setting made for Ms. Tilly. Khazaneh agreed to assist Kantor with the ring. The parties agree there was no discussion that Rima would be paid for this service.

Thereafter, on either December 2 or 3, 2003, Kantor called Khazaneh to alert him that the diamond would be sent that week (Kantor Aff., para 12). On December 4, 2003, Kantor learned that Tallarico Jewelers, one of Kazanjian's wholly owned subsidiaries, was returning a pearl necklace to Rima. Kantor testified that he decided to send the diamond in the same package and, to that end,

he placed the diamond, and a consignment memorandum (Kantor Aff. Ex. 1) in a manila envelope and brought it to Tallarico. According to Kantor, the envelope containing the diamond and the memorandum were included in the package that was sent from Tallarico to Rima via Brinks overnight delivery (Kantor Aff., para 21). Kantor stated that he wrote "Jennifer Tilly" on the manila envelope containing the diamond (Kantor Aff., para. 20) and that he wrote "ATTN Jennifer Tilly" on the outside of the shipping label so that Khazaneh would know that the package contained the diamond. (Kantor Aff. Ex. 4)

On Friday, December 5, 2003, Rima received the Brinks package from Tallarico. According to Natalya Semenova, the Rima employee who received and opened the Brinks package, the diamond was not in the package. There is some dispute as to whether Kantor and Khazaneh spoke about the diamond on December 5<sup>1</sup>. However, it is undisputed that on Monday, December 8, 2003, Kantor did call Kazaneh to inquire about the diamond and Kazaneh told him that only the pearls were in the Brinks package. (Khazaneh Dep. at 44-45) Khazaneh states that on Monday, December 8, he searched through the garbage but he was unable to locate packing material or the diamond. (Khazaneh Dep. at 139)

Thereafter, plaintiff commenced this action alleging causes of action for breach of a bailment contract, negligence, *res ipsa loquitor*, and conversion.

Rima now moves for summary judgment dismissing the complaint on the grounds that the documentary evidence establishes that: 1) a bailment was not created or, in the alternative, if a

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<sup>1</sup> On December 16, 2003, Kazaneh told the insurance investigator that, on December 5, Kantor asked Kazaneh whether he had received the diamond and that Kazaneh replied that there was no diamond (Kantor Aff., Ex. 2, pp. 2-3). However, in later depositions and affidavits, both Kantor and Kazaneh indicate that they did not discuss the diamond on December 5. (Kantor Aff., para. 31; Kazaneh Dep. at 48)

bailment was created, that it was a gratuitous bailment and there is no evidence of gross negligence; 2) that plaintiff's negligence contributed to the loss of the diamond, and 3) that plaintiff has not established the criteria for application of the doctrine of *res ipsa loquitor*. It also contends that the conversion claim must be dismissed because it is duplicative of the breach of contract claim.

Kazanjian opposes the motion arguing that a bailment was created and that because the bailment arose out of a business relationship, it was either a bailment for hire or a mutual benefit bailment. Moreover, Kazanjian contends that the question as to what happened to the diamond and/or plaintiff's alleged contributory negligence are issues of fact to be decided at trial.

#### Discussion

On a motion for summary judgment, the proponent of the motion must make a *prima facie* showing of entitlement to judgment as a matter of law by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact. [*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853(1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557,562 (1980)]. Where the proponent of such a motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for the failure to do so [*Vermette v. Kenworth Truck Co.*, 68 N.Y.2d 714 (1986); *Zuckerman v. City of New York*, supra at 560]. Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient. [*Alvord and Swift v. Steward M. Muller Constr. Co.*, 46 N.Y.2d 276 (1978); *Fried v. Bower & Gardner*, 46 N.Y.2d 765 (1978)]

### Bailment

Under New York law, "a bailment is defined as a delivery of personal property for some particular purpose, or a mere deposit, upon a contract express or implied, and that after such purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to the directions or kept until he reclaims it as the case may be. It is essential that there be actual or constructive delivery by the bailor as well as actual or constructive acceptance of the property of the bailee." [*Mays v. New York, New Haven & Hartford Railroad Co.*, 197 Misc. 1062, 1063-1064 (App. Term, 1<sup>st</sup> Dept 1950)].

It is well settled that the bailee must knowingly take the goods into his possession. [*Osborn v. Cline*, 263 N.Y. 434 (1934); *General Motors Acceptance Corp. v. Grafinger*, 61 Misc. 2d 670 (Civ. Ct. New York 1969)]. See also, *Avisun Corp. v. Mercer Motor Freight, Inc.*, 37 A.D.2d 517 (1<sup>st</sup> Dept 1971) (for a bailment, plaintiff's goods have to be placed in a position to be cared for and under the control of defendant with his knowledge and consent). Mere delivery of the goods is not enough. [*Stephens v. Katz Parking System, Inc.*, 75 Misc.2d 690 (Civ. Ct. New York 1973) (it was neither disclosed nor reasonably to be anticipated that the car's trunk contained expensive musical equipment; thus no bailment was established as to the trunk's contents); *Burke v. Avis Corp.*, 104 Misc. 2d 826, 827 (Civ. Ct. New York 1980) (defendant could not have bailee's responsibility thrust upon it without its consent or knowledge, and thus cannot be held presumptively liable for the property in the trunk of the car on a bailment theory)].

In *Swarth v. Barney's Clothes*, 40 Misc. 2d 423, 424 (App. Term 1<sup>st</sup> Dept 1963), the court found that no bailment existed for a wallet left in an automobile in a parking lot because, "[a]cceptance is absent when the property is not such as is usually and customarily left with a

custodian in like circumstances and no disclosure of this fact is made. In that situation, the person sought to be charged as bailee having no reason to suppose the property has been delivered to him is liable only if on express notice, 'for the bailee cannot by artifice be compelled to assume a liability greater than he intended'" (citation omitted).

In the case before the court, there are issues of fact about whether a bailment contract was formed because there are questions about whether Rima had a reason to know, or should have known that the diamond would be in the Brinks package from Tallarico, and there are questions about whether Rima knowingly or constructively accepted the diamond on December 5, 2003.

Moreover, assuming *arguendo* that a bailment contract was created, there are issues as to whether the bailment was gratuitous or whether it was a bailment for hire or mutual benefit. There is no dispute that the parties had a long standing business relationship where they would routinely send valuable jewelry back and forth to each other, and there is no dispute that Kantor and Kazaneh did not discuss compensation with regard to the setting of the diamond.

Rima contends that, if indeed there was a bailment, that it was a gratuitous bailment which is by definition the transfer of possession or use of the property without compensation and, in a gratuitous bailment, the bailee is liable only for gross negligence or bad faith and not for ordinary negligence. [*Massimo v. Martucci Development Corp.*, 2003 WL 23169853 (App. Term 2<sup>nd</sup> Dept.); *Voorhis v. Consolidated Rail Corp.*, 60 N.Y.2d 878 (1983)]. In the Voorhis case the Court of Appeals stated that "even as to a gratuitous bailee the failure to return the object bailed establishes a prima facie case of gross negligence, requiring the bailee to come forward with an explanation." Further, Kazanjian correctly argues that there is a question about whether Rima would have earned a profit on the ring and the mounting, even though the parties did not contemplate compensation in

the ordinary sense. If so, the bailment may be considered "for mutual benefit," where the bailee is liable for ordinary negligence. [*Luna v. Pierro*, 2004 WL 784500 (Civ. Ct. Queens County)] Where the facts of a particular case suggest that some profit or benefit may have been anticipated, the question as to whether the bailment was gratuitous or for mutual benefit is one of fact for trial. [*Fili v. Matson Motors, Inc.*, 183 A.D.2d 324, 328 (4<sup>th</sup> Dept. 1992)].

#### Res Ipsa Loquitor

Initially the court notes that "res ipsa loquitor is an evidentiary rule and as such does not constitute a separate cause of action" [*Frew v. The Hospital of Albert Einstein College of Medicine*, 76 AD2d 826 (2<sup>nd</sup> Dept. 1980)]. See also, *Abbott v. Page Airway, Inc.*, 23 NY2d 502, 512 (1969); *Major v. Astrazeneca, Inc.*, 2006 WL 2640622 (NDNY 2006). However, to recover based on the permissible inference of negligence through application of this rule of evidence, plaintiff must establish: (1) that the event is the type that does not occur in the absence of someone's negligence; (2) that the event was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been caused by any voluntary action or contribution on the part of the plaintiff. [*Pappalardo v. New York Health Club*, 279 A.D.2d 134, 142 (1<sup>st</sup> Dept. 2000)]. Here, the rule is not available to plaintiff as it cannot show that the loss of a diamond would only result if someone was negligent. Such a loss can certainly occur as the result of theft or conversion rather than as the result of someone's negligence. Moreover, the diamond was not in Rima's exclusive control at all times. It was shipped from Los Angeles to New York and it was out of both plaintiff's and defendant's control for a period of time in both Los Angeles and New York and during the shipping [*Imhotep v. State of New York*, 298 A.D.2d 558 (2<sup>nd</sup> Dept. 2002)] (where an instrumentality is generally under the control of persons other than the defendant, *res ipsa loquitor*

does not apply)]. Moreover, there are questions about whether Kazanjian's negligence, if any, may have caused or contributed to the loss of the diamond [*Lee v. Bonavita*, 216 A.D.2d 8 (1<sup>st</sup> Dept 1995)].

Conversion & Negligence

A conversion takes place where someone intentionally, or without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. The two key elements of this tort are (1) the plaintiff's possessory right in the property and (2) defendant's dominion over the property in derogation of plaintiff's rights. [*Colavito v. New York Organ Donor Network*, 8 N.Y.3d 43 (2006)]

To establish a cause of action for negligence plaintiff must prove a duty that defendant owed to plaintiff, a breach of that duty, and injury that results from the breach. [*Alfaro v. Walmart Stores, Inc.*, 210 F.3d 111 (2<sup>nd</sup> Cir. 2000)(applying New York law)]

In this case, the affidavits and other evidence submitted by the parties do not establish which entity, if any, is responsible for the loss of the diamond. Because there are questions of fact about the circumstances under which the diamond was lost, plaintiff's causes of action for conversion and negligence remains viable at this time. See, *Hartog v. Mehle*, 14 A.D.2d 336 (1<sup>st</sup> Dept 1961)(question of whether defendant who lost a bracelet acted with due care is for the jury to decide).

Accordingly, it is ORDERED that defendant Rima Investors Corp.'s motion for summary judgment dismissing the complaint is granted solely to the extent of dismissing the cause of for *res ipsa loquitor* and the motion is otherwise denied

Dated: May 1, 2009

  
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