

**Brown v Intrepid Museum Found., Inc.**

2009 NY Slip Op 32417(U)

October 15, 2009

Supreme Court, New York County

Docket Number: 600946/08

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB

PART 15

*Justice*

Index Number : 600946/2008  
BROWN, RODNEY HILTON  
vs.  
INTREPID MUSEUM FOUNDATION  
SEQUENCE NUMBER : 002  
PARTIAL 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

**IS DECIDED**

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

**FILED**

OCT 21 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 10/15/09

WALTER B. TOLUB

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
RODNEY HILTON BROWN

Plaintiff,

Index No. 600946/08  
Mtn. Seq. 005

-against-

INTREPID MUSEUM FOUNDATION, INC, d/b/a  
INTREPID SEA AIR and SPACE MUSEUM

Defendant.

-----x  
INTREPID MUSEUM FOUNDATION, INC, d/b/a  
INTREPID SEA AIR and SPACE MUSEUM,

Third-Party Plaintiff,

-against-

McCOLLISTER'S TRANSPORTATION GROUP,  
INC., and ARTEX, INC.

Third-Party Defendants.  
-----x

**WALTER B. TOLUB, J.:**

This is Plaintiff's motion for partial summary judgment on the issue of liability (CPLR 3212). Defendant INTREPID MUSEUM FOUNDATION, INC, d/b/a INTREPID SEA AIR and SPACE MUSEUM (Intrepid), does not oppose Plaintiff's motion, but cross-moves for an order limiting its liability to \$5,000.00. Plaintiff opposes Defendant's cross-motion and seeks damages in the amount of \$175,000.00.

Third-Party Defendants take no position on these motions.

Facts

Plaintiff, a military historian and collector, loaned the Intrepid a photo album which memorialized the battle of Iwo Jima

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[\*3]  
taken by Associate Press Photographer Joe Rosenthal (Photo Album/Album). The Album contained the original Pulitzer prize winning photograph of the Marines raising the American flag atop Mount Suribachi after the Battle of Iwo Jima.

The photographs in the Album were loaned to the Intrepid for a display commemorating the sixtieth anniversary of the US capture of Iwo Jima.

Prior to sending the items, by letter dated February 3, 2005, Plaintiff sent the Intrepid a list of items that would be loaned. Plaintiff provided values next to each of the items listed so that the Intrepid could get the appropriate insurance coverage (Intrepid Ex. 1).

Included in Plaintiff's list was the Photo Album at issue in this action. Item 14 in the February 3, 2005 letter lists:

Joe Rosenthal's complete original photo album of his Iwo Jima Flag raising roll of film (the landing, going up the mountain, Marines' prayer service halfway up, etc.) Inside cover inscribed: Joe Rosenthal AP.....1946....."On Iwo Jima" The 50 photos were removed from the album and are each in clear plastic sheet protectors. Formerly on loan to the National Portrait Gallery/Smithsonian Institution. \$5,000.  
(Intrepid Ex. 1 ¶14).

The Intrepid procured insurance for Plaintiff's stated value of each item.

In December of 2005, almost a year after the items had been loaned, Larry Sheldon, the Collections Manager for the Intrepid,

[\* 4]

sent Plaintiff a form for a five year renewal of the loaned items. Additionally, Mr. Sheldon's letter stated that he had left out the loan values on the renewal form for Plaintiff to enter so that insurance records could be updated. The renewal agreement was never consummated and updated loan values were never provided.

In the summer of 2006, the defendant Intrepid decided that the Intrepid museum would be closed so that the ship could be placed in dry dock for needed repairs. Plaintiff was informed of the Intrepid's decision and told that his items would be returned in October.

On November 11, 2006, a shipment from the Intrepid was delivered to Plaintiff but without some of the photographs.

It is undisputed that the Intrepid lost six<sup>1</sup> photographs from the Album. The Intrepid does not dispute that it is liable to Plaintiff for the loss of the pictures, rather, the Intrepid argues that damages are limited to \$5,000.

Plaintiff argues that there are material issues of fact in dispute. Specifically, Plaintiff argues that the Intrepid has not shown that it reasonably relied on Plaintiff's outdated estimated values of the items loaned, and that the Intrepid was a bailee and liable for the entire amount of the loss.

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<sup>1</sup>The Complaint asserts that 8 photographs are missing.

### Discussion

As with any motion for summary judgment, success is wholly dependent on whether the proponent of either of the respective motions has made a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005], quoting Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1985] [internal quotes omitted]). A party is entitled to summary judgment if the sum total of the undisputed facts establish the elements of a claim or a defense as a matter of law. This means that none of the material elements of the claim or defense are in dispute (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:180).

On defendant's motion for summary judgment, defendant may demonstrate the lack of several prima facie elements of plaintiff's case, however, to prevail, defendant only needs to demonstrate the absence of a single element (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:182). Once defendant presents evidence showing the absence of facts necessary to establish a prima facie case, the burden shifts to the plaintiff (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing] §37:190).

[\* 6]

Plaintiff informed the Intrepid that the value of the photo album was \$5,000 in his letter of February 3, 2005 (Intrepid Ex. 1). Specifically, the items were listed together with their values "so that they may be covered by Intrepid's insurance." (Id.).

The Intrepid claims that based on Plaintiff's representation that the Photo Album was valued at \$5,000, the Intrepid procured insurance for the album in said amount and cannot be held liable for more.

No other document was signed by the parties. No other value was given to the items loaned to the Intrepid.

Plaintiff argues that the Intrepid acted as a bailee and is therefore liable for the full actual value of the Album.

A bailee may contract to limit liability to the value of the article received, if the rate charged is reasonably based on the value of the article (New York Forms Legal and Business, Personal Property, §16:30). If the stated valuation does not reflect the true valuation of the bailed article, the terms of the agreement will be construed most strongly against the bailee, and the alleged limitation will only be given effect where the agreement is absolutely free and clear in its intents and purposes (Fire Assoc. Of Philadelphia v. Saks & Co., 223 F.2d 822 [2d Cir. 1955]; Rappaport v. Phil Gottlieb-Sattler, Inc., 280 AD 424 [1<sup>st</sup> Dept 1952]).

[\*7]

Where there is a limitation of liability in an agreement, it must be is clear in its intents and purposes be given effect (International Business Machines Corp v. Universal Transcontinental Corp., 191 AD2d 536 [2<sup>nd</sup> Dept 1993]).

"The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent, and that the best evidence of what parties to a written agreement intend is what they say in their writing" (Innophos, Inc v. Rhodia, SA, 10 NY3d 25, 29 [2008] citing Greenfield v. Philles Records, 98 NY2d 562,569 [2002]). "Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide" (Id. at 29).

Although Plaintiff specifically wrote in his February 3, 2005 letter that the amount of \$5,000 be used by the Intrepid for insurance purposes to cover the Album in the event of loss (Intrepid Ex. 1), this cannot be construed as a limit on liability because it is not "absolutely clear" that such was the understanding of the parties (Van Dyke Productions, Inc. v. Eastman Kodak Company, 12 NY2d 693 [1963]).

Accordingly, it is

ORDERED that Plaintiff's motion for partial summary judgment

[\* 8]  
against the defendant Intrepid on the issue of liability is granted; and it is further

ORDERED that Intrepid's cross-motion to limit Plaintiff's liability to \$5,000 is denied; and it is further

ORDERED that Plaintiff's cross-motion to recover \$175,000 in damages is denied; and it is further


ORDERED that a trial is to be held on the amount of damages owed to Plaintiff.

Counsel for the parties are directed to appear for a pre-trial conference on November 13, 2009 at 11:00AM room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/13/09

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HON. WALTER B. TOLUB, J.S.C.