

A. Link Partners, Inc. v Senderowicz

2010 NY Slip Op 31215(U)

May 12, 2010

Supreme Court, New York County

Docket Number: 601576/2008

Judge: Emily Jane Goodman

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5-18-10

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

EMILY JANE GOODMAN

PART 17

Index Number : 601576/2008

A. LINK PARTNERS
vs
SENDEROWICZ, MENACHEM

Sequence Number : 003

SUMMARY JUDGMENT

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

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided per attached.*

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

FILED
MAY 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/12/10

[Signature]

EMILY JANE GOODMAN /s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

-----x

A., LINK PARTNERS, INC.,

Plaintiff,

Index No. 601576/2008

-against-

MENACHEM SENDEROWICZ,

Defendant.

-----x

Emily Jane Goodman, J.S.C.:

FILED
MAY 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

In this action, A. Link Partners, Inc. (A. Link) sues Menachem Senderowicz (Senderowicz) for breach of contract and conversion, arising out of Senderowicz's failure to return or pay for a diamond bracelet (the bracelet) and a single, unmounted 4.08 carat diamond (the diamond). A. Link now moves for an order granting it summary judgment on its complaint, in the amount of \$174,000.00, with interest.

Background

A. Link is in the business of selling manufactured diamond jewelry, primarily to retail establishments, but also to others in the trade, and, on occasion, would buy loose diamonds to be used in engagement rings. In 2007, for example, according to A. Link's president, Jeffrey Link (Link), it bought single stones, five or six times, from the Ideal Brilliant Company (Ideal), a seller of single stones, which operated at 580 Fifth Avenue, the address of the Diamond Dealers Club (DDC), located in the building's lobby.

Senderowicz, who was from Antwerp, where his family ran a diamond trading firm, had been employed by A. Link as a marketing specialist for about two years, ending in mid-2007, when he was fired by Link, allegedly for not doing his job. Link ebt, at 13. Senderowicz's job had involved advertising, and acting as a liaison between A. Link and the retail jewelers which carried A. Link's products. During his employment with A. Link, Senderowicz also was permitted to take merchandise off the premises, and A. Link had insurance covering Senderowicz for that purpose. Id., at 32, 65-66. Senderowicz claims (aff., ¶ 9) that he was required to sign a memo whenever he took jewelry to a trade show for A. Link. However, Link testified (ebt, at 28-32) that, while Senderowicz was an A. Link employee, he was not required to sign memos.

Amron Ungar (Ungar) has for many years worked part-time, on a daily basis, for A. Link, picking up diamonds from manufacturers, helping A. Link buy and sell diamonds, and interacting on behalf of A. Link with the diamond manufacturers in the 47th Street vicinity, several blocks from A. Link's premises. He is also a diamond broker, independent of his employment with A. Link.

After Senderowicz left A. Link's employ, Ungar allegedly called him regularly, asking if he had any private customers who would be interested in buying loose diamonds. In February 2008, Senderowicz called Ungar at A. Link, and informed him that a

member of Senderowicz's synagogue was interested in purchasing a four-carat diamond, and that he could be a potential buyer for larger-sized diamonds. Ungar then allegedly informed Link, who told him to handle the negotiations. Ungar ebt, at 26, 36; see also Link ebt, at 49-50. On February 26, 2008, Ideal provided to Ungar, on memo to him, several diamonds of about four carats. Aff. in opp., exs. A, B. The price of the 4.08 carat stone was listed in the memo as \$144,962.40. The memo was addressed to Ungar, c/o the DDC, and recited that it was received at "your risk from all hazards," that it had to be returned to Ideal on its demand, and that a sale could only occur and title pass when Ideal agreed to a sale and issued a bill of sale. Aff. in opp., ex. A. Ungar did not receive mail, nor did he have an office, at the DDC. According to Ungar, he told the broker at Ideal that the memo was for A. Link, not for himself. Ungar brought the memo to A. Link.

Senderowicz then took the potential customer, Zvi Hager (Hager), up to A. Link's premises. Ungar did not know Hager, but was familiar with a rabbi with the same surname, whom Ungar then learned was evidently related to Hager. Ungar showed Hager the stones, and Hager indicated that he wanted the 4.08 carat stone. Ungar claims that he negotiated the price with Senderowicz (Ungar ebt, at 38-39), but Senderowicz claims (aff., ¶ 6) that Ungar negotiated the price with Hager. Arrangements were made for

Senderowicz to pick up the diamond, which he was then going to deliver to Hager, who intended to pay for it in cash.

On February 28, 2008, Senderowicz arrived at A. Link's building, and, according to Ungar, contacted Ungar from the lobby, indicated that he did not want to come up, and asked that Ungar bring the diamond down to the lobby. Ungar ebt, at 40; Link ebt, at 38; but see Senderowicz ebt, at 48 (in which he claims that he took possession of the diamond in A. Link's conference room). Ungar allegedly went to the lobby, gave it to Senderowicz, and took out his memo book, in which he wrote out a description of the diamond, that it was from "A. Link" at 444 Madison Ave to Senderowicz, that the total was \$141,000, that it was "for inspection and examination only," and that it was "at your risk from all hazards." The memo also indicated that it would remain A. Link's property, subject to its order, and was required to be returned on A. Link's demand. It further provided that a sale could only occur, and title pass, when said owner agreed to the sale and issued a bill of sale.

Link asserted that the reason the memo was not on its usual computerized memo form was that it was given to Senderowicz downstairs. Senderowicz, who was admittedly "familiar with the practice of using 'memos' in the industry," (Senderowicz aff., ¶ 9), signed the memo upon his receipt of the diamond, and was to receive payment from Hager in exchange for the diamond. Link testified that anyone who took merchandise from A. Link was

required to sign a memo, although its employees generally were not so required. Link ebt, at 28-32. Senderowicz was advised by Link to get a special marking pen to ensure that the money he received from Hager was genuine.

Senderowicz had also contacted A. Link and spoke to Link's partner, Douglas Sills (Sills), telling him that Hager, on his visit to select the diamond, had seen a diamond bracelet which he wanted to purchase. The bracelet was manufactured on behalf of A. Link in 2006 at a total cost to A. Link of \$19,300.48. Link ebt, at 39-46. Accordingly, on February 28, 2008, Senderowicz also picked up the diamond bracelet from an A. Link receptionist. Link testified (ebt, at 48) that, when Sills asked Link whether he would be comfortable giving the bracelet to Senderowicz, despite the fact that he no longer worked at A. Link, Link replied that he was, provided that Senderowicz signed a memo. Link asserted that, on or about that day, Senderowicz signed a memo bearing a date of February 28, 2008 from A. Link to him, describing the bracelet and listing the price as \$33,000. The memo recited that the bracelet was delivered to Senderowicz "for inspection and examination only, and will remain our property," that a sale of the bracelet would only be valid when Senderowicz paid for it, that until returned to A. Link, such merchandise was at Senderowicz's "risk from all hazards," and that in case a lawsuit was commenced by A. Link to collect the bracelet, Senderowicz agreed to pay additional costs, for example,

attorneys' and collection agency fees.

Senderowicz claims that Hager came to his apartment; took the diamond and the bracelet, went downstairs with Senderowicz to get the money from Hager's driver; told Senderowicz that the driver had failed to bring all of the money; gave Senderowicz a briefcase that contained some of the money; told Senderowicz he would return with the rest of the money; and meanwhile held onto the jewelry. Senderowicz asserts that, because Hager was a big man, he felt intimidated and therefore, let him hold onto the jewelry. Hager left, and then returned with the money for the bracelet, which he gave to Senderowicz, and advised Senderowicz that he had insufficient funds for the diamond. Hager returned what was ostensibly the diamond to Senderowicz. Senderowicz allegedly counted out \$31,800 from the briefcase, tested it with a marker, and returned the balance to Hager. Senderowicz aff., n 9.

The next morning, Senderowicz went to A. Link's premises, gave Link the cash he had received from Hager, having previously taken his split of the money. Link ebt, at 59-60. Senderowicz gave Link 300 \$100 bills, for a total of \$30,000. Johnson moving aff., ¶ 9. It is not entirely clear whether the cash was tested at A. Link, or whether Link simply surmised that it had been. See Link ebt, at 55, 56. Then, Senderowicz gave Ungar the diamond, who, in Senderowicz's presence, placed it on a scale, where it weighed more than six carats, rather than 4.08. Ungar

examined the stone under a loop, and expressed his concern over the stone's authenticity. Accompanied by Senderowicz, he went to Sills's office, where Sills examined it under magnification, and opined that it was a cubic zirconium (cz). Senderowicz maintains (aff. n 10) that Ungar and Sills advised him not to report the fake stone to the police, because Ungar knew Hager's family and wanted to first seek help from Rabbi Arthur Schneir, who, when contacted, allegedly advised Ungar that Hager was a criminal on parole, but that he would try to contact Hager's family over the weekend in an attempt to rectify the situation, but was ultimately unable to do so.

That Monday, March 3, Ungar tried to deposit into his bank account \$300 of the money allegedly received from Hager, and was informed that the money was counterfeit. He then contacted Link and advised him that he was holding \$30,000 in counterfeit money. Link ebt, at 51-52. According to Senderowicz, Link then insisted that he sign the aforementioned bracelet memo, which Senderowicz claimed had been backdated to February 28, and Senderowicz then signed it. Link testified (ebt, at 72) that Ungar acknowledged that he was responsible for the bracelet and necklace, and had promised to make good on them.

Senderowicz was given back the counterfeit money and the cz. On March 3, he took them to the police and reported the incident. The complaint report lists Senderowicz as the "C/V" (presumably complainant/victim), sets forth a value of \$141,000 for the

diamond and \$30,000 for the bracelet, and states that the C/V had received \$32,000¹ in counterfeit money from a "KNOWN BUSINESS ACQUAINTANCE." Aff. in opp., ex. H. Allegedly, the police were unable to find Hager.

On March 10, 2008, Ungar received, on memo, a 7.03 carat diamond (not at issue here), valued at \$35,200 per carat, from Ideal, for his own account. That diamond was allegedly lost by Ungar that same day, leading Ideal's president, Meilech Fastag (Fastag), to file with its insurer an April 28, 2008 statement of loss, after deduction of a \$5,000 deductible, for \$242,456. Ungar was listed in that statement as the person who lost the diamond. Fastag also, that day, signed a receipt subrogating the claim to Ideal's insurer, warranting that no settlement had been made with, or release given to, any person or entity against whom a claim might lie.

The loss of the 4.08 carat diamond was allegedly not reported to Ideal until April 12, 2009, because Ungar claimed that he was hopeful the police would recover it, as they were notified on March 3, 2008. Ungar ebt, at 43-44. That day, Ideal issued a bill for the diamond, indicating that it was sold to A. Link for \$135,000, and that payment was due on June 11, 2008. On or about that day, Ideal also delivered to A. Link the original

¹The police issued vouchers for the cz and for 317 counterfeit \$100 bills. It is unclear whether the other \$300 was in the possession of Senderowicz's bank.

Gemological Institute of America (GIA) certificate, dated February 14, 2008, for the diamond, describing it in detail. As of January 9, 2009, the date on which Link was deposed, A. Link had not yet paid Ideal for the diamond.

According to Senderowicz (aff., n 3), Ideal never filed a claim with its insurer for the loss of the 4.08 carat diamond. Further, A. Link never filed an insurance claim for either the bracelet or the diamond, and Link testified (ebt, at 67-70) that after this action was commenced, in May 2008, when defense counsel brought up the insurance issue, Link contacted his insurance agent of 40 years, Gerard Adams, who told him that, under the circumstances, the loss was not insurable. See also Johnson reply aff., ¶ 13 (Adams allegedly told plaintiff's counsel on November 17, 2008 that the loss was uninsurable, since it came within the off-premises exclusions in the policies).

A. Link commenced this action only against Senderowicz, asserting claims sounding in breach of contract and conversion. An answer, verified personally by Senderowicz, was served, in which he seemingly disputed the value and/or authenticity of the bracelet and the diamond, but admitted that he had received both from A. Link. Answer, ¶¶ 3, 4, 6. The only "AFFIRMATIVE DEFENSE[S]" pleaded in that answer were that the two causes of action failed to state a cause of action, and that Senderowicz was acting solely as A. Link's agent and that any loss arose from criminal acts perpetrated against Senderowicz, while acting in

that capacity.

Following the completion of discovery and the filing of the note of issue, A. Link now seeks summary judgment on those two causes of action. A. Link maintains that the two memos, admittedly signed by Senderowicz, constitute consignment/bailment contracts, which put the risk of loss from all hazards on Senderowicz. A. Link further claims that the values stated in each of those memos constituted an agreed-upon value of each item. Additionally, A. Link asserts that it is the rightful owner of the bracelet, having manufactured it, and that its title to it is superior to Senderowicz's. A. Link also claims that it is the rightful owner of, and has superior title to, the diamond, as evidenced by the Ideal invoice to it; its possession of the original GIA certificate; the memo's recitation that it was from A. Link; and by the fact that it has been making payments to Ideal. A. Link's motion is supported by Link's and Fastag's affidavits, both of whom assert that the diamond was given to Ungar on behalf of A. Link, and that the diamond was sold to A. Link, which has been making payments to Ideal for the diamond. Senderowicz opposes the motion.

Discussion

The law is well settled that the movant on a summary judgment application bears the initial burden of prima facie establishing its entitlement to the requested relief, by

eliminating all material allegations raised by the pleadings. Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Winegrad v New York University Medical Center, 64 NY2d 851 (1985); Kuri v Bhattacharya, 44 AD3d 718 (2d Dept 2007). The failure to meet one's burden mandates the denial of the application, "regardless of the sufficiency of the opposing papers." Winegrad, 64 NY2d at 853. However, where the movant demonstrates its prima facie entitlement to summary judgment, the burden shifts to the other side to raise a material triable issue of fact warranting the motion's denial. Alvarez v Prospect Hospital, 68 NY2d at 324. Also, "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court [internal citations omitted]." Gibson v American Export Isbrandtsen Lines, Inc., 125 AD2d 65, 74 (1st Dept 1987).

Breach of Contract Cause of Action

Senderowicz opposes that branch of A. Link's motion which seeks summary judgment on the breach of contract cause of action. He asserts that memos in the jewelry industry are commonly used as receipts; that the memos he signed were merely evidence of his receipt of the bracelet and diamond, and were not contracts; that there was no consideration given for the memos; that he never intended to be contractually bound; and that it is his

understanding of industry custom, that the recipient of jewelry on memo is not a party to a contract. Senderowicz, who asserts that he has no expertise in determining the authenticity or value of diamonds, claims that A. Link has failed to establish the value of the bracelet and the diamond, and that the photocopy of the GIA certificate has no evidentiary value, so as to establish the diamond's worth or authenticity.

Additionally, Senderowicz claims that A. Link has no standing to pursue this action as to the diamond, because Ungar procured it for his own account, not A. Link's, and therefore, A. Link has no ownership or possessory rights to the diamond. Senderowicz argues that A. Link's claim that the diamond was obtained by Ungar for A. Link's account not credible because neither Ideal nor A. Link made an insurance claim, no payments for the diamond were made by A. Link to Ideal before Link was deposed, and because Ungar allegedly lost, on March 10, 2008, i.e., within 10 days of Hager's receipt of the bracelet and the diamond, a 7.03 carat diamond given to Ungar on memo by Ideal, for which Ideal filed an insurance claim. However, Senderowicz does not submit evidence of insurance fraud, or any evidence that A. Link's insurance covered the loss at issue.

A. Link maintains that Senderowicz's affidavit consists of "wild speculation." Johnson reply aff., ¶ 3. A. Link further asserts that the clear terms of the memos, including that his receipt of them was at Senderowicz's risk from all hazards,

refute that they were merely receipts, and demonstrate that they were consignment/bailment contracts. Also, A. Link urges that the fact that Senderowicz once held a job in the wholesale jewelry business, does not qualify him to render an opinion as to how these memos were to be used and interpreted. Further, A. Link urges that the evidence demonstrates that the diamond was obtained for its account and was sold to it by Ideal. A. Link additionally claims that Senderowicz cannot contest the values and authenticity of the diamond and bracelet because the amounts listed in the memos totaling \$174,000 constituted their agreed-upon values, and because Senderowicz sought to sell them to Hager for amounts in excess of the \$174,000 set forth in the complaint (Johnson reply aff., ¶ 11).

Senderowicz's claim that he received no consideration for signing the memos is devoid of merit. Clearly, he received the jewelry in exchange for signing the memos, and he was to receive a portion of the sales price for the bracelet, and presumably, also for the diamond, had he sold that. Similarly unavailing is Senderowicz's claim that the memos were not contracts, his bald and conclusory statements of his understanding of industry custom notwithstanding.

A consignment is "an 'agency with a bailment' and [is] basically governed by the law of agency and service contracts [citation omitted]." *Rahanian v Ahdout*, 258 AD2d 156, 159 (1st Dept 1999).

"'Bailment' is defined as a delivery of personalty for some particular purpose, or on mere deposit, upon a contract express or implied, that after the purpose has been fulfilled it will be redelivered to the person who delivered it, or otherwise dealt with according to that person's directions, or kept until it is reclaimed."

9 NY Jur 2d Bailments & Chattel Leases § 1; *Carter v Mike's Auto, Inc.*, 27 Misc 3d 1212(A), 2010 NY Slip Op 50692(U), *3 (Poughkeepsie City Ct 2010).

Usually, a bailee is liable for the fair and reasonable value of the lost property (*Jones v Morgan*, 90 NY 4 [1882]; *Vetland v FX Enterprises I, Ltd.*, 49 AD3d 632 [2d Dept 2008]), which, if the item has a market value, is that value (*Jones v Morgan*, 90 NY at 10). The market value is not necessarily the retail price, but its replacement value. *Wehle v Haviland*, 69 NY 448 (1877).

In the instant case, a bailment arose when A. Link entrusted the diamond and bracelet to Senderowicz for the purpose of selling them. *Leventritt v Sotheby's, Inc.*, 5 AD3d 225, 226 (1st Dept 2004). The memos served in part as receipts for the jewelry by Senderowicz in connection with his examination, inspection, and by implication, his sale of that jewelry. *Hartog v Mehle*, 14 AD2d 336, 339 (1st Dept 1961). The memos also stated the conditions under which Senderowicz could dispose of the jewelry, and thus, their terms are, in that respect, contractual. *Ibid.* The intent of the memos' language regarding risks was intended to make Senderowicz "assume all risks in regard to the jewelry,

without regard to fault on [his] part." *Id.* at 338; see also *Allemania Fire Ins. Co. of Pittsburgh v Keller Diamond Corp.*, 101 NYS2d 9, 12-13 (Sup Ct, NY County 1950), *revd on other grounds* 278 App Div 899 (1st Dept 1951) (absent fault or negligence a bailee is not ordinarily liable for the loss, unless he contractually takes on a more extensive obligation); *Consolidated Laundries Corp. v Regis Operators, Inc.*, 26 AD2d 383 (3d Dept 1966); *Rapid Safety Fire Extinguisher Co. v Hay-Budden Mfg. Co.*, 37 Misc 556 (App Term, 1st Dept), *affd for reasons stated below* 77 App Div 643 (1st Dept 1902).

While a mere receipt can be explained by parol evidence to show that the writing was not intended to be a contract (*Hartog v Mehle*, 14 AD2d at 339), the evidence here demonstrates that the memos were not mere receipts. Thus, since Senderowicz does not deny that the goods were received by him for sale, address the memos' risk language, offer any parol evidence as to what was intended by that language, or indicate that there were any representations by A. Link's agents as to the nature of the risks assumed, he is contractually bound by the memos. See generally *id.* at 338-339; *Verstandig & Sons, Inc. v Sobel*, 26 Misc 2d 649 (Sup Ct, NY County 1960); *Allemania Fire Ins. Co. of Pittsburgh v Keller Diamond Corp.*, 101 NYS2d at 9. Indeed, Senderowicz claims that he was familiar with these types of memos and had signed them in the past.

That Senderowicz allegedly signed the bracelet memo after the alleged theft is of no consequence, since it clearly imposed on him the risks of all hazards as well as the obligation to pay certain costs if a lawsuit was commenced to recover the bracelet, and there is a lack of evidence offered by him that he signed that memo other than of his free will.

Senderowicz does not deny that A. Link was the owner of the bracelet. However, to the extent that he resists that portion of the breach of contract claim pertaining to the diamond on the ground that A. Link was not the owner of the diamond because the diamond was allegedly obtained by Ungar for his own account, Senderowicz' arguments do not overcome the fact that the memo he signed, before the diamond was allegedly switched by Hager (and therefore, before there was any motive to fabricate), listed the diamond as coming from A. Link at 444 Madison Avenue, rather than from Ungar. In addition, Senderowicz does not explain why he would sign a memo indicating that the diamond was from A. Link, when he allegedly believed that it was from Ungar. Moreover, Senderowicz admitted in his answer that the object was received from A. Link, and that he was acting solely as A. Link's agent, undercutting his assertion that he thought the diamond was from Ungar for his own account. Further, Ungar, Fastag, and Link assert that the diamond was purchased by A. Link, and it is difficult to fathom why A. Link would expose itself to liability to Ideal if the diamond was being sold to Hager for Ungar's own

account. Also, Senderowicz's insinuation that the insurance claim for the 7.03 carat diamond was really for the loss of the 4.08 carat diamond does not make sense, since it would expose Ungar to a subrogation claim for a 7.03 carat diamond valued at about \$247,000, instead of for one worth about \$100,000 less. Accordingly, A. Link has established that the diamond was obtained and being sold for its account, and that it has standing to assert its breach of contract claim.

Since A. Link has established that Senderowicz breached both of the memos which he signed, A. Link is entitled to an order granting it summary judgment on liability. However, because A. Link has not established the value of the diamond and the bracelet, for which A. Link now seeks respectively \$141,000 and \$33,000, that amount must be determined at trial. See e.g. *Verstandig & Sons, Inc.*, 26 Misc 2d at 652-653 (where memo was ambiguous as to whether stated price was the sales price or agreed-upon value, a triable issue existed on damages). In the instant case, while Link conclusorily asserts in his affidavit that the price set forth in each memo was the agreed-upon value, the memos do not clearly state that, and Link does not offer evidence of any conversation in which Senderowicz had agreed that the amount in each memo was the agreed-upon value of the jewelry. Nor is there any evidence set forth by A. Link that there was a custom and practice in the industry by which the bailee

understood that he was liable for the amount stated in a memo, irrespective of whether there was a sale. See *Lipschutz v Gordon Jewelry Corp.*, 373 F Supp 375, 381 (SD Tex 1974). Moreover, the evidence does not support the claim that the amount set forth in each memo was the amount for which Senderowicz was liable or that Senderowicz attempted to sell the two items for more than \$174,000, as claimed by A. Link's counsel. Specifically, it appears that Senderowicz was to get a cut of the bracelet price and, presumably, was to get a cut of the diamond's sale price. *Freund v Washington Square Press, Inc.*, 34 NY2d 379, 382 (1974) (party injured by breach of contract cannot recover more than if contract had been performed). On this record, the amount Senderowicz was to receive is unclear. Also, while A. Link now claims that it is entitled to \$33,000 plus interest on the bracelet, it appears that the sales price was less, because Hager paid less, and A. Link apparently accepted a lesser amount before it realized that the money was counterfeit. In addition there seems to be a discrepancy as to what Hager paid, since Senderowicz asserts in his affidavit that he received \$31,800 from Hager, but evidently reported to the police that he had received \$32,000. Additionally, the bracelet's cost to A. Link two years earlier was about \$19,000, and A. Link has not provided any evidence that its value substantially appreciated. Further, as noted in a letter from defense counsel, A. Link previously

summoned Senderowicz to Rabbinical Court. A copy of the summons was attached to that letter (both of which are contained in the County Clerk's file) which indicated that A. Link was owed "\$160,000 [for] MERCHANDISE RECEIVED AND NOT PAID FOR," instead of the \$174,000, with interest, now claimed on this motion. Accordingly, the branch of this motion which seeks summary judgment on the breach of contract cause of action is granted as to liability only, but is otherwise denied.

Conversion Cause of Action

Senderowicz also asserts that summary judgment must be denied on the conversion cause of action because, among other reasons, A. Link has failed to demonstrate the requisite intent to convert, and that there was a wrongful disposition or withholding by him of the property; rather, he maintains that he was the victim of Hager's crime. In response, A. Link's counsel avers that he and Link met with unspecified individuals from the District Attorney's office and with a police detective, and that they were told that Senderowicz was a suspect with respect to the theft of both items. Plaintiff's counsel further asserts that, aside from Senderowicz's self-serving claims, there is no evidence that Hager ever took possession of the jewelry.

A conversion occurs when a person "intentionally and without authority assumes or exercises control over personal property belonging to someone else, interfering with that

person's right of possession." *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 (2006); *Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283, 288 (2007). The two main elements of a conversion claim are the plaintiff's interest or immediate superior possessory right in the property and the "defendant's dominion over the property or interference with it, in derogation of plaintiff's rights." *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d at 50; *Dobroski v Bank of America, N.A.*, 65 AD3d 882, 885 (1st Dept 2009). "A conversion implies a wrongful act, a mis-delivery, a wrongful disposition, or withholding of the property. A mere non-delivery will not constitute a conversion, nor will a refusal to deliver, on demand, if the goods have been lost through negligence, or have been stolen." *Magnin v Dinsmore*, 70 NY 410, 417 (1877); *Salt Springs Natl. Bank v Wheeler*, 48 NY 492, 495 (1872).

It is readily apparent that A. Link has failed to meet its burden of establishing that Senderowicz converted the bracelet and the diamond, because it has not demonstrated as a matter of law that Senderowicz acted intentionally and wrongfully and asserted dominion over or withheld these items in derogation of plaintiff's rights. Plaintiff's counsel's hearsay claim that unspecified law enforcement personnel considered Senderowicz a suspect in the disappearance of the jewelry does not suffice to meet A. Link's burden on this motion. Accordingly, the branch of

its motion which seeks an order granting it summary judgment on its conversion cause of action is denied.

Conclusion

In light of the foregoing, it is

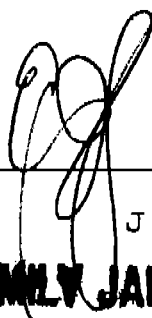
ORDERED that A. Link Partners, Inc.'s motion for summary judgment is granted against defendant Menachem Senderowicz on the first cause of action for breach of the consignment contracts with respect to the diamond and the bracelet, as to liability only, and is otherwise denied; and it is further

ORDERED that the parties appear for trial on July 12, 2010.

This Constitutes the Decision and Order of the Court.

Dated: May 12, 2010

ENTER:



J.S.C.

EMILY JANE GOODMAN

FILED
MAY 18 2010
NEW YORK
COUNTY CLERK'S OFFICE