

Marchello v Perfect Little Prods., Inc.

2010 NY Slip Op 31536(U)

June 9, 2010

Supreme Court, Nassau County

Docket Number: 5057/06

Judge: Karen V. Murphy

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

ANTHONY "PEPPI" MARCHELLO,

Plaintiff(s),

-against-

**PERFECT LITTLE PRODUCTIONS, INC. MEDIA
RECORDING STUDIO, STEVEN YOUNG, MRS.
STEVE YOUNG (A.K.A. VALERIE VALENTE),**

Defendant(s).

_____ x

**PERFECT LITTLE PRODUCTIONS, INC., MEDIA
RECORDING STUDIO, STEVEN YOUNG, MRS.
STEVE YOUNG (A.K.A. VALERIE VALENTE),**

Third-Party Plaintiff(s),

-against-

**ANTHONY MARCHELLO, JR. a/k/a GENE
MARCHELLO,**

Third-Party Defendant(s).

_____ x

Index No. 5057/06

Motion Submitted: 4/15/10

Motion Sequence: 003, 004, 005

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XXX
- Answering Papers.....X
- Reply.....X

Motion by plaintiff for summary judgment in his favor against all defendants is granted as to liability for the cause of action for negligence/breach of bailment, and denied as to the remainder of the complaint.

Motion by third-party defendant for summary judgment dismissing the third-party complaint is granted.

Motion by defendants for summary judgment dismissing the complaint for failure to state a cause of action is denied.

Background

Plaintiff is a member of the band the Good Rats, a group that made a number of albums back in the 1970's. Commencing in 1994, plaintiff had an oral agreement for the use of the recording studio owned by defendant Perfect Little Productions, Inc. ("Perfect"), formerly known as Media Recording Studio. Defendants Steve Young and Valerie Valente are the owners of Perfect. Steve Young operated the recording studio as a self-taught recording engineer.

Plaintiff testified that he paid an hourly rate for the use of the studio. According to plaintiff he also paid for tapes that were used, and then stored in the back room at the Studio. When Perfect switched from tapes to digital recordings, the music was stored on Perfect's hard drive and on two separate jazz drives owned by plaintiff but stored in a cabinet at the studio. Defendant Young would transfer the music from his hard drive to the two jazz drives, but space was an issue. Consequently, defendant Young recommended that plaintiff purchase two hard drives of his own, one to be used as a master hard drive and the other as a safety. Plaintiff testified that defendant Young stated he would store the master hard drive and the safety.

From 1994 to 2001 the Good Rats recorded and stored between 1500 and 2000 hours of music at Perfect's studio. Plaintiff's plan was to make four compilation albums. In addition, plaintiff's son/third-party defendant Gene Marchello recorded his own songs that were transferred to the master hard drive and the safety. Defendant Young testified that each time the Good Rats recorded music, he always backed it up on the back up hard drives in the cabinet in the studio. It was always his job to do the backing up.

Plaintiff ceased recording in 2002 because of a heart ailment. Sometime in 2005, Perfect installed a new computer system in the studio. Defendant Young transferred the music of "active customers" from the old computer to the new computer and then deleted the contents of the hard drive on the old computer. As plaintiff's band had not recorded music in several years, plaintiff was not an "active customer." Defendant Young did not advise plaintiff that he was deleting Good Rats' music from the studio hard drive, and he did not check to see whether plaintiff's master hard drive and/or safety hard drive were in working order.

When plaintiff called Perfect to resume recording work, defendant Young tried to access the recordings on the master hard drive and the safety. One of the hard drives did not contain the folder with the music. The other hard drive crashed. Defendant Young sent the crashed drive to Bohemia and New Jersey, but it couldn't be fixed. All of plaintiff's recordings were permanently lost.

Plaintiff commenced his action in 2006. In his amended complaint plaintiff alleges claims for breach of contract, negligence, extreme emotional distress, and breach of bailment. At this time plaintiff moves for summary judgment on his claims.

In 2007, defendants commenced a third-party action against plaintiff's son. The third-party complaint alleges claims for negligence, contribution and indemnification. Plaintiff's son moves for summary judgment dismissing the third-party complaint on the grounds that there is no evidence that he caused or contributed to the loss of plaintiff's music. Plaintiff's son testified that prior to recording he would get unused CD's from in or near the closet in which the plaintiff's and his own hard drives were stored, and he would place the CD in the recording machine himself. However he further testified that he never had any physical contact with the hard drives that contained Good Rats' music.

Defendants oppose both motions and seek summary judgment dismissing the complaint. As to the cause of action for breach of contract, defendants argue that Perfect never agreed to store plaintiff's hard drives; the agreement was for recording music. Backup tapes, and later backup hard drives, would be stored in a cabinet in the control room of the studio if the customer chose to leave them there. In short, according to defendants, the backup hard drives were kept at Perfect's studio solely for plaintiff's convenience.

As to the cause of action for negligence, defendants assert that third-party defendant and others had unsupervised access to Perfect's computer for the purpose of modifying the music. Defendants insist that this raises a triable issue of fact as to the third-party defendant's role in the disappearance of plaintiff's music from one of the hard drives, and the corruption of the other. Defendants also say they were told the damage to plaintiff's hard drive that crashed was caused by "wear and tear."

Defendants claim that plaintiff's cause of action for breach of bailment must fail because they did produce the plaintiff's backup drives, albeit without the music allegedly encoded on the backup drives, or in an irretrievable form. Defendants further insist that in the event a bailment existed, it was a gratuitous bailment, and they met the standard of reasonable care.

Summary Judgment Standard

Summary judgment is the procedural equivalent of a trial (*S.J. Capelin Assoc., Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341, 313 N.E.2d 776, 357 N.Y.S.2d 478 [1974]). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist (*Suffolk County Dept. of Social Services v. James M.*, 83 N.Y.2d 178, 182, 630 N.E.2d 636, 608 N.Y.S.2d 940 [1994]). The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law (*Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 82, 790 N.E.2d 772, 760 N.Y.S.2d 397 (2003); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]). Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). Summary judgment will not be defeated by mere conclusions or unsubstantiated allegations (*id.*).

Discussion

On this record, material issues of fact are presented as to whether the parties had an oral contract for the storage of Good Rats' music (see generally *Certain Underwriters at Lloyd's, London v. U.S. Adjustment Corp.*, 29 A.D.3d 335, 814 N.Y.S.2d 607 [1st Dept., 2006]). Accordingly, summary judgment on this cause of action must be denied.

Although they are alleged separately, plaintiff's claims for negligence and breach of bailment are really one cause of action. A bailee is responsible for the reasonable value of property lost through its negligence (*Vetland v. FX Enterprises I, Ltd.*, 49 A.D.3d 632, 854 N.Y.S.2d 415 [2d Dept., 2008]). "It is the element of lawful possession, and the duty to account for the thing as the property of another, that creates the bailment, whether such possession results from contract or is otherwise lawfully obtained" (*Foulke v. New York Consol. R. Co.*, 228 N.Y. 269, 275, 127 N.E. 237, 9 A.L.R. 1384 (1920); *Martin v. Briggs*, 235 A.D.2d 192, 663 N.Y.S.2d 184 [1st Dept., 1997]). In the case of a bailment for mutual benefit, the bailee was obliged to exercise ordinary care with respect to the item bailed (*Aronette Manufacturing Co. v. Capitol Piece Dye Works, Inc.*, 6 N.Y.2d 465, 160 N.E.2d 842, 190 N.Y.S.2d 361 [1959]). In the case of a gratuitous bailment, the bailee may only be liable for gross negligence (*Voorhis v. Consolidated Rail Corp.*, 60 N.Y.2d 878, 458 N.E.2d 823, 470 N.Y.S.2d 364 [1983]). The failure to return the object bailed establishes a *prima facie* case of gross negligence, requiring the bailee to come forward with an explanation (*Voorhis* at 879; *Roth v. Black Star Pub. Co., Inc.*, 239 A.D.2d 484, 658 N.Y.S.2d 59 [2d Dept., 1997]). It is not enough to show that the defendant/bailee used reasonable care in its

system of custody, if mysterious disappearance is the only explanation given (*Damast v. New Concepts in Jewelry, Ltd.*, 86 A.D.2d 886, 447 N.Y.S.2d 530 [2d Dept., 1982]).

At the outset this Court must address the issue of whether a cause of action for bailment is available for intangible information stored on computer hard drives. Research reveals no precedent in New York regarding computer hard drives. Traditionally a bailment arises when property is taken into the possession of the bailee (*Osborn v. Cline*, 263 N.Y. 434, 437, 189 N.E. 483 [1934]). The property at issue has always been personal property (*Voorhis* (suitcase); *Aronette* (raincoats); *Foulke* (package); *Martin* (paintings); *Damast* [diamond rings]). Even the cases involving photographic images are about the loss of the medium containing those images, and not erasure or corruption of the images themselves (*Roth* (photographic images); *Blackman v. Michael Friedman Pub. Group, Inc.*, 201 A.D.2d 328, 607 N.Y.S.2d 43 (1st Dept., 1994) (photographic transparencies); *Nierenberg v. Wursteria, Inc.*, 189 A.D.2d 571, 592 N.Y.S.2d 27 (1st Dept., 1993), lv app den 82 N.Y.2d 651 (1993) [slide tray containing slides]). The cases that deal with deletions from computer hard drives are spoliation cases (see *Xiao Yang Chen v. Fischer*, __ A.D.3d __, 2010 WL 2106238 (2d Dept., 2010) and *Ingoglia v. Barnes & Noble College Booksellers, Inc.*, 48 A.D.3d 636, 852 N.Y.S.2d 3 [2d Dept., 2008]).

Nevertheless, in a landmark case involving intangible electronic computer records and data, the Court of Appeals has recently found that “it generally is not the physical nature of a document that determines its worth, it is the information memorialized in the document that has intrinsic value” (*Thyroff v. Nationwide Mutual Ins. Co.*, 8 N.Y.3d 283, 292, 864 N.E.2d 1272, 832 N.Y.S.2d 873 [2007]). The Court noted that “the tort of conversion must keep pace with the contemporary realities of widespread computer use” and therefore held that intangible electronic records that were stored on a computer could be subject to a claim of conversion in New York (*Thyroff* at 292-293). Following this reasoning, the Court is compelled to conclude that intangible music stored on a hard drive can be subject to a claim of bailment.

In this case, whether the bailment of the hard drives containing plaintiff’s music was gratuitous or for mutual benefit is of no consequence because plaintiff has established a *prima facie* case of gross negligence through his request for the return of the hard drives containing Good Rats’ music and defendants’ failure to comply. The Court therefore turns to defendants’ explanation, which deals only with the bailed property, namely the two hard drives containing the Good Rats’ music, and not the studio hard drive.

According to defendant Young, one of plaintiff’s hard drives did not have the music file on it, and the other permanently crashed. These hard drives were paid for by plaintiff, and stored in defendants’ cabinet in the control room. It was defendant Young himself who did all the backing up of all the music onto the hard drives, as he did for every customer.

Young admitted that computer-savvy customers would sometimes make some changes on his studio computer, and sometimes he would leave the premises for five or ten minutes. Young tries to implicate plaintiff's son with his testimony that he showed plaintiff's son some basic things like how to start a song and how to stop it and how to raise and lower the volume of an instrument or the whole system. However, defendant Young admitted that he was the one who always selected the son's folder and opened the song requested. If he ran out for a sandwich and left the son at the computer, he didn't know if something was different from when he departed. This conclusory and speculative testimony is not evidence of fault on the part of the son, and does not raise a triable issue of fact as to a reasonable explanation for the loss of the bailed property. It is not even clear how much of this testimony refers to the studio computer or the studio hard drive, as opposed to plaintiff's two backup drives.

Finally, the excuse of a hard drive crashing because of "wear and tear" is pure unsubstantiated hearsay. No affidavit to this effect has been presented, and indeed the identity of the speaker is not even given.

Based on the foregoing, defendants' proffered explanation for the loss of plaintiff's music in its entirety must be rejected. That one of plaintiff's backup hard drives did not have the music file, and that the other "crashed," without more, does not suffice to raise a triable issue of fact.

Accordingly, plaintiff's motion for summary judgment on his negligence/ breach of bailment claim is granted on the issue of liability only. None of the parties addressed the issue of damages, which shall be referred to the trial court.

Plaintiff's son's motion for summary judgment dismissing the third-party complaint against him must also be granted. Defendants failed to produce any evidence whatsoever of fault on the part of plaintiff's son. In the absent of fault, defendants have no claim against the son for negligence, contribution, or indemnification, and these claims are hereby dismissed.

The foregoing constitutes the Order of this Court.

Dated: June 9, 2010
 Mineola, N.Y.

Loren V. Murphy
 J. S. C.
ENTERED

6 JUN 15 2010
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE