

**Seeger v Hercules Movers, Inc.**

2010 NY Slip Op 32411(U)

August 4, 2010

Sup Ct, NY County

Docket Number: 101420/09

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE  
Justice

PART 10

Seeger

INDEX NO.

101420/09

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

- v -

Hercules Tapers Inc.

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

**FILED**  
AUG 13 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

Status conference  
NOI extended

9/23/10  
9/24/10

Pt. 10

Dated: 8/4/10

HON. JUDITH J. GISCHE

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: IAS PART 10

-----X  
CHRISTOPHER A. SEEGER,

Plaintiff,

Decision and Order  
Index No. 101420/09

-against-

Seq. No. 001

HERCULES MOVERS, INC., DANIEL MARTINEZ,  
LUIS ALBERTO MARTINEZ MAGDALENO, SHIMON  
ELIEZER, and DROR ELIEZER,

Presiding:  
Hon. Judith J. Gische

Defendants.

-----X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

**PAPERS**

Defs' amended n/m w/ KMP afform, AV affid, exhs	
Pltf's opp w/MH affirm . . . . .	3
Defs' reply w/KMP affirm . . . . .	4
Defs' additional reply w/KMP affirm . . . . .	5
Pltf's additional opp w/MH affirm, exhs . . . . .	6
Defs' sur-reply w/KMP affirm, exhs . . . . .	

**FILED**  
AUG 13 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
Gische, J.

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for breach of contract, conversion, negligence and punitive damages arising from the alleged theft of plaintiff's watch.

Issue was joined by the defendants who are jointly represented. They are the moving company and the individual movers. This motion for summary judgment is brought pre-note of

issue. If the complaint is not dismissed, then defendants ask for partial summary limiting plaintiff's recovery to an amount equal to \$.30 per pound or \$2,500, whichever is greater, as per an agreement between defendant Hercules Movers, Inc. (Hercules) and plaintiff. Since issue was joined, summary judgment relief is available (CPLR 3212[a]; Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 [1<sup>st</sup> Dept 2001]).

### **Background**

On January 7, 2009, plaintiff, through his employee, Jaclyn Cuffaro, contracted with Hercules to pack and move furniture and other personal items from plaintiff's former residence, located at 401 East 60<sup>th</sup> Street, New York, New York, to his current residence located at 95 Worth Street, New York, New York for a fee of \$3,000. On that same day, Hercules' employees, defendants Daniel Martinez, Luis Alberto Martinez Magdaleno, Shimon Eliezer, and Dror Eliezer ("Individual Defendants"), arrived at the plaintiff's former residence to start packing plaintiff's possessions.

Although Cuffaro allegedly instructed the Individual Defendants not to enter the master bathroom, one of the Individual Defendants approached Cuffaro with a watch, designed by Ulysse Nardin, which he found in the master bathroom, inquiring as to whether he should pack it. Cuffaro allegedly told that Individual Defendant that he was not to go into the

master bathroom and that the watch should be placed back where he found it. Cuffaro accompanied that Individual Defendant into the master bathroom, where they placed the Watch in a drawer under the sink. The Individual Defendants continued to pack until approximately 5:30 P.M. that evening under Cuffaro's supervision.

On January 8, 2009, the Individual Defendants returned to the plaintiff's former residence to finish the job. Once again, Cuffaro was present to oversee the move. Plaintiff alleges that during this time, another Individual Defendant entered the master bathroom without Cuffaro's permission. It was during this time that plaintiff believes his watch was stolen from the master bathroom.

Later in the day, plaintiff's driver arrived at the former residence to assist Cuffaro with packing the master bathroom. As they were packing, Cuffaro noticed that the watch was missing from the drawer. Cuffaro immediately confronted the Individual Defendants about the watch, and they denied any involvement. She then called the New York City Police Department, who arrived at the scene and took a complaint. Despite this incident, the Individual Defendants completed the move, and Cuffaro signed a document stating that the move was completed and all items were delivered. Although plaintiff had previously paid the \$3,000 moving fee, in response to the alleged theft, he charged back the \$3,000 onto his credit card, leaving Hercules unpaid for the

move.

Plaintiff now brings this action alleging breach of contract, negligence, gross negligence, and conversion.

### **Discussion**

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law. Once the movant has demonstrated entitlement, the burden shifts to the opposing party to produce evidence sufficient enough to raise an issue of fact warranting a trial. *People v Grasso*, 50 AD3d 535, 545 (1<sup>st</sup> Dept 2008).

Defendants argue that plaintiff cannot bring a cause of action for breach of contract, because plaintiff has not performed under the contract. The elements of a cause of action for breach of contract are: (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. See *Noise In The Attic Productions, Inc. v London Records*, 10 AD3d 303 (1<sup>st</sup> Dept 2004). Here, defendants have made a prima facie showing that plaintiff did not perform under the agreement, as he charged back the fee that was to be paid to Hercules in exchange for Hercules' services. Plaintiff does not dispute this fact, he does not even address this cause of action in his opposition, let alone raise any issues of fact warranting a trial. It appears that plaintiff has abandoned this claim. In any event,

defendants have met their burden of providing they are entitled to summary judgment on the breach of contract cause of action. Therefore, the first cause of action (breach of contract) is dismissed as a matter of law.

Another reason to dismiss the first cause of action is that the service contract was between plaintiff and Hercules only, and the Individual Defendants are not a signatory thereto. Thus, absent any privity among plaintiff and the Individual Defendants, he has no factual or legal basis to support his claims against them (*Leonard v Gateway II, LLC*, 68 AD3d 408 (1<sup>st</sup> Dept 2009)).

Defendants also seek summary judgment dismissing plaintiff's causes of action for negligence and gross negligence. Defendants argue that they moved every item with reasonable care. In response, however, plaintiff raises an issue of fact as to whether defendants were negligent in providing their services to plaintiff, as the watch allegedly went missing during the move. A question of fact exists as to whether defendants were negligent in failing to follow Cuffaro's alleged instructions in regard to what rooms to pack and what rooms were off limits to the movers as they performed their services.

Negligence cases by their very nature typically do not lend themselves to summary judgment, since the question of negligence itself is really one for the fact finder. *Ugarriza v Schmieder*, 46 NY2d 471, 474 (1979). "Only if it can be concluded as a

matter of law that defendant was negligent, may summary judgment be granted in a negligence action." *Id.* This is not the case here.

With respect to plaintiff's gross negligence claim, which involves a higher level of aggravated conduct than ordinary negligence (*Colnaghi, U.S.A., Ltd. v Jewelers Protection Services, Ltd.*, 81 NY2d 821, 823-824 [1993]), plaintiff has raised an issue of fact as to whether defendants' alleged conduct in ignoring the moving instructions "'smacks' of intentional wrongdoing." *Id.* It is conduct that evinces a reckless indifference to the rights of others. *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540 (1992).

Here, plaintiff alleges that his watch was stolen after his employee warned the Individual Defendants to leave alone and put it in a drawer. The court's role on a motion for summary judgment is to determine whether there is a material factual issue to be tried, not to resolve it. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 (1995). The motion should be granted only if the movant is entitled to judgment as a matter of law. see, *Ugarriza v. Schmieder*, 46 N.Y.2d 471, 474 (1979). If at trial plaintiff proves his claim, that the watch was stolen because the defendants failed to follow instructions, then, a reasonable jury could find that this was gross negligence. *Voorhis v. Consolidated Rail Corp.*, 60 N.Y.2d 878

(1983; *Internationale Nederlanden (U.S.) Capital Corp. v. Bankers Trust Co.*, 261 A.D.2d 117 (1<sup>st</sup> Dept. 1999)).

Plaintiff seeks punitive damages in connection with his gross negligence cause of action. Punitive damages are not awarded for the purpose of compensating a plaintiff for an injury or a loss, but serve the societal purposes of punishing and deterring the wrongdoer, as well as others, from similar conduct in the future. Since the gross negligence and punitive damages claims are closely aligned, the claim for punitive damages remains for trial as well.

Defendants also seek summary judgment dismissing plaintiff's claim against them for conversion. However, defendants have not established their *prima facie* case that they did not convert plaintiff's property and, therefore, not proved their entitlement to summary judgment on this cause of action, as a matter of law. Simply stating that they did not engage in improper conduct is not enough. Further, the complaint taken by the New York City Police Department, submitted by defendants in support of their motion, is inconclusive, and does not show that defendants did not convert the plaintiff's watch.

Defendants have identified some inconsistencies in Cuffaro's deposition testimony and her sworn affidavit submitted in opposition to their motion. Issues about credibility are for the jury to make at trial. *Forrest v Jewish Guild for the Blind*, 3

NY3d 295, 315 (2004), quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 (1986).

Finally, defendants seek, in the alternative, partial summary judgment limiting plaintiff's recovery to \$.30 per pound or \$2500, whichever is greater, as per the agreement between plaintiff and Hercules. While NY UCC 7-309 permits a carrier to limit its liability, if it is found that the defendants' conduct arose to the level of gross negligence, the limitation of liability provision would not be enforced. See *Stevens Van Lines, Inc. v Don's Moving & Storage, Inc.*, 2009 WL 727780, 2009 NY Slip Op 30539 (U) (Sup Ct, NY County 2009); *Downstate Medical Center v Purolator Courier Corp.*, 138 Misc 2d 714, 717 (Civ Ct, Kings County 1988). Therefore, at this stage, partial summary judgment cannot be granted on this issue. Further, the court notes that limitation of liability is not effective with respect to a carrier's liability for conversion of an item for its own use. NY UCC 7-309.

### **Conclusion**

Defendants' motion is granted only to the extent that the first cause of action is dismissed. Otherwise it is denied. Since the note of issue has not yet been filed and it is unclear whether discovery is completed, the court orders that any outstanding discovery be completed by September 10, 2010. A compliance conference is hereby scheduled for September 23, 2010

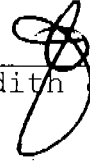
in Part 10 at 9:30 a.m. The date to file the note of issue is hereby extended to September 24, 2010.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
August 4, 2010

So Ordered

  
\_\_\_\_\_  
Hon. Judith J. Gische

**FILED**  
AUG 13 2010  
NEW YORK  
COUNTY CLERK'S OFFICE