

**Stevens Van Lines, Inc. v Don's Moving & Stor.,
Inc.**

2011 NY Slip Op 30755(U)

March 29, 2011

Supreme Court, New York County

Docket Number: 600852/08

Judge: Louis B. York

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

PRESENT: **LOUIS B. YORK** _____

PART 1

Index Number : 600852/2008 **J.S.C.**

STEVENS VAN LINES

INDEX NO. _____

vs

DON'S MOVING & STORAGE

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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 GRANTED WITH ACCORDANCE WITH MEMORANDUM DECISION.

FILED

MAR 31 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/29/11 _____

Lly

LOUIS B. YORK 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 2

----- X
STEVENS VAN LINES, INC., doing business as
Stevens Worldwide Van Lines,

Plaintiff,

Index No. 600852/08

-against-

DON'S MOVING & STORAGE, INC.,

Defendant.

FILED

MAR 31 2011

----- X
LOUIS B. YORK, J.:

NEW YORK
COUNTY CLERK'S OFFICE

This decision addresses the Motion for Summary Judgment of plaintiff Stevens Van Lines, Inc. (hereafter Stevens) against defendant Don's Moving & Storage, Inc. (hereafter Don's Moving). For the reasons discussed *infra*, Stevens Motion for Summary Judgment is denied.

Facts

Stevens was hired by Mr. Steven Brainard to move his household goods from his home in Niskayuna, New York to a new location in North Carolina. As part of the move, the Mr. Brainard's possessions were to be stored for a period of 30 to 60 days between the time they were picked up and when they were delivered to him in North Carolina. The agreement provided that Stevens was to be liable to Mr. Brainard for the full replacement value of any goods lost or damaged up to a limit of \$75,000.

In order to accomplish their contract with Mr. Brainard, Stevens contacted Don's Moving, first to conduct an inventory of Mr. Brainard's goods and subsequently to pick up the household goods and store them until such time as Mr. Brainard was ready to receive the goods. Don's Moving is a certified motor carrier and owns a seventeen

thousand square foot warehouse in Albany, New York which is equipped with locks and an alarm system. Once Mr. Brainard was ready for delivery, the goods were to be collected by Stevens and delivered to North Carolina. While neither Stevens nor Don's Moving deny the existence of an agreement between them, no signed writing appears to exist detailing the terms of the agreement. Stevens has presented a copy of a fax dated August 11, 2006 that was sent to Don's Moving which states in part: "Please advise if you are available to pack on August 24 (full pack based on 14,889 pounds) and pick up for S.I.T at your warehouse (30 – 60 days) on August 25th" (Affidavit of Vicki Bierlein, Ex. B). The fax also included itemized pricing including a line item for warehouse crating.

Don's Moving picked up Mr. Brainard's goods and stored them in the trailer in which they had been picked up. The trailer was stored at a parking lot owned by Don's Moving which was located behind a freezer warehouse two blocks from the warehouse of Don's Moving. While the goods were being stored by Don's Moving, the trailer in which they were being kept was broken into by a person or persons unknown and some of the goods were taken or damaged. Determining the value of the lost and damaged goods to be in excess of \$75,000, Stevens paid Mr. Brainard \$75,000 in exchange for Mr. Brainard's release of his claims against Stevens and Don's Moving. Stevens then commenced the present action against Don's Moving.

Plaintiff's Contentions

Stevens contends that under the terms of its contract with Don's Moving, Don's Moving was required to store Mr. Brainard's household goods in its warehouse rather than in a trailer. Stevens states that on August 15, 2006, an employee of Don's Moving called Stevens requesting permission to store the goods in a trailer on an outdoor parking

lot. Stevens vice president Vicki Bierlein then contacted Mr. Glen Mangine, president of Don's Moving, and was assured by him that that goods would be placed in the warehouse. Following that conversation, Ms. Bierlein sent a fax to the attention of Glen at Don's Moving which included the statement: "As we discussed, please plan to pack on 8-24, load on 8-25 (finish on 8-26 if necessary), and bring the hhg back to your warehouse for 30 to 60 days" (Affidavit of Vicki Bierlein, Ex. B).

Stevens further contends that Don's Moving was aware that Stevens was liable to Mr. Brainard for the full replacement value of his goods up to a maximum of \$75,000. This is based on the receipt by Don's Moving of a document entitled "Information Summary Of The Contract or Purchase Order" which was included with a request for Don's Moving to conduct a pre-move survey in a fax on June 29, 2006 (Affidavit of Vicki Bierlein, Ex. A).

Defendant's Contentions

While Don's Moving does not deny the existence of a contract between it and Stevens, Don's Moving denies that it was ever instructed to store Mr. Brainard's goods in its warehouse. Don's Moving also contends that it never agreed that it would be liable for up to \$75,000 in the event of damage or loss of the goods (O'Sullivan Affidavit, ¶ 7). Don's Moving supports this contention by pointing out that when it picked up the goods from Mr. Brainard, it issued him a Bill of Lading limiting its liability to \$2,500.

Discussion

As an initial matter, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect*

Hosp., 68 NY2d 320, 324 [1986] [citations omitted]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*id.* [citation omitted]). "[I]t is axiomatic that 'on such a motion, the court's role is limited to issue finding, not issue resolution'" (*Martin H. Bauman Assoc. v H & M Intl. Transp.*, 171 AD2d 479, 483 [1st Dept 1991], quoting *Kriz v Schum*, 75 NY2d 25, 33 [1989]).

Stevens first argues that it is entitled to summary judgment as it has established that the failure by Don's Moving to store Mr. Brainard's goods in its secure warehouse was a breach of the contract between Stevens and Don's Moving, and that Stevens payment to Mr. Brainard was a result of that breach. As neither party has produced a signed writing outlining the terms of the agreement, "[i]n determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look, rather, to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds" (*Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 399 [1977] [citations omitted]).

Here, Stevens has presented considerable evidence supporting its claim both in the form of unsigned documents that were sent to Don's Moving making reference to the warehouse and Ms. Bierlein's affidavit reporting an oral agreement with the President of Don's Moving that the goods would be stored in the warehouse. This evidence is sufficient to make a prima facie showing that the contract required Don's Moving to store Mr. Brainard's goods in its warehouse. In response, Don's Moving has presented Ms. O'Sullivan's affidavit stating that Stevens ever instructed Don's Moving to store the goods

in its warehouse. While Ms. O'Sullivan's statement is hardly compelling, "issues as to witness credibility are not appropriately resolved on a motion for summary judgment" (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002]). Accordingly, the determination of the existence and terms of the contract between Stevens and Don's Moving must properly be left to the trier of fact (*see Martin H. Bauman Assoc. v H & M Intl. Transp.*, 171 AD2d 479, 483 [1st Dept 1991]; *Berlinger v Lisi*, 288 AD2d 523, 525 [3d Dept 2001]).


In the sections labeled Point II and Point III of its Memorandum of Law, Stevens argues that it is entitled to summary judgment because of the negligence of Don's Moving. "It is well established that negligence cases do not generally lend themselves to resolution by summary judgment, since that remedy is appropriate only where the negligence or lack of negligence of the defendant is established as a matter of law" (*Chahales v Garber*, 195 AD2d 585, 586 [2d Dept 1993] [citations omitted]). This case is no exception. Here, while Stevens has presented evidence that the household goods were stored in a trailer in an unsecured parking lot and not in the secured warehouse owned by Don's Moving, the Court cannot hold that defendant's decision to store the goods in the trailer was unreasonable as a matter of law. Thus, on this record, a question of fact still exists as to whether Don's Moving was negligent such that granting summary judgment is inappropriate.

Therefore, for the reasons stated above, Steven's Motion for Summary Judgment is denied.

Based on the foregoing, it is

ORDERED that the Motion for Summary Judgment is denied.

Dated: 3/29/11



Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

FILED

MAR 31 2011

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