

**Pennsylvania Lumbermen's Mut. v Gulf Gas Sta.**

2011 NY Slip Op 31181(U)

April 13, 2011

Sup Ct, NY County

Docket Number: 104829/10

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_  
J.S.C. Justice

PART 10

Index Number : 104829/2010  
PENNSYLVANIA LUMBERMEN'S  
VS.  
GULF GAS STATION  
SEQUENCE NUMBER : 001  
INQUEST

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
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

**FILED**

APR 15 2011

motion (a) and cross-motion (b) decided in accordance with the annexed decision/order of even date.  
NEW YORK COUNTY CLERK'S OFFICE

*Inquest on damages scheduled for Thursday, June 9, 2011 at 2:15 p.m.*

Dated: APR 13 2011

*JJG*  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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  
PENNSYLVANIA LUMBERMEN'S MUTUAL  
INSURANCE COMPANY, as subrogee of  
METROPOLITAN LUMBER CO., INC.,

**DECISION/ ORDER**  
Index No.: 104829/10  
Seq. No.: 001

Plaintiff,

**-against-**

GULF GAS STATION, KENNY SINGH, DANIEL  
GRANT, JAMES BROWN, JR., GUY CARTER,  
AND JASHIR PACHAV,

**PRESENT:**  
Hon. Judith J. Gische

J.S.C.  
**FILED**

**APR 15 2011**

Defendants.

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

COUNTY CLERK'S OFFICE

<b>Papers</b>	<b>Numbered</b>
Pltf n/m (3215) w/GMJ affid, MRF and KF affirms, exhs	..... 1

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

Plaintiff, Pennsylvania Lumbermen's Mutual Insurance Company ("Mutual") is the subrogee of Metropolitan Lumber Co., Inc. ("Metropolitan"), its insured. According to Mutual, defendants fraudulently converted \$66,209.90 by using Metropolitan's gas credit cards for their own benefit.

Plaintiff moves for an inquest pursuant to CPLR § 3215(e) against defendants, Gulf Gas Station ("Gulf"), Kenny Singh ("Singh"), Daniel Grant ("Grant"), James Brown, Jr. ("Brown"), and Guy Carter ("Carter") based upon their failure to answer. Grant, Brown and Carter are employees of Metropolitan. Singh is the manager of Gulf and Pachav is alleged to be an employee of Gulf. Plaintiff does not move against

defendant, Jashir Pachav ("Pachav"), nor does plaintiff provide proof of service on Pachav. Plaintiff commenced this action by the filing of a summons with notice with the court on April 14, 2010. After 3 attempts, plaintiff served the summons with notice upon Grant by affixing a copy of such to his residence on April 22, 2010 and mailing a copy on April 26, 2010. CPLR § 308(4). Brown was personally served with the summons with notice on April 22, 2010. CPLR § 308(1). Singh was served through a person of suitable age and discretion at his actual place of business on May 10, 2010, which was followed by a mailing on May 11, 2010. CPLR § 308(2). Gulf was served through a managing agent on May 10, 2010. BCL § 306. Carter was served through his sister, a person of suitable age and discretion, at his residence, on May 1, 2010, which was followed by a mailing on May 4, 2010. CPLR § 308(2). Plaintiff has also complied with the additional requirements of CPLR § 3215(g)(3)(i) by mailing an additional copy on January 13, 2011.

Defendants have not demanded a complaint or otherwise opposed this motion and their time to do so has expired.

### **Discussion**

Plaintiff has shown that the defendant has defaulted in this matter and that it is entitled to a judgment if it can otherwise establish a *prima facie* case. Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3<sup>rd</sup> Dept 2001); Zelnik v. Bidermann Industries U.S.A., Inc., 242 AD2d 227 (1997). A default in answering the complaint constitutes an admission of the factual allegations therein and the reasonable inferences which may be made therefrom (Rokina Optical Co., Inc. v. Camera King, Inc., 63 N.Y.2d 728 [1st Dept.

1984]).

An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim [Zelnick v. Biderman Industries U.S.A., Inc., 242 A.D.2d 227 (1st Dept. 1997); and CPLR § 3215 (f)] or a complaint verified by a person with actual knowledge of the facts surrounding the claim [Hazim v. Winter, 234 A.D.2d 422 (2d Dept. 1996); and CPLR § 105 (u)].

Plaintiff provides the affidavit of Kenneth Ferguson ("Ferguson"), director of safety for Metropolitan, who states that three of Metropolitan's truck drivers were charging gasoline for personal use on company gas cards and were also charging gasoline on the company cards in exchange for cash, at the Gulf gas station located in Corona, Queens, New York. Ferguson states that the scam started in October of 2006.

Plaintiff also provides the affidavit of Gary M. Johnson ("Johnson"), certified public accountant, assigned to investigate Mutual's claim. Johnson states that upon reviewing the documents and records, the internal mileage did not accurately reflect the actual mileage for the trucks, and that the trucks were supposed to have 14 miles per gallon, yet the documentation showed that they were only getting 5 or 6 miles per gallon. Johnson states that he used a number of calculations and tests to arrive at the conclusion that a total of \$66,209.90 in excess gasoline purchases was made from the period of October 2006 through March 2008 (when the employees were terminated).

In the complaint, plaintiff asserts causes of action for conversion (COA1) and negligent hiring/training/supervision (COA2).

In order to establish conversion, the plaintiffs must establish that they owned an identifiable piece of property and that defendants exercised dominion over or interfered

with the property in defiance of plaintiff's rights. See State v. Seventh Regiment Fund, Inc., 98 N.Y.2d 249 (2002); Ahles v. Aztec Enterprises, Inc., 120 A.D.2d 903 (1986). Conversion can be established even where one comes into lawful possession of the property, but then wrongfully detains or uses the property. A refusal to return the property can form the basis for a claim of conversion. Employers' Fire Ins. Co. v. Cotten, 245 N.Y. 102 (1927).

To establish a cause of action based on negligent hiring and supervision, it must be shown that "the employer knew or should have known of the employee's propensity for the conduct which caused the injury." Jackson v. New York University Downtown Hosp., 69 A.D.3d 801 (2d Dept. 2010) quoting Kenneth R. v. Roman Catholic Diocese of Brooklyn, 229 A.D.2d 159 at 161 (2d Dept. 1997). Moreover, "there is no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee." Doe v. Whitney, 8 A.D.3d 610, 612 (2d Dept. 2004).

Based on the foregoing, plaintiff has established a *prima facie* cause of action for breach for conversion against defendants. Defendants used the gas card, given to them legally by plaintiff, for their own personal benefit. Carter, Grant, and Brown benefitted from this illegal use by receiving cash and using the gas for their own personal benefit, rather than for the intended benefit of Metropolitan. Additionally, Gulf and Singh benefitted by receiving plaintiff's money without providing actual gas or services for the amount of money they received. In essence, defendants interfered with the property (the gas card and its funds) and interfered with it in defiance of plaintiff's rights.

However, plaintiffs' 2nd cause of action must fail, since plaintiff has failed to establish that either of defendants' employers "knew or should have known of the employee's propensity for the conduct which caused the injury." Jackson v. New York University Downtown Hosp., *supra*.

Accordingly, plaintiffs' motion is granted against defendants on the issue of liability only. Since the court is unable to ascertain plaintiffs' damages, this case is hereby scheduled for an inquest on damages on **Thursday, June 9, 2011 at 2:15 p.m.**, at 60 Centre Street, New York, NY, room 232, part 10.

### **Conclusion**

*In accordance herewith, it is hereby:*

**ORDERED** that plaintiff, PENNSYLVANIA LUMBERMEN'S MUTUAL INSURANCE COMPANY, as subrogee of METROPOLITAN LUMBER CO., INC.'s motion for entry of a default judgment against defendants, GULF GAS STATION, KENNY SINGH, DANIEL GRANT, JAMES BROWN, JR., and GUY CARTER, is granted on the 1<sup>st</sup> cause of action, on the issue of liability only; and it is further

**ORDERED** that plaintiffs' 2<sup>nd</sup> cause of action is hereby severed and dismissed; and it is further

**ORDERED** that all claims against defendant, JASHIR PACHAV, are hereby severed and dismissed; and it is further

**ORDERED** that this case is hereby scheduled for an inquest on damages on

Thursday, June 9, 2011 at 2:15 p.m., at 60 Centre Street, New York, NY, room 232,  
part 10; and it is further

ORDERED that any requested relief not expressly addressed herein has  
nonetheless been considered by the court and is denied; and it is further

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, New York  
April 13, 2011

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**

**APR 15 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**