

Rotblut v Ben-Hur Moving & Stor. Co.

2014 NY Slip Op 30630(U)

February 28, 2014

Supreme Court, New York County

Docket Number: 112169/2011

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C. Justice

PART 46

Index Number : 112169/2011
ROTBLUT, WILLIAM D.

INDEX NO. _____

vs
BEN HUR MOVING & STORAGE

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

The following papers, numbered 1 to 2, were read on this motion ~~to~~ for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that ~~this motion is~~ and adjudges that:

The court grants plaintiffs' motion for summary judgment in part and denies plaintiffs' motion in part, pursuant to the accompanying decision. C.P.L.R. § 3212(b) and (e).

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

FILED

MAR 17 2014

COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
MAR 17 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: 2/28/14

Lucy Billings, J.S.C.

LUCY BILLINGS
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----X
WILLIAM D. ROTBLUT and LOIS B. ROTBLUT, Index No. 112169/2011

Plaintiffs

- against -

BEN-HUR MOVING & STORAGE COMPANY,

Defendant
-----X

FILED

MAR 17 2014

DECISION AND ORDER

COUNTY CLERK'S OFFICE
NEW YORK

LUCY BILLINGS, J.S.C.:

Plaintiffs move for summary judgment on their claims for defendant's breach of its contract with plaintiffs for moving and storage of their household furnishings while their apartment was renovated. C.P.L.R. § 3212(b).

I. THE EVIDENCE

The cost of the services was \$1,316.00, which plaintiffs paid to defendant. Defendant prepared a "Household Goods Descriptive Inventory" itemizing each piece of plaintiffs' personal property that defendant removed from their apartment and each that defendant placed in storage, signed by defendant's authorized agent and plaintiff Lois Rotblut, and authenticated by defendant's president and plaintiff William Rotblut. Aff. of William Rotblut Ex. C; Aff. of Alon Modlin Ex. A, at 5. According to defendant's inventory, defendant removed the following pieces of furniture from the apartment, but did not place them in storage: one of six custom dining room chairs, two

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custom seat cushions, a cabinet, a table, and bookcase shelves. William Rotblut attests that the bookcase itself was damaged beyond repair, which defendant's repair service reported to defendant. He further attests that a second table, of black metal mesh and on wheels, likewise was damaged beyond repair and that a chest of drawers was scratched and chipped, its drawers misaligned, and its handles missing or broken. Lois Rotblut received a letter from an employee in defendant's Customer Service Department, to which defendant's president also attests, acknowledging that the chair, the cushions, the bookcase, and two tables were "Missing Pieces." Rotblut Aff. Ex. D, at 1; Modlin Aff. Ex. B, at 1.

According to the "Order for Service" signed by Lois Rotblut, which itemizes the costs of the services, plaintiffs paid \$100.00 for a "FULL REPLACEMENT" value of \$10,000.00, Rotblut Aff. Ex. B; Modlin Aff. Ex. A, at 1, to which "a deductible of \$250.00 will be applied." Modlin Aff. Ex. A, at 3. Plaintiffs claim the replacement value of the furniture pieces listed in defendant's letter alone exceeds \$10,000.00, and further claim entitlement to five more matching dining room chairs, because the lost custom chair is irreplaceable.

Defendant does not dispute its liability for the furniture pieces that defendant lost or irreparably damaged. Defendant claims, however, that the "FULL REPLACEMENT" value of \$10,000.00 represents plaintiffs' valuation of all their household furnishings that defendant moved. Therefore the value of

plaintiffs' missing and irreparably damaged pieces must be less than \$10,000.00. Defendant further claims that the replacement value of the five pieces listed in defendant's letter is \$2,200.29. None of the parties' evidence supporting their claimed replacement values, however, is in admissible form.

II. DEFENDANT'S LIABILITY

Based on the parties' undisputed contract, with its enforceable limitation on defendant's liability, and their affidavits' undisputed facts, defendant is liable for up to \$9,750.00 in damages for replacement of plaintiffs' furniture pieces that defendant lost or damaged. See Sommer v. Federal Signal Corp., 79 N.Y.2d 540, 553-54 (1992); ERE LLP v. Spanierman Gallery, LLC, 94 A.D.3d 492, 494 (1st Dep't 2012); Metropolitan Life Ins. Co. v. Noble Lowndes Intl., 192 A.D.2d 83, 89 (1st Dep't 1993). Although defendant's letter does not include a full list of the pieces listed in William Rotblut's affidavit, defendant does not dispute that any of the pieces William Rotblut lists were lost or irreparably damaged, including a cabinet, a black mesh metal table on wheels, and a chest of drawers. Since plaintiffs' damages are capped at \$9,750.00, whether replacement of all six matching chairs is necessary to replace the one lost dining room chair is likely academic. If not, plaintiffs will bear the burden at trial to establish that necessity.

The contract terms, however, that plaintiffs "order \$10,000.00 of Replacement Value Liability to which a charge of \$100.00 and a deductible of \$250.00 will be applied," manifest

plaintiffs' purchase of \$10,000.00 in coverage from defendant for plaintiffs' potential losses caused by defendant and not a valuation of their total inventory of household furnishings. Modlin Aff. Ex. A, at 3 (emphasis added). See Vigilant Ins. Co. v. Bear Stearns Cos., Inc., 10 N.Y.3d 170, 177 (2008); Koren Rogers Assoc. Inc. v. Standard Microsystems Corp., 79 A.D.3d 607, 608 (1st Dep't 2010); Rapp B. Props., LLC v. RLI Ins. Co., 65 A.D.3d 923, 924 (1st Dep't 2009). Therefore plaintiffs are entitled to that full amount to the extent they prove losses equalling that amount, reduced by the \$250.00 deductible.

Finally, plaintiffs claim a refund of the \$1,316.00 they paid for defendant's services, a payment the contract acknowledges. While defendant did not completely fail to perform its promised services, it did, at minimum, fail to store the pieces of furniture omitted from defendant's inventory of pieces placed in storage: a dining room chair, two seat cushions, a cabinet, a table, and bookcase shelves. See F. Garofalo Elec. Co. v. New York Univ., 300 A.D.2d 186, 189 (1st Dep't 2002). Insofar as defendant failed to deliver back to plaintiffs other pieces in the same condition as when defendant removed them, defendant also failed in its performance. VisonChina Media Inc. v. Shareholder Representative Servs., LLC, 109 A.D.3d 49, 58 (1st Dep't 2013). Again, plaintiffs will bear the burden at trial to prove the extent to which defendant failed to perform its contract and thus the proportionate share of the \$1,316.00 to which plaintiffs are entitled. Brushton-Moira Cent. School Dist.

v. Thomas Assocs., 91 N.Y.2d 256, 261 (1998). See Lamberti v. Angiolillo, 73 A.D.3d 463, 464 (1st Dep't 2010); Edwardo Galleries v. Federal Express Corp., 5 A.D.3d 313, 314 (1st Dep't 2004). This amount is not encompassed in defendant's "Replacement Value Liability." Modlin Aff. Ex. A, at 3 (emphasis added).

III. CONCLUSION

Consequently, the court grants plaintiffs' motion for summary judgment to the extent of awarding plaintiffs partial summary judgment on defendant's liability in the amount proved at trial, up to \$9,750.00 of replacement value of plaintiffs' personal property that defendant lost or that it damaged so as to render the property unusable. C.P.L.R. § 3212(b) and (e). Plaintiffs do not claim any repair expenses. Given the \$250.00 deductible, plaintiffs of course must establish \$250.00 more in damages than plaintiffs will be entitled to recover.

The court also grants plaintiffs partial summary judgment on defendant's liability for a partial refund of plaintiffs' \$1,316.00 payment for defendant's services to the extent plaintiffs prove at trial that defendant failed to return their personal property in the same condition as when defendant removed the property. Id. The court otherwise denies plaintiffs' motion. C.P.L.R. § 3212(b).

FILED

MAR 17 2014

DATED: February 28, 2014

COUNTY CLERK'S OFFICE
NEW YORK
Lucy Billings
LUCY BILLINGS, J.S.C.

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J.S.C.