

S. Rafael Jewels Corp. v Nezaj
2014 NY Slip Op 31251(U)
May 13, 2014
Supreme Court, New York County
Docket Number: 107336/11
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

S. RAFAEL JEWELS CORP.

Plaintiff,

INDEX No. 107336/11

MOTION DATE _____

-against-

MOTION SEQ. No. 001

LINOLITA NEZAJ,

MOTION CAL NO. _____

Defendant.

The following papers, numbered 1 to _____ were read on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1, 2

Answering Affidavits- Exhibits 3, 4

Replying Affidavits 5

CROSS-MOTION: _____ YES NO

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

FILED

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

MAY 15 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/13/14

Donna M. Mills
J.S.C.

Check one: _____ FINAL DISPOSITION

DONNA M. MILLS, J.S.C.
NON-FINAL DISPOSITION

FILED

MAY 15 2014

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58**

INDEX NO. COUNTY CLERK'S OFFICE
107336/11 NEW YORK

S. RAFAEL JEWELS CORP.,

Plaintiff,

- against -

LINOLITA NEZAJ,

DECISION/ORDER

Defendant.

DONNA M. MILLS, J.:

The plaintiff S. Rafael Jewels Corp. ("Plaintiff or bailor"), moves for summary judgment, against the defendant Linolita Nezaj ("Defendant or bailee") on the second cause of action in the complaint, and awarding the plaintiff judgment in the amount of \$122,000 with interest from March 8, 2011. Defendant opposes the motion on the grounds that the Plaintiff has failed to establish that the Defendant was negligent as a matter of law, failed to address its own negligence, and failed to provide a basis to determine the alleged value of the property that is in dispute.

BACKGROUND

This lawsuit arises out of the loss of several pieces of jewelry owned by the Plaintiff on or about March 7, 2011. It is undisputed that on prior occasions, Abe Rafaeil, who handled the affairs of the Plaintiff Corporation, lent pieces of jewelry to Defendant to wear to particular formal events. Since there was a mutual understanding that the Defendant would return the subject jewelry to the Plaintiff, the Defendant was the bailee of the subject jewelry.

On the date of the subject incident, Defendant boarded the subway with her three year old daughter and was carrying her purse, which contained the subject jewelry. While

on the train, the Defendant claims that her daughter suddenly stepped towards the subway door, and she left her seat to get her daughter. Defendant claims that while away from her seat she realized that her purse with the subject jewelry was gone. Immediately afterwards, Defendant ran to a payphone and called 911. Although a police investigation was commenced, the subject jewelry was never recovered.

APPLICABLE LAW & DISCUSSION

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, 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 (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

It is well-established law in this state that the failure on the part of a bailee to return bailed property on demand raises a presumption of negligence in the case of a

mutual bailment or bailment for hire. In such a case, the bailee must exercise reasonable care and diligence in safeguarding the bailed property and is responsible for loss or injury resulting from negligence (see generally, 9 N.Y. Jur.2d, *Bailments and Chattel Leases*, § 89). Where the bailor has established a *prima facie* case of bailment, the burden of going forward is shifted to the bailee, who must explain “the circumstances of the loss ... to rebut the presumption of negligence” and, in connection with that explanation, must demonstrate “how he cared for the property and why he cannot return it” (9 N.Y. Jur.2d, *Bailments and Chattel Leases*, §§ 148, 149).

In support of its motion for summary judgment, the plaintiff established, *prima facie*, that the Defendant was negligent in failing to preserve the jewelry and committed a breach of a bailment (see *Voorhis v. Consolidated Rail Corp.*, 60 N.Y.2d 878, 879, 470 N.Y.S.2d 364, 458 N.E.2d 823; *Ramirez v. City of White Plains*, 35 A.D.3d 698, 826 N.Y.S.2d 426). When Defendant could not produce plaintiff’s jewelry a presumption of negligence arose requiring the Defendant to come forward with a legally sufficient explanation to rebut this presumption. Here, Defendant did not come forward with any evidence and argues that she is not sure what happened to the jewelry because she was distracted by her infant daughter.

Inasmuch as the presumption of negligence on the part of the bailee has not been rebutted, this Court finds that Plaintiff is entitled to judgment on liability and that the only triable issue of fact arising on Plaintiff’s motion for summary judgment relate to the amount of damages to which Plaintiff is entitled.

Accordingly, it is

ORDERED that plaintiff’s motion for summary judgment is granted with regard to

liability; and it is further

ORDERED that an immediate trial of the aforesaid issue of fact shall be had before the court; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties thereto and upon the Clerk of the Trial Support Office (Room 158) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial.

Dated: 5/13/14

ENTER:


J.S.C.

DONNA M. MILLS, J.S.C.

FILED

MAY 15 2014

COUNTY CLERK'S OFFICE
NEW YORK