

**Bentley Meeker Light. & Staging, Inc. v Mason**

2020 NY Slip Op 33387(U)

October 15, 2020

Supreme Court, New York County

Docket Number: 160493/2017

Judge: Robert D. Kalish

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

**PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM**

*Justice*

-----X

BENTLEY MEEKER LIGHTING & STAGING, INC.

Plaintiff,

- v -

STEPHEN MASON,

Defendant.

-----X

INDEX NO. 160493/2017  
MOTION DATE 09/02/2020  
MOTION SEQ. NO. 003

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 66, 67, 68

were read on this motion to/for DISMISSAL.

Defendant Stephen Robert Mason (“Mason”)’s Motion for Summary Judgment pursuant to CPLR 3212(b) dismissing the Complaint by Plaintiff Bentley Meeker Lighting & Staging, Inc. (“Bentley Meeker”) is denied for the reasons stated herein.

**BACKGROUND**

Plaintiff Bentley Meeker Lighting & Staging, Inc. (“Bentley Meeker”) commenced this action on November 27, 2017 to recover an amount in excess of \$65,000 from its former employee, Defendant Mason, for Mason’s alleged conversion of five D&B Audiotechnik 4 Channel Amplifiers (the “Amplifiers”) that Mason allegedly stole from Bentley Meeker. Bentley Meeker alleges in its verified complaint that it employed Mason as an Audio/Visual Shop Warehouse Employee from on or about October 29, 2015 to August 31, 2016 and as an Audio/Visual Shop Department Manager from on or about September 1, 2016 to October 3, 2017. Bentley Meeker further alleges that Mason stole the Amplifiers from Bentley Meeker’s principal place of business, located at 465 10th Avenue, New York, New York, 10018, on October 2, 2017. Bentley Meeker further alleges that it terminated the employment of Mason on October 3, 2017.

### I. Parties Contentions

Mason makes the following two arguments in support of his motion for summary judgment. First, Mason argues that “the undisputed [evidence] establishes that Mr. Mason did not surreptitiously remove and convert Plaintiff’s property.” (Memo in Supp at 12.) Mason further argues that based on the fact that he “did not take possession of the [said property], ... the undisputed evidence fails to establish the elements of a conversion claim.” (*Id.* at 13.) In support, Mason argues:

“[T]he undisputed evidence establishes that the allegedly stolen equipment was loaded into a black SUV in front of Plaintiff’s Premises (where equipment is routinely loaded onto vehicles for company purposes) and driven away by an unidentified person. Plaintiff has not offered any evidence to explain where the allegedly missing equipment was taken or by whom. Moreover, Plaintiff has not offered any evidence to create a triable fact that the allegedly missing equipment was delivered to Mr. Mason at any point.” (*Id.* at 13.)

In opposition, Bentley Meeker argues that “Defendant did not meet his initial burden of eliminating any material issues of fact from the case.” (Memo in Opp at 4.) Bentley Meeker further argues that “Defendant did not submit any photos or videos in support of his motion, and completely failed to establish any defense as a matter of law ... [and] is relying solely on what he argues are gaps in Plaintiff’s case[] to argue that the Plaintiff will not be able to prove its prima facie case.” (*Id.* at 4-5.) Bentley Meeker further argues that it submitted a video into the record “show[ing] Defendant alone in the Building, and after his shift ended, covering the Amplifiers with accessory bags, then wheeling them out of the Building[,]” and, in light most favorable to the nonmoving party, “there is an enormous amount of evidence to support Plaintiff’s interpretation of the video.” (*Id.* at 5-6, 11.)

In its reply brief, Mason argues that he “[b]ecause Plaintiff concedes that it does not know the identity of the ‘unidentified’ and ‘unknown accomplice’ or the whereabouts of the

amplifiers, judgment must be entered in favor of Mr. Mason[.]” (Reply Memo at 2 [internal citations omitted]).

Going back to Mason’s arguments in support of his motion for summary judgment, Defendant Mason secondly argues that Plaintiff’s damages as pleaded in the Complaint “are not calculated from the time of conversion.” (Memo in Supp at 14-15.) Mason further argues that “Plaintiff’s Verified Complaint alleges that its damages exceed \$65,000[;] [h]owever, this figure is grossly overstated ... [as] Mr. Ledford admitted at his deposition that Plaintiff had only paid \$37,128.15 for the used equipment.” (*Id.* at 15 [internal citations and quotations omitted].)

In opposition, Bentley Meeker argues that “Plaintiff has not overstated its measure of damages.” (Memo in Opp at 8.) Bentley Maker further argues that “the cost to replace the Amplifiers ... is approximately \$65,000.00.” (*Id.* at 9.) Bentley Meeker further argues that “Ledford’s deposition testimony shows that Plaintiff purchased the Amplifiers for a discount because they were used, but that the cost to replace them is substantially higher because they are not easily acquired.” (*Id.* at 8.)

In reply, Mason argues that as Plaintiff is in the very business of buying audio-visual equipment, it would not be entitled to the market value of the amplifiers. (Reply Memo at 4.)

### DISCUSSION

It is well settled that a party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact. (*See Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). The failure of the moving party to make a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 [1985]). Once

this showing has been made, the burden shifts to the nonmoving party to produce “evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) “On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012].) The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true. (*See Roth v Barreto*, 289 AD2d 557 [2001]; *O'Neill v Town of Fishkill* 134 AD2d 487 [1987].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 [1st Dept 2002].)

In order to succeed on a cause of action sounding in conversion, plaintiff must show (1) legal ownership of possession to certain personal property and (2) must show that the defendant intentionally and without authority assumed or exercised control over the property in question or interference with it, interfering with the plaintiff's right of possession. (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006].) Where possession of the property is initially lawful, conversion occurs when there is a refusal to return the property after demand. (*Hoffman v. Unterberg*, 9 AD3d 386 [2d Dept.2004] *abrogated on other grounds* in *Tzolis v Wolff*, 10 NY3d 100, 103 [2008].)

The general rule of damages in a conversion action is to indemnify the injured party by awarding the party the value of the converted property. (*See Fantis Foods, Inc. v Std. Importing Co., Inc.*, 49 NY2d 317, 326 [1980] [internal citations omitted].) Plaintiff must demonstrate the value of the goods “based on ... actual money loss, as reflected by such factors as the original cost of the items, their age and condition at the time of conversion, and their replacement value[.]” (*See Correa v Midtown Moving*, 2004 WL 1717604, 2004 N.Y. Slip Op. 50798(U), 4 Misc 3d 135(A) [App Term 2004] [internal quotations and citations omitted]; *see also Puebla Palomo v DeMaio*, 403 F Supp 3d 42, 62 [NDNY 2019].) Where the nature of the goods involved is such that they are readily exchanged in the market place, the measure is the fair market value of the goods at the time of conversion which is generally the price at which the goods can be replaced in the market. (*Ashare v Mirkin, Barre, Saltzstein & Gordon, P.C.*, 106 Misc 2d 866, 866 [Sup Ct, Suffolk County, 1980], *affd as mod on other grounds*, 81 AD2d 650 [2d Dept 1981], *affd*, 54 NY2d 891 [1981] [internal citations and quotations omitted].) However, “[r]ecovery will not be denied merely because the quantum of damages is uncertain or difficult to ascertain.” (*Shoecraft v BBS Automotive Group, Inc.*, 48 AD3d 786, 787 [2d Dept 2008].)

Here, Defendant Mason fails to sustain his burden for summary judgment as he fails to tender sufficient evidence to eliminate material issues of fact. During his deposition, Mason is shown and asked about twelve video surveillance recordings from the day of the alleged incident at the warehouse. The videos span around 40 minutes. Based on the videos and other documents, Mason himself states that the videos show that on September 30, 2017, he was on the fifth floor of Plaintiff’s building, where Plaintiff’s audio equipment is located. Mason further states that the videos depict him loading in two “bathtubs” some boxes or bags and wheeling the “bathtub” to the freight elevator. Mason states that the videos show him load the boxes into a vehicle. Mason

states that said bathtubs could fit “twenty” Amplifiers. (EBT at 106:08-119:23.) Mason states that he has no recollection of what kind of equipment is depicted in the videos. (*Id.* at 131:21-25.) Mason states that he has no recollection of whether he was loading the equipment for a specific event.

The Court finds that Defendant Mason fails to tender sufficient evidence to eliminate material issues of fact, as reasonable inferences drawn from the evidence when viewed in the light most favorable to the nonmoving party, here Plaintiff, including said video recordings and Mason’s work attendance following September 30th, (Plaintiff’s Witness/Director of Operations Ledford EBT at 223:20-224:04 [indicating that Mason stopped showing up for work “starting Monday, October 2nd”]; *see also* Answer to Response to Interrogatory No 9, NYSCEF Doc No 60 [stating that the arrest date was October 10, 2017]), make out a *prima facie* case of conversion. To the extent that Defendant argues that the video recordings captured him conducting his job duties for an event, Plaintiff disputes this and goes into lengthy detail as to why this was likely not the case. (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006]; *Aboueleien v Foda*, 2018 WL 1044046 [N.Y. Sup Ct, Queens County 2018].) Furthermore, to the extent Mason argues that Bentley Meeker has gaps in its case, “[o]n a motion for summary judgment, the defendant cannot meet its initial burden by pointing to gaps in the plaintiff’s case; rather, it must affirmatively demonstrate the merit of its claim or defense.” (*Vumbico v Estate of Wiltse*, 156 AD3d 939, 941 [2d Dept 2017].) Further, Bentley Meeker’s damages were estimated in the ad damnum clause at \$ 65,000 based upon the argument that the measure of damages is the replacement cost of the items. It will be up for the jury to determine the measure of equipment at the time of conversion based on the law charged by the court. To the extent that Mason argues that the Complaint does not allege the damages as of the time of

conversion, Bentley Meeker disputes this argument with witness deposition testimony.

Accordingly, the Court finds that these are issues that need to be decided by a factfinder.

The Court has considered parties' remaining arguments and finds them irrelevant to the motion at hand or unavailing.

**CONCLUSION**

Accordingly, and for the reasons so stated, it is hereby

ORDERED that Defendant Mason's motion for summary judgment dismissing Plaintiff's action is denied; and it is further,

ORDERED that counsel serve a copy of this order with notice of entry upon all parties within 20 days of entry.

The foregoing constitutes the decision and order of the Court.

10/15/2020  
DATE

  
ROBERT DAVID KALISH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE