

Barrett v Jarmon
2025 NY Slip Op 35543(U)
February 10, 2025
Supreme Court, Rockland County
Docket Number: Index No. 032436/2022
Judge: David Fried
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To commence the statutory time period for appeals as of right (CPLR §5513 [a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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ANDREW BARRETT, 222 JAMAICA ECONOMY
DRUG, INC., and EDS HEALTHCARE PHARMACY
INC.,

Plaintiffs,

DECISION & ORDER

-against-

Index No. 032436/2022
Motion Sequence No. 5

JACOB JARMON, 222 JAMAICA DRUG, LLC and,
UNKNOWN COMPANIES 1-5,

Defendants.

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HON. DAVID FRIED, A.J.S.C.

The papers filed electronically via NYSCEF numbered 94 through and including 119 (“Motion”) were read and considered herein. Upon such reading and consideration, the Motion is disposed as follows:

BACKGROUND

By Decision & Order dated October 30, 2023 (NYSCEF Doc. No. 33), this Court dismissed Plaintiffs’ causes of action for breach of contract, fraud, identity theft, and conversion relating to accounts receivable. As such, the only claim remaining in this action is Plaintiffs’ claim for conversion of two parata machines and three automobiles. Plaintiff filed the Note of Issue on January 24, 2025. Defendants now bring the within Motion Sequence No. 5 seeking an Order dismissing the Complaint pursuant to CPLR §3212. Plaintiffs oppose said Motion.

PARTIES’ CONTENTIONS

Defendants contend that there are no material issues of fact for trial because Plaintiff Andrew Barrett (“Plaintiff Barrett”) attested to the following: that he obtained information that Defendants were in possession and using the alleged two parata machines and three automobiles as of June, July, or August 2016; that he never attempted to obtain possession of the alleged parata machines or the automobiles

or demanded that any of the Defendants return the parata machines or automobiles to any of the Plaintiffs; that Plaintiffs' representatives never (i) requested or demanded that any of the Defendants return the two parata machines or the three automobiles to any of the Plaintiffs; (ii) made any arrangements to retrieve the parata machines and automobiles from the Defendant; and (iii) went to the pharmacy to retrieve the parata machines or the automobiles; that Defendants never prevented any of the Plaintiffs or Plaintiffs' representatives from obtaining possession of the parata machines and automobiles; and that he has no personal knowledge or documentation establishing the damages Plaintiffs allegedly suffered.

In opposition, Plaintiffs contend that Defendant Jacob Jamron¹ ("Defendant Jamron") attested to the following: that the two parata machines were on the premises of the Plaintiff 222 Jamaica Economy Drug, Inc. ("Plaintiff JEDI") when the partial asset sale was consummated; that Defendant Jamron moved the parata machines to a different location; that Defendant Jamron sold the larger parata machines for one dollar on eBay; that as to the smaller parata machine, Defendants paid off the whole contract for over \$75,000, without written proof; that the vehicles were corralled by the Defendants and used in the Defendants' businesses; that Defendant Jamron did not know where the vehicles were presently, or who may have sold them on behalf of the Defendants.

Plaintiffs further contend as follows: that in August 2016, counsel for the Plaintiffs sent a cease-and-desist letter to counsel for the Defendants directing the Defendants to stop using the parata machines and the vehicles since those items were not included in the partial asset sale; that Defendant Jamron did not recall having seen that letter and claimed to have no knowledge whether there was a reply to that letter; that Plaintiff Barrett's then-wife, Phyllis Pincus, made continual efforts to contact Defendant Jamron for the purpose of obtaining the quick books program of Plaintiff JEDI, and of obtaining a return of the parata machines and the vehicles but never could speak to Defendant Jamron and did not get a return communication; and that Defendant Jamron testified that he never heard from Ms. Pincus.

In Reply, Defendants contend as follows: that Plaintiffs never provided Defendant Jamron with a copy of his deposition transcript for his examination, review and signature as required by CPLR §3116, and this Court's Part Rules; that Plaintiffs' opposition does not create a material issue of fact, rather, it simply confirms admissions made by Plaintiff Barrett; and that Plaintiffs' admissions demonstrate that the conversion claim, if any, accrued in 2016 when Plaintiffs learned Defendants were using the parata machines as evidenced by Plaintiffs' assertion that a 2016 cease-and-desist letter was sent and that Ms. Pincus made efforts in 2016 to obtain the return of the parata machines and vehicles.

DISCUSSION

A summary judgment movant must tender evidentiary proof in admissible form sufficient to demonstrate that there remains no reasonably disputable triable issue of material fact such that judgment should be directed in its favor as a matter of law (see e.g. *Giuffrida v. Citibank Corp.*, 100 NY2d

¹ The Complaint misspells the individual Defendant's last name as "Jarmon."

72 [2003], citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; CPLR §3212). Only upon the movant's sufficient *prima facie* showing does the burden shift to the respondent to rebut that showing (see *id.*). If the respondent adduces record evidence or other pleadings that demonstrate any triable issue of material fact – according respondent the benefit of every reasonable favorable inference from the pleadings and record – then summary judgment must be denied (see *id.*).

“Conversion is the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights” (*State of New York v. Seventh Regiment Fund*, 98 N.Y.2d 249, 259, 746 N.Y.S.2d 637, 774 N.E.2d 702 [internal quotation marks omitted]). “[T]o establish a cause of action in conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question ... to the exclusion of the plaintiff's rights” (*Batsidis v. Batsidis*, 9 A.D.3d 342, 343, 778 N.Y.S.2d 913 [internal quotation marks omitted]; see *Castaldi v. 39 Winfield Assoc.*, 30 A.D.3d 458, 458, 820 N.Y.S.2d 279). *PDK Labs, Inc. v. GMG Trans West Corp.*, 101 AD3d 970, 957 NYS2d 191 (2nd Dept. 2012).

Defendants have established their *prima facie* entitlement to summary judgment dismissing the remaining portion of Plaintiffs' conversion claim. Defendants have demonstrated that Plaintiffs have failed to meet their burden to show legal ownership or an immediate superior right of possession of the parata machines or the vehicles. In opposition, Plaintiffs fail to raise a material issue of fact regarding same. Plaintiffs do not contest Defendants' contentions that Plaintiff Barrett attested that he cannot specifically identify the alleged two parata machines and three automobiles and that he has no documentation establishing that Plaintiffs are the owners of same. Moreover, and notwithstanding that Plaintiffs may not rely on deposition testimony from an unsigned transcript they failed to provide to Defendant Jamron (see, CPLR §3116 and this Court's Part Rules §5[e][iii]), the aforementioned testimony of Defendant Jamron, at the very least, does not contradict Plaintiff Barrett's testimony.

Notwithstanding, even if Plaintiffs demonstrated legal ownership or an immediate superior right of possession of the parata machines or the vehicles, the statute of limitations on their purported conversion claim would have expired prior to commencement of the within action. “The three-year Statute of Limitations is applicable to conversion actions (CPLR §214[3]) and generally, runs from the date the conversion takes place (*Al-Roc Prods. Corp. v. Union Dime Sav. Bank*, 74 A.D.2d 834, 425 N.Y.S.2d 525). “Where the original possession is lawful, a conversion does not occur until the defendant refuses to return the property after demand or until he sooner disposes of the property” (*Johnson v. Gumer*, 94 A.D.2d 955, 464 N.Y.S.2d 318). However, “where [the] right [to demand] grows out of the receipt or detention of money or property by a trustee, agent or other person acting in a fiduciary capacity, the time within which the action must be commenced shall be computed from the time when the person having the right to make the demand discovered the facts upon which the right depends (CPLR §206 [a][1]).” See, *Bernstein v. La Rue*, 120 A.D.2d 476, 477, 501 N.Y.S.2d 8969 (2nd Dept. 1986).

Here, Plaintiffs allege that the parata machines and vehicles were not part of the 2016 partial asset sale; hence, original possession of the parata machines and vehicles could not have been lawful and thus, demand of return of same, is not a condition precedent to commencing a conversion action. However, even if a demand was required, Plaintiffs contend same would be futile. Moreover, Plaintiff Barrett testified at his deposition that as of June, July, or August of 2016, he had knowledge that Defendant Jamron was using the parata machines and the vehicles (NYSCEF Doc. No. 99, p. 59, lines 15-19). Even if said statement is not enough to impute discovery of the purported conversion, by 2018, Plaintiff Barrett discovered the facts upon which the right to demand return of said items depends (*see*, Plaintiff Barrett Deposition Testimony at NYSCEF Doc. No. 99, pp. 60-61).

Plaintiff Barrett's subsequent statements in his affirmation in opposition to the within Motion, relating to different and later times frames of purportedly obtaining knowledge of the alleged conversion, do not change the fact that Plaintiffs do not allege an original lawful possession by Defendants of the parata machines and vehicles; rather, Plaintiffs allege that the partial asset sale did not include said items. Plaintiffs make no claim that Defendants were a trustee, agent or other person acting in a fiduciary capacity, thereby triggering computation of the statute of limitations from the date of discovery of the purported conversion. Moreover, said subsequent statements made by Plaintiff Barrett, related to different and later times frames, are merely self-serving, contradict his own prior deposition testimony that he knew the parata machines and vehicles had been taken, at the very least, by 2018.

Therefore, according Plaintiffs the benefit of every reasonable favorable inference from the pleadings and record, and even using the later date of 2018, rather than 2016, to calculate the three year statute of limitations, by the time Plaintiffs commenced this action on June 8, 2022, said three year statute of limitations on the remaining purported conversion claim, had expired.

In light of the foregoing, it is hereby

ORDERED, that Defendants' Motion for Summary Judgment is GRANTED to the extent set forth herein, and Plaintiffs' remaining claim for conversion of two parata machines and three automobiles is DISMISSED.

The foregoing constitutes the Decision & Order of this Court.

Dated: New City, New York
February 10, 2025

E N T E R:



HON. DAVID FRIED, A.J.S.C.
STATE OF NEW YORK