FILED BY CLERK
NOV 18 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

INTER "K" N.V., Plaintiff/Appellee, v. UPS SUPPLY CHAIN SOLUTIONS, INC., a Delaware corporation, Defendant/Appellant.	2 CA-CV 2011-0026 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CV05241

Honorable Stephen M. Desens, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 Appellant UPS Supply Chain Solutions, Inc. (UPS), appeals from the trial court's grant of summary judgment in favor of appellee Inter "K" N.V. (Inter K), a foreign corporation. UPS argues the court erred in granting summary judgment on the issues of liability and damages for breach of a bailment contract. For the following reasons, we affirm the judgment.

Factual and Procedural Background

¶2 We view the facts and the inferences to be drawn from them in the light most favorable to the party opposing summary judgment. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, ¶ 13, 38 P.3d 12, 20 (2002). Inter K purchased 450 cases of cigarettes in the Philippines in 2003 and arranged for them to be shipped to the United States. Upon the arrival of the cigarettes in Los Angeles, United States Customs and Border Protection officials seized the cigarettes and stored them in a warehouse pending the government's forfeiture action. After Inter K reached a settlement with Customs, the cigarettes were released to Inter K on the condition the cigarettes would be sold for export only.

¶3 Inter K entered into a contract with Alfredo Puchi[1] whereby Puchi would purchase the cigarettes to be sold for export only. As part of the sale, Inter K agreed to have the cigarettes transported to UPS's warehouse in a Free Trade Zone (FTZ) in Nogales, Arizona. Puchi was to pay $166,920 total for the 450 cases of cigarettes.

[1]Alfredo Puchi is the owner of G. Puchi Wholesale Foods Corp. We refer to them collectively throughout this decision as "Puchi."

¶4 Inter K's customhouse broker prepared a customs form, CF 7512, to allow the goods to be moved from the Customs warehouse in Los Angeles. The form states the goods are consigned to "Inter 'K' c/o FTZ #60." Upon the arrival of the cigarettes in Nogales, UPS prepared a "Warehouse Verification In & Out Freight" form identifying Inter K as the customer.

¶5 Before the cigarettes arrived at the FTZ, Puchi began contacting UPS's customer service representative, Esperanza Alcantar, about admitting the cigarettes into the FTZ. After they arrived, he had numerous conversations with Alcantar, and he instructed his customhouse broker, David Partida, to arrange with UPS to have the cigarettes transferred to Puchi's warehouse. Partida sent UPS a Customs Form 7501 and letter requesting release of the cigarettes as documentation to withdraw the cigarettes from the FTZ, and UPS released them to Partida. This transfer was accomplished without Inter K's authorization or approval. Puchi began selling the cigarettes from his duty-free store in Nogales but did not pay Inter K the contract price for the cigarettes. Rather, Puchi paid Inter K only $10,000.

¶6 In July 2005, Inter K filed a complaint against Puchi and UPS. In its sole claim against UPS, Inter K asserted UPS had "agreed to act as bailee for Inter K's goods when it accepted custody of the cigarettes and made a zone entry" and that it had breached the bailment contract by releasing the cigarettes to Puchi without Inter K's authorization.[2] After years of litigation involving Inter K, Puchi, and other persons not

[2]A bailment is created when "personal property is delivered to one party by another in trust for a specific purpose, with the express or implied agreement that the

parties to this appeal, Inter K moved for partial summary judgment against UPS on the issue of liability. After the trial court granted that motion, Inter K then moved for "final summary judgment" against UPS on the issue of damages in March 2010. The trial court again granted summary judgment in favor of Inter K and entered a final judgment pursuant to Rule 54(b), Ariz. R. Civ. P., in which Inter K also was awarded attorney fees in the amount of $66,934.[3] This appeal followed.

Discussion

¶7 UPS contends the trial court erred in granting summary judgment in Inter K's favor on both liability and damages. We review de novo the trial court's grant of summary judgment. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, ¶ 4, 7 P.3d 136, 139 (App. 2000). A party is entitled to summary judgment only when there is no genuine issue of disputed material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c); *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶8 In granting judgment in favor of Inter K, the trial court relied in part on former A.R.S. § 47-7204(A), which provided, "A warehouseman is liable for damages

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property will be returned or accounted for when the purpose is accomplished." *Nava v. Truly Nolen Exterminating of Houston, Inc*., 140 Ariz. 497, 500, 683 P.2d 296, 299 (App. 1984). Under former A.R.S. § 47-7102(A)(1), the Uniform Commercial Code provision applicable to this case, a "[b]ailee" is a "person who by a warehouse receipt, bill of lading or other document of title acknowledges possession of goods and contracts to deliver them." 1984 Ariz. Sess. Laws, ch. 77, § 3.

[3]Inter K also was awarded judgment in its favor against Puchi in a separate decision not part of this appeal, and UPS was ordered to pay "taxable costs of $5,366.15, which . . . shall be a joint and several liability with [Puchi]."

for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful person would exercise under like circumstances . . . ."[4] 1984 Ariz. Sess. Laws, ch. 77, § 3. UPS asserts that the trial court erred in granting summary judgment in Inter K's favor because whether UPS exercised reasonable care in releasing the goods to Puchi was a question of fact for the jury.

¶9 But Inter K has alleged and argues on appeal that UPS breached the bailment contract by its misdelivery to Puchi.[5] Such misdelivery cases are not governed by the negligence standard of former § 47-7204. *See Turner v. Scobey Moving & Storage Co*., 515 S.W.2d 253, 254-55 (Tex. 1974) (finding identical provision to former § 47-7204 under Texas law inapplicable to controversy over misdelivery because "loss of or injury to the goods" covers "loss by fire or theft or like causes," not unauthorized delivery of goods);[6] U.C.C. § 7-403 cmt. 1 (superseded 2003), 2C U.L.A. 385 (2005) (stating that "misdelivery" has been purposefully omitted from list of lawful excuses for failure to deliver under document of title); *cf. Lerner v. Brettschneider*, 123 Ariz. 152, 154-55, 598 P.2d 515, 517-18 (App. 1979) (acknowledging "[m]isdelivery constitutes

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[4]The Uniform Commercial Code, which is now codified as A.R.S. §§ 47-1101 through 47-10101, underwent substantial amendments in 2003, which were adopted by Arizona in 2006. *See* 2006 Ariz. Sess. Laws, ch. 53, §§ 5-50; 2C U.L.A. 16 (Supp. 2008). Because the versions in effect before the amendments are applicable to this case, we cite the former versions of the statutes.

[5]Misdelivery is "[d]elivery not according to contractual specifications; esp. delivery to the wrong person." *Black's Law Dictionary* 1089 (9th ed. 2009).

[6]To the extent UPS has alleged it lost the cigarettes due to Puchi's theft, and thus, negligence principles apply, this is a new argument on appeal. Therefore, we do not address it.

wrongful exercise of control" to support conversion claim, not negligence claim). Rather, pursuant to former A.R.S. § 47-7403, a bailee must deliver goods in its possession "to a person entitled under the document" of title unless the bailee establishes a lawful excuse for its failure to deliver.[7] 1984 Ariz. Sess. Laws, ch. 77, § 3. This statute is based on the general principle that warehousemen who misdeliver goods are absolutely liable for the value of those goods. *See generally Utica Nat'l Bank & Trust Co. v. Happy Wheat Growers, Inc.*, 558 F.2d 279, 282 (5th Cir. 1977) (warehouseman's absolute liability for misdelivered goods not excused by lack of causation or exercise of due care); *Quinto v. Millwood Forest Prods., Inc.*, 938 P.2d 189, 192 (Idaho Ct. App. 1997) ("[A] delivery of bailed property by a bailee to one not authorized by the bailor to receive it is a conversion or a breach of the bailment contract for which the law imposes liability on the bailee irrespective of negligence.").

¶10 The trial court found that form CF 7512, which had been prepared by Inter K's customhouse broker, "is the relevant document of title," and, thus, because that form listed Inter K as the consignee, UPS was "in breach of the bailment contract as a matter of law" when it delivered the goods to Puchi without Inter K's authorization. While acknowledging that form CF 7512 lists the consignee as Inter K, UPS contends a material issue of fact remains because other documents prepared by Inter K, such as an invoice and a "pickup order," failed to "unequivocally name Inter K as owner of the goods" but,

[7]The parties consistently have asserted this misdelivery claim is governed by the U.C.C., and, thus, we need not decide whether a common law breach of bailment claim exists independently of the U.C.C.

rather, created a reasonable inference that Puchi had "a controlling interest in the cigarettes, if not outright ownership." A "[d]ocument of title" can be a

> bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers.

1999 Ariz. Sess. Laws, ch. 203, § 13 (former A.R.S. § 47-1201(15)). Further, "[t]o be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass." *Id.*

¶11 Here, the trial court correctly found form CF 7512 is a "document of title." Although the document does not fit within one of the specific types listed in the statute such as a bill of lading or warehouse receipt, the CF 7512 qualifies as "any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers." 1999 Ariz. Sess. Laws, ch. 203, § 13 (former § 47-1201(15)).[8] The CF 7512 is a standardized Customs document used to "facilitate the entry of goods into the United States and the goods' subsequent transportation." *NYC*

[8]Inter K relies on the current version of A.R.S. § 47-1201(B)(16)(b), which was amended in 2006 to include "transport document[s]" among those specifically enumerated as documents of title. *See* 2006 Ariz. Sess. Laws, ch. 53, § 5. However, we apply the version of the statute in effect at the time of the breach. *Cf. Tarrant Cnty. Hosp. Dist. v. GE Automation Servs., Inc.*, 156 S.W.3d 885, 891 (Tex. App. 2005) (noting rule without discussion).

Apparel FZE v. U.S. Customs & Border Prot., 484 F. Supp. 2d 77, 89 (D.D.C. 2007). Puchi's broker, Partida, testified that the form is "an in-transit document" that "allows merchandise to go from one warehouse to another" while under the supervision of Customs. The form arrived at UPS's warehouse with the cigarettes, and it describes the consignee as "Inter 'K' [care of]" UPS's warehouse at UPS's physical address.

¶12 Partida testified by deposition that entities often consign goods to themselves in the manner Inter K used here, and Inter K's attorney stated in his affidavit that he intentionally consigned the goods to Inter K to clarify Inter K's ownership of them until Puchi had paid. By showing Inter K as the consignee, the form was clear as to the entity entitled to the goods. *See* 1984 Ariz. Sess. Laws, ch. 77, § 3 (former A.R.S. § 47-7102(A)(2), defining consignee as "person named in a bill to whom or to whose order the bill promises delivery" and former § 47-7403(D), defining "person entitled under the document" of title in relevant part as "person to whom delivery is to be made by the terms of or pursuant to written instructions"). Therefore, the trial court correctly concluded Inter K was entitled to judgment as a matter of law because the CF 7512 was a document of title, and we uphold the determination that UPS is liable to Inter K under former § 47-7403 for failing to deliver the goods pursuant to the terms of that document.

¶13 UPS argues that even if it is liable, the trial court erred in granting summary judgment on the issue of damages because it "properly has limited its liability to $50.00." Specifically, UPS emphasizes that Inter K's customhouse broker required Inter K to sign a Customs Power of Attorney, which provides that "[t]hird parties to whom the goods are entrusted may limit liability for loss or damage," and that UPS expressly had adopted the

industry standard of limiting liability for loss or damage to $50 as evidenced by their standard Terms and Conditions of Service, which document is readily available for review on their website. But limitations on liability in a bailment contract must be specifically agreed to by the parties. *See Lerner*, 123 Ariz. at 155, 598 P.2d at 518; *cf. Grain Dealers Nat'l Fire Ins. Co. v. Union Co.*, 111 N.E.2d 256, 261 (Ohio 1953) (warehouse receipt limiting liability must be presented to bailor at commencement of bailment to have binding effect). And UPS concedes that neither Inter K's customhouse broker nor anyone else from Inter K ever signed the document setting forth UPS's terms and conditions of service.

¶14 Nonetheless, UPS contends, relying on *Norfolk Southern Railway v. Kirby*, 543 U.S. 14 (2004), that "an intermediary may effectively bind the owner of goods to a third party's limitation." *Kirby* is distinguishable on several grounds. There, the owner of goods expressly had agreed to a limitation-of-liability provision with the general contractor and a provision extending the limitation of liability to claims "made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract." *Id*. at 30. Here, Inter K did not expressly agree to any limitation of liability; rather, the term in the contract between Inter K and its customhouse broker was simply that "[t]hird parties to whom the goods are entrusted may limit liability for loss or damage." This clause is insufficient to bind Inter K to UPS's specific limitation of liability under the principles set forth in *Kirby*.

¶15 In the alternative, UPS contends Puchi, who did sign the document, was acting as an agent for Inter K in doing so. UPS relies on the law of apparent authority,

which involves "conduct of a principal that allows a third party reasonably to conclude that an agent is authorized to make certain representations or act in a particular way." *Miller v. Mason-McDuffie Co. of S. Cal*., 153 Ariz. 585, 589, 739 P.2d 806, 810 (1987). But an agency relationship is a fiduciary relationship in which the agent acts on the principal's behalf. Restatement (Third) of Agency § 1.01 (2006); *accord Queiroz v. Harvey*, 220 Ariz. 273, ¶ 8, 205 P.3d 1120, 1122 (2009). Thus, Puchi, the opposing party to Inter K in an arms-length transaction, hardly could be considered an agent of Inter K. And Inter K did nothing that would have allowed UPS reasonably to conclude that Puchi was authorized to act on Inter K's behalf. The trial court did not err in concluding the $50 limitation clause does not apply to this action.

¶16 UPS next argues that even if its liability is not limited, the appropriate measure of damages is a jury question. Yet UPS mischaracterizes this action as an action based on UPS's "'negligence in caring for the property,'" for which "'the bailor is entitled to be compensated for all losses that are the natural consequence and proximate result of the bailee's tortious act.'" 8A Am. Jur. 2d *Bailments* § 250 (2011). Inter K, too, erroneously relies on authority allowing for the recovery of the market value under the U.C.C. equivalent to former A.R.S. § 47-7204, a statute inapplicable to this misdelivery case.[9] *See* 1984 Ariz. Sess. Laws, ch. 77, § 3; *see also* 7 Hawkland U.C.C. Series § 7-204:6 (2011) ("If the goods are completely destroyed or lost, the market value of the goods may be an appropriate measure of damages.").

[9]The trial court also based its decision about damages on a finding that UPS was liable under former § 47-7204. *See* 1984 Ariz. Sess. Laws, ch. 77, § 3.

¶17 Neither party has provided the standard for measuring damages in a misdelivery case where the goods were neither destroyed nor lost. In general, however, the measure of damages in a bailment action for conversion is the fair market value of the property at the time of the conversion. *See* 8A Am. Jur. 2d *Bailments* § 254. UPS argues that the evidence of the fair market value of the cigarettes is in dispute, relying solely on Puchi's deposition testimony about the quality of the cigarettes. But the best evidence of fair market value is the value that a willing buyer and willing seller would pay pursuant to an arms-length transaction. *See Boyce v. Soundview Tech. Grp., Inc.*, 464 F.3d 376, 387 (2d Cir. 2006); *Honeywell Info. Sys., Inc. v. Maricopa Cnty*., 118 Ariz. 171, 174, 575 P.2d 801, 804 (App. 1977). Here, at the time UPS released the cigarettes to Puchi, Puchi and Inter K had reached an agreement that Puchi would purchase the cigarettes for $166,920. Both Puchi and Inter K were experienced in the cigarette trade and presumably had taken into account the variables Puchi describes, such as the age and quality of the cigarettes, when reaching an agreement on the price. Thus, that price is the best evidence of fair market value, and there is no genuine issue of material fact about whether another amount would be more accurate.

¶18 UPS also argues the trial court erred when it found Inter K had no duty to mitigate its damages by repossessing the cigarettes from Puchi.[10] Inter K and the court

[10]UPS also points out it raised a comparative negligence defense and argues in the event it is found liable, "the factual issue[] of . . . comparative negligence should be decided." But UPS asserts this argument only in the context of a negligence claim and does not argue comparative fault applies to a U.C.C. conversion by misdelivery claim. Thus, we need not address this issue further. *See Kaman Aerospace Corp. v. Ariz. Bd. of Regents*, 217 Ariz. 148, n.6, 171 P.3d 599, 604 n.6 (App. 2007).

relied on *Weiss v. Saffell*, 82 Ariz. 316, 319-20, 313 P.2d 390, 393 (1957), a conditional sales contract case, in so concluding. Although *Weiss* does not address squarely whether a plaintiff in a misdelivery by conversion case has a duty to mitigate damages by repossessing the goods, the court's conclusion that Inter K had no duty here is correct nonetheless. *See Wash. State Bank v. Medalia Healthcare L.L.C.*, 984 P.2d 1041, 1045 (Wash. Ct. App. 1999) (plaintiff in conversion action has no obligation to take back converted property); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 15, at 106 (5th ed. 1984) (once property converted, "defendant cannot undo his wrong by forcing the goods back upon their owner . . . in mitigation of damages").

¶19 Finally, because we have upheld summary judgment in favor of Inter K, it remains the successful party in a contract action entitled to fees and costs under A.R.S. § 12-341.01(A). However, UPS contends that, even if Inter K is the successful party, § 12-341.01(A) does not apply to an action between a bailor and a bailee. *See Ariz. Tile, L.L.C. v. Berger*, 223 Ariz. 491, ¶ 35, 224 P.3d 988, 995-96 (App. 2010) (whether attorney fee statute applies is question of law reviewed de novo). Our supreme court has held, in the analogous case of *Wenk v. Horizon Moving & Storage Co.*, 131 Ariz. 131, 132, 639 P.2d 321, 322 (1982), that a breach of a bailment contract claim could support an award of attorney fees and costs as "arising out of a contract" pursuant to § 12-341.01(A). *Accord Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 543, 647 P.2d 1127, 1141 (1982). UPS has pointed to no distinction between the contract here and the contract in *Wenk*, and we cannot find a material distinction. Thus, were we to conclude that this breach of a bailment claim does not arise out of contract, we would do so in

contravention of *Wenk*, and we are not at liberty to modify or overrule decisions of our supreme court. *See City of Phx. v. Leroy's Liquors*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993).[11]

¶20 We also award Inter K its costs and attorney fees on appeal pursuant to § 12-341.01(A) upon its compliance with Rule 21(c), Ariz. R. Civ. App. P.

Disposition

¶21 For the foregoing reasons, we affirm the trial court's judgment against UPS.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

[11]UPS maintains that another supreme court case, *Barmat v. John & Jane Doe Partners A-D*, 155 Ariz. 519, 522, 747 P.2d 1218, 1221 (1987), decided after *Wenk*, suggests a bailor/bailee relationship is a special relationship whose duties do not arise out of contract. In *Barmat*, the sole issue on review was whether parties in a legal malpractice action were eligible for fees under § 12-341.01(A). 155 Ariz. at 520, 747 P.2d at 1219. However, despite the reference to bailors and bailees in that context, the court in *Barmat* cited *Wenk* with approval as involving a contract implied in fact, under which fees can be awarded properly pursuant to § 12-341.01(A). *Barmat*, 155 Ariz. at 521, 523, 747 P.2d at 1220, 1222. At least in the context here, which is indistinguishable from that in *Wenk*, we thus conclude that *Wenk* still controls.