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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C.
Justice

PART 2

Index Number : 103416/2010
VIGILANT INSURANCE
VS.
HAYES STORAGE WAREHOUSE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

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

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

Replying Affidavits _____ | No(s). _____

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

[redacted]
MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM

FILED

JUN 14 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 6/8/12

_____, J.S.C.
LOUIS B. YORK

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 2

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VIGILANT INSURANCE COMPANY, as subrogee of MICHAEL BITTAN,

Plaintiff,

Index No.: 103416/10

-against-

DECISION

HAYES STORAGE WAREHOUSE, INC.,

Defendant.

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LOUIS B. YORK, J.:

Defendant moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

BACKGROUND

This action arises out of the payment by plaintiff Vigilant Insurance Company (Vigilant) for the disappearance of a work of art scheduled on an all risk insurance policy issued to Vigilant's subrogee, Michel[1] Bittan (~~Bittan~~) Bittan alleged that he kept the work of art in a room rented by him in defendant's warehouse over a ten-year period. The lease for the storage room provides, in pertinent part:

> It is expressly understood that the relationship between the parties is that of Tenant and Landlord and that there

[1]Although the caption indicates the subrogee's name as "Michael," at this deposition he stated that his name is "Michel."

> is no relationship of bailment between Tenant and Landlord, and as such Landlord has no responsibility of liability with respect to any contents situated in the demised premises.

Further, the lease provides that defendant "shall not be liable for any damage to property of Tenant ... nor for loss or damage to any property of the Tenant by theft or otherwise" unless caused by defendant's negligence. *Id.*

The complaint alleges three causes of action: (1) bailment; (2) negligence in storage, handling, custody and control; and (3) conversion.

The art work in question, entitled "Triod," consists of aluminum tiles packed in a small cardboard carton approximately 18 inches square, and the carton was possibly unmarked. This box was stored in a room approximately 16 by 10 feet, with as many as 100 other artworks belonging to Bittan. Bittan testified that at his EBT that he did not keep an inventory of the items that he placed in the room, and that he did not request defendant to handle Triod in any way during the period that it was allegedly in the rented room. *EBT at 16, 38.* Bittan also testified that, during the entire period in which he leased space from defendant, the only people with access to the leased room were himself, his controller, and defendants' employees, because the keys to the

room were kept by defendant in its office. *Id.* at 18.

In February of 2008, approximately 10 years after Bittan rented the space from defendant, Bittan and his brother, along with a couple of their workers, removed all of the items kept by him in the two rooms that he rented from defendant, placed them in a large rented truck, and took them to Bittan's home in New Jersey. According to Bittan, he did not have a list of the works that were supposed to be stored in the room, nor did he count the pieces when they were put in or removed from the truck. Bittan stated that defendant's employees moved his boxes from the leased room to the elevator, from which he, his brother and his workers moved the items to the truck.

Two weeks after Bittan removed the items to his New Jersey home, he matched the items with those appearing on his insurance policy issued by Vigilant and could not find Triod, which he then reported missing to Vigilant. When questioned at his deposition, Bittan said at pp 33-34 that he did not recall the last time that he had seen Triod in the storage room, although he did recall seeing it there, and admitted that it was possible that he might have removed it from the warehouse. Further, Bittan did not claim that the work was stolen from the warehouse, but said that the warehouse was the last place that he recalled

seeing it, and that he does not know what happened to the work. *EBT* at 41.

Pursuant to the terms of its policy, which specifically scheduled Triod, Vigilant paid Bittan $130,000. According to Ronzel Simmons, the witness who was deposed on behalf of Vigilant, Vigilant concluded that the loss resulted from a "mysterious disappearance." Simmons EBT, at 31.

Defendant states that Bittan did not deliver any goods to it for storage, that he did not receive any warehouse receipts or inventories for items stored in his rented rooms, and that the lease provides for rental payments and has no charges for storage of goods. Therefore, according to defendant, there are no facts upon which a bailment may be found. In addition, defendant claims that it did not convert Triod, nor can a conversion be based on a bailment since no bailment existed.

In opposition to the instant motion, Vigilant argues that, despite its status as a landlord, defendant had access to Bittan's leased room and controlled ingress and egress to the room. Hence, Vigilant maintains that Triod was removed, either negligently or deliberately, by or with the concurrence of defendant and/or its employees.

Robert Valenti testified on behalf of defendant and affirmed

that, in order to operate the elevator in defendant's facility, one had to be a member of the appropriate union, and the freight elevator was the only means of moving works of art into or out of the building. Valenti EBT, at 18-19, 20-24, 27-29. Valenti also stated that, during the period in which Bittan leased space, he, Valenti, would be positioned at a counter in the building's lobby to control who entered the premises. *Id.* at 33-36, 89-93. Valenti said that, during the time that he was associated with defendant, there were no break-ins; however, one of its employees was fired after a tenant accused him of theft and the employee was arrested. *Id.* at 36-39.

Valenti testified that the building in which the art work was stored had a state-of-the-art alarm and climate control system, was protected by motion sensors and alarm contacts on the doors and window, and had an audible siren.

According to exhibits presented to Valenti at his deposition, on several occasions defendant released, received, and/or wrapped articles for Bittan.

Vigilant maintains that defendant's motion should be denied because it has failed to explain how the work of art could have disappeared without defendant's negligence. Further, Vigilant asserts that a bailment may be created by the act of lawful

possession of an object, which would render the possessor liable for failing to exercise reasonable care.

In reply, defendant argues that Vigilant fails to cite any act of negligence on the part of defendant and bases its entire opposition on an impermissible inference founded on circumstantial evidence. Moreover, defendant maintains that there has been no evidence presented that it ever took possession of Triod, because the mere fact that, as a landlord, it had access to the rented room does not support a conclusion that it obtained possession of the goods stored in that room.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary

judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Defendant's motion is granted and the complaint is dismissed.

Plaintiff's first cause of action is based on a breach of a bailment relationship.

> "A bailment is the possession or retention of property by one person under circumstances obligating him to deliver the property to another upon demand or at a given time. A bailment can be for mutual benefit, for the benefit of the bailor or for the benefit of the bailee. The standard of care required of the bailee varies with the type of bailment [internal citation omitted]."

Gunning v Regina Metropolitan Co., LLC, 16 Misc 3d 1131(A) (Civ Ct, NY County 2007).

> "If plaintiff is to recover for bailee negligence, [it] must establish that a bailment relationship existed with respect to the [lost] goods, and that the bailee failed to exercise the required standard of care in storing the goods. The statutorily defined standard of care provides: '(1) A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances but unless otherwise agreed he is not liable fro damages which could not have been avoided by the exercise of such care' [internal citations omitted]."

Singer Company v Stott & Davis Motor Express, Inc., 79 AD2d 227, 231 (4th Dept 1981).

Moreover, a bailment does not have to arise through a

contract, but may also be created by the possession of the object and the duty to account for it. *See Mack v Davidson*, 55 AD2d 1027 (4th Dept 1977). When the custodian of the object is paid a fee, the custodian is required to exercise ordinary care in relation to the bailed article. *See Aronette Manufacturing Company v Capitol Piece Dye Works, Inc.*, 6 NY2d 465 (1959); *see also Faller v Scali, McCabe Sloves, Inc.*, 198 AD2d 96 (1st Dept 1993).

In the case at bar, defendant asserts that no bailment was ever created. The basis of defendant's contention is the contractual relationship between the parties, which specifically identifies such relationship as one of landlord-tenant and states that it is not one of bailment, and the fact that defendant was never in sole possession of Triod. *See Kahn & Rolnick, Inc. v Interborough Fur Storage Co., Inc.*, 196 Misc 749 (Sup Ct, NY County 1949). However, viewing the evidence in a light most favorable to plaintiff, thereby assuming that a bailment was created, plaintiff still cannot prevail on its claim.

As stated above, since defendant received a fee for renting the room, its standard of care, if a bailment were effectuated, would be that of reasonable care. In other words, plaintiff would have to come forward with evidence in admissible form that

establishes defendant's negligence in failing to use reasonable care to protect the work of art. This it cannot do.

All of the evidence provided with the motion indicates that defendant maintained adequate security measures to safeguard its customers ' possessions, and plaintiff has not contradicted defendant's averments on this point. Plaintiff's argument regarding defendant's alleged breach of its duty of care rests entirely on circumstantial evidence.

> To establish a claim of negligence that is based, as here, entirely on circumstantial evidence, a plaintiff must demonstrate the existence of 'facts and conditions from which the negligence of the defendant and the causation of the [loss] by that negligence may be reasonably inferred.' While plaintiff's proof need not positively exclude every other possible cause of the [loss], it 'must render those other causes sufficiently "remote" or "technical" to enable a jury to reach its verdict based not upon speculation, but upon the logical inference to be drawn from the evidence' [internal citations omitted].

Schneider v Kings Highway Hospital Center, Inc., 67 NY2d 743 (1986); *J.E. v Beth Israel Hospital*, 295 AD2d 281, 283 (1st Dept 2002).

In the instant matter,

> "summary judgment in defendant's favor is appropriate because 'it is just as likely that the [loss] could have been caused by some other factor (unrelated to any alleged negligence on defendant's part) ... (and thus) any determination by the trier of fact as to the cause of the

> [loss] would be based upon sheer speculation' [internal citations omitted]."

Smart v Zambito, 85 AD3d 1721, 1721 (4th Dept 2011).

Bittan testified that he does not recall the last time prior to his removing the items from the rented room that he saw Triod and, during the ten-year period in which Triod was stored in defendant's facility, access to his rented room was available to himself and several of his employees. Bittan also averred that Triod was stored in an unmarked box and that he maintained no inventory of the items that he kept in the room that he rented from defendant. In addition, Bittan also stated that it is possible that he removed Triod from the rented room himself, and he does not allege that Triod was stolen by defendant or defendant's employees.

Bittan cannot even establish that Triod was not removed from defendant's facility and loaded onto the truck that he rented, or that it was not removed from his rented truck and placed in his New Jersey residence. Moreover, since Bittan did not even check the items removed from defendant's facility against his insurance policy for two weeks, it is also possible that Triod disappeared from his own home. Therefore, plaintiff cannot even establish that Triod was not returned to Bittan and, hence, defendant cannot be found to have breached its duty of ordinary care. *See*

I.C.C. Metals, Inc. v Municipal Warehouse Company, 50 NY2d 657 (1980).

For the above reasons, plaintiff's first cause of action, based on the breach of a bailment, and its second cause of action, based on negligence, must be dismissed.

Similarly, plaintiff's third cause of action for conversion must also be dismissed.

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession ... [internal quotation marks and citation omitted]." *Tudisco v Duerr*, 89 AD3d 1372, 1373 (4th Dept 2011). Not only has plaintiff failed to provide any evidence that defendant intentionally interfered with Bittan's right of possession, but its own investigation concluded that Triod was lost due to a mysterious disappearance, not a conversion. Hence, plaintiff has failed to establish a prima facie case of conversion.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment to dismiss the complaint is granted and the complaint is dismissed,

with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 6/8/12

ENTER:

Louis B. York

LOUIS B. YORK
J.S.C.

FILED

JUN 14 2012

NEW YORK
COUNTY CLERK'S OFFICE