

**Mears v Long**

2016 NY Slip Op 32607(U)

December 20, 2016

Supreme Court, Suffolk County

Docket Number: 16118/2013

Judge: James Hudson

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Supreme Court of the County of Suffolk  
State of New York - Part XLVI  
Memorandum Decision

COPY

PRESENT:

HON. JAMES HUDSON

Acting Justice of the Supreme Court

X-----X

ROBERT MEARS and  
RM REPAIR SERVICE CORP.

Plaintiffs,

-against-

CHRISTOPHER LONG a/k/a CHRIS LONG,  
STEVEN LONG a/k/a STEVE LONG,  
CHRISTOPHER ISAZA a/k/a CHRIS ISAZA  
and SOUTH 2<sup>ND</sup> REALTY CORP.,

Defendants.

X-----X

DECISION AFTER INQUEST

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The matter at hand is an inquest to determine the measure of damages suffered by the Plaintiff as a result of the actions of the Defendants. Liability was established by default. The Court heard testimony and documentary evidence on February 3, 2016 and May 18, 2016. Counsel for the parties were afforded the opportunity to submit post-inquest briefs. The Court has reviewed same and wishes to thank Mr. White and Mr. Rabinowitz for the eloquence and scholarship of their respective memoranda. They do credit to their clients and to the profession of law.

The Plaintiff, Mr. Robert Mears, testified. He indicated that his business consisted of the repair of heavy equipment and selling of parts. He is currently the owner of RM Repair Service and Long Island Heavy Equipment Parts. He was also co-owner of an entity called Empire Tractor Parts Corporation which was a joint business enterprise between Mr. Mears and Mr. Christopher Long.

The testimony of Mr. Mears detailed the monies and equipment parts which were misappropriated by the various Defendants. Mr. Mears testified that he paid a bill to American Express on behalf of Empire Tractor to which the Defendant Christopher Long did not contribute and also testified as to non-business related purchases made by Christopher

Long (Plaintiff's Exhibits 7, 7a and 8) that he had to pay to American Express the sum of \$29, 638.57 to cover these expenses.

Mr. Mears also said that Empire Tractor had a customer named Rahama who ordered a large quantity of equipment parts from Empire Tractor (Plaintiff's Exhibits 10,11 and 12). He further stated that these parts were "seized" by the Defendants. Plaintiff's Exhibit 9 was a letter from Christopher Long to the Plaintiff. Mr. Mears, having established his familiarity with Chris Long's signature, stated that Mr. Christopher Long had signed the document. It related that the parts designated for "Rahama" had been taken by Chris Long to satisfy back rent due for 950 South 2<sup>nd</sup> Street. (February 3, 2016 Transcript p.35). In turn, 950 South 2<sup>nd</sup> Street was owned by 950 South Realty of which Mr. Steven Long was the principal. Mr. Mears also stated that Mr. Isaza was a part owner of 950 South Realty. A review of the Empire Tractor Invoices showed that they totaled \$35, 851.99 and represented a lost profit of \$8706.80.

Mr. Mears' testimony also addressed his claims of conversion and unjust enrichment against all of the Defendants in reference to a company known as Diesel Cast Welding. This arose from an incident with respect to items called "the diesel cast parts" (February 3, 2016 Transcript p.55). Mr. Mears' testimony established that these parts were delivered to 950 South 2<sup>nd</sup> Street after he had vacated the premises. Mr. Mears then watched as Christopher Long, Christopher Isaza and Steven Long unloaded a FedEx truck which contained a delivery of parts for him. These parts cost \$4,440.00 (February 3, 2016 Transcript p.62). Mr. Mears also explained that he had paid the full amount of sales tax (\$438.94), the preparation of the tax return (\$550.00) and that the Defendant Christopher Long did not pay anything towards these business expenses.

Mr. Mears also introduced Empire Tractor's bank statement which showed Christopher Long withdrew \$8,194.76 from the account on September 18, 2012. This essentially left no funds in the business account.

Mr. Steven Long took the stand. He stated, *inter alia*, that he owned the premises located at 950 South 2<sup>nd</sup> and that he was the owner of 950 South Realty Corporation. Mr. Long denied that he signed the receipt for the delivery of goods or took possession of same (Plaintiff's Exhibit 14). He stated that the Plaintiff vacated the *locus in quo* on September 15, 2012. When he visited the premises on the following day, it was essentially empty save for "...some junk laying around, you know, in the corner, some stuff laying outside, some pallet racks and stuff like that... some metal racks... little bit of junk inside on the floor" (May 18, 2016 Transcript pp. 38-39).

Christopher Isaza also testified. He described himself as an owner of 950 South 2<sup>nd</sup> Realty Corp. He also denied having received certain goods delivered to the premises (Plaintiff's Exhibit 14).

Christopher Long also testified for the defense. He stated that he was a 50% owner of Empire Tractor along with the Plaintiff Robert Mears. When Mr. Long examined the American Express bill shown to him by defense counsel, he stated that both himself and Mr. Mears were cardholders (May 18, 2016 Transcript p.43). He also described the procedure that the business followed in sending parts to Rahama (May 18, 2016 Transcript p.45). He contended that this particular order was one of the largest the company had and that the Plaintiff prevented it from taking place. As to the incident of September 15, 2012, Mr. Long contends that the Plaintiff was in possession of the parts and took them with him when he left (May 18, 2016 Transcript p.48). Mr. Long denied having signed for parts that arrived after Mr. Mears left and informed the Court that there were other persons in the building with access to the rental space of himself and Mr. Mears (May 18, 2016 Transcript p.51). Mr. Long also admitted to closing out the business bank account and transferring the funds to his own business which apparently he viewed as the successor to the jointly owned corporation he formerly operated with Mr. Mears (May 18, 2016 Transcript p.52). The Court must note that Mr. Long's testimony regarding possession of the equipment parts was in direct contradiction to a letter he wrote to Mr. Mears in which Mr. Long acknowledged that possession of the business's stock was with the landlord and their sale would be applied to back rent (Plaintiff's Exhibit 9).

After observing Mr. Mears on the stand and listening to his testimony, the Court found him to be in all respects credible. The same cannot be said for the testifying Defendants. The demeanor of Mr. Steven Long, Christopher Isaza and Mr. Christopher Long was less than persuasive. Although the defense presented more witnesses, the quality of their testimony was far less than that of Mr. Mears. As the trier of fact in an inquest, it falls to the Court to determine the credibility to each witness and assess their value in reaching the truth (*Latora v. Ferreira*, 102 A.D.3d 838, 839, 958 N.Y.S.2d 727, 728 [2<sup>nd</sup> Dept. 2013]). It is a solemn duty in which the Court must use its powers of observation in addition to sifting the submitted evidence for consistency, and simple common sense logic. As the learned Court (Gazzillo J.) stated in *J & K Parris Const., Inc. v. Roe Ave., Assoc., Ltd.*, 47 Misc. 3d 1227(A), 18 N.Y.S.3d 579 (Sup. Ct. Suffolk Co. 2015), the trier of fact has the ability to gauge a witness by "the very whites of their eyes" (Id. citing *Wigmore on Evidence*, § 1367).

Based on demeanor *alone* we found the Plaintiff to be credible and the Defendants to be patently incredible (*Lawson-Groome v. Smalls*, 40 N.Y.S.3d 497, 498 (2<sup>nd</sup> Dept. 2016). It is axiomatic that the quality of proof always trumps the quantity of evidence. In the matter

*sub judice*, the Court is moved to discount the Defendants' testimony in their entirety. The sole question is whether the Plaintiff's proof, standing alone, proves damages and if so, to what extent.

It is beyond cavil that:

"Although a defaulting Defendant admits all traversable allegations in the complaint, including the basic issue of liability, an allegation of damage is not a traversable allegation and, therefore, a defaulting Defendant does not admit the plaintiff's conclusion of damages but may, at an inquest, offer proof in mitigation of damages if it involves '...circumstances intrinsic to the transactions at issue' in the plaintiff's complaint" (*Amusement Bus. Underwriters, a Div. of Bingham & Bingham, Inc. v. Am. Int'l Grp., Inc.*, 66 N.Y.2d 878, 880, 489 N.E.2d 729, 731 [1985] citing *Rokina Optical Co. v. Camera King, Inc.*, 63 N.Y.2d 728, 469 N.E.2d 518 [1984]).

Although the Defendants attempted to offer evidence which appeared to have a bearing on liability, we remind them that "[t]he sole issue to be determined at an inquest is the extent of damages sustained by the plaintiff" (*Gonzalez v. Wu*, 131 A.D.3d 1205, 1206, 16 N.Y.S.3d 768 (2<sup>nd</sup> Dept.2015) citing *Rokina Opt. Co. v. Camera King, supra*; *Taylor v. Brooke Towers LLC*, 73 A.D.3d 535, 901 N.Y.S.2d 224).

In comparing the testimony of Mr. Mears to the prayer for relief in his complaint, we are satisfied that he has sustained his burden of proof as to all of his causes of action with two exceptions.

The tenth cause of action requests an award of attorney's fees. The Appellate Courts in our State have long been proponents of the "American Rule" which holds "...that "[a]n attorney's fee is merely an incident of litigation and is not recoverable absent a specific contractual provision or statutory authority" (*214 Wall St. Assocs., LLC v. Med. Arts-Huntington Realty*, 99 A.D.3d 988, 990, 953 N.Y.S.2d 124, 126 [2<sup>nd</sup> Dept. 2012] citing (*Levine v. Infidelity, Inc.*, 2 A.D.3d 691, 692, 770 N.Y.S.2d 83; see *Matter of A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1, 5, 511 N.Y.S.2d 216, 503 N.E.2d 681; *Gorman v. Fowkes*, 97 A.D.3d 726, 949 N.Y.S.2d 96). Plaintiff's counsel has failed to persuade the Court that this rule should be departed from.

The Plaintiff's complaint also makes a request for punitive damages. "[T]he courts of this State have been so adamant that punitive damages are 'a social exemplary 'remedy,' [and] not a private compensatory remedy', that the imposition of such damages for private purposes has been held to violate public policy" (*Fabiano v. Philip Morris Inc.*, 54 A.D.3d

146, 150, 862 N.Y.S.2d 487, 490 [1<sup>st</sup> Dept. 2008] quoting *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 358, 386 N.Y.S.2d 831, 353 N.E.2d 793 [1976] ). The standard of the Court in deciding whether to impose punitive damages is whether the erring party has engaged in "...pervasive and grave misconduct affecting the public generally" (Id. at 150 citing *Walker v. Sheldon*, 10 N.Y.2d 401, 223 N.Y.S.2d 488, 179 N.E.2d 497 [1961]). A review of the record clearly shows that this criteria has not been met. Punitive damages will not be awarded.

In all other respects, however, the Court finds that Plaintiff has proved his claims. Although Defense counsel has made a skillful argument that Mr. Mears' proof is insufficient, we respectfully disagree. Ultimately, our finding that his clients' testimony was without merit prove fatal to his contentions.

Based on the credible proof, which consists exclusively of the evidence and testimony offered by Mr. Mears, the Court finds that the Plaintiff has proven the following damages by a fair preponderance of the credible evidence.

As to the first cause of action for breach of fiduciary duty as against Christopher Long, compensatory damages in the amount of \$29,638.57.

As to the second and third causes of action sounding in conversion and unjust enrichment respectively as against all the Defendants, compensatory damages in the amount of \$35,851.99.

As to the fourth and fifth causes of action for conversion and unjust enrichment respectively as against all the Defendants, compensatory damages in the amount of \$4,440.00.

As to the sixth cause of action for a *prima facie* tort as against all the Defendants, compensatory damages in the amount of \$27,145.19 in favor of Mr. Mears and \$4,440.00 in favor of RM Repair Service Corp. This cause of action is essentially duplicative of the damage sought in the second, third, fourth and fifth causes of action and cannot be added to a total amount. This finding of the Court shows merely that the Plaintiff proved damages under alternative theories of liability.

As to the seventh cause of action for unjust enrichment as against Christopher Long, compensatory damages in the amount of \$438.94.

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As to the eighth cause of action for unjust enrichment as against Christopher Long, compensatory damages in the amount of \$550.00.

As to the ninth cause of action for unjust enrichment as against Christopher Long, compensatory damages in the amount of \$8,194.76.

As to the tenth cause of action for attorney's fees, the Court declines to award same.

The Court also declines to award punitive damages. Plaintiff, however, will be awarded statutory costs and disbursements.

Settle judgment.

**DATED: DECEMBER 20, 2016**  
**RIVERHEAD, NY**

  

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**HON. JAMES HUDSON, A.J.S.C.**