SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

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J.B. INTERNATIONAL, LLC,

Plaintiff,

- v -

MANHATTAN BUYERS, INC.; ARTHUR J. ABRAMS; ALBERT A. JONAH; SEVERN REALTY PARTNERS LP; 576 FIFTH MASTER TENANT LLC; and KENT SECURITY OF NEW YORK, INC.,

Defendants.

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INDEX NO. 152121/2018

MOTION DATE 12/24/2019, 12/16/2019, 12/30/2019

MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, (Motion 002) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 94, 107, 108, 110, (Motion 003) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 109, 111, 112, 113, 115

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion of defendant Kent Security of New York, Inc. ("Kent Security") for summary judgment (Motion Seq 001) is granted; the motion of defendants 576 Fifth Master Tenant LLC ("576 Fifth") and Severn Realty Partners L.P. ("Severn") for summary judgment (Motion Seq 002) is granted in part and to the extent set forth herein; and the motion of defendants Manhattan Buyers, Inc. ("Manhattan Buyers"), Arthur J. Abrams a/k/a Arthur Abramov ("Abramov") and Albert A. Jonah ("Jonah") (together, the "MB Defendants") for leave to file an amended answer and for summary judgment (Motion Seq 003) is granted in part to the extent set forth herein, and denied as to the remainder, in accord with the following memorandum decision.

Background

Plaintiff J.B. International, LLC ("Plaintiff") is a diamond merchant seeking to recover for property damage arising out of the theft and conversion of diamonds. At all times relevant to the present action, Plaintiff maintained offices at 576 Fifth Avenue, New York, New York (the "Building"), which is owned and operated by defendant Severn. Defendant 576 Fifth is the managing agent of the building. Plaintiff alleges that, while in the process of moving offices within the Building, one of its employees inadvertently discarded diamonds valued at over $4.5 million dollars, including one 10.11 carat, oval-shaped diamond, in the Building's common-area trash (verified complaint ¶ 14; NYSCEF Doc No 1). Non-party Wilfred Martinez ("Martinez"), a security guard who was employed by Kent Security, was videotaped removing boxes from the common-area trash, which Plaintiff alleges contained the mislaid diamonds. Martinez then sold the 10.11 carat diamond to Manhattan Buyers, a diamond merchant that also maintains offices in the Building. Abramov is President and part owner and Jonah is an officer and part owner of Manhattan Buyers. The MB Defendants argue that, although they purchased the 10.11 carat diamond from Martinez, they were unaware that Martinez had stolen it from Plaintiff. In any event, after the MB Defendants purchased the 10.11 carat diamond, they had it re-cut, which reduced the overall size of the stone to approximately 9 carats. The MB Defendants assert that the diamond was re-cut to correct a "bowtie" flaw and increase the value of the diamond, while Plaintiff asserts that the stone did not have a bowtie flaw and the cutting reduced the overall value of the stone. On December 14, 2015, Martinez was arrested and charged with grand larceny. Plaintiff filed this action, and the present motions were commenced after issue was joined and discovery completed.

Standard of Review

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [internal quotation marks and citation omitted]). Upon proffer of evidence establishing a *prima facie* case by the movant, the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] [internal quotation marks and citation omitted]).

Discussion

A. Motion Sequences 001 and 002

Plaintiff's second cause of action for negligent hiring, the sole cause of action alleged against defendants Kent Security, 576 Fifth, and Severn, alleges that these defendants failed to exercise reasonable care in hiring security guards to protect the Building's occupants. In motion sequence 001, Kent Security moves for summary judgment to dismiss both the complaint as asserted against it and 576 Fifth and Severn's cross-claims for common law and contractual indemnity, contribution, and breach of contract. In motion sequence 002, Severn and 576 Fifth

move for summary judgment to dismiss both the complaint as against them and Kent Security's cross-claims for contractual and common law indemnity.

In its unopposed motion, Kent Security argues that the cause of action for negligent hiring, which relies on the theory of *respondeat superior*, should be dismissed against it because the theft was a clear departure from the scope of Martinez' employment, Kent Security neither knew nor should have known of Martinez' propensity to steal, and should not be held responsible for Martinez' actions. The doctrine of *respondeat superior* renders an employer vicariously liable for torts committed by an employee acting within the scope of his or her employment (*Bowman v State of New York*, 10 AD3d 315 [1st Dept 2004]). An employer may also be held liable for an employee's tortious act under theories of negligent hiring and negligent supervision (*Gonzalez v City of New York*, 133 AD3d 65 [1st Dept 2015]). A necessary element of this cause of action is that the employer knew or should have known of the employee's propensity for the conduct that caused the injury (*N.X. v Cabrini Med. Ctr.*, 280 AD2d 34 [1st Dept 2001]). In support of its motion, Kent Security submits, *inter alia*, background checks, personnel files, and deposition testimony that show that the theft was outside the scope of Martinez' employment and that he had no criminal history before he was hired by Kent Security. The record contains no contrary evidence that Kent Security knew or should have known of Martinez' propensity for the conduct which caused plaintiff's monetary injury. Taken together, this evidence is sufficient to establish Kent Security's prima facie entitlement to judgment as a matter of law dismissing Plaintiff's second cause of action for negligent hiring (*see Wallace v. Gomez*, 296 AD2d 306 [1st Dept 2002]). Therefore, that branch of Kent Security's motion for summary judgment dismissing plaintiff's complaint against it is granted and the complaint is hereby dismissed as against Kent Security.

In their motion, 576 Fifth and Severn move for summary judgment dismissing the complaint as against them and dismissing Kent Security's cross-claims for contractual and common law indemnity. Kent Security opposes the motion only to the extent that the movants seek indemnification from Kent Security, and takes the position that 576 Fifth and Severn bear no liability in this action for which they need indemnification. Plaintiff does not oppose the motion. The movants contend that they contracted with Kent Security as an independent contractor to provide security related services for the Building and they cannot be held liable for the acts of an independent contractor under the circumstances of this case.

"As a general rule, a principal is not liable for the acts of an independent contractor because principals ordinarily do not control the manner in which independent contractors, as opposed to employees of the principal, perform their work" (*Goodwin v Comcast Corp.*, 42 AD3d 322 [1st Dept, 2007]). The exceptions to this rule "fall roughly into three basic categories: where the employer is negligent in selecting, instructing or supervising the independent contractor; where the independent contractor is hired to do work which is 'inherently dangerous'; and where the employer bears a specific, nondelegable duty" (*Saini v Tonju Assoc.*, 299 AD2d 244, 245 [1st Dept 2002]). In support of their motion, the movants submit a contractual agreement between 576 Fifth, Severn, and Kent Security (the "Security Contract"), the plain language of which establishes that Kent Security was an independent contractor (contract between 576 Fifth and Kent Security ¶¶ 1, 20; NYSCEF Doc No 66). Therefore, the general rule limiting liability of the principals, 576 Fifth and Severn, applies. Whereas there has been no contrary showing that 576 Fifth and Severn were involved in the hiring of Kent Security employees or otherwise knew or should have known that Martinez would perpetrate a crime while working as a security guard, and no other exception to the general rule that principals are

not liable for the acts of independent contractors has been raised by any party, Fifth and Severn are not liable for Kent Security's hiring of Martinez (*see, e.g., McLaughlin v BR Guest, Inc*., 149 AD3d 519 [1st Dept, 2017]). Moreover, because Kent Security was not negligent in hiring Martinez (see *supra* at 3-4), dismissal of the second cause of action in its entirety is appropriate. Therefore, 576 Fifth and Severn's motion for summary judgment dismissing the complaint and any and all cross-claims interposed against them is granted; the second cause of action is dismissed in its entirety; and the complaint is dismissed as against Kent Security, 576 Fifth, and Severn. To the extent that 576 Fifth and Severn move, in the alternative, for an order granting conditional summary judgment against Kent Security based on contractual indemnity, this portion of the motion is denied as moot.

B. Motion Sequence 003

In motion sequence 003, the MB Defendants move pursuant to CPLR 3025 for an order permitting them to amend their answer to include an affirmative defense that they are innocent purchasers of stolen chattel; deeming the amended answer served *nunc pro tunc*; and pursuant to CPLR 3212 for an order granting them summary judgment and dismissing the complaint and cross-claims asserted against them. Plaintiff opposes the motion.

At the outset, leave to amend a pleading "should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit" (Y.*A. v Conair Corp.*, 154 AD3d 611, 612 [2017]). In support of the motion to add the affirmative defense that they are an innocent purchasers of stolen chattel, the MB Defendants argue that Plaintiff will not be prejudiced by the amended defense because plaintiff was aware of deposition testimony given by Abramov, which indicated that the MB Defendants had no knowledge that the diamond was stolen. This court agrees. Plaintiff will suffer no surprise

or undue prejudice by the proposed amendment; and, although the question of whether movants had knowledge that the diamond was stolen is a question of fact, the deposition testimony is sufficient to support a finding that the proposed amendment is not palpably insufficient or patently devoid of merit. Accordingly, the MB Defendants' motion for an order, pursuant to CPLR 3025, permitting them leave to amend their answer is granted. The MB Defendants' amended answer annexed to its moving papers is hereby deemed served and filed *nunc pro tunc*.

The MB Defendants also move for summary judgment for dismissal of Plaintiff's first cause of action for conversion, which alleges that that Manhattan Buyers assumed ownership of the diamond and "vandalized, mutilated and destroyed the 10.11 carat diamond in an attempt to conceal that it was stolen." (complaint ¶ 25; NYSCEF Doc No 1). "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. Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights." (*Colavito v New York Organ Donor Network, Inc*., 8 NY3d 43, 49-50, [2006] [citations omitted]). The first key element is not in dispute. With respect to the second element, the MB Defendants assert that Abramov's deposition testimony demonstrates that he did not know the diamond was stolen, leaving no questions of material fact for trial. Further, the MB Defendants cite *Gillet v Roberts* (57 NY 28, 34 [1874]) and *State v Seventh Regiment Fund, Inc.* (98 NY2d 249 [2002]) for the proposition that a cause of action for conversion against a *bona fide* purchaser of stolen goods does not accrue until the rightful owner has demanded return of the item and that demand is refused. The MB Defendants argue that they are not liable for conversion because they were in lawful possession of the diamond and returned the diamond

once they were informed it was stolen. Plaintiff contends that questions of fact exist regarding the veracity of Abramov's testimony and, in turn, whether the MB Defendants were in lawful possession of the diamond. Plaintiff also argues that demand would have been futile in the present instance because the diamond was re-cut before Plaintiff discovered the theft.

Upon review of these arguments and the evidence currently before the court, it is the determination of this court that questions of fact exist which preclude summary judgment. As an initial matter, Abramov's testimony and the self-serving statements of the MB Defendants are insufficient to establish summary judgment as a matter of law. The parties dispute, among other things, the value of the diamond before and after it was re-cut, whether or not the diamond had a "bowtie" flaw before it was re-cut, and whether the MB Defendants took proper and customary steps to determine the origin of the stone before altering it. All of the facts have bearing on the issue of whether Manhattan Buyers was a *bona fide* purchaser of stolen goods who had lawful possession of the stone, and it is the responsibility of the trier of fact to evaluate these issues and determine the veracity of Abramov's testimony; not this court on a motion for summary judgment. Accordingly, that portion of the MB Defendants' motion that seeks an order dismissing plaintiff's first cause of action for conversion is denied. Also, because a conversion of chattel may support a jury verdict of punitive damages, the motion to dismiss the request for punitive damages is also denied (*see Hoffman v Babad*, 187 A.D.3d 542, 542 [1st Dept 2020]).

Next, the MB Defendants seek dismissal of Plaintiff's third cause of action, which alleges that the movants "conspired to steal plaintiff's 10.11 carat oval diamond and to conceal their criminal conduct by purchasing the stolen diamond and altering the diamond to make it unidentifiable" (complaint ¶ 37; NYSCEF Doc No 1). "Although New York does not recognize an independent cause of action for civil conspiracy, allegations of civil conspiracy are permitted

to connect the actions of separate defendants with an otherwise actionable tort" (*Cohen Brothers Realty Corp. v Mapes*, 181 AD3d 401, 404 [1st Dept 2020]). "To establish a claim of civil conspiracy, the plaintiff must demonstrate the primary tort, plus the following four elements: an agreement between two or more parties; an overt act in furtherance of the agreement; the parties' intentional participation in the furtherance of a plan or purpose; and resulting damage or injury" (*id.*). Here, the complaint adequately pleads a cause of action for conspiracy by pleading a cause of action for a primary tort – conversion – and pleading that the MB Defendants conspired to purchase the diamond with knowledge that it was stolen and took the overt step of re-cutting the diamond to conceal the theft, which resulted in damage to the Plaintiff. Outstanding questions of fact regarding these allegations preclude summary judgment dismissing the claim. Therefore, the cause of action for conspiracy is dismissed only to the extent that it is asserted as an independent cause of action, but the allegations of conspiracy are hereby deemed part of the cause of action for conversion (*see Errant Gene Therapeutics, LLC v Sloan-Kettering Institute for Cancer Research*, 174 AD3d 473, 474 [1st Dept 2019]).

Finally, that branch of Manhattan Buyers' motion seeking an order dismissing Kent Security's cross-claim for contractual indemnification is also granted because there is no privity between Manhattan Buyers and Kent Security, and that portion of the motion seeking dismissal of 576 Fifth's and Severn's cross-claim for common law indemnification is granted as a result of the complaint having been dismissed as against 576 Fifth and Severn.

Accordingly, it is hereby

ORDERED that the motion of defendant Kent Security of New York Inc. (Motion Seq 001) for summary judgment is granted in its entirety and the complaint and all-cross claims are dismissed as against this defendant; and it is further

ORDERED that the motion of defendants 576 Fifth Master Tenant LLC and Severn Realty Partners, L.P. (Motion Seq 002) for summary judgment is granted in its entirety and the complaint and all cross-claims are dismissed as against these defendants; and it is further

ORDERED that the motion of defendants Manhattan Buyers, Inc., Arthur J. Abrams a/k/a Arthur Abramov, and Albert A. Jonah (Motion Seq 003) is granted in part and to the extent that defendants Manhattan Buyers, Inc., Arthur J. Abrams a/k/a Arthur Abramov, and Albert A. Jonah are granted leave to amend their answer, and the proposed amended answer filed at NYSCEF Doc No 89 is deemed served and filed *nunc pro tunc*, and that all cross-claims interposed against defendants Manhattan Buyers, Inc., Arthur J. Abrams a/k/a Arthur Abramov, and Albert A. Jonah are dismissed; and it is further

ORDERED that the motion of Manhattan Buyers, Inc., Arthur J. Abrams a/k/a Arthur Abramov, and Albert A. Jonah (Motion Seq 003) is denied as to the remainder of said motion; and it is further

ORDERED that plaintiff and Manhattan Buyers, Inc., Arthur J. Abrams, and Albert A. Jonah are directed to contact the chambers of this court at lfurdyna@nycourts.gov within fifteen days of entry of this order to set a date for a virtual status conference.

This constitutes the decision and order of the court.

12/18/2020
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE