IN THE SUPREME COURT OF THE STATE OF NEVADA

ROGER THOMAS KNOX,
Appellant,
vs.
TOMAC ENTERPRISES, A NEVADA CORPORATION D/B/A MAACO PAINTING & BODY WORKS; AND GERRY P. TOMAC; MIKE PARMAN, D/B/A REEL CONSTRUCTION CO.; AND FIDELITY AND GUARANTY INSURANCE UNDERWRITERS, INC.,
Respondents.

No. 40272

FILED

DEC 21 2004

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from a district court order granting summary judgment in favor of respondents. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Appellant Roger Knox kept his tools on the premises of his employer, respondent Tomac Enterprises ("Tomac"). On April 28, 1999, a fire destroyed Tomac's auto paint shop, but, according to Knox's undisputed allegation, his tools were not destroyed in the fire, he personally saw them intact as late as May 1 or 3, 1999, and he was assured by others after the fire that his tools were safe.

Although Knox asserts that he was not free to remove his tools and was required to keep them on the premises so that other employees could use them, Tomac introduced evidence that Knox left his tools there voluntarily and was free to remove them before the fire. Tomac admitted,

however, that the only persons with keys to the premises before the fire were Tomac's officer, respondent Gerry Tomac, and the general manager.

Immediately after the fire, the premises were fenced and secured in order to prevent people from entering the area and to keep the site intact during the forensic investigation into the fire's cause. Tomac's insurer, respondent Fidelity and Guaranty Insurance Underwriters, Inc. ("Fidelity"), admitted that it hired Pinkerton Security Services ("Pinkerton") to secure the premises and prevent anyone from entering or removing items. Knox provided copies of memos by Pinkerton that instructed the security officers to prohibit anyone from removing any property from the premises, except for one or two trucks that Fidelity said could be removed. Knox claims that he made repeated attempts between April 30 and May 3 to retrieve his tools, but was prohibited from doing so by Pinkerton and was told that he would be contacted when he could retrieve his tools. Fidelity also admitted to hiring respondent Reel Construction Co. ("Reel") to assist in dismantling the ruined structure, to move debris at the fire investigators' direction, and to cleanup the rubble.

According to Knox, he asked Gerry Tomac for permission to remove his tools, and Gerry responded that he would talk to Fidelity's field representative. Knox alleges that Fidelity's representative did not recall talking to Gerry about releasing Knox's tools. Knox further alleges that he met Gerry Tomac at the premises on May 7 because Gerry had been contacted by an unknown witness and informed that a loader operator was placing Knox's tools in a pile. Knox asserts that his tools were not found on May 7. Knox claims that Tomac promised to replace his tools, and in

support, submitted a memo from Tomac's attorney stating that he was attempting to obtain insurance coverage for the tools' alleged loss. According to Knox, his tools have not been returned to him, nor has he been compensated for their loss.

After Knox sued Tomac for bailment, conversion, and intentional/negligent destruction of property, Tomac filed a third party indemnity complaint against Reel and Fidelity. The district court subsequently granted summary judgment in Tomac's favor on Knox's complaint and for Reel and Fidelity on Tomac's third party complaint. Knox then appealed.

Our review of a summary judgment order is de novo.[1] Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to summary judgment as a matter of law.[2] In determining whether summary judgment is warranted, the court must view the pleadings and evidence, and make every reasonable inference in the light most favorable to the nonmoving party.[3] If the nonmoving party bears the burden of persuasion at trial, then the party moving for summary judgment may satisfy its burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) "pointing out . . . that there is an absence

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[1]Nevada Contract Servs. v. Squirrel Cos., 119 Nev. 157, 160, 68 P.3d 896, 899 (2003).

[2]Id.; see also NRCP 56(c).

[3]Nevada Contract Servs., 119 Nev. at 160, 68 P.3d at 899; Pressler v. City of Reno, 118 Nev. 506, 510, 50 P.3d 1096, 1098 (2002).

of evidence to support the nonmoving party's case."[4] Having reviewed the record in a light most favorable to the appellant, we conclude that Tomac did not negate any essential elements of Knox's claims or establish that Knox lacks evidence to support his case. Genuine issues of material fact preclude summary judgment.[5]

Genuine issues of material fact exist as to whether Tomac may be liable to Knox under a conversion and/or negligence theory, based upon the existence of a bailment. "The word 'bailment' is generally defined as meaning a delivery of property for some particular purpose on an express or implied contract that after the contract's purpose has been fulfilled, the property will be returned to the bailor, or dealt with as he directs."[6] Generally, three classifications of bailment exist: bailment for the sole benefit of the bailor, bailment for mutual benefit, and bailment for the sole benefit of the bailee.[7] These classifications correspond generally with the three degrees of care required of the bailee: slight, ordinary, and great.[8]

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[4]Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); see Clauson v. Lloyd, 103 Nev. 432, 743 P.2d 631 (1987).

[5]As Knox's claim for intentional/negligent destruction of property appears subsumed by his bailment and conversion claims, we have not addressed it in this order.

[6]8 C.J.S. Bailments § 2 (2004).

[7]J. A. Bryant, Jr., Annotation, Employer's Liability for Theft or Disappearance of Employee's Property Left at Place of Employment, 46 A.L.R.3d 1306 (1976 & Supp. 2004).

[8]Id.

As we explained in Kula v. Karat, Inc.,[9] when a bailment is created, the bailee's failure to return the goods or show that their loss occurred without negligence on his part will raise a presumption that the bailee has converted the goods or lost them as a result of his negligence:

> Where a bailee, either for hire or gratuitously, is entrusted with care and custody of goods, it becomes his duty at the end of the bailment to return the goods or show that their loss occurred without negligence on his part. Failing in this, there arises a presumption that the goods have been converted by him, or lost as a result of his negligence, and he is accountable to the owner for them.

The district court determined that no bailment had been created, citing other state court's decisions in Pinto v. Bridgeport Mack Trucks,[10] Hacker v. Dan Young Chevrolet,[11] and Shingler Motors v. West.[12] But in Buckley v. Colorado Mining Co., Inc.,[13] a case decided

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[9]91 Nev. 100, 104, 531 P.2d 1353, 1355 (1975) (holding that a bailment had been created and not voided by an oral agreement, so that casino was liable for monies held in safekeeping for appellant).

[10]458 A.2d 696 (Conn. Super. Ct. 1983).

[11]304 N.E.2d 552 (Ind. Ct. App. 1973).

[12]193 S.E.2d 60 (Ga. Ct. App. 1972).

[13]294 S.E.2d 665 (Ga. Ct. App. 1982); see also Kottlowski v. Bridgestone/Firestone, Inc., 670 N.E.2d 78 (Ind. Ct. App. 1996) (concluding that the employer was liable as bailee for the theft of a 1000-pound locked toolbox and tools, when the employee did not have access to the tools after work and the employer had not met its duty of care in light of the employer's history of prior losses).

after Shingler Motors, the Georgia Court of Appeals held that summary judgment should not have been rendered because an issue of fact existed as to whether a bailment had been created and, therefore, whether a restaurant owner could be held liable when fire destroyed the organ of a musician who played at the restaurant. The court distinguished Shingler Motors and another Georgia case on the basis that, unlike the bailors in those cases, the musician in Buckley had no key to the restaurant's premises, so he could not remove his organ when the premises were closed. Therefore, a bailment might have been created because the restaurant had impliedly accepted the organ's delivery for purposes beneficial to the restaurant, musician, or both, and had maintained independent and exclusive possession of the bailed property. Accordingly, the court found that summary judgment should not have been granted.

In the present case, Tomac asserts that after the fire, it lacked control over the premises and thus had no duty of care regarding Knox's tools. Additionally, Tomac introduced uncontroverted evidence that it did not actually or proximately cause the fire or the loss of the tools. However, a duty of care arises when a bailment is created and is not extinguished until the goods are returned or properly accounted for.[14] In this case, genuine issues of material fact exist as to whether a bailment between Knox as bailor and Tomac as bailee of Knox's tools was created before the fire. While Tomac did not have exclusive possession of the

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[14]M. Bruenger & Co. v. Dodge City Truck Stop, 675 P.2d 864, 868 (Kan. 1984); 8 C.J.S. Bailments § 2 (2004); see also Kula, 91 Nev. at 104, 531 P.2d at 1353.

premises after the fire, it admitted that only Gerry and the general manager had keys to the premises before the fire, thus controlling access to Knox's tools after normal work hours. Tomac undeniably knew of the presence of Knox's tools on its premises before the fire, and implicitly or explicitly granted permission for Knox to leave them there. Even though Tomac introduced undisputed evidence that Knox voluntarily left his tools at his workplace and was free to take them home, a bailment may exist solely for the benefit of the bailor.

Further, Knox asserted, without rebuttal evidence from Tomac, that he was paid a higher commission amount because he used his own tools, and that Tomac's other employees used his tools, so Knox and Tomac both benefited from the use of Knox's tools. Thus, alternatively, a bailment for mutual benefit might have been created before the fire.

Additionally, Knox alleged that Gerry Tomac told him that his tools would be replaced, and in support, provided a letter from Tomac's attorney stating that he was still pursuing the possibility of obtaining insurance coverage for the alleged loss. Although Tomac denied responsibility for the tools' loss, this evidence may further support a finding that Tomac had an unextinguished duty of bailment to Knox.

With respect to Knox's conversion claim, in Bader v. Cerri,[15] we explained conversion as follows:

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[15]96 Nev. 352, 356, 609 P.2d 314, 317 (1980) (case citations omitted), overruled in part on other grounds by Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 5 P.3d 1043 (2000).

> A conversion occurs whenever there is a serious interference to a party's rights in his property. . . . When this happens the injured party should receive full compensation for his actual losses. . . .

We then concluded that the jury instruction given in that case was correct. The jury instruction stated:

> Conversion exists where one exerts wrongful dominion over another's personal property or wrongful interference with the owner's dominion. The act constituting "conversion" must be an intentional act, but it does not require wrongful intent and is not excused by care, good faith, or lack of knowledge. Conversion does not require a manual taking. Where one makes an unjustified claim of title to personal property or asserts an unfounded lien to said property which causes actual interference with the owner's rights of possession, a conversion exists.[16]

Additionally, citing Bader, this court stated in Evans v. Dean Witter Reynolds, Inc.[17] that whether a conversion occurred is generally a question of fact for the jury.

Although Tomac claims that Knox did not present any evidence of its intentional or negligent disposal of his tools, if a bailment between Knox and Tomac is shown to have been created before the fire, then a presumption of liability would arise. Tomac would have the burden of going forward with evidence to show that the loss of the tools resulted

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[16]Id. at 357 n.1, 609 P.2d at 317 n.1.

[17]116 Nev. at 606, 5 P.3d at 1048.

through no negligence or conversion on its part.[18] With respect to the negligence claim, the degree of care to be applied would depend on the type of bailment created.[19]

We conclude that genuine issues of material fact remain with respect to Knox's claims against Tomac. Consequently, summary judgment should not have been granted to Tomac, or to Fidelity and Reel on Tomac's third-party indemnity complaint.[20] Accordingly, we reverse the summary judgment and remand this matter to the district court for further proceedings consistent with this order.

It is so ORDERED.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

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[18]See Gaudin Motor Co. v. Wodarek, 76 Nev. 415, 417, 356 P.2d 638, 639 (1960).

[19]See supra note 7.

[20]See Medallion Dev. v. Converse Consultants, 113 Nev. 27, 33, 930 P.2d 115, 119 (1997).

cc: Hon. Brent T. Adams, District Judge
Roger Thomas Knox
Bennion & Clayson
Georgeson Thompson & Angaran, Chtd.
Hawkins Folsom & Muir
Washoe District Court Clerk