

293 A.D.2d 273
Supreme Court, Appellate Division, First
Department, New York.

GENERALE BANK, Plaintiff–Appellant,
v.
BELL SECURITY, INC., Defendant–Respondent.
[And a Third–Party Action].

April 4, 2002.

Synopsis

Creditor which hired security service to guard warehouse where debtor's collateral was stored brought breach of contract action against the service after much of the collateral was removed. The Supreme Court, New York County, [Donna Mills](#) and [Sheila Abdus-Salaam, JJ.](#), entered summary judgment in favor of security service, and creditor appealed. The Supreme Court, Appellate Division, held that: (1) removal of collateral from warehouse established security service's prima facie liability, and (2) extent of the services that creditor engaged security service to provide and whether such services encompassed the removal of items from warehouse by means of access other than the front door were questions of fact that precluded summary judgment.

Reversed.

West Headnotes (4)

- ^[1] **Detectives and Security Guards**
🔑 Authority, duty, and liability of private
detectives and security providers

Removal of collateral from warehouse that creditor hired security service to guard after obtaining temporary restraining order preventing debtor from removing its inventory from warehouse established security service's prima facie liability to creditor for breach of contract, even if actions of third parties caused the collateral's removal.

[1 Cases that cite this headnote](#)

- ^[2] **Judgment**
🔑 Contract cases in general

Extent of the services that creditor engaged security service to provide and whether such services encompassed the removal of items from warehouse by means of access other than the front door were questions of fact that precluded summary judgment in creditor's action against service for breach of contract to guard warehouse and prevent removal of debtor's collateral.

[1 Cases that cite this headnote](#)

- ^[3] **Damages**
🔑 Reparation by wrongdoer

Amount of creditor's settlement with debtor in action on debt represented set off against creditor's loss in its breach of contract action against security service, which allegedly allowed removal of collateral from warehouse that creditor had hired service to guard.

[Cases that cite this headnote](#)

- ^[4] **Guaranty**
🔑 Release or loss of other securities
Secured Transactions
🔑 Disposition of collateral

Impairment of collateral subjects a creditor or guarantor to greater liability.

[Cases that cite this headnote](#)

Attorneys and Law Firms

**199 [Mark H. Moore](#), for Plaintiff-Appellant.

Deborah DelSordo, for Defendant-Respondent.

MAZZARELLI, J.P., ANDRIAS, WALLACH, RUBIN and MARLOW, JJ.

Opinion

*273 Order, Supreme Court, New York County (Donna Mills, J.), entered on or about January 19, 2001, which granted defendant's motion to renew a prior order of the same court (Sheila Abdus Salaam, J.), denying defendant's motion for summary *274 judgment and, upon renewal, granted defendant's motion and dismissed the complaint, unanimously reversed, on the law, with costs, the motion denied and the complaint reinstated.

Plaintiff Generale Bank is the creditor of third-party defendant Easy Trading, N.V., which owes some \$6.6 million secured by a lien on its inventory stored at a Brooklyn warehouse. On July 19, 1994, plaintiff obtained a temporary restraining order preventing Easy Trading or its agents from removing, transferring or otherwise disposing of any inventory subject to the lien.

That same day, counsel for plaintiff sent a letter by facsimile transmission, confirming that "Bell Security will have two security guards watch the warehouse * * * If anyone attempts to remove any inventory from the warehouse, your guards should show them the order of the court" and inform counsel or plaintiff's vice president of the incident. Plaintiff's attorney included a copy of the temporary restraining order in the transmission. The address listed in the order transposed two digits in the Street number of the warehouse. However, both the letter and the cover sheet state the correct address. Moreover, it is clear that defendant actually did guard the warehouse located at 791 Kent Avenue (not 719) because plaintiff was billed some \$60,000 for security services provided to that address over a period of five months.

On November 17, 1994, having obtained an order of seizure, plaintiff bank entered into a stipulation with the debtor permitting the bank to sell the collateral and apply the proceeds to the debt. However, **200 when plaintiff's vice president gained access to the warehouse, he discovered that "more than three quarters of the inventory had been removed." Plaintiff thereafter settled its action against Easy Trading for \$2.82 million, of which approximately \$450,000 remains unpaid.

Plaintiff commenced this action in February 1996. In October 1999, defendant brought a motion for an order "[p]ursuant to CPLR 3212, granting summary judgment dismissing the summons and complaint." The moving

papers contended that plaintiff could not prove that it sustained any damage as the result of defendant's malfeasance because plaintiff could offer only speculation regarding who stole the inventory and how the items—some 44,000 pieces of crystal and china—were removed from the warehouse. This motion was denied by the first order (Sheila Abdus Salaam, J.), entered on or about March 28, 2000. The court found issues of fact as to whether defendant was hired to prevent removal of items from the warehouse or merely to guard the front door, as defendant alleges.

*275 In September 2000, defendant submitted its second motion, denominated a motion to dismiss pursuant to CPLR 3211, which also sought renewal of the former CPLR 3212 motion. On September 18, 2000, the parties appeared before Justice Abdus-Salaam, who was engaged in the trial of another matter and who referred this and all other motions to the Trial Justice. It is apparent that trial began almost immediately because defendant states, "On September 21, 2000, following several days of testimony," the court undertook "to review the motions and determine whether there was a viable cause of action." The court's review culminated in the order appealed from, dismissing the complaint on the ground that "the lack of specificity in the 'letter agreement' and the misstatement of the location of the property in the Temporary Restraining Order annexed to this letter does not create a contract between the plaintiff Generale Bank and the defendant Bell Security." The court concluded, "Without a contractual relationship, or the meeting of the minds, the plaintiff's action fails."

[1] [2] It is abundantly clear that defendant provided security services to plaintiff, that property was removed from the premises secured by defendant and that plaintiff was damaged by the loss of its collateral. Under these facts, having actually undertaken performance, defendant would be prima facie liable to plaintiff for breach of contract even in the absence of a writing. The intervention of third parties is immaterial because such a breach of security is the immediate consequence of the lapse in security with which defendant is charged (*McKinnon v. Bell Security*, 268 A.D.2d 220, 700 N.Y.S.2d 469). The extent of the security services defendant was engaged to provide and whether such services encompassed the removal of items by means of access other than the front door merely present questions of fact for resolution at trial.

[3] [4] That plaintiff settled its action against the debtor is material only insofar as the amount of the settlement represents a set off against the total amount of plaintiff's loss. It is accepted that impairment of collateral subjects a

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creditor or guarantor to greater liability (see, *Executive Bank v. Tighe*, 54 N.Y.2d 330, 337, 445 N.Y.S.2d 425, 429 N.E.2d 1054). In this case, plaintiff has been able to recover less than half of the amount owed by the debtor, and the unavailability of collateral securing the debt represents a significant monetary loss.

All Citations

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