Mendler v. Winterland Productions, Ltd.
N.D.Cal.,1998.
Only the Westlaw citation is currently available.
United States District Court, N.D. California.
Jeffrey Hunter MENDLER, Plaintiff,
v.
WINTERLAND PRODUCTIONS, LTD., et al.,
Defendants.
**No. C96-2624 TEH.**

May 6, 1998.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER TRIAL

HENDERSON, J.

***1** The above-captioned matter was tried to the Court on May 27-28, 1997. The suit arises from two licensing agreements between Plaintiff Jeffrey Hunter Mendler ("Hunter"), a professional photographer, and Defendant Winterland Productions, Ltd. ("Winterland"), a manufacturer of screen-printed apparel. On December 18, 1997, this Court, after carefully reviewing the testimony and evidence admitted, issued a Notice of Intended Ruling, and referred the parties to a settlement conference on the question of damages under the contract claim. Subsequent efforts to settle this matter have proved unsuccessful. Accordingly, and good cause appearing, the Court hereby converts its intended ruling into the ruling of the Court and resolves the remaining issue regarding damages under the contract claim.

*FINDINGS OF FACT AND CONCLUSIONS OF LAW*

*Copyright Claim*

The Court finds for Winterland on this claim on the ground that Winterland's use of the slides was within the scope of the license agreements. *S.O.S., Inc. v. Payday, Inc.,* 886 F.2d 1081, 1085 (9th Cir.1989). The Court finds for defendant San Diego Yacht Club ("SDYC") on the same ground as above in addition to which there is no evidence from which this Court could find that SDYC was liable for any alleged conduct by Winterland.

*Conversion Claim*

The Court finds for Winterland on the ground that plaintiff has not proven that Winterland converted the slides by failing to return them. While the Court did not find Winterland's testimony-that it returned, or attempted to return, the slides-to be at all credible, at most, plaintiff has demonstrated that the slides were negligently lost or misplaced. This sort of negligence, however, is insufficient to demonstrate conversion under prevailing and long-established law. *See e.g. Gonzales v. Personal Storage, Inc.,* 56 Cal.App.4th 464, 476-77, 65 Cal.Rptr.2d 473 (1997) (negligence in caring for goods does not result in conversion); *George v. Bekins Van & Storage Co.,* 33 Cal.2d 834, 838, 205 P.2d 1037 (1949) (no conversion occurs if redelivery of goods is not possible because they been lost or destroyed because of negligence); *Emmert v. United Bank & Trust Co. of California,* 14 Cal.App.2d 1, 57 P.2d 963 (1936) ("The general rule is that neither negligence, active or passive, nor a breach of contract, even though it result in injury to, or loss of, specific property, constitutes a conversion"). The Court also finds in favor of SDYC on the ground that plaintiff failed to present any evidence upon which such liability could be established.

*Negligence Claim*

Plaintiff's counsel conceded at trial that plaintiff's negligence claim is barred by the applicable California statute of limitations. Accordingly, the Court finds for defendants on this claim.

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*Contract Claim*

The Court finds that plaintiff has satisfactorily established, by a preponderance of the evidence, that this claim is not barred by the statute of limitations and that Winterland breached the contract by failing to perform that part of the agreement which states that "The photographs will remain the property of Jeffrey Hunter and will be returned by Winterland Productions." As noted above, the Court did not find credible the testimony offered by Winterland to establish that the slides had been returned to Hunter. Accordingly, Winterland breached the contract by failing to return the slides. The Court finds for SDYC on this claim on the ground that plaintiff failed to present *any* evidence upon which liability could be established.

***2** With respect to the question of damages against Winterland for breach of contract, the Court previously observed that the trial record in this area is far from solid and clearly does not provide sufficient foundation from which this Court could award a value of $1,500 per slide. Having carefully reviewed the record, the Court now concludes that plaintiff has failed to provide sufficient admissible evidence to support a competent award of damages; thus, the Court is limited to awarding nominal damages in this case.

It is well established that the burden of proof is on the plaintiff to prove his damages with reasonable certainty, and that the extent of such damage must be proved as a fact. *Carpenter Foundation v. Oakes,* 26 Cal.App.3d 784, 799-800, 103 Cal.Rptr. 368 (1971) ("It is elementary that a party claiming damage must prove that he has suffered damage and prove the elements thereof with reasonable certainty"); *Fields v. Riley,* 1 Cal.App.3d 308, 313, 81 Cal.Rptr. 671 (1969). *See also Avina v. Spurlock,* 28 Cal.App.3d 1086, 1089, 105 Cal.Rptr. 198 (1972) ("award of damages, as in other findings, must rest upon substantial legal evidence"). This is not to say that the amount of damages need be calculated with absolute certainty. Rather, the law simply requires that some *reasonable basis of computation* be used, even if the result reached is an approximation. *GHK Associates v. Mayer Group, Inc.,* 224 Cal.App.3d 856, 873, 274 Cal.Rptr. 168 (1990).

Here, plaintiff contends that he is entitled to recover $1,500 in damages for each slide not returned by Winterland. In support of this contention, plaintiff testified that he has known other photographers who had their slides lost and they "never got less than $1500, in fact, usually more per image." Tr. at 83 He cites one specific example in which a photographer received $85,000 for 36 photographs. *Id.* He also testified that he believes that the slides are worth $1,500 and that he has "studied materials regarding valuation of lost slides" and that study is part of the reason he formed this opinion. Tr. at 81, 85.

The Court is not satisfied that this testimony provides substantial legal evidence from which this Court can determine that the value of the lost slides *in this case* was $1,500. The valuation of lost slides and photographs depends on a number of factors including the established prestige and earning level of the photographer, the uniqueness of the subject matter and the technical excellence of the slides. Plaintiff's testimony regarding what another photographer recovered in another case does not establish a reasonable basis for determining plaintiff's damages here. This leaves the Court with plaintiff's own self-serving and rather vague and general testimony regarding his own lay opinion of the value of his slides. The Court does not have sufficient confidence in this testimony to find that it provides a reasonable basis for computing the value of each slide.FN1

FN1. Plaintiff also asked the Court to take Judicial Notice of an article entitled "Valuation of Lost or Damaged Transparencies" by Michael D. Remer, an attorney for a magazine photographers society. However, it is clear that plaintiff does not simply seek to have the Court take judicial notice of the fact that the article was pub-

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lished; rather, he seeks to have the Court consider the contents of the article as evidence. *See* Pl's Response to Defendants' Objections to Request for Judicial Notice ("The opinions contained [in the article] are evidence .... and as such are subject to as much evidentiary weight as the Court chooses to assign"). However, the article, which is clearly hearsay, was not admitted into evidence and it can not properly be admitted through the back door by invoking the doctrine of Judicial Notice. Accordingly, plaintiff's Request for Judicial Notice is denied.

Moreover, the cases discussed in this article do not assist plaintiff's position. In *Girard Studio Group, Ltd. v. Young & Rubicam, Inc.,* 147 A.D.2d 357, 536 N.Y.S.2d 790 (1989), two experts testified as to the value of the slides at issue. In *Baker v. International Record Syndicate, Inc.,* 812 S.W.2d 53 (Tex.App.1991) and *Sharp Shooters v. McCafrey & McCall,* C88-1102 (D.S.D.Fla1989) the court simply enforced liquidated damages clauses. And in *Rattner v. Geo Magazine* (Sup.Ct.N.Y.1987) and *Hoffman v. Portogallo* (Sup.Ct.N.Y.1987) the courts found that the valuation of a transparency depended on various factors, regarding which the plaintiffs had clearly introduced evidence. In *Hoffman,* the plaintiff was also qualified as an expert witness.

When proof of actual damages fails, "the court can award no more than nominal damages." *Avina,* 28 Cal.App.2d at 1088, 82 P.2d 209. Such damages should be limited to one dollar or less. *Id.* at 1088-89, 82 P.2d 209 ($100 is a substantial recovery and does not come within the definition of nominal damages). Accordingly, plaintiff shall be awarded $1.00 in nominal damages on his claim for breach of contract, *Id.* at 1088, 82 P.2d 209 (nominal damages appropriate when there has been actual injury but extent of damages cannot be determined from the evidence presented).

*CONCLUSION*

***3** Plaintiff has prevailed on his claim for breach of contract against Winterland but is entitled to recover no more than $1.00 in nominal damages due to the failure of proof on the question of damages. Defendants are entitled to judgment in their favor on all remaining claims.

**IS IS SO ORDERED.**

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Not Reported in F.Supp., 1998 WL 241599 (N.D.Cal.)

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