COLORADO COURT OF APPEALS

DATE FILED: June 6, 2019
CASE NUMBER: 2018CA94

Court of Appeals No. 18CA0094
City and County of Denver District Court No. 16CV33113
Honorable Jennifer Torrington, Judge

Orion Air Group Holdings, LLC,

Plaintiff-Appellee,

v.

Arapahoe Airport Joint Venture #1 and Arapahoe Airplaza JV #1,

Defendants-Appellants.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE TOW
Richman and Harris, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced June 6, 2019

Godfrey Johnson PC, Brett Godfrey, Aaron Bakken, Denver, Colorado, for Plaintiff-Appellee

Lewis Roca Rothgerber Christie LLP, Frederick J. Baumann, Kenneth F. Rossman, Denver, Colorado, for Defendants-Appellants

¶ 1 Defendants, Arapahoe Airport Joint Venture #1 and Arapahoe Airplaza JV #1 (collectively, the Arapahoe Defendants), appeal the trial court's denial of their motion for directed verdict, the entry of judgment following a jury verdict in favor of plaintiff, Orion Air Group Holdings, LLC (Orion), and the trial court's denial of their motion for judgment notwithstanding the verdict. We reverse.

I. Background

¶ 2 Orion brought this case after a hangar it leased from the Arapahoe Defendants partially collapsed and damaged a number of aircraft parts. Orion, along with three other parties who have since dismissed their claims, brought a premises liability claim asserting that the Arapahoe Defendants' failure to properly maintain the hangar led to its collapse. The plaintiffs also made separate claims against another defendant, The Travelers Indemnity Company, that were settled prior to trial.

¶ 3 During discovery, the Arapahoe Defendants filed a motion for determination of law asserting that Orion did not have standing to recover damages. Specifically, the Arapahoe Defendants alleged that Orion did not have an ownership interest in the parts, which

were instead owned by Tempus Aircraft Sales and Service LLC (TASS) — a company under common ownership with Orion. The trial court denied the motion, ruling in part that there were material allegations sufficient to support a finding that Orion suffered an injury in fact because it remained liable to TASS as a bailee of the parts.[1]

¶ 4 At trial, it was undisputed that Orion held the lease to the hangar, and that TASS stored the parts there. Jack Gulbin, who owns both Orion and TASS, testified that Orion took responsibility for the safe storage of the parts. However, during Orion's case-in-chief, evidence was introduced showing: (1) that TASS, not Orion, owned the parts; (2) that TASS had keys to the hangar; (3) that TASS controlled the physical space inside the hangar; and (4) that TASS independently restricted access to the parts within the hangar.

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[1] We note that there is no written agreement establishing either a bailment or Orion's liability to TASS for the damage caused by the hangar collapse. Instead, Orion asserts that "if [it] recovers" from this lawsuit, it will voluntarily reimburse TASS for the loss. At oral argument, Orion's counsel represented that the liability is now a default judgment against Orion in TASS's bankruptcy claim, but no such judgment is a part of the record before us.

¶ 5 At the close of Orion's case-in-chief, the Arapahoe Defendants moved for a directed verdict, once again asserting that Orion lacked standing to recover damages for harm to parts owned by TASS. In its response, Orion reiterated its claim that it was a bailee of the parts and therefore liable to TASS for the damage caused by the hangar collapse. The trial court denied the motion, ruling that there were facts in the record that, when interpreted in the light most favorable to the plaintiff, were sufficient to support a finding that a bailment existed.

¶ 6 At the conclusion of the trial, the parties agreed to include the following definition of bailment in jury instructions: "A bailment is a delivery of personal property by one person to another for a specific purpose with understanding that the property is to be returned when the purpose is accomplished." The parties also initially agreed to include a separate question for the jury asking whether Orion was a bailee of TASS. Orion subsequently questioned whether "that's really a jury question in view of the undisputed testimony that the parts were stored in the hangar." The Arapahoe Defendants again asserted that delivery, control, and purpose were

in dispute. However, in the following exchange, the trial court agreed that the facts demonstrated a bailment as a matter of law:

> Mr. Godfrey: [The parts] were delivered to Orion.
>
> The Court: Because they're in the hangar.
>
> Mr. Godfrey: They were clearly put . . . in the hangar. That's a delivery.
>
> The Court: Yes.
>
> Mr. Godfrey: The hangar is ours, therefore they're in our physical custody.
>
> The Court: I think that's right. [The question regarding bailment] comes out. Okay.

¶ 7 After the jury returned a verdict in favor of Orion, awarding $2,929,025.37 in damages, the Arapahoe Defendants moved for judgment notwithstanding the verdict. The trial court did not address the motion, and it was deemed denied. The Arapahoe Defendants now appeal.

II. Bailment

¶ 8 The Arapahoe Defendants argue that the trial court erred in denying their motion for a directed verdict. Specifically, they assert that Orion failed to prove that it had suffered any injury because it was not the owner of the damaged parts and failed to introduce

evidence that it had possession and control of those parts as a bailee. We agree.

A. Standard of Review

¶ 9 We review a trial court's rulings on motions for directed verdict and judgment notwithstanding the verdict de novo. *Vaccaro v. Am. Family Ins. Grp.*, 2012 COA 9M, ¶ 40. A directed verdict is appropriate only if, when viewing the facts in the light most favorable to the non-moving party, no reasonable jury could find in favor of the non-moving party. *MDM Grp. Assocs., Inc. v. CX Reinsurance Co.*, 165 P.3d 882, 885 (Colo. App. 2007).

B. Applicable Law

¶ 10 "A bailment is a delivery of personal property by one person to another in trust for a specific purpose, with an express or implied contract that the property will be returned or accounted for when the specific purpose has been accomplished or when the bailor reclaims the property." *Christensen v. Hoover*, 643 P.2d 525, 528-29 (Colo. 1982). In order to create a bailment, possession and control over the subject property must pass to the bailee. *Id.* at 529. "However, a bailment does not arise in those situations where the owner of the property retains control over his property." *Simons*

v. First Nat'l Bank of Denver, 30 Colo. App. 260, 262, 491 P.2d 602, 603 (1971).

C. Application

¶ 11 Orion's argument, both in the trial court and on appeal, is that because the aircraft parts were stored in the hangar it leased, it was a bailee of the parts. We are unconvinced.

¶ 12 Nothing in the record indicates that TASS ever relinquished control over the aircraft parts stored in the hangar. While it is undisputed that Orion "was on the lease," it is similarly undisputed that TASS employees had unimpeded access to the hangar and exercised control over the parts and inventory in the space. Indeed, TASS had keys to the hangar and independently restricted access to the parts stored there.

¶ 13 Nevertheless, Orion argues that "TASS operated inside [the] hangar at the pleasure of Orion," apparently suggesting that it could have chosen to exclude TASS from the space. Nothing in the record suggests that TASS's decision to store parts and conduct operations within the hangar contemplated granting Orion the

authority to withhold access to the parts.[2] After all, TASS employees possessed keys to the hangar. Further, any decision to deny TASS access would be inconsistent with the purpose of the claimed bailment — to secure the safe storage of the parts for TASS's continued use.

¶ 14 Orion also argues, without citing to authority, that the rule precluding the creation of a bailment relationship where the owner retains control of the property is meant to "protect the bailee from a claim by the bailor" and not, as applies here, to insulate a third party from liability. We are unconvinced. The rule does not protect bailees, but rather establishes that where the property owner retains control of the property, no bailment is created. *Simons*, 30 Colo. App. at 262, 491 P.2d at 603. Here, Orion's only claimed injury is derived from its status as a bailee of the parts. If no bailment was created, its claim must fail.

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[2] We also note that where a bailor is entitled to immediate possession of bailed property, he or she may be privileged "to enter land in the possession of the [bailee], for the purpose of taking possession of the thing and removing it from the land." Restatement (Second) of Torts § 183 (Am. Law Inst. 1965).

¶ 15 Because there is no dispute that TASS retained control of the parts stored within the hangar, no reasonable jury could have found that a bailment was created. Accordingly, the trial court erred in denying the Arapahoe Defendants' motion for a directed verdict.

III. Conclusion

¶ 16 The judgment is reversed, and the case is remanded for entry of judgment in favor of the Arapahoe Defendants.

JUDGE RICHMAN and JUDGE HARRIS concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

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Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Steven L. Bernard
Chief Judge

DATED: December 27, 2018

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