STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: February 26, 2014)

ROSARIO TURDO	:	
	:	
V.	:	**C.A. No. WC-2011-0466**
	:	
JAMES MAIN	:	

DECISION

K. RODGERS, J. This case came before the Court, sitting without a jury, on Plaintiff Rosario Turdo's (Turdo or Plaintiff) Complaint for certain monies owed by Defendant James Main (Main or Defendant), during the course of their now-dissolved relationship. Defendant's Counterclaim is also before this Court alleging that Plaintiff improperly repossessed a certain vehicle used by Defendant and tortiously converted it to her own use.

Jurisdiction is pursuant to G.L. 1956 § 8-2-13. For the reasons set forth herein, judgment shall enter for Defendant.

I

Findings of Fact

Having reviewed the evidence presented by both parties, the Court makes the following findings of fact.

The parties were involved in a romantic relationship between 2007 and 2010, living together for a portion of that time at Plaintiff's residence in the Ashaway section of Hopkinton, Rhode Island. Plaintiff owns several parcels of real estate and an unidentified bar. Defendant is presently a commercial fisherman but had ventured into construction and roofing fields in the

past. During the course of their relationship, Plaintiff loaned Defendant sums of money and documented the repayment of those loans in handwritten ledgers.

In June 2009, Defendant was residing with his cousin in Westerly. At that time, Plaintiff owned a GMC Sierra pickup truck that she was intending to sell. Defendant offered to purchase the pickup truck from her to be used as a work truck for his new construction and roofing business. This offer culminated in a handwritten contract prepared by Plaintiff. That contract reads in pertinent part:

> "Agreement between Rose Turdo & James Main
> Ref: 2004 GMC Sierra 4 x 4 Black Pickup
> . . . .
> "Rose Turdo to remain owner until final payment received by 12-1-09 - $500 received as down payment 6-5-09. $150.00 per week to be paid each Friday until $11,000 total received – First payment due 6-12-09.
> "All repairs - parts – maintenance – expenses are the responsibility of James Main –
> "Truck registration & Insurance & Title to remain under Rose Turdo with right to use. Upon default the truck remains the property of Rose Turdo without any reimbursement.
> "Title to be released with Lean [sic] until previous debt of $10,000 paid in full by 7-1-2010." Pl.'s Ex. 1.

Defendant timely made the $500 down payment. Defendant understood that Plaintiff had previously paid the insurance due on the pickup truck for one year as one of the reasons why her name would continue to be on the title, registration and insurance. Defendant agreed with the terms of the contract, and both parties executed the contract on June 5, 2009. In large part, Defendant complied with the payment terms of $150 per week. Defendant also had two oil changes and one tune-up performed on the pickup truck.

In mid-December 2009, Plaintiff presented Defendant with a handwritten ledger purporting to document all the amounts Defendant owed to Plaintiff and all the payments made thereon. Def.'s Ex. B. That ledger reveals that through December 11, 2009, Defendant was

current in payments due pursuant to the June 5, 2009 agreement. Id. The ledger also reveals that Plaintiff included household expenses as additional debts that Defendant owed. Notably, the parties had never agreed that Defendant would be responsible for Plaintiff's household expenses, nor was Defendant even living at Plaintiff's residence at the time.

When Plaintiff presented Defendant with the handwritten ledger, Plaintiff made specific demands of Defendant. Plaintiff informed Defendant that she would repossess the pickup truck if Defendant did not pay the lump sum of $2500 to be paid towards the pickup truck and that future payments towards the pickup truck would increase from $150 weekly to $200 weekly. According to Defendant, this lump sum was needed for Plaintiff to satisfy an obligation related to her bar business.

Plaintiff presented Defendant with an "agreement" dated December 17, 2009, purportedly to reflect these demands, which Defendant refused to execute. This December 17, 2009 "agreement" is the basis of Plaintiff's Complaint, see Pl.'s Complaint, but was never introduced at trial. Although Defendant did not execute any written agreement on December 17, 2009, he did withdraw $1600 of his own funds and paid Plaintiff that amount in cash. The parties also agreed at that time, at Plaintiff's suggestion, that an $800 debt due from Ed Alore to Defendant would be paid directly to Plaintiff. Thereafter, Defendant made weekly cash payments to Plaintiff in the amount of $200.

Plaintiff ceased her recordings on the ledger on or about December 17, 2009. See Def.'s Ex. B. Defendant, however, created his own ledger based upon Plaintiff's recorded payments through December 17, 2009, and also included, thereafter, the weekly payments he made through February 22, 2010. Def.'s Ex. C. The credible testimony, supported by the documentary evidence of record, demonstrates that Defendant was current on the debt owed on the pickup

truck as of February 22, 2010, and the balance due on the June 5, 2009 agreement as of that date was $10,700. Id.

Notwithstanding the increased payments Defendant made and the good standing that he was in regarding the June 5, 2009 loan agreement, on February 21, 2010, Plaintiff demanded that Defendant return the pickup truck to her or she would report it to the police as being stolen.[1] This demand took place by way of a telephone call that Defendant received while he was at the home of his stepmother, Victoria Bentley (Bentley), with whom Defendant was then residing. Bentley was in close proximity to Defendant while he spoke to Plaintiff on the telephone. Bentley thereafter offered to Defendant to pay off the loan due to Plaintiff, which Defendant in turn conveyed to Plaintiff. Plaintiff rejected that offer and demanded the pickup truck be returned to her. On that same day, Plaintiff reported to the Westerly Police Department that Defendant, her ex-boyfriend, refused to return the pickup truck to her after she no longer permitted him to use it. Def.'s Ex. A. The civil complaint Plaintiff made with the Westerly Police Department makes no mention that Defendant had been, and continued to, pay Plaintiff on the loan to purchase the pickup truck. See id.

Defendant ultimately returned the pickup truck to Plaintiff on or about February 26, 2010. Plaintiff thereafter sold the pickup truck in or about September 2010, for the sum of $10,000.

On July 12, 2011, Plaintiff filed a one-count Complaint alleging breach of contract against Defendant relating to the December 17, 2009 "agreement." Plaintiff claims Defendant

[1] Although not objected to, Plaintiff offered testimony that she was aware that Defendant was on probation at the time she threatened to report the pickup truck stolen. No evidence was ever introduced concerning the veracity of this testimony or the crime for which Defendant was allegedly sentenced to probation. Nonetheless, the Court infers from this testimony that Plaintiff was well aware that she was threatening to expose Defendant to additional legal difficulties.

owes her $17,840. Defendant responded sixteen days later denying the allegations and asserting a Counterclaim for $12,050 "for repossed [sic] 2004 GMC and wages." Defendant amended his Answer on August 31, 2013, again denying the allegations and seeking $12,000, representing the value of the vehicle and payments submitted under the June 5, 2009 agreement.

The matter came on for hearing before this Court, without the intervention of a jury, on August 27, 2013.

II

Presentation of Witnesses

Plaintiff and Defendant each testified, as did Bentley.

Plaintiff presented to the Court as angry and vindictive. She offered no sentimental or favorable impression of the parties' past relationship. Her spiteful testimony offered insight into how she viewed the parties' relationship: Defendant continuously borrowing large sums of money from Plaintiff; Defendant's extended family taking over her residence when visiting from out of state; and Defendant being incapable of properly using and maintaining the pickup truck. While it is not uncommon to observe some negative feelings between litigants, the disgust expressed by Plaintiff about Defendant leaves the Court guessing what redeeming qualities Defendant had that attracted Plaintiff to him in the first place. Nonetheless, the outright distaste Plaintiff presently has for Defendant is best exemplified by her adamant denial that they were ever engaged to be married, a fact which Defendant credibly disputes.

Plaintiff's testimony as to debts incurred and payments received by Defendant lacked all credibility. Plaintiff testified that she maintained a handwritten ledger in which she recorded expenses, including the undisputed loans amounting to $21,000, as well as other expenses—housing, loans to Defendant's children, and other miscellaneous charges—but provided no

evidence of agreements which would support such debts. However, Plaintiff's own testimony attempted to undercut her handwritten ledger. For instance, Plaintiff at first testified that Defendant failed to make certain payments that she recorded in her handwritten ledger, specifically payments on December 4, 2009 in the amount of $500 and on December 11, 2009 in the amount of $150. When pressed on cross-examination, however, Plaintiff recanted this testimony and admitted to receipt of the above-mentioned payments. Plaintiff further testified that she ceased recording payments in the ledger on or about December 11, 2009, and received no further payments from Defendant after that time—testimony flatly contradicted by Plaintiff's later testimony indicating that she received $1,600 from Defendant on December 17, 2009. With regard to the December 17, 2009 entries in her handwritten ledger, she incredibly asserted that the entries were made by someone other than her and that, in any event, the amount paid on that day was not for the pickup truck but was for recent household expenses to allow Defendant's family to stay at her house for a visit.

Defendant, on the other hand, presented as calm, rational, and genuinely hurt by the tone and vitriol of Plaintiff's testimony. He offered testimony on the amounts and manner in which he made payments to Plaintiff under the terms of the June 5, 2009 agreement as well as after her December 17, 2009 demand for an additional lump sum and additional weekly payments, all of which was substantiated in Plaintiff's handwritten ledger up to December 17, 2009, and in Defendant's ledger. See Def.'s Exs. B, C. He even acknowledged that the day after Plaintiff's February 21, 2010 demand that he return the pickup truck and the complaint she filed with the Westerly Police Department, he and Plaintiff remained a couple and that he paid her $200 in person. See Def.'s Ex. C. When questioned about the parties' engagement, Defendant recounted the date they were engaged, October 20, 2009, and that she returned the engagement ring to him

in January 2010, subsequent to a visit to Rhode Island by his parents, who stayed with Plaintiff for no more than five days. Defendant appeared genuinely crestfallen during this testimony. In sum, Defendant never dismissed the affection he had for Plaintiff, he presented as a credible witness, and Plaintiff simply did not.

Bentley also offered credible testimony, albeit limited in its scope. Bentley confirmed that she offered to pay off Defendant's loan to Plaintiff, notwithstanding that no specific pay off amount was conveyed to her at that time. Bentley's offer to relieve Defendant's debt was unsurprising given the Plaintiff's unreasonable demands at a time when Defendant was current on his payments due to Plaintiff and Bentley's financial ability to assist her stepson, as evidenced by Bentley ultimately purchasing another truck for Defendant for $17,000 in cash.

III

Standard of Review

Rule 52(a) of the Superior Court Rules of Civil Procedure provides that, "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon." Super. R. Civ. P. 52(a). In a non-jury trial, "'the trial justice sits as a trier of fact as well as law.'" Parella v. Montalbano, 899 A.2d 1226, 1239 (R.I. 2006) (quoting Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984)). "'Consequently, he [or she] weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences.'" Id. (quoting Hood, 478 A.2d at 184). It is well established that "assigning credibility to witnesses presented at trial is the function of the trial justice, who has the advantage of seeing and hearing the witnesses testify in court." McBurney v. Roszkowski, 875 A.2d 428, 436 (R.I. 2005) (citations omitted). The trial justice may also "'draw inferences from the testimony of witnesses, and such inferences, if reasonable, are entitled on review to the same

weight as other factual determinations.'" DeSimone Elec., Inc. v. CMG, Inc., 901 A.2d 613, 621 (R.I. 2006) (quoting Walton v. Baird, 433 A.2d 963, 964 (R.I. 1981)).

Furthermore, "[w]hen rendering a decision in a non-jury trial, a trial justice 'need not engage in extensive analysis and discussion of all evidence. Even brief findings and conclusions are sufficient if they address and resolve the controlling and essential factual issues in the case.'" Parella, 899 A.2d at 1239 (quoting Donnelly v. Cowsill, 716 A.2d 742, 747 (R.I. 1998) (citation omitted)). The trial justice need not "'categorically accept or reject each piece of evidence in his [or her] decision for [the Supreme] Court to uphold it because implicit in the trial justices [sic] decision are sufficient findings of fact to support his [or her] rulings.'" Notarantonio v. Notarantonio, 941 A.2d 138, 147 (R.I. 2008) (quoting Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 102 (R.I. 2006)).

IV

Analysis

Whether a trial is conducted before a jury or before this Court, the law imposes upon each party the obligation of proving that which it claims; in other words, he who advances a proposition has the burden of sustaining its validity. See Gen. Acc. Ins. Co. of Am. v. Am. Nat'l Fireproofing, Inc., 716 A.2d 751, 757 (R.I. 1998) ("[t]he burden of proof rests upon the party who asserts the affirmative of an issue and this burden never shifts []"). The law further requires each party to prove that which it asserts or claims by a fair preponderance of the evidence, or proof by the greater weight of the evidence. See Campbell v. Walsh-Kaiser Co., 72 R.I. 358, 359, 51 A.2d 530, 531 (1947) ("the person or party having the affirmative of a contested issue must prove that issue, as in any other civil case, by a fair preponderance of the evidence []"). In a civil action such as this, it is proper to find that a party has succeeded in carrying the burden of

proof on an issue if, after considering all the evidence in the case, the Court believes that what is sought to be proven on that issue is more likely true than not true. The party asserting a claim must prove each and every element of that claim by a preponderance of the evidence. See Campbell, 72 R.I. at 359, 51 A.2d at 531.

In determining the facts in this case, this Court considers the testimony from the witness stand and the documentary evidence that has been marked as full exhibits in this case. There were four exhibits marked as full exhibits in this case. See Pl.'s Ex. 1 and Def.'s Ex. A (marked in full by agreement); Def.'s Exs. B, C (marked in full without objection). No other exhibits were moved into evidence at trial and documents marked for identification are not considered by this Court in its Decision. Importantly, the Court also considers the credibility of the witnesses, which wholly lies in favor of Defendant. See Section II, supra.

A

Plaintiff's Claim for Breach of Contract

Plaintiff seeks relief from the December 17, 2009 agreement, which was never executed and was not presented to the Court as evidence.

"'A contract is an agreement which creates an obligation. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation.'" Lamoureaux v. Burrillville Racing Ass'n, 91 R.I. 94, 98, 161 A.2d 213, 215 (1960) (quoting 17 C.J.S. Contracts § 1, p. 310).

Here, the only agreement between the parties offered into evidence was the June 5, 2009 agreement for the truck. Furthermore, Defendant's credible testimony demonstrated that he refused to sign any agreement on December 17, 2009. Accordingly, and notwithstanding Plaintiff's failure to proffer the alleged agreement into evidence, Defendant's testimony reveals

that, as of December 17, 2009, there was no mutuality of agreement between the parties such as would create an enforceable contract.[2] Moreover, with regard to the June 5, 2009 agreement, the credible evidence demonstrates that Defendant was in good standing on this loan agreement as of February 21, 2010, the date of Plaintiff's demand to return the pickup truck, and through February 26, 2010, the date of repossession.

In sum, Plaintiff wholly failed to sustain her burden of proving a valid, enforceable agreement as of December 17, 2009, and. therefore, has no basis for her breach of contract action. As such, judgment shall enter for Defendant on Plaintiff's breach of contract claim.

B

Defendant's Counterclaim

Defendant asserts that Plaintiff wrongfully repossessed the pickup truck by way of threats of criminal prosecution. "'[T]he gravamen of an action for conversion lies in the defendant's taking the plaintiff's personalty without consent and exercising dominion over it inconsistent with the plaintiff's right to possession." DeChristofaro v. Machala, 685 A.2d 258, 262 (R.I. 1996) (quoting Fuscellaro v. Indus. Nat'l Corp., 117 R.I. 558, 560, 368 A.2d 1227, 1230 (1977)). The focus of the inquiry is "'whether [a] defendant has appropriated to his [or her] own use the chattel of another without the latter's permission and without legal right.'" Id. (quoting Terrien v. Joseph, 73 R.I. 112, 115, 53 A.2d 923, 925 (1947)). In order to sustain an action for conversion, a plaintiff must demonstrate an ownership or possessory interest in the property at the time of the conversion. Id. at 263 (citing Larson v. Dawson, 24 R.I. 317, 318, 53 A. 93, 94 (1902)).

[2] Plaintiff never argued that there was any modification of the terms of the June 5, 2009 agreement by which Defendant agreed to repay additional amounts included in Plaintiff's handwritten ledger, such as household expenses.

Here, Defendant alleges that Plaintiff wrongfully repossessed the truck and later sold it for $10,000. Pursuant to the June 5, 2009 loan agreement, Defendant was given the right to possess the truck, with title vesting once the amount was paid in full. See Pl.'s Ex. 1. Clearly, Defendant had a possessory interest in the pickup truck in February 2010. By contrast, Plaintiff's right to repossess the truck only accrued once Defendant defaulted. See id. At the time Plaintiff actually repossessed the truck on February 26, 2010, Defendant was current on his payments due under the June 5, 2009 agreement and was not in default. Thus, Plaintiff had no legal right to interfere with Defendant's possessory rights in the truck, yet did so in a manner that was designed to intimidate and harass Defendant. Plaintiff had threatened to, and did, report to the Westerly Police Department that Defendant was using the pickup truck without her consent and was determined to continue to dangle the sword of Damocles over Defendant's head by threatening further legal difficulties. Under these circumstances, Defendant's response thereto—turning the pickup truck back over to Plaintiff—cannot be viewed as having been voluntary. Accordingly, this Court finds that Plaintiff appropriated the pickup truck for her own use without Defendant's consent and without legal right. Defendant has established the tort of conversion and is entitled to damages.

In Rhode Island, the measure of damages for conversion is usually the value of the property at the time of the conversion, a matter which may be proved by evidence of market value. Jeffrey v. Am. Screw Co., 98 R.I. 286, 291, 201 A.2d 146, 150 (1964). Here, Defendant seeks $12,000, representing the value of the truck and payments made under the June 5, 2009 agreement. Defendant, however, has not presented any evidence of market value as of the date of repossession on February 26, 2010. Notably, Plaintiff has not contested that she received fair market value for the pickup truck in September 2010. Therefore, this Court views the sale price

Plaintiff received for the truck in September 2010 as an accurate indication of its market value, $10,000.

Finally, Defendant is not entitled to the payments made pursuant to the June 5, 2009 loan agreement because it would unjustly enrich Defendant at Plaintiff's expense beyond that which he has lost, i.e., the value of the truck at the time of repossession. Nor is Defendant entitled to an award of attorney's fees under G.L. 1956 § 9-1-45[3] as Defendant's action sounds in tort and not breach of contract as required under the statute. As such, judgment shall enter for Defendant in the amount of $10,000.

V

Conclusion

For the foregoing reasons, this Court finds that Plaintiff has failed to produce any evidence that an agreement between the parties was formed on December 17, 2009, or that Defendant breached any other agreement with Plaintiff. Accordingly, judgment shall enter for Defendant on Plaintiff's Complaint. Additionally, Defendant is entitled to judgment on Defendant's Counterclaim in the amount of $10,000 for Plaintiff's unlawful conversion of the pickup truck.

Counsel for Defendant shall prepare a judgment consistent with this Decision.

[3]G.L. 1956 § 9-1-45 reads in pertinent part, "The court may award a reasonable attorney's fee to the prevailing party in any civil action arising from a breach of contract [.]"

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Rosario Turdo v. James Main**
CASE NO:	**WC 11-0466**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**February 26, 2014**
JUSTICE/MAGISTRATE:	**Kristin E. Rodgers**
ATTORNEYS:	
For Plaintiff:	**Barbara Fontaine, Esq.**
For Defendant:	**George J. Bauerle, III, Esq.**