IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEY CORPORATE CAPITAL, INC., SUCCESSOR BY MERGER TO KEYCORP LEASING, INC.,	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
DAVID A. TILLEY,	:	No. 04-1652
PENNCO MACHINE, INC.,	:	
BOSTON MACHINERY, INC., and	:	
PENNCO MACHINE, LLC,	:	
Defendants.	:	

Stengel, J. **February 27, 2006**

MEMORANDUM

I. Background

In July 2002, defendant Pennco Machine, Inc. ("Pennco") received delivery of a piece of industrial equipment, a Hitachi Seiki Model HT40G-111 CNC Turning Center (the "equipment") from plaintiff Key Corporate Capital, Inc. ("Key"). In December 2002, Pennco found a buyer for the equipment - defendant Boston Machinery, Inc. ("Boston") - who was willing to pay $104,000. Pennco sought Key's permission to sell the equipment to defendant Boston, and Key agreed to the proposed transaction, contingent upon receipt of proceeds in the amount of $80,000.00. Pennco and Boston then settled on a price of $80,000.00, and Boston tendered payment, but Pennco never gave Key the money. Boston resold the equipment to Tecomet, who is not a party to this litigation. On January 7, 2004, defendant David A. Tilley ("Tilley"), principal of Pennco, entered into a

settlement agreement with Key, agreeing to pay Key the $80,000.00 in monthly installments beginning on January 31, 2004. Tilley, however, never made any payments.

Key filed this lawsuit on April 15, 2004. Key raises claims of conversion, fraud, and breach of contract against Pennco and Tilley, officer participation against Tilley, successor liability against defendant Pennco Machine, LLC, and conversion and replevin against Boston. On December 20, 2004, summary judgment was entered against defendants Tilley and Pennco for failure to remit $80,000.00 to Key.

With respect to the remaining conversion claim against Boston, Key states that Boston knew or should have known when it acquired the equipment that Pennco did not have and could not pass clear title to the equipment. Moreover, according to Key, Boston knew or should have known at the time that it resold the equipment that it did not have and could not pass clear title to the equipment. Key demands judgment against Boston in the amount of $80,000.00, plus interest and costs. Key and Boston have filed cross-motions for summary judgment.

II. Standard of Review

The court has subject matter jurisdiction based upon diversity of citizenship of the parties, pursuant to 28 U.S.C. § 1332. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). An issue

is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. *Id.*

A party seeking summary judgment always bears the initial responsibility for informing the court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial *Celotex* burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. Under Rule 56, the court must view the evidence presented on the motion in the light most favorable to the opposing party. *Liberty Lobby*, 477 U.S. at 255. The court must decide not whether the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. *Id.* at 252. If the non-moving party has exceeded the mere scintilla of

evidence threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent. *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992).

III. Discussion

There is no issue of material fact here. The parties agree on the chain of events.[1] The only dispute is whether, as a matter of law, Boston Machinery was a "buyer in ordinary course of business" under the Pennsylvania Commercial Code, 13 PA. C.S.A. §2403. If Boston was a buyer in the ordinary course, it cannot be liable to Key for conversion or replevin. *Id*. Because I find that Boston Machinery is a buyer in the ordinary course and therefore falls under the protection of the P.C.C., I will grant summary judgment in favor of Boston.

In relevant part, the Pennsylvania Commercial Code, 13 PA. C.S.A. §2403(b) provides that "[a]ny entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." The parties agree that Pennco was a "merchant who deals in goods of that kind," as well as an "entruster" under the meaning of the statute. The parties

[1] The only real dispute is over whether Boston actually received an email purportedly sent by Key to Boston on December 10, 2002 which said: "Key Equipment Finance has agreed to sell the Hitachi Seiki 40G Turning Center, S/N TG40266, to Pennco Machine, Inc. The invoice is being sent to Pennco this afternoon. *Upon receipt of final payment, ownership will pass to Pennco.*" (Emphasis added). Though I think that whether Boston actually received the email is immaterial, I will assume that Boston did receive it.

further agree that a "buyer in the ordinary course of business" is statutorily defined as a "person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person . . . in the business of selling goods of that kind." 13 PA. C.S.A. §1201. The parties do not agree as to whether the purchase by Boston from Pennco was in good faith as to the interests of Key and therefore whether Boston was a buyer in the ordinary course of business. They do agree, however, that the issue is dispositive.

Key argues that Boston did not purchase the equipment in good faith because it was aware of Key's interest in the equipment, and chose to go ahead with the purchase anyway, in violation of Key's rights. Thus, Key essentially argues that Boston's knowledge of its interest is prima facie evidence of knowledge of *violation* of that interest. Boston argues that knowledge of Key's interest, in and of itself, is insufficient to show that Boston had knowledge the sale was in violation of that interest. In Boston's view, Key has to affirmatively show that Boston knew its actions were in violation of Key's interests. I find that Boston's statement of the law is the accurate one.

In *KDG Auto Sales, Inc. v. Asta Funding, Inc.*, 781 A.2d 202 (Pa. Super. 2001), the Pennsylvania Superior Court noted that section 1201 "prohibits a buyer in the ordinary course from having actual knowledge that the sale is **in violation** of a security interest of a third party." *Id*. at 204, fn 3 (emphasis in original).[2] Here, Boston repeatedly inquired

[2] The fact that the court in *KDG* referred to a security interest rather than a more general interest is immaterial. The relevant inquiry here is how Boston's notice Key's interest affected

into whether the equipment was free of encumbrances, and as to whether Key was aware of the sale. Pennco responded in the affirmative to both inquiries. Boston further insisted upon clauses to that effect in the final invoice for the equipment. I find that Boston's inquiries are evidence of knowledge of Key's interest in the equipment, but not of any knowledge that the sale would be in violation of that interest.

The single piece of evidence to which Key points to show that Boston was aware of a violation of Key's interest is an email sent from Key to Boston, copying Pennco, on December 10, 2002. In it, Patricia Norwood, a Key employee, wrote that "[u]pon receipt of final payment, ownership will pass to Pennco." Key argues that this email constituted actual notice to Boston that unless payment was made directly to Key, Key retained ownership of the equipment. Key imbues this email with too much significance. Even if Boston did understand the email to mean that ownership would only pass once Key (rather than Pennco) received the money, it is well established that "[p]ayment to an authorized agent is payment to the principal." *Savidge v. Metropolitan Life Ins. Co.*, 110 A.2d 730, 732 (Pa. 1955). As discussed above, it is undisputed that Pennco was an authorized agent to sell the equipment. Therefore, I find that Boston purchased the equipment in good faith and was therefore a buyer in the ordinary course of business.

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its status as a buyer in the ordinary course, not what the nature of the interest itself was.

O R D E R

AND NOW, this 27th day of February, 2006, after consideration of Defendant Boston Machinery, Inc.'s Motion for Summary Judgment (Dkt. #59) and all responses thereto, it is hereby **ORDERED** that Defendant's Motion is **GRANTED**. Judgment shall be entered in favor of Defendant Boston Machinery, Inc.

It is further **ORDERED** that after consideration of Plaintiff's Motion for Summary Judgment Against Defendant Boston Machinery, Inc. (Dkt. #57), and all responses thereto, Defendant's Motion is **DENIED**.

The clerk of court is directed to close this case.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.