

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

U.S. DIAMOND & GOLD, et al.,	:	CASE NO. 3:06-cv-371
Plaintiffs,	:	Judge: Thomas M. Rose
v.	:	
JULIUS KLEIN DIAMONDS LLC, et al.,	:	PLAINTIFFS' MEMORANDUM
Defendants.	:	CONTRA DEFENDANT, JULIUS KLEIN DIAMONDS, LLC'S MOTION FOR DIRECTED VERDICT

I. INTRODUCTION

JKD's Motion for Directed Verdict mischaracterizes and ignores evidence presented at trial in a last desperate attempt to avoid submitting Plaintiffs' claims to the jury. Based upon the evidence adduced at trial, construed most strongly in favor of Plaintiffs, there is substantial evidence to support Plaintiffs' side of the case, upon which the reasonable minds of the jury might reach different conclusions and, as such, JKD's Motion must be denied.¹

II. LAW AND ANALYSIS

A. Standard for Judgment as a Matter of Law

Under Ohio law,² "the test to be applied by a trial court in ruling on a [motion for judgment as a matter of law] is the same test to be applied on a motion for a directed verdict.

The evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made,

¹ *Aetna Casualty and Surety Company v. Leahey Construction Company, Inc.* (6th Cir. 2000), 219 F.3d 519, 532.

² In a diversity case in which a motion for judgment as a matter of law is based upon the sufficiency of the evidence the court must apply the substantive law of the state whose law governs the matter. *American Trim v. Oracle Corporation* (6th Cir. 2004), 383 F.3d 462, 471. This Court has previously determined that the substantive law of the State of Ohio governs this action. June 11, 2008 Entry and Order (Doc. # 112), pp 39-40.

and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon [a motion for judgment as a matter of law]."³ Substantial evidence has been defined as "evidence of such quality and weight that reasonable persons in the exercise of impartial judgment may reach different conclusions."⁴

This standard has been explained to require a court to view all evidence, not just that which supports the party opposing the motion, with all *reasonable inferences*, in the light most favorable to the nonmoving party.⁵ A court is not required, however, to take all allegations as true for purposes of the motion.⁶ Rather, there must be a sufficient amount of evidence, more than a scintilla, in conflict to create a material question of fact.⁷

B. There is Substantial Evidence as to Plaintiffs' Unjust Enrichment Claim.

JKD erroneously claims that Plaintiffs have introduced no evidence other than Mr. Stafford to prove the existence of the Pink Diamond, that Plaintiffs placed the Pink Diamond in the package that was sent to JKD in New York, or that the benefit of the Pink Diamond was conferred upon JKD. JKD's argument is improper and inaccurate.

By arguing that Plaintiffs have presented only the unsupported testimony of Mr. Stafford, JKD asks the Court to weigh Mr. Stafford's credibility—a request that is improper in arguing that it is entitled to judgment as a matter of law.⁸ Likewise, JKD improperly asks the Court to evaluate the credibility of Mr. Chambers and Mr. Lorelle, two witnesses who testified that they saw the Pink Diamond, and JKD also disregards testimony of Brink's Global Services which

³ *Aetna Casualty and Surety Company, supra.*

⁴ *In re Young v. Compton Plaza* (Bank. Ct. S.D. Ohio 1990), 120 B.R. 429, 434.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Aetna Casualty and Surety Company, supra.*

says that JKD received and accepted the Brink's package containing the Pink Diamond "in good order." Mr. Stafford unequivocally testified that he placed a \$1.7 million Pink Diamond in the box and that neither the Pink Diamond box nor the Brink's bag containing the Pink Diamond box contained any hole. JKD has also testified that it accepted the bag in good order from Brink's and that it does not believe Brink's tampered with the box or the bag in any way.

The testimony of the witnesses from JKD has been proven time and again to be inconsistent with sworn Affidavits submitted to this Court. Additionally, the surveillance videos upon which JKD relies have been proven to be different in several significant ways, and these differences raise questions regarding the trustworthiness of the surveillance video that can only be answered by a jury.

JKD seems to argue that because none of its witnesses is willing verbally to acknowledge on the witness stand that he "received" the Pink Diamond, Plaintiffs have no cause of action. Whether or not JKD is telling the truth about whether they received the Pink Diamond is inherently a jury question based upon the credibility or lack thereof of JKD's evidence. Reasonable persons in the exercise of impartial judgment may indeed reach different conclusions in this case, and JKD is not entitled to judgment as a matter of law on Plaintiffs' unjust enrichment claim.

C. There is Substantial Evidence as to Plaintiffs' Conversion Claim.

JKD argues for judgment as a matter of law as to Plaintiffs' conversion claim on the same flawed reasoning upon which it based its argument as to Plaintiffs' unjust enrichment claim—that is, that there is no evidence that the Pink Diamond existed and that there is no evidence that JKD retained the Pink Diamond. As such, for the reasons articulated above, JKD is not entitled to judgment as a matter of law on Plaintiffs' conversion.

D. There is Substantial Evidence as to Plaintiffs' Claim for Civil Liability for the Criminal Act of Theft.

JKD again argues that it is entitled to judgment as a matter of law as to Plaintiffs' claim for civil liability for the criminal act of theft because there is no evidence that the Pink Diamond existed, that it was in Plaintiffs' possession, or that it was in the package when it arrived at JKD. For the reasons articulated above, JKD is not entitled to judgment as a matter of law on Plaintiffs' claim for civil liability for the criminal act of theft.

JKD also argued that it is entitled to judgment on this claim because Plaintiffs failed to offer any evidence of JKD's state of mind in order to establish that JKD knowingly deceived Plaintiffs or that JKD knowingly deprived Plaintiffs of the Pink Diamond by falsely representing that JKD had not stolen the Pink Diamond.⁹ JKD has mischaracterized Plaintiffs' theft claim, and as such, has ignored Plaintiffs' evidence of JKD's *mens rea*.

Plaintiffs claim that JKD committed the crime of theft by deception by making intentional misrepresentations to Plaintiffs that Plaintiffs should send the Pink Diamond to JKD in New York and that JKD would submit the Pink Diamond to the GIA to be certified, and that JKD New York would consider purchasing the Pink Diamond. JKD made these representation to Plaintiffs so that Plaintiffs would send the Pink Diamond to JKD in New York. Under Ohio law, such intentional misrepresentations is evidence of intent, or *mens rea*, to commit theft by deception.¹⁰

Plaintiffs presented substantial evidence upon which reasonable minds may reach different conclusions as to whether JKD had the requisite mental state to steal the Pink Diamond, and JKD is not entitled to judgment as a matter of law as to Plaintiffs' claim for civil liability for the criminal act of theft.

⁹ JKD's Motion, p. 10-11.

¹⁰ *Gonzalez v. Spofford* (8th Dist. June 30 2005), Case No. 85231, 2005 Ohio 3415, ¶ 29.

III. CONCLUSION

For all of the foregoing reasons, Plaintiffs have presented substantial evidence upon which reasonable minds may reach different conclusions as to Plaintiffs' claims for unjust enrichment, conversion and civil liability for the criminal act of theft. JKD's Motion for Judgment as a Matter of Law must be overruled.

Respectfully submitted,

/s/ Dianne F. Marx

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CERTIFICATE OF SERVICE

I certify that true copies of the foregoing document were filed and served on counsel of record electronically through the Court's CM/ECF system on November 14, 2008 and also served by e-mail on:

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