

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D17480
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_____AD3d_____

Argued - November 20, 2007

REINALDO E. RIVERA, J.P.
ROBERT A. SPOLZINO
EDWARD D. CARNI
WILLIAM E. McCARTHY, JJ.

2006-09778

DECISION & ORDER

Mark Simon, d/b/a On The Mark, Jewelry,
Coins & Collectibles, appellant, v State
National Insurance Company, et al.,
respondents.

(Index No. 11398/05)

Mary Beth Mullins, Larchmont, N.Y., for appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola, N.Y. (Mark J. Volpi and Gail L. Ritzert of counsel), for respondents.

In an action to recover benefits under an insurance policy, the plaintiff appeals from an order of the Supreme Court, Westchester County (Murphy, J.), entered September 29, 2006, which granted the defendants' motion for summary judgment dismissing the complaint.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting that branch of the motion which was for summary judgment dismissing the plaintiff's cause of action to recover the value of items he received on consignment from Anthony Jewelers and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed, without costs or disbursements.

The defendants established their prima facie entitlement to judgment as a matter of law by showing that the plaintiff failed to comply with paragraph 9 of the insurance policy captioned "RECORDS AND INVENTORY." In opposition, the plaintiff raised a triable issue of fact as to

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whether he kept proper records as to those items he received on consignment from Anthony Jewelers, as required by the policy. Accordingly, the Supreme Court erred in granting that branch of the defendants' motion which was for summary judgment dismissing the cause of action to recover the value of those items (*see Anjay Corp. v Those Certain Underwriters at Lloyds of London*, 33 AD3d 323; *Mord v New York Indem. Co.*, 216 App Div 252, *affd* 244 NY 589; *cf. Coin Roberto v Reliance Ins. Co.*, 281 AD2d 319; *Globe Jewelry v Pennsylvania Ins. Co.*, 72 Misc 2d 563; *see also Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 89 AD2d 131, *affd* 60 NY2d 390; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

The defendants' remaining contention is without merit.

RIVERA, J.P., SPOLZINO, CARNI and McCARTHY, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court