

**E. Chabot, Ltd. v Lead Underwriters of Great Lakes
Reinsurance (U.K.) plc**

2009 NY Slip Op 30906(U)

April 15, 2009

Supreme Court, New York County

Docket Number: 116945/04

Judge: Edward H. Lehner

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EDWARD H. LEHNER

PART _____

Index Number : 116945/2004
E. CHABOT, LTD.
VS.
GREAT LAKES REINSURANCE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

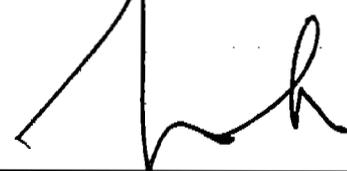
Upon the foregoing papers, it is ordered that this motion

with accompanying memorandum decision
motion is decided in accordance

FILED
APR 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

APR 15 2009

Dated: _____



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 19

-----X
E. CHABOT, LTD.,

Plaintiff,

-against-

Index No.:
116945/04

Those Lead Underwriters of GREAT LAKES
REINSURANCE (U.K.)Plc. and other subscribing
Underwriters to Policy/Certificate No. HN03ACY667,

Defendants.

EDWARD H. LEHNER, J.:

FILED
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NEW YORK

BACKGROUND

The basic issue raised on this motion by defendants for summary judgment dismissing the complaint is whether plaintiff has stated sufficient facts with respect to its claim for loss of jewelry to raise a triable issue on the asserted defense that the "unexplained loss" exclusion of its insurance policy bars coverage.

Plaintiff (Assured) is a jewelry company that is insured by defendants under what is referred to as a jewelers' block policy (the "Policy"). Under section 5, entitled "Insuring Conditions," the Policy contains the following exclusions:

- (i): "Loss or damage to property while in or upon any automobile, motorcycle, or any other vehicle unless, at the time the loss or damage occurs, there is actually in or upon such vehicle, the Assured, or a permanent employee of the Assured, or a person whose sole duty is to

attend the vehicle, except as may be endorsed hereon

(m): "Unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory"

On the morning of September 24, 2003, Baroukh Shabot (Shabot), the father of the Assured's principal shareholder, picked up jewelry at the Assured's premises in Manhattan before going to visit customers in Brooklyn. He was accompanied by Ezra Behfar (Behfar), another employee of the Assured. The two men traveled to Brooklyn by train, where they transferred to Shabot's car, drove to 18th Avenue, parked the car, and then proceeded to call on customers.

Shabot stated that during the day he noticed water leaking from the car, but he ignored it. He further stated that a man approached him to tell him that his car was leaking. Shabot testified that during the time he was talking to this man no one else approached the car and no one opened the doors or the trunk of the car. Shabot eventually drove away to visit another customer without externally checking the leak. Shabot and Behfar traveled on foot after the car was parked, carrying the jewelry with them. At approximately 4:00-4:30 p.m., the men returned to the parked car and placed the jewelry in the trunk, which they then locked. They then drove from 18th Avenue to Avenue M. Behfar exited to go collect money from a customer, and was gone approximately five minutes. Shabot waited in the car, during which time a man

approached him and told him that his vehicle was leaking. This was not the same person from the earlier incident. The man offered to show Shabot the source of the leak, and Shabot got out of the car, taking the car keys with him. He then opened the hood, and the man indicated several holes in the radiator. Shabot states that he immediately closed the hood and reentered the vehicle. He further testified that when he got back in the car, the trunk was closed and he did not see a "trunk ajar light" or any other warning light on. He also stated that the trunk could be released from inside the vehicle, but the release makes a noise, and that while he was outside he did not hear the trunk release, that the area was quiet, and that he did not see anyone approach the car. When Behfar returned, he and Shabot drove back to Shabot's home, at which time they opened the trunk and discovered that the jewelry was missing.

After Shabot and Behfar discovered that the jewelry was missing, they did not immediately call the police, the Assured, or the insurance broker. At his deposition, when asked what happened to the property, Shabot said; "I don't know. I wish I knew." Behfar also testified that he did not know what happened to the property or where or when it was lost.

The jewelry was valued at over \$150,000. The Policy has a \$100,000 limit, with a \$10,000 deductible. The Assured submitted a claim to defendants for \$90,000,

which was denied by letter dated September 13, 2004. The basis of the denial was the Policy provisions noted above. The present action ensued.

DISCUSSION

The plaintiff in an action against an insurer to recover for a loss allegedly covered by a policy of insurance has the burden of proving a prima facie case, i.e., that the loss is a covered event. *Dato Jewelry, Inc. v Western Alliance Insurance Company*, 238 AD2d 193 (1st Dept 1997); *Vasile v Hartford Accident & Indemnity Company*, 213 AD2d 541 (2d Dept 1995). Once the plaintiff meets that burden, the insurer must prove that the loss comes within the scope of a policy exclusion. *Maurice Goldman & Sons, Inc. v Hanover Insurance Company*, 80 NY2d 986 (1992).

Since the facts are uncontroverted, for the purposes of this summary judgment motion it can be concluded that the Assured has met its initial burden, and it becomes the insurer's obligation to bring forth facts to demonstrate that the claim falls within one of the Policy's exclusions.

Defendants' primary argument is that, based on all the facts presented, the loss is not covered because it falls under the above quoted provisions of Condition 5(m) as an "unexplained loss." In support of this argument, defendants rely heavily on *Maurice Goldman & Sons, Inc. v Hanover Insurance Company*, 179 AD2d 388 [1st Dept], *aff'd* 80 NY2d 986, which defendants maintain is strikingly similar to the case

at bar and involved an exclusionary clause identical to that set forth in Condition 5(m). There, the Appellate Division wrote:

"Plaintiff insured, a jewelry company, brought this action to recover on contracts of primary and excess 'jewelers block' insurance entered into with defendants. During a business trip, plaintiff's president realized that a bag containing jewelry was missing but he could not say where or how the loss occurred. We agree with the IAS court that the claim is outside the ambit of coverage on the basis of the policies' exclusionary clause for 'unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory.' Clearly, these words ("unexplained loss") are meant to apply to losses, such as this, for which the insured can furnish no explanation whatsoever and, set off as they are from the rest of the sentence, are not limited by the phrase 'mysterious disappearance or loss or shortage disclosed on taking inventory.' "

In affirming, the Court of Appeals ruled that the said clause "is susceptible of only one interpretation," and that was the one set forth above stated by the Appellate Division.

Defendants argue that, in the case at bar, Shabot and Behfar similarly have no idea how the jewelry was lost. In Shabot's deposition in 2004, when asked about the loss, he affirmed that he did not know what happened to the jewelry, stating: "It got lost. It got stolen. ... I don't know when, but I believe in Avenue M. ... Must be Avenue M because I put it in my hand and with the guy in 18 Avenue. It was 100 percent in the trunk. When we got to Avenue M, when the hood was open, must be somebody open the trunk." (Ex. C, pp. 170-171). When questioned, Shabot admitted

that he had no idea who may have taken the jewelry because he didn't see anyone, or hear anything, and there was no damage to the trunk. Additionally, in Behfar's deposition in 2004, he also said that he had no idea how the jewelry was lost.

In opposition to this motion, the Assured provides an affirmation from Shabot, dated July 18, 2008, in which he says, for the first time, that "I now believe that the man on 18th Avenue and the man on Avenue M were working together and stole the jewelry, while I was on Avenue M." He further affirms that "[t]he jewelry had to have been stolen by somebody, who opened the trunk, when the hood was open, although I did not see anybody near the car, I did not hear anything and did not hear the door shut."

However, as stated in *Ellen v. Lauer*, 210 AD2d 87, 90 (1st Dept. 1994):

"It is not enough that the party opposing summary judgment insinuate that there must be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists or, in the alternative, supply the court with an acceptable excuse why such proof cannot be supplied at this state of the proceedings."

In the cases in which courts found triable issues of fact in situations involving this same exclusionary clause in an insurance policy, the insured was able to provide some evidence to support the contention of coverage in addition to its own conclusory statements.

In *Topliffe v US Art Co., Inc.* 40 AD3d 967 [2d Dept 2007], when artwork was

missing, there was evidence that, prior to the discovery of the loss, there had been extensive renovations, and the artwork was inadvertently placed in a location in which construction refuse was routinely gathered and discarded. The court determined that, with this evidence, the trier of fact might reasonably believe that the artwork was accidentally thrown away. In *S. Bellara Diamond Corp. v First Specialty Insurance Corp.*, 287 AD2d 368 [1st Dept 2001], the insured himself thought that he accidentally threw a parcel of diamonds into the garbage as he hurriedly cleaned off his desk before going to lunch, which, the court held, provided sufficient circumstantial evidence that a jury could reasonably believe that the diamonds were accidentally thrown away. In *Gurfein Bros., Inc. v Hanover Insurance Company*, 248 AD2d 227 [1st Dept 1998], a case relied upon by the Assured, the court found that an insured, who lost diamonds that he had placed in the trunk of his car, met the burden in opposing the insurer's summary judgment motion because he provided circumstantial evidence from several sources that supported an inference of theft, including the approximate time, place and method of the alleged theft, as well as the identity of the alleged thieves.

Further, courts have held that the mere fact that the insured property is no longer where the insured placed it does not warrant the inference that the property was lost, much less that it was stolen. *General Credit Corp. v Travelers*, 288 AD2d

66 (1st Dept 2001); *WestCom Corp. v Greater New York Mutual Insurance Company*, 41 AD3d 224 (1st Dept 2007).

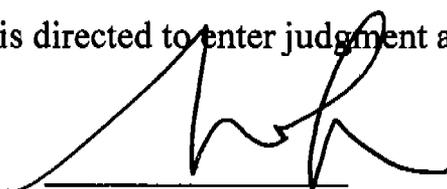
In light of plaintiff's failure to offer any evidence to explain what happened to the jewelry, other than its employees' speculation unsupported by any specific facts that reasonably support the contention, its claim is clearly an "unexplained loss," and thus not covered by the Policy in light of the said exclusionary clause contained therein.

Defendants have also argued that, even if the loss could not be attributed to the "unexplained loss" exclusion, it still would not be covered because the Assured failed to adhere to the requirement that the jewelry remain in the "close care, custody and control" of Assured or Assured's employees. However, having determined that the loss is excluded under Condition 5(m) of the Policy, the court need not address this issue.

CONCLUSION

Based on the foregoing, defendants' motion for summary judgment is granted, the complaint is dismissed, and the Clerk is directed to enter judgment accordingly.

Dated: April 15, 2009



J.S.C.

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