

**Genevit Creations, Inc. v Gueits Adams & Co.**

2002 NY Slip Op 30087(U)

July 19, 2002

Supreme Court, New York County

Docket Number: 602754/98

Judge: Leland G. DeGrasse

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**LEF AND DeGRASSE**

PRESENT: \_\_\_\_\_  
Justice

PART - 25 -

*Genovet Creations Inc*  
*etc*  
- v -  
*Sweets, Adams & Co*  
*etc*

INDEX NO. 602754-98  
MOTION DATE 6/28/02  
MOTION SEQ. NO. 07  
MOTION CAL. NO. 2

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

**SCANNED**  
AUG 01 2002

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION.**

JUL 19 2002



Dated: \_\_\_\_\_ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

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

PRESENT: LELAND DeGRASSE  
Justice

PART 25

Genevieve Creaton

INDEX NO. 602754/98

- v -

MOTION DATE 6/28/02

Guerts Adams & Co.

MOTION SEQ. NO. 008

MOTION CAL. NO. 67

The following papers, numbered 1 to \_\_\_\_\_ were read on 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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Reviewed per the memorandum decision dated JUL 19 2002 which disposes of motion sequence no. 07

JUL 19 2002

Dated: \_\_\_\_\_

\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NEW YORK : I.A.S. PART 25  
----- X

GENEVIT CREATIONS, INC. and QUALITY :  
JEWELRY CO., INC.

Plaintiffs,

-against-

GUEITS ADAMS & COMPANY, GUEITS ADAMS &  
COMPANY, a division of EYL and GORDON  
INSURANCE BROKERS, INC., and EYL GORDON  
INSURANCE BROKERS, INC, and their  
successors in interest, if any, and  
EDWARD GUEITS, GERRY ADAMS AND BARRY  
RAUCHER,

Defendants.

----- X

Index No. :  
602754/98  
  
Cal. No. : 3 of  
6/4/02

DeGRASSE, J. :

Motion sequence numbers 07 and 08 are consolidated for disposition.

This action arises from a dispute between plaintiffs and defendant insurance brokers over policies of insurance sold through defendants. In motion sequence 07 defendants move for summary judgment, or, in the alternative, to reargue an earlier decision on defendants' pre-answer motion to dismiss. Plaintiffs cross-move for sanctions. In motion sequence 08 plaintiffs move this court to take judicial notice of a stipulation among the parties that was "so ordered" by Justice Heitler of this court. According to plaintiffs, this so ordered-stipulation renders defendants' summary judgment motion untimely.

**FACTS**

Plaintiff Genevit Creations, Inc. ("Genevit") is a former jewelry manufacturer, and plaintiff Quality Jewelry Co.

("Quality"), Inc. is a former jewelry wholesaler. Both companies shared space in midtown Manhattan and collaborated in their business dealings. Quality allegedly extended numerous loans to Genevit.

Genevit's and Quality's offices were robbed at gunpoint on June 9, 1992, and plaintiffs allege that the thieves made off with millions of dollars in cash and jewelry. Of this, by far the larger loss was Genevit's, which allegedly was in excess of \$3 million. Quality's alleged loss was \$225,000.

At the time of the robbery, both Genevit and Quality were covered by "jeweler's block" policies of insurance issued by Lloyd's of London ("Lloyd's"). These policies had been sold through defendant brokers Eyl and Gordon Insurance Brokers, Inc., d/b/a Gueits, Adams & Company ("Gueits Adams"), In 1991, Lloyd's issued policy number SCB200359/90 to Genevit for the period July 27, 1991, to July 27, 1992 with a coverage limit of \$3 million. Quality purchased a similar policy with a lower coverage limit in 1991 numbered SCB200344/90

Plaintiffs claim that the Lloyd's syndicate that issued their policies conducted a lengthy investigation in which the syndicate avoided payment by continually seeking more and more information concerning plaintiffs' alleged losses. According to plaintiffs, Lloyd's demand for business records in excess of one year prior to the robbery was a violation of the "special records clauses" contained in their respective policies. Plaintiffs also claim that Lloyd's demanded records beyond the plaintiffs' "stock

records," which were the only records required to prove a loss under the terms of the "loss settlement clauses" of the respective policies.

Apparently frustrated by Lloyd's investigation, the plaintiffs sued Lloyd's three months after the robbery. Lloyd's brought a separate suit for declaratory relief, and the two actions were consolidated. This case settled three years later, in late 1995, for \$1.5 million.<sup>1</sup>

This action commenced on June 5, 1998. The poorly drafted complaint contains a single cause of action with multiple theories of liability. The gravamen of the complaint is that Gueits Adams were joint venturers with the Lloyd's syndicate holding plaintiffs' policies. The complaint alleges that defendants shared the premiums, not just the commissions, with the syndicate, and sought *to* depress claimant's recovery on the policies to increase their own profits. The complaint also alleges that defendants promised to be plaintiffs' "insurance department," and to insure that they would always be fully insured. Defendants also allegedly stated that their fiduciary duty would be solely to plaintiffs, and not to any underwriter or insurer. Plaintiffs allege that defendants urged them to purchase the Lloyd's policies because Lloyd's required only plaintiffs' stock books to prove their losses, and that these records need only go back one year.

Plaintiffs blame defendants for Lloyd's alleged demand to

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<sup>1</sup>This sum was in addition to amounts advanced to Genevit and Quality by Lloyd's in the period shortly after the robbery. Lloyds advanced \$175,000 to Quality, and \$124,364.98 to Genevit.

look at more than this limited universe of records, and for its failure to fully cover plaintiffs' alleged losses. They also claim that defendants should have advised plaintiff to hire an insurance adjuster or experienced attorney to handle its claims with Lloyd's. Quality's president Iser Abramovitz states in his affidavit that defendants in fact affirmatively discouraged plaintiffs from retaining an adjuster.

Justice Beverly Cohen of this Court decided a pre-answer motion to dismiss by defendants. After Justice Cohen's retirement, Justice Crane decided a motion to renew and reargue Justice Cohen's decision. The claims surviving after these decisions are plaintiffs' breach of contract, fraud, and misrepresentation claims.

#### DISCUSSION

##### A. Timeliness of Defendants' Motion for Summary Judgment

As a threshold matter, plaintiffs assert that defendants' motion for summary judgment is untimely under Rule 17 of the Rules of the Justices New York County Supreme Court Civil Branch, which provides in relevant part that "unless specified otherwise in a particular case ... all motions for summary judgment must be made no later than 60 days after the filing of the note of issue." The note of issue in this case was filed on January 31, 2002, and the instant motion was filed on May 22, 2002.

This argument fails. The Preliminary Conference Order in the case, which provides that the time within which to bring a

dispositive motion shall be "per the CPLR," i.e. 120 days. (CPLR 3212[a].) This order supercedes the local rule.

In motion sequence 08, plaintiffs seek to augment the record with a stipulation dated April 13, 2000 that was so-ordered by Justice Heitler. Plaintiffs' new counsel asserts that she found this document after reviewing the files kept by previous counsel in this action. The court grants the motion to include this stipulation in the record before the court.

Plaintiffs assert that the stipulation provides that the motion for summary judgment must be brought within 60 days of the filing of the note of issue. This interpretation of the stipulation is wholly unsupported by its plain language. Contrary to plaintiffs' characterization, the stipulation states that any motion for summary judgment must be brought within 120 days of the last deposition held in the case. Defendants have brought forth un rebutted evidence that the last deposition was held on January 29, 2002, which means that the instant motion for summary judgment is timely under the stipulation.

**B. Breach of Contract Claim**

Plaintiffs' breach of contract claim appears to be based on defendants' alleged oral statements that they would serve as plaintiffs' in-house insurance department and would ensure that plaintiffs had everything they needed in insurance. Also, Abramovitz asserts that Lloyd's requirements for documentation of plaintiffs' loss exceed the documentation required by the

contracts. However, he conceded at his deposition that the loss settlement clause in his Lloyd's contract was the one described to him by defendants. Additionally, his Lloyd's contract did provide in a special records clause that only one year of documentation was required, which would comport with Abramovitz's expectations. To the extent Lloyd's made demands for documentation beyond what was allowed in the contracts of insurance, plaintiffs' dispute is with Lloyd's, not defendants.

Defendants argue that this contract claim is time-barred. However, Justice Crane found that defendants had waived this defense by not following Justice Cohen's instructions to submit it to a special referee. (See Genevit Creations, Inc. v Gueits Adams and Co., Sup Ct, New York County, September 29, 2000, Crane, J., index No. 602754/98 at 7 n.3.)

Defendants are on firmer ground in arguing that the alleged oral contract violates the Statute of Frauds. Plaintiffs' description of the oral contract is that defendants agreed to be more than brokers, but rather a **kind** of in-house insurance department for plaintiffs, responsible for maintaining appropriate insurance and for enforcing plaintiffs' rights under the insurance policies. This alleged oral contract *is* not one to be completed within one year, and accordingly it runs afoul of the Statute of Frauds. (See GOL § 5-701[1].) For this reason plaintiffs' breach of contract claim is dismissed.

**C. Defendants' Fraud and Misrepresentation Claims**

Defendants argue that plaintiffs' negligent misrepresentation claim is time-barred. Plaintiffs assert that their misrepresentation claim sounds in intentional misrepresentation, but they provide no explanation as to how this claim differs from their fraud claim. In all events, to the extent that the claim can be characterized as negligent misrepresentation, it is barred by the applicable three-year statute of limitations. (See Chase Scientific Research Inc. v NIA Group, 96 NY2d 20.)

As plaintiffs have not distinguished their fraud claim from their "intentional misrepresentation" claim, they shall be treated herein as one. The elements of fraud are misrepresentation of a material fact, knowledge by the party making the misrepresentation that it was false when made, justifiable reliance on the statement, and damages. (E.g. Swersky v Dreyer and Traub, 219 AD2d 321, 326.)

Defendants assert that plaintiffs have failed to prove that their relationship with defendants was anything beyond the usual arms-length insurance brokerage relationship. Defendants have demonstrated that the policies that they sold to plaintiffs adhered to plaintiffs' alleged expectations with respect to proof of loss. Accordingly, defendants argue convincingly that any trouble plaintiffs had recovering on their insurance policies was caused by Lloyd's behavior, not by anything the defendants did. Defendants argue without rebuttal from plaintiffs that the only issue in plaintiffs action against Lloyd's was proof of loss, not

coverage. Defendants argue that if plaintiffs settled that action for less than their claimed loss, plaintiffs cannot blame defendants for any shortfall they incurred.

Plaintiffs' fraud claim is based on the premise that defendants were engaged in an undisclosed and illicit joint venture with the Lloyd's syndicate holding plaintiffs' policies. Defendants' alleged knowledge of the falsity of their statements rests on the existence of this relationship. However, plaintiffs provide no proof of this relationship other than the conclusory and non-specific statements in Abramovitz's affidavit.

Plaintiffs appear to argue that the defendants made the following alleged misrepresentations of material fact: 1) that the policies offered by Lloyd's were the best for defendants, 2) that defendants would be plaintiffs' "in-house" insurance department that would ensure plaintiffs were properly insured and would advocate for plaintiffs if a claim had to be made. Plaintiffs state that these claims were false because defendants were in fact involved in a clandestine joint venture with the Lloyd's syndicate, and that it was in defendants' interest to limit any payout on the policy.

Plaintiffs fail to lay bare their proof on the ties between defendants and the Lloyd's syndicate. Although they claim that the relationship between defendants and the Lloyd's syndicate became clear during the discovery phase of plaintiffs' action against Lloyds, plaintiffs provide no documentation to substantiate this allegation. Abramovitz claims in his affidavit that

plaintiffs "have many documents which prove the voluntary involvement in the scheme to defraud plaintiffs," yet not one of these purported documents is appended to their papers. By failing to bring forth any evidence tending to demonstrate the existence of this alleged joint venture, plaintiffs have failed to demonstrate that defendants acted with scienter. A party must lay bare its proof once a prima facie case for summary judgment has been made out, (E.g. Haider v Rahim, 273 AD2d 442; Manowitz v Senter, 62 AD2d 898, appeal dismissed 45 NY2d 819.) Plaintiffs have failed to carry this burden.

#### CONCLUSION

Defendants' motion for summary judgment is granted. The clerk shall enter judgment dismissing the complaint. Plaintiffs' cross-motion for sanctions is denied. Plaintiffs' motion to supplement the record to include the stipulation dated April 13, 2000 signed by the parties and "so ordered" by Justice Heitler is granted.

This constitutes the decision and order of the court.

Date:

||| 19 2002

\_\_\_\_\_  
J.S.C.