

**Aldiam Intl. Inc. v Underwriters at Lloyds,
London**

2007 NY Slip Op 32872(U)

September 10, 2007

Supreme Court, New York County

Docket Number: 0116371/2004

Judge: Martin Shulman

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

MARTIN SHULMAN

J.S.C.

P

PART 1

Index Number : 116371/2004

ALDIAM INTERNATIONAL

vs.

UNDERWRITERS AT LLOYDS, LONDON

SEQUENCE NUMBER : 001

VACATE ORDER/JUDGEMENT

INDEX NO. 116371/04

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

TI

s motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
SEP 14 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: SEP 10 2007

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

----- X
ALDIAM INTERNATIONAL INC., :

Plaintiff, :

Index No: 116371

-against- :

Decision and Order

All those UNDERWRITERS AT LLOYD'S, LONDON, :
subscribing to Policy of Insurance numbered
VP621810V

and All those UNDERWRITERS AT LLOYD'S,
LONDON, subscribing to Policy of Insurance identified
as Gueits, Adams & Co. Loose Shipment Cover,

Defendants. :

----- X

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SEP 14 2007
NEW YORK
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Hon. Martin Shulman, J.S.C.:

Plaintiff, Aldiam International, Inc. ("Plaintiff" or "Aldiam"), moves to set aside the May 17, 2007 jury verdict rendered in favor of defendants, all those Underwriters at Lloyd's, London, subscribing to Policy of Insurance numbered VP621810V and all those Underwriters at Lloyd's, London, subscribing to Policy of Insurance identified as Gueits, Adams & Co. Loose Shipment Cover ("Defendants" or "Lloyd's"), dismissing Plaintiff's complaint as being against the weight of the evidence (CPLR §4404[a])("JNOV Motion"). Defendants oppose the JNOV Motion.

During the morning hours of June 22, 2003 at a Hong Kong jewelry show, Plaintiff claims its field sales representative, Avi Karhashon ("Avi"), was struck from behind and robbed of valuable diamonds. Thereafter, Aldiam filed its claim of loss with Lloyd's pursuant to a then existing contract of insurance (see "the Policy" as Exhibit 1 to Plaintiff's JNOV Motion). Lloyd's denied coverage under an exception to the Policy

set forth in Subdivision [4](a) of the “Schedule of Property Amounts Insured and Limitations of Liability” Section which states, in relevant part:

This Policy insures against all risks of loss of or damage to the above described property arising from any cause whatsoever
EXCEPT:

(a) Loss, damage or expense caused by or resulting from sabotage, theft, conversion or other act or omission of a dishonest character (1) on the part of the Assured or his or their employees, . . .

Defendants claim Avi staged the robbery triggering this Policy exclusion. With this extant material issue of fact, the jury trial ensued. On May 17, 2007, the jury rendered a verdict in favor of Defendants dismissing the action.

Plaintiff argues that Defendants did not meet their burden of establishing by a preponderance of the credible evidence that Avi, “entrusted with the [jewelry] goods had in fact stolen them. . .” (Hugel Aff. at ¶ 4 in support of JNOV Motion), thus warranting a judgment notwithstanding the verdict in Adiam’s favor. In opposition, Defendants argue that there was sufficient evidence presented for the jury to reasonably conclude that the robbery was staged and to sustain the verdict in Lloyd’s favor.

“A court may set aside a jury verdict and grant judgment as a matter of law to the losing party only ‘where there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial’ (*Cohen v. Hallmark Cards*, 45 NY2d 493, 499) . . .” *Brewster v. Prince Apts., Inc.*, 264 A.D.2d 611, 612, 695 N.Y.S.2d 315, 318 (1st Dept., 1999); *see also, Smolinsky v. 46 Rampasture Owners, Inc.*, 230 A.D.2d 620, 646 N.Y.S.2d 110 (1st Dept., 1996); and *Niewieroski v. National Cleaning Contractors*, 126 A.D.2d 424, 425, 510 N.Y.S.2d 127 (1st Dept., 1987). Upon the court’s

review of the trial record, it must construe the evidence in the light most favorable to the non-moving party (see *Mirand v. City of New York*, 84 N.Y.2d 44, 50, 614 N.Y.S.2d 372 [1994]).

Restating the latter standard more broadly:

To be entitled to a judgment as a matter of law, the . . . [Plaintiff] must demonstrate that the . . . [Defendants] failed to . . . [meet their burden that the loss Plaintiff suffered fell within the Policy exclusion]; the . . . [Defendants'] evidence must be accepted as true, and the . . . [Defendants] must be given the benefit of every favorable inference which can reasonably be drawn from the evidence (*Windisch v Weiman*, 161 AD2d 433, 437). The motion should be granted only if there is no rational process by which the jury could find for . . . [Defendants] as against the moving . . . [Plaintiff] (*supra*, at 437; *Harding v Noble Taxi Corp.*, *supra*, at 369). (bracketed matter added)

Campbell v. Rogers & Wells, 218 A.D.2d 576, 631 N.Y.S.2d 6 (1st Dept., 1995).

Under a different standard, “[w]hile the trial court has the power to set aside the jury's verdict if contrary to the weight of the evidence (CPLR 4404 [a]), the court must first conclude ‘that the jury could not have reached its verdict on any fair interpretation of the evidence’ (*Delgado v. Board of Educ.*, 65 A.D.2d 547, *affd* 48 N.Y.2d 643) . . .” *Wiseberg v. Douglas Elliman-Gibbons & Ives, Inc.*, 224 A.D.2d 361, 638 N.Y.S.2d 82 (1st Dept., 1996). In this context, the court’s analysis will not involve a question of law, but rather will require a discretionary balancing of many factors. See *Nicastro v. Park*, 113 A.D.2d 129, 495 N.Y.S.2d 184 (2nd Dept., 1985). Thus, the trial court may not set aside the jury verdict “merely because it disagrees with the result. Its power in this area must be exercised with caution since, in the absence of an indication that substantial justice has not been done, a litigant is entitled to the benefit of a favorable verdict.

Fact-finding is within the province of the jury, not the trial court . . .” *Brown v. Taylor*, 221 A.D.2d 208, 209, 633 N.Y.S.2d 170, 171 (1st Dept., 1995).

The jury had the opportunity to listen to the respective testimonial evidence, weigh the credibility of the witnesses and consider photographs and other documentary evidence. In doing so, the jury reasonably rejected Avi’s testimonial description of the robbery. Among the factual information *inter alia* before the jury was: (1) the admitted, flimsy construction of the jewelry booth walls incapable of withstanding a forcibly thrown human body; (2) the absence of photographs and medical treatment records corroborating serious injuries Avi allegedly sustained during the course of the robbery; (3) the occurrence of the alleged robbery prior to the jewelry show’s opening to the public and the alleged robbers’ successful evasion from certain security measures; and (4) Michael Zion’s¹ eventual purchase of one of the stolen diamonds (see Defendants’ Memorandum of Law in Opposition to JNOV Motion).

Based on the trial record, this court finds there were valid lines of reasoning and permissible inferences for the jury to draw upon that would lead these rational jurors to reach their conclusions based upon the testimonial and other admitted evidence presented at trial and decide the triable issue of whether Plaintiff sustained an insurable loss requiring coverage under the Policy. *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 410 N.Y.S.2d 282 (1978). This ample trial record does not justify a judgment notwithstanding the verdict reinstating Plaintiff’s insurable loss claim and awarding a judgment in favor of Plaintiff as a matter of law. *LePatner v. VJM Home Renovations*,

¹ Michael Zion is the brother of Menashe Zion, a principal of Aldiam, who resides in Israel and is also a diamond dealer.

Inc., 295 A.D.2d 322, 744 N.Y.S.2d 337 (2nd Dept., 2002); *cf.*, *Carnavalla v. Osso*, 301 A.D.2d 620, 753 N.Y.S.2d 887(2nd Dept., 2003).

Having found sufficient evidence in the trial record to support the verdict, this court must then inquire as to whether the conflicting testimonial and documentary evidence presented by the parties and which resulted in “a verdict for the [D]efendant[s]. . . so preponderate[d] in favor of the [P]laintiff that [the verdict] could not have been reached on any fair interpretation of the evidence. . . “ *Moffatt v. Moffatt*, 86 A.D.2d 864, 447 N.Y.S.2d 313 (2nd Dept., 1982) and quoted with approval, with bracketed matter added, in *Lolik et al., v. Big V Supermarkets, Inc.*, 86 N.Y.2d 744, 631 N.Y.S.2d 122 (1995). In conducting a factual inquiry of the trial record, this court further finds no basis to set aside the verdict as against the weight of the evidence and direct a new trial.

This constitutes the decision and order of this court. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York
September 10, 2007



HON. MARTIN SHULMAN, J.S.C.

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