

**Atlantic Balloon & Novelty Corp. v American
Motorists Ins. Co.**

2007 NY Slip Op 33283(U)

September 27, 2007

Supreme Court, Suffolk County

Docket Number: 0010985/1997

Judge: Emily Pines

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#016) is denied.

This is an action to recover damages in connection with an alleged theft of cash and other property belonging to the plaintiffs at the plaintiffs' warehouse in Deer Park, New York on May 25 and 26, 1995. The plaintiffs claim that the theft took place during the course of an auction of their merchandise, that it was perpetrated by the auctioneer and by others attending the event, and that the thieves took cash in the amount of \$185,000 and inventory valued in excess of \$484,000.

Prior to the alleged theft, in or about December 1994, the plaintiffs contacted the defendant broker, George Wagner Associates ("Wagner"), to procure insurance for their business. According to the deposition testimony of Denise Sirigo ("Sirigo"), the president and principal shareholder of plaintiff Atlantic Balloon & Novelty Corp., she telephoned Drew Muller ("Muller"), an account executive employed by Wagner, advised him that the plaintiffs wanted to insure \$500,000 worth of inventory, and memorialized this conversation in a letter dated December 5, 1994. Muller, by contrast, testified at his deposition that Sirigo did not request a specific amount of business personal property coverage and that he did not recall having previously seen the December 5, 1994 letter; rather, she asked him to provide quotes for a number of different possible scenarios and, in response to her request, he provided quotes for the coverage in the amounts of \$100,000 and \$150,000. Defendant American Motorists Insurance Company ("AMICO") subsequently issued a policy providing business personal property coverage in the amount of \$100,000 for the period December 16, 1994 through December 16, 1995. According to Sirigo, it was not until after she reported the loss to the broker in May or June of 1995 that she realized the plaintiffs had never received copies of the policy or its declarations page. By letter dated March 29, 1996, AMICO denied the plaintiffs' claim on the ground that its investigation revealed that no theft of business personal property had occurred.

The plaintiffs commenced this action against AMICO on May 16, 1997, alleging that AMICO breached the policy by failing to make payment for the loss sustained. On April 3, 1998, the plaintiffs filed a supplemental summons and amended complaint joining the remaining defendants to the action. As to Wagner, the plaintiffs allege in the amended complaint that Wagner held itself out to the public as a competent and knowledgeable insurance broker, that the policy was purchased for the plaintiffs by and through Wagner and based upon Wagner's representations and advice, that the broker was negligent in procuring a policy of insurance with limits of coverage that were neither appropriate nor adequate for the plaintiffs' business, that as a result of this negligence, the plaintiffs suffered a loss of business property, and that even if the insurer were to pay the limits of the coverage, the coverage available would be inadequate to compensate the plaintiffs for their loss.

By stipulation dated December 29, 1998, the action was discontinued against defendant National Insurance of New York, Inc.

Wagner now moves for an order, *inter alia*, pursuant to CPLR 3212¹ granting summary judgment

¹ To the extent Wagner seeks relief under CPLR 3211 (a) (5), the motion is untimely; however, by
(continued...)

dismissing the complaint on the grounds (i) that the action should be dismissed pursuant to Business Corporation Law § 1312 (a) because the plaintiffs were not authorized to do business in New York, (ii) that the plaintiffs' cause of action against it is barred by the applicable statute of limitations, and (iii) that the plaintiffs have not alleged and cannot establish necessary elements of its cause of action, namely, Wagner's failure to obtain coverage specifically requested by the plaintiffs nor the existence of an agreement or special relationship that would support the creation of a continuing duty to advise, guide or direct the plaintiffs to obtain additional coverage.

AMICO also moves for summary judgment on the grounds (i) that the plaintiffs lack the capacity to sue because they are foreign corporations doing business in New York without authorization and, further, because they were not active corporations at the time they commenced this action, and (ii) that the plaintiffs failed to comply with conditions precedent and cannot establish a covered loss under the policy.

Initially, the Court finds that the defendants waived their objection that the plaintiffs lacked the capacity to sue—whether because the plaintiffs were foreign corporations unauthorized to do business in New York or by reason of their inactive status—as the defendants failed to raise it in any of their respective answers or in a motion to dismiss before service of their answers (*see*, Business Corporation Law § 1312 [a]; CPLR 3211 [a] [3], [e]; ***Household Bank [SB], N.A. v Mitchell***, 12 AD3d 568, 785 NYS2d 116 [2004]). A challenge to the status of a corporate plaintiff, as here, does not implicate the jurisdiction of the court but rather the plaintiff's capacity to sue (***Security Pac. Natl. Bank v Evans***, 31 AD3d 278, 820 NYS2d 2 [2006], *appeal dismissed* 8 NY3d 837, 830 NYS2d 8 [2007]). Unlike a jurisdictional defect, which deprives a court of the power to entertain the case before it and is not waivable, lack of legal capacity to sue is a curable and waivable defect which affects, at most, a court's power to render a judgment on the merits in the plaintiff's favor (***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2007]; ***Boland v Indah Kiat Fin. (IV) Mauritius***, 298 AD2d 288, 748 NYS2d 744 [2002]; *see also*, ***Maro Leather Co. v Aerolineas Argentinas***, 161 Misc 2d 920, 617 NYS2d 617 [1994], *appeal dismissed* 85 NY2d 837, 624 NYS2d 365, *cert denied* 514 US 1108, 115 S Ct 1958 [1995]). Since the defendants' objection was capable of being, and was in fact, waived, they are barred from raising it in this action.

The Court also rejects Wagner's claim that the plaintiffs' cause of action against it is time-barred. Even assuming, as Wagner contends, that the cause of action sounds in negligence only and not in contract, it does not appear that the cause of action is untimely. Under CPLR 214 (4), the applicable statute of limitations for negligence is three years. Since a plaintiff must demonstrate damages in order to establish a prima facie case of negligence (*e.g.*, ***Green v State of New York***, 222 AD2d 553, 634 NYS2d 768 [1995]), the claim is not enforceable—and does not accrue—until damages are sustained (*see*, ***Kronos, Inc. v AVX Corp.***, 81 NY2d 90, 595 NYS2d 931 [1993]; ***Lavandier v Landmark Ins. Co.***, 26 AD3d 264, 810 NYS2d 45 [2006]; ***Venditti v Liberty Mut. Ins. Co.***, 6 AD3d 961, 774 NYS2d 849 [2004]; *see also*, ***Hoffman v Insurance Co. of N. Am.***, 241 Ga 328, 245 SE2d 287 [1978]; *but see*, ***Mauro v Niemann***

¹(...continued)

pleading the defense of statute of limitations in its answer, Wagner preserved it as a basis for summary judgment (*see*, CPLR 3211 [e]).

Agency, 303 AD2d 468, 756 NYS2d 611 [2003]). Here, the plaintiffs could not have pleaded all the facts necessary to their cause of action until May of 1995 at the earliest, when the alleged theft took place. The cause of action having thus accrued less than three years before the date on which Wagner was joined as a party defendant, *i.e.*, April 3, 1998, the Court finds it was timely pleaded.

As to Wagner's remaining claim, the Court finds questions of fact whether the plaintiffs specifically requested coverage in the amount of \$500,000 and, if so, whether Wagner breached its common-law duty to obtain the requested coverage or to advise of its inability to do so (*see generally, Murphy v Kuhn*, 90 NY2d 266, 660 NYS2d 371 [1997]).

AMICO's motion is denied as well. AMICO contends that the plaintiffs failed to comply fully with all the terms of the insurance, and are thus barred from maintaining this action, because they failed to provide complete inventories of the items allegedly stolen, as requested by AMICO, and failed to provide records as to the amount of money allegedly on hand at the time of the loss, and because Atlantic Balloon failed to resume operations as quickly as possible; and that the plaintiffs failed to establish a covered loss, in part, because the policy specifically excludes coverage for dishonest and criminal acts such as those allegedly perpetrated by the auctioneer.² The Court, however, finds the pre- and post-auction inventories

² Under the heading "Property Loss Conditions," the policy requires that the insured "see that the following are done in the event of loss or damage to Covered Property," including

- e. At our request, give us complete inventories of the damaged and undamaged property. Include quantities, costs, values and amount of loss claimed.
 - f. Permit us to inspect the property and records proving the loss or damage. Also permit us to take samples of damaged property for inspection, testing and analysis.
- * * *
- j. Resume all or part of your "operations" as quickly as possible.

and provides that no one may bring a legal action against the insurer under the policy unless "[t]here has been full compliance with all the terms of this insurance." Further, under the heading "Exclusions," the policy provides that the insurer "will not pay for loss or damage caused by or resulting from any of the following," including

- g. Dishonesty: Dishonest or criminal acts by you, any of your partners, employees, directors, trustees, authorized representatives or anyone to whom you entrust the property for any purpose:
 - 1) Acting alone or in collusion with others; or
 - 2) Whether or not occurring during the hours of employment.

This exclusion does not apply to acts of destruction by your employees; but theft by

(continued...)

supplied by the plaintiffs sufficient to satisfy their obligation under the policy (notwithstanding that they may not be sufficient to support their claim of loss). Likewise, even if the plaintiffs did not comply with AMICO's request to provide records of money allegedly stolen, it does not appear on the face of the policy that this would bar the instant suit. All the policy requires in this regard is that the insured *keep* such records so that the insurer "can verify the amount of any loss or damage" and that the insured *permit* the insurer to inspect such records, not that the insured provide such records on request.³ Nor has AMICO adduced any evidence that the plaintiffs were, in fact, capable of resuming operations, much less that they failed to do so quickly. Finally, the Court finds a question of fact, sufficient to defeat summary judgment, whether and to what extent the plaintiffs "entrusted" property within the meaning of the subject exclusion (*see*, n 2, *supra*) so as to fall outside the policy's coverage.

Dated: 9/27/07
Riverhead, NY

 _____ FINAL DISPOSITION X _____ NON-FINAL DISPOSITION

Emily Pines

HON. EMILY PINES
 I.S.C.

²(...continued)

employees is not covered.

- h. False Pretense: Voluntarily parting with any property by you or anyone else to whom you have entrusted the property if induced to do so by any fraudulent scheme, trick, device or false pretense.

³ Notably, and by way of contrast, the policy's preceding paragraph expressly requires that the insured *give* the insurer complete inventories upon the insurer's request (*see*, n 2, *supra*).