

**Jerry Shulman Produce Shipper, Inc. v OneBeacon  
Ins. Co.**

2008 NY Slip Op 33275(U)

December 1, 2008

Supreme Court, Nassau County

Docket Number: 8090/08

Judge: Kenneth A. Davis

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 3  
NASSAU COUNTY

JERRY SHULMAN PRODUCE SHIPPER, INC.  
And EAST END REALTY, INC.,

Plaintiff,

SUBMISSION DATE: 11/7/008

INDEX No.: 8090/08

-against-

ONEBEACON INSURANCE COMPANY,

MOTION SEQUENCE # 1

Defendants.

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Motion by defendant, OneBeacon Insurance Company, pursuant to CPLR 3211(a)(1), (5), (7) and (8), for an Order dismissing plaintiffs' complaint, is denied.

Insofar as a motion made pursuant to CPLR 3211 requires this Court to accept as true the allegations of the complaint (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]), the underlying facts are as follows:

This action seeks to recover damages for the breach of a comprehensive business insurance policy (Policy Number: 713-00-62-70-0001), issued by the defendant OneBeacon Insurance Company ("OneBeacon") for the benefit of the plaintiffs, Jerry Shulman Produce Shipper, Inc. ("Shulman") and East End Realty, LLC. ("East End"). Both plaintiffs were insured under the same commercial insurance policy which included coverage for real estate, equipment, business operations, and other associated risks in connection with and/or located at 4880 Depot Lane, Cutchogue, New York (the "insured premises") for a term commencing May 28, 2005 through May 28, 2006. There were four buildings located at the

insured premises which is referred to on said policy as Location 2 Buildings 1, 2, 3 and 4. Plaintiff East End is the owner of all four buildings and the real estate located at the insured premises. Plaintiff Shulman leased buildings numbered 1, 3 and 4 and was a tenant at said premises (*Complaint*, ¶11). On May 1, 2006, a fire at the premises destroyed building 1 together with all its contents. The fire also caused damage to buildings 2, 3 and 4. The contents destroyed in building 1 (with the exception of some small amounts of personal property owned by employees) were owned by Shulman. Plaintiffs commenced this litigation asserting three causes of action: (1) coverage under the Policy with respect to the cost of demolition and debris removal in the amount of \$26,837.32; (2) coverage under the Policy for reimbursement of costs to install new septic systems in the amount of \$29,945.00; and (3) coverage for decrease in value of stock as provided in the Bucket Limit of the Policy in the amount of \$23,289.75. However, in his affirmation in opposition to defendant's instant pre-answer motion to dismiss, plaintiffs' counsel states that "[p]laintiffs are prepared to discontinue the First and Second causes of action" (*Aff. In Opp.*, ¶5). Thus, plaintiffs' sole remaining cause of action sounds in coverage for the decrease in value of "Stock" as provided for in the Bucket Limit of the Policy in the amount of \$23,289.75. Plaintiffs allege that in addition to the insurance policy covering the loss caused by the fire of building 2 and its contents, the "Bucket Limit of Insurance" also provides "[c]overage for the decreased value of 'Stock' due to damage to another part or parts of 'stock'..." (*Complaint*, ¶26). The insurance policy defines "Stock" as: "(a) Merchandise held in storage or for sale; (b) Raw Materials; or © In process or finished goods including supplies used in their packing or shipping."

Plaintiff, Shulman, a shipper of produce, had numerous bags and packing materials which he claims fall under the definition of "Stock" listed in the insurance policy. Plaintiff claims that he sustained a "decreased value...due to damage to another part or parts of stock." On June 14, 2006 and March 31, 2008, plaintiffs submitted a claim for these damaged packaging materials in the amount of \$23,289.75 to the defendants. Plaintiffs received a denial for the claim originally submitted on June 14, 2006 by e-mail on August 30, 2006. Plaintiffs' second re-submission was also denied and never paid.

Defendant moves, pre-answer, to dismiss plaintiffs' third cause of action under CPLR 3211(a)(1), (a)(5), (a)(7) and (a)(8). This Court will address the merits of defendant's motion separately and in turn.

CPLR 3211(a)(5)

The insurance policy at issue states in pertinent part as follows:

PROPERTY CONDITIONS

The Special Property Coverage Form and Special Property Plus Coverage Form are subject to the Common Policy Conditions, and the following Conditions. The breach of any condition of this Coverage Form at any one or more locations will not affect coverage at any location where, at the time of loss or damage, the breach of condition does not exist.

\* \* \*

I. LEGAL ACTION AGAINST US

No one may bring a legal action against us under this Coverage Part unless:

- 1. There has been full compliance with all of the terms of this Coverage Part; and
- 2. The action is brought within 2 years after:
  - a. The date of which the direct physical loss or damage occurred, unless b., or c. below apply; or
  - b. The date you discover the loss, if the loss is covered by the Inland Marine Causes of Loss or your Crime Coverages; and
  - c. Until 90 days after you have filed proof of loss with us, if the loss is covered by your Crime Coverages.

Based upon the plain language of the insurance policy noted above, the accrual date for a cause of action against OneBeacon began on the date of the direct physical loss and damage which in this case was May 1, 2006, the date of the fire. Thus, as agreed to by the parties herein, plaintiffs had until May 1, 2008 to bring a claim against the defendant, OneBeacon. Pursuant to CPLR 304(a), an action is commenced by the filing of a summons and complaint. Plaintiffs commenced this action by filing the summons and complaint with the Nassau County Clerk on May 1, 2008. Defendant, however, contends that the "[p]laintiff completed service...upon the Insurance Department of the State of New York pursuant to Insurance Law §1212 on August 29, 2008" which falls outside of the two year time period stipulated in the insurance contract and as such, plaintiffs' complaint should be dismissed pursuant to CPLR 3211(a)(5). Assuming the truth of defendant's otherwise bald and legally unsupported argument, it is plainly clear that the insurance policy states that a legal action against the defendant has to be brought within 2 years after the date of the fire. It is well established that in common legal parlance, "brought" used in connection with a suit means "instituted", "commenced;" it signifies initiation of legal proceedings (*Brodsky v. Fiore*, 194 Misc. 837 [Sup. Ct. New York 1949]). The phrase "to bring an action" has settled, customary, legal, as well as general, meaning, and refers to the initiation of legal proceedings in the suit. The word "brought" is not synonymous with "service" of the summons and complaint. If the defendant, which drafted the insurance policy,

intended the action to be "served" rather than "brought" within 2 years, it should have so drafted the agreement to avoid any ambiguity. Thus, for the purposes of this motion, this Court holds that the use of the word "brought" without further qualification does not require anymore than filing of the action with the county clerk which the plaintiff in this case performed in a timely fashion.

CPLR 3211(a)(8)

Defendant also argues that plaintiffs' complaint should be dismissed for not having been timely served pursuant to CPLR §306-b which states that "[s]ervice of the summons and complaint...shall be made within one hundred twenty days after the filing of the summons and complaint..." Plaintiff commenced the action by filing of the summons and complaint on May 1, 2008 (CPLR 304). It is undisputed that plaintiff served the complaint upon the defendants on August 29, 2008 which was, in fact, the 120<sup>th</sup> day following the filing date (General Construction Law §20). Thus, plaintiff's complaint was also timely served under the CPLR.

CPLR 3211(a)(1) and (a)(7)

Finally, defendants also move to dismiss plaintiffs' third cause of action pursuant to CPLR 3211(a)(1) and (a)(7).

A motion to dismiss made pursuant to CPLR 3211(a)(1) will fail unless the documentary evidence that forms the basis of the defense resolves all factual issues as a matter of law, and conclusively disposes of the plaintiffs' claim (*McCue v. County of Westchester*, 18 AD3d 830, 831 [2<sup>nd</sup> Dept. 2005]; *Held v. Kaufman*, 91 NY2d 425, 430-431 [1998]). Moreover, a motion to dismiss made pursuant to CPLR 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiffs, the complaint states in some recognizable form any cause of action in law (*AG Capital Funding Partners, L.P. v. State St. Bank and Trust Co.*, 5 NY3d 582, 590-591 [2005]; *Leon v. Martinez*, 84 NY2d 83, 88 [1994]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19).

Plaintiffs, in their third cause of action, claim that certain items, including boxes of reinforced tape, one case shrink wrap, one shrink wrap roller, new washer spongers, chef potato bags, slip sheets, master bags, pallets, tote bags, wood bin boxes and poly bags are covered under the Bucket Limit of Insurance because these items constitute "stock." Plaintiffs claim that under the definitions section attached to the policy, "stock" is defined as including supplies used in their shipping or packing.

Defendant, on the other hand, claims that plaintiffs seek coverage for direct damages resulting from the fire, which are not covered under the "Bucket Limit of Insurance." Defendant submits

that under the Special Property Plus Coverage Form, only consequential damages are covered and plaintiffs' loss of the Specified Items are direct damages resulting from the fire

The insurance policy states, in pertinent part, as follows:

BUCKET LIMIT OF INSURANCE DECLARATIONS

The following limits are the total coverage limits for that particular coverage and include the amount provided in the appropriate form.

Bucket Limit of Insurance	\$500,000
Personal Effects	
Valuable Information Property	
Accounts Receivable	
Outdoor Property	
Fine Arts	
Hardware, Software, Media and data	
Fire Extinguisher and Automatic Extinguishing System Recharge	
Fire Department Service Charge	
Conditional Sales Agreement	
<i>Consequential Damage</i>	
Tenants Improvements & Betterments	

In addition to the above noted declarations page, the insurance policy also clarifies in the "Special Property Plus Coverage Form - Quick Reference Guide" that there are certain "COVERAGES" provided for in the policy (marked as section "A"), certain "CAUSES OF LOSS (and Exclusions)" (marked as section "B"), "PROPERTY VALUATION & LOSS PAYMENT" (marked as section "C"), "LIMITS OF INSURANCE" (marked as section "D"), "DEDUCTIBLES" (marked as section "E"), "CONDITIONS" (marked as section "F"), and "DEFINITIONS" (marked as section "G"). The Bucket Limit of Insurance is further explained under the "Limits of Insurance" Section to the Special Property Plus Coverage Form as follows:

16. Bucket Limit of Insurance

- a. Your Bucket Limit of Insurance applies to covered loss or damage to the following types of property, or Coverages:
  - \* \* \*
  - (10) Coverage for the decreased value of "Stock" due to damage of another part or parts of "Stock"; \*\*\*
- b. Your Bucket Limit of Insurance also applies per covered premises shown in the Declarations.\*\*\*
- c. If Specific Limits of Insurance are shown in the Declarations for any Coverages or property also subject to this Bucket Limit, then this Bucket Limit of Insurance will apply in excess of the

Specific Limits of Insurance and any Deductible applying to them.

- d. The Bucket Limit of Insurance applies only when loss or damage occurs at a scheduled location.
- e. Unless otherwise shown in the Declarations, your Bucket Limit of Insurance is \$500,000.

The Definitions Section of the Special Property Plus Coverage Form states that the term "Stock" means:

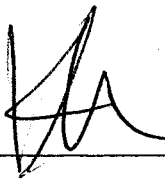
- 23. "Stock" means:
  - a. Merchandise held in storage or for sale;
  - b. Raw materials; or
  - c. In process or finished goods; including supplies used in their packing or shipping.

Based upon the papers submitted to this Court, this Court finds that the conflicting interpretations of the insurance policy presented by both parties warrants a denial of defendant's pre-answer motion to dismiss plaintiffs' complaint. Notably, the policy does not anywhere in the Bucket Limit of Insurance section use the words "direct damages" or "consequential damages." Both parties' use of these terms are merely their interpretation of what the policy means. Inasmuch as defendant's instant motion is made prior to joinder of issue (CPLR 3211), it is necessarily addressed to the face of the pleading (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]). At this stage, neither party has been put to its proof. Giving them the benefit of every favorable inference, a reasonable chance exists that the plaintiffs might prevail. The question of whether they should be afforded additional coverage under the "Bucket Limit of Insurance" cannot be resolved at the pleading stage. Therefore, the motion to dismiss the third cause of action is denied (*Rovello v. Orofino Realty Co.*, 40 NY2d 633, 635 [1976]).

Based upon plaintiffs' counsel's representation that "[p]laintiffs are prepared to discontinue the First and Second causes of action" (*Aff. In Opp.*, ¶5), this Court herewith directs counsel for plaintiff to serve and file a discontinuance of said causes of action within thirty days.

This shall constitute the decision and order of this Court.

Dated: DEC 01 2008

 **ENTERED**

KENNETH A. DAVIS

DEC 03 2008

NASSAU COUNTY  
COUNTY CLERK'S OFFICE