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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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HISTORICAL DESIGN, INC.,

Plaintiff(s),

-against-

EAGLE MOVING AND STORAGE CO., EAGLE MOVERS, INC., d/b/a EAGLE MOVING AND STORAGE CO., GENERAL CASUALTY INSURANCE, CINCINNATI INSURANCE COMPANY, AND FIREMAN'S FUND INSURANCE COMPANY,

Defendant(s).

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Index No. 13633/09

Motion Submitted: 1/21/10
Motion Sequence: 001, 002, 003

The following papers read on this motion:

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

This motion by the defendant General Casualty Insurance for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against it is granted.

This motion by the defendant Cincinnati Insurance Company for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against it is granted.

This motion by the defendant Fireman's Fund Insurance Company for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against it is denied.

In this action, the plaintiff bailor Historical Design seeks to recover of the defendant bailee Eagle Moving and Storage as bailee ("Eagle") for property that it placed in storage with Eagle in 1997. Historical Design alleges that it sought the return of its property in or about May 2008 and that Eagle notified it in July, 2008 that it could not account for its property and that there has been a physical loss or damage by complete destruction of it. When it placed its property with Eagle, Historical Designs received two receipts, one reflecting that Eagle received 534 items in boxes and the other reflecting that Eagle received 117 items in two boxes on January 20, 1997. Both of the receipts provided that "Contents insured for actual cash value up to $350,000.00, insured by R.S. Hammerschlagg." Historical Design alleges that despite its repeated demands, Eagle has refused to submit a claim for its property to the defendant insurance companies, which insured its property at various times via policies with Eagle.

Eagle's insurers seek dismissal of the complaint against them pursuant to CPLR § 3211(a)(7).

"The sole criterion in considering a motion to dismiss pursuant to CPLR § 3211(a)(7) is whether 'from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" (***East Hampton Union Free School Dist., Sandpebble Builders, Inc.***, 66 A.D.3d 122, 130, 884 N.Y.S.2d 94 (2d Dept., 2009), quoting ***Gershon v. Goldberg***, 30 A.D.3d 372, 373, 817 N.Y.S.2d 322 (2d Dept., 2006), citing ***Guggenheimer v. Ginzburg***, 43 N.Y.2d 268, 275, 372 N.E.2d 17, 401 N.Y.S.2d 182 [1977]). The complaint must be liberally construed and the court must accept the facts alleged by the plaintiff as true and accord the plaintiff the benefit of every possible favorable inference. (***4511 West 232nd Owners Corp. v. Jennifer Realty Co.***, 98 N.Y.2d 144, 151-152, 773 N.E.2d 496, 746 N.Y.S.2d 131 [2002]).

Insurance Law "3420(b)(1) authorizes 'any person who . . . has obtained a judgment against the insured for damages for injury sustained or loss or damage occasioned during the life of the policy or contract' to maintain an action against the insurer 'subject to the limitation and conditions of paragraph two of subsection (a) hereof.'" (***Lang v. Hanover Ins. Co.***, 3 N.Y.3d 350, 354, 820 N.E.2d 855, 787 N.Y.S.2d 211 [2004]). Insurance Law §3420(a)[2]) requires insurance policies to state that "in case judgment against the insured shall remain unsatisfied at the expiration of thirty days from the serving of notice of entry of judgment upon the attorney for the insured, or upon the insured, and upon the insurer, then an action may . . . be maintained against the insurer under the terms of the policy . . . for the amount of such judgment not exceeding the amount of the applicable limit of coverage . . . ." (See, ***Lang v. Hanover Ins. Co., supra***, at p. 355).

Contrary to Historical Designs' allegations, Insurance Law §§3420(a)(2), (b)(1) are not limited to personal injury cases. Insurance Law 3420(a) provides that it applies to, *inter alia*, policies or contracts insuring against "liability for injury to, or destruction of, property." (See, ***Azad v. Capparelli***, 51 A.D.3d 956, 858 N.Y.S.2d 393 (2d Dept., 2008); ***NC Venture I, L.P. v. Complete Analysis, Inc.***, 22 A.D.3d 544, 801 N.Y.S.2d 762 [2d Dept., 2005]). Insurance Law 3420 applies in this scenario. (See, ***Fisons Corp. v. Lumbermen's Mut. Cas. Co.***, 229 A.D.2d 925, 645 N.Y.S.2d 230 [4th Dept. 1996]). Therefore, unless it qualifies as an insured or intended third-party beneficiary, pursuant to Insurance Law § 3420, Historical Designs "must first obtain a judgment against [Eagle], serve the insurance company with a copy of the judgment and await payment for 30 days. Compliance with these requirements is a condition precedent to a direct action against the [defendant] insurance compan[ies]." (***Lang v. Hanover Ins. Co., supra***, at p. 354, citing ***Thrasher v. U.S. Liability Ins. Co.***, 19 N.Y.2d 159, 166, 225 N.E.2d 503, 278 N.Y.S.2d 793 [1967]). Historical Designs has not obtained a judgment against Eagle, the alleged tortfeasor insured. "Having failed to fulfill the condition precedent to suit, [it cannot] pursue a direct action against [the defendant insurers]." (***Lang v. Hanover Ins. Co., supra***, at p. 355).

Contrary to Historical Design's position, it is not binding law that when the named insured is a bailee for hire as to a plaintiff's goods, and those goods are covered by the bailee's insurance policy, the bailor is permitted to sue the insurance company directly when the bailee fails or refuses to claim against the insurance policy on the bailor's behalf. "The existence of an insurable interest. . . is not of itself sufficient to confer benefits under a policy extending coverage for property damage. Resort must be had to the terms of the policy to determine who is covered and the extent of coverage." (***Stainless, Inc. v. Employers Fire Insurance Company***, 69 A.D.2d 27, 31, 418 N.Y.S.2d 76 (1st Dept. 1979), aff'd, 49 N.Y.2d 924 (1980); see also, 71 N.Y. Jur.2d, Insurance § 2114) (policy's language covering goods "on account of whom it may concern" or by "trust and commission" make bailor the real property in interest or the party beneficially entitled thereto enabling them to sue insurer directly whereas "where policy contains a clause making the loss payable to and adjustable with the bailee, from which it may be inferred that the insurer does not intend to assume direct liability to the owners, the owners' rights are limited to the distribution of the funds after collection by the bailee and no action against the insurer is maintainable by them"); Carmody-Wait-2d, New York Practice § 19:32 Insurance Beneficiary Other Than Named Insured). "The intention to benefit the third party must appear from the four corners of the [policy]. The terms contained in the [policy] must clearly evince an intention to benefit the third party who seeks the protection of the [policy]." (***Stainless, Inc. v. Employers Fire Insurance Company, supra***, at p. 33-34, citing ***Flemington Nat. Bank & Trust Co. v. Domler Leasing Corp.***, 65 A.D.2d 29, 410 N.Y.S.2d 75 (1st Dept., 1978), aff'd. 48 N.Y.2d 678 (2008); ***Kornblut v. Chevron Oil Co.***, 62 A.D.2d 831, 407 N.Y.S.2d 498 (2d Dept., 1978), aff'd, 48 N.Y.2d 853 (1979); ***Bernal v. Pinkerton's Inc.***, 52 A.D.2d 760, 382

N.Y.S.2d 769 (1st Dept., 1976), aff'd, 41 N.Y.2d 938 (1977); ***MacKendrick v. Newport News Shipbuilding & Dry Dock Co.***, 40 A.D.2d 798, 338 N.Y.S.2d 41 (1st Dept., 1972), aff'd, 35 N.Y.2d 681 (1974). ***Cerullo v. Aetna Cas. & Sur. Co.,*** 41 A.D.2d 1, 341 N.Y.S.2d 767 (4th Dept. 1973)***; Ramos v. Shumavon***, 21 A.D.2d 4, 247 N.Y.S.2d 699 (1st Dept., 1964), aff'd, 15 N.Y.2d 610 (1964); ***10 N.Y. Jur., Contracts, § 239***.

Eagle's policies with General Casualty Insurance and Cincinnati Insurance company provides, *inter alia*, that "no person or organization has a right . . . to join [it] as a party or otherwise bring [it] into a 'suit asking for damages from an insured." A person or organization may sue it to recover on an agreed settlement or on a final judgment against the insured.

Eagle's policy with General Casualty Insurance provides coverage to only "the named insured shown in the Declarations." There is no language which can be interpreted as extending coverage to Historical Design as the bailor.

While Cincinnati Insurance Company's policy defines "Covered Property" as, *inter alia*, "Personal Property of others that is in your care, custody or control or for which you are legally liable," it specifically provides "**No Benefit to Bailee**. No person or organization other than you, having custody of covered Property will benefit from this insurance." Historical Design is not an intended third-party beneficiary who may recover directly from Cincinnati Insurance Company.

Fireman's Fund has not cited to any policy language precluding Historical Design from suing it directly nor has it cited the policy language which defines how the insured interest is held, i.e., "on account of whom it may concern" or by "trust and commission" versus a limitation making the loss payable to and adjustable with only the bailee. Thus, it has not established that Historical Design lacks standing to sue it directly pursuant to its policy terms. Moreover, at this juncture, pre-discovery, Historical Design's inability to establish that the loss occurred while the Fireman Fund's policy was in effect does not require dismissal of its complaint: In fact, Fireman's Fund has not established that the loss did not occur while its policy was in effect.

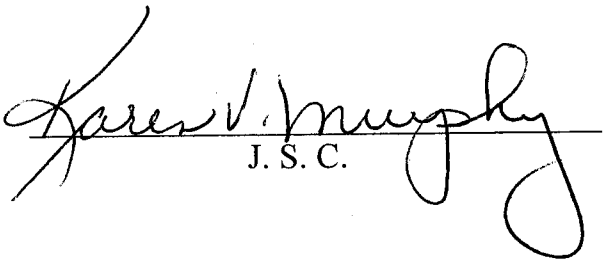
Nevertheless, the seventh cause of action sounding in negligence fails and is dismissed. (See, ***Long Island Lighting Co. v. Transamerica Delaval, Inc.***, 646 F. Supp. 1442, 1457, (S.D.N.Y. 1986), rearg den., 648 F. Supp. 988 (S.D.N.Y. 1986) Fireman's Fund's motion is denied.

General Casualty Insurance and Cincinnati Insurance Company's motions to dismiss the complaint against them are granted.

The court notes that any disclaimers by the defendant insurance companies are pursued at their own risk. They take the risk that the plaintiff will obtain a judgment against Eagle and then seek payment pursuant to Insurance Law § 3420 at which time they may litigate only the validity of their disclaimer. (***Lang v Hanover Ins. Co., supra***, at p. 356; see also, ***Bowker v. NVR, Inc.***, 39 A.D.3d 1162, 834 N.Y.S.2d 798 (4th Dept., 2007), lv den., 42 A.D.3d 976 [4th Dept., 2007]).

The foregoing constitutes the Order of this Court.

Dated: February 25, 2010
Mineola, N.Y.



J. S. C.