

**Hermitage Ins. Co. v Art Crating, Inc.**

2011 NY Slip Op 31608(U)

June 15, 2011

Sup Ct, NY County

Docket Number: 116802/09

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE  
J.S.C. Justice

PART 10

Index Number: 116802/2009  
HERMITAGE INSURANCE COMPANY  
vs.  
ART CRATING, INC.  
SEQUENCE NUMBER: 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

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 (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 6/15/11

HON. JUDITH J. GISCHE J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----X  
HERMITAGE INSURANCE COMPANY,

Plaintiff,

-against-

ART CRATING, INC., ART COURIER, BOXART, INC., FRITZSTOCK, INC. f/k/a DIETL INTERNATIONAL SERVICES, INC., TIFFANY TRANSPORT INT'L, a division of CARRIER CLEANING SERVICES, INC., LUFTHANSA CARGO, AG, and AXA ART INSURANCE CORPORATION as subrogee of GAGOSIAN GALLERY INTERNATIONAL, LLC formerly known as GAGOSIAN GALLERY OF LONDON, LLC.,

Defendants.  
-----X

**DECISION/ ORDER**  
Index No.: 116802/09  
Seq. No.: 001

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C.

**UNFILED JUDGMENT**

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Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Pltf's n/m (3212) w/MEH affirm, EJ and EC affids, exhs . . . . .	1,2,3,4
Def's opp w/PLJ affirm, exhs . . . . .	5
Def Dietel's opp w/MMS affirm . . . . .	6
Pltf's reply . . . . .	7

*Upon the foregoing papers, the decision and order of the court is as follows:*

Plaintiff, Hermitage Insurance Company ("Hermitage") moves for summary judgment, seeking a declaration that it does not have a duty to defend or indemnify defendant, Art Crating, Inc. ("Art Crating"), its insured, in connection with a separate action pending in the Supreme Court, Kings County ("the underlying action") (*AXA Art Ins. Corp. a/s/o Gagosian Gallery Int'l, LLC f/k/a Gagosian Gallery of London, LLC v. Art Courier, et al.*, Index No. 108763/09).

Issue has been joined between the parties to this motion and the filing of the note of issue has not yet occurred. Thus, this motion is appropriately before the court for consideration at this time. CPLR § 3212(a); Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 (1st Dept. 2001).

### **Facts and Arguments Presented**

The plaintiff in the underlying action (“AXA”) alleges that on October 13, 2008, a Brice Marden painting entitled “AuCentre” (the “painting”), was damaged while in transit from Moscow to New York. AXA alleges that, as a result of the underlying defendants’ negligence, it suffered damages in the amount of \$3,000,000.00 (the “loss”).

It is undisputed that, Hermitage, as insurer, and Art Crating, as insured, entered into a general liability policy, which was in effect on the date of the loss (the “Policy”). The Policy requires that Art Crating notify Hermitage “as soon as practicable of an ‘occurrence’ or an offense which may result in a claim.”

On November 25, 2008, Art Crating was notified of the loss in a letter from AXA’s counsel, which states “unless suitable arrangements are made to reimburse AXA for this loss . . . the insurer, at its option and sole discretion, will commence legal action against you to recover this loss . . . you should forward a copy of this letter to your insurance company.” On December 1, 2008, Art Crating replied stating that it was not involved in the packing or handling of the painting and “will not accept any responsibility for this loss.” The underlying action was commenced on June 19, 2009. On July 28, 2009, Hermitage first received notice of the underlying action and loss by facsimile from its agent, non-party Trans World Facilities, Inc. Thereafter, Hermitage investigated the

underling claim and disclaimed coverage by letter dated August 26, 2009, based on Art Crating's failure to provide timely notice of the loss.

Art Crating does not dispute any of the above facts, but contends that it had a good faith belief as to non-liability and that no claim would be brought against it. Art Crating's belief as to non-liability is based on an alleged telephone conversation with Fritz Dietl ("Dietl"), President of defendant Dietl International Services, Inc. ("Dietl Inc."); the deposition testimony of Dietl from the underlying action; and Lufthansa's cargo reports. Dietl testified, in relevant part, that he was hired by the Gagosian Gallery to arrange for the painting to be transported from New York to Moscow, where it arrived intact. However, at some point, the painting was shipped back to New York, from Moscow, without Dietl's knowledge. Dietl later learned that defendant, Art Courier, had arranged for the transportation, and that the damage to the painting was caused in the Frankfurt airport, while being held for a connecting flight to New York. Dietl testified, "Art Crating was not involved in this shipment from Moscow at all."

Dietl Inc. denies responsibility for Art Crating's acts and takes no position with respect to the merits of the instant motion.

### **Discussion**

The movant on a summary judgment motion has the initial burden of proving entitlement to summary judgment, by tender of evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1st Dept. 1980); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1st Dept. 1985). It is only when the proponent of the motion makes a

*prima facie* showing of entitlement to summary judgment does the burden then shift to the party opposing the motion who must then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. Zuckerman v. City of New York, *supra* at 562. Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact or where the factual issue is arguable or debatable. International Customs Assoc., Inc. v. Bristol-Meyers Squibb Co., 233 A.D.2d 161, 162 (1st Dept. 1996). Moreover, the court cannot resolve issues of credibility, as it is for the jury to weigh the evidence and draw legitimate inferences therefrom. S.J. Capelin Assocs. v. Globe Mfg. Corp., 34 N.Y.2d 338 (1st Dept. 1974).

Where a liability insurance policy requires that notice of an occurrence be given "as soon as practicable," such notice must be provided to the carrier within a reasonable period of time. Great Canal Realty Corp. v. Seneca Ins. Co., 5 N.Y.3d 742 (2005). "The duty to give notice arises when, from the information available relative to the accident, an insured could glean a reasonable possibility of the policy's involvement." Tower Ins. Co. of New York v. Lin Hsin Long Co., 50 A.D.3d 305 (1st Dept. 2008) *quoting* Paramount Ins. Co. v. Rosedale Gardens, 293 A.D.2d 235, 239-40 (1st Dept. 2002). An insurer is not obligated to pay for the loss of its insured in the absence of timely notice in accordance with the terms of the policy. DiGuglielmo v. Travelers Property Cas., 6 A.D.3d 344 (1st Dept. 2004).

Here, Hermitage has established as a matter of law, and it is undisputed that, Art Crating failed to give Hermitage notice of the loss within a reasonable period of time. The painting was damaged on October 13, 2008 and Art Crating was made aware of this

loss on November 25, 2008, when it was also told to notify its insurance carrier. Instead, Art Crating waited until July 28, 2009, over eight months later, before notifying Hermitage. This constitutes an unreasonable delay as a matter of law. See Public Service Mut. Ins. Co. v. Harlen Housing Associates, 7 A.D.3d 421 (1st Dept. 2004) (eight months was found unreasonable); DiGuglielmo v. Travelers Property Cas., *supra* (seven months was found unreasonable).

Regardless of whether Art Crating had a reasonable, good faith belief that the incident would not result in liability, as a matter of law, this reasoning fails. Although courts have recognized that “a good-faith belief of nonliability,” may be reasonable (Security Mut. Ins. Co. of New York v. Acker-Fitzsimons Corp., 31 N.Y.2d 436 [1972]); “where a reasonable person could envision liability, that person has a duty to make some inquiry” (White v. City of New York, 81 N.Y.2d 955, 958 [1993]). A reasonable possibility of the policy’s involvement is sufficient to trigger the duty to notify, even if there are some factors that tend to suggest the opposite. Paramount Ins. Co. v. Rosedale Gardens, *supra*.

The importance of prompt notice of any occurrence that “may result in a claim” is so that the insurer is not compelled to “relinquish its right to prompt notice and all the benefits that accrue therefrom—a timely investigation and the opportunity, if appropriate, to dispose of the claim in its early stages, an opportunity that might be irretrievably lost in the case of delayed notice—by placing undue emphasis on the liability assessment of one not trained or even knowledgeable in such matters.” Paramount Ins. Co., v. Rosedale Gardens, *supra* at 240.

Art Crating was notified of the loss on November 25, 2008 and was put on notice

by AXA that it should notify its insurance company and that legal action might ensue. Regardless of Dietl's communications with Art Crating and whether Art Crating had a reasonable believe of non-liability, Art Crating still had an obligation under the Policy to promptly notify Hermitage "as soon as practicable" of a possible claim. Thus, as soon as Art Crating was apprised of the loss, it should have notified Hermitage of a loss that "may result in a claim." Paramount Ins. Co., v. Rosedale Gardens, *supra*.

Hermitage has established its *prima facie* case by proving that it has no duty under the policy to defend or indemnify Art Crating in the underlying action because Art Crating breached its contractual duty of providing timely notice of a possible claim. In opposition, Art Crating has failed to raise any triable issues of fact. Zuckerman v. City of New York, *supra*. Therefore, Hermitage's motion for summary judgment is hereby granted.

### Conclusion

*In accordance with the foregoing,*

IT IS HEREBY

ORDERED that plaintiff, HERMITAGE INSURANCE COMPANY motion for summary judgment against ART CRATING, INC. is GRANTED in all respects; and it is further

ORDERED ADJUDGED AND DECLARED that plaintiff, HERMITAGE INSURANCE COMPANY, does not have a duty to defend or indemnify defendant, ART CRATING, INC., in connection with a separate action pending in the Supreme Court, Kings County (AXA Art Ins. Corp. a/s/o Gagosian Gallery Int'l, LLC f/k/a Gagosian Gallery of London,

*LLC v. Art Courier, et al.*, Index No. 108763/09); and it is further


**ORDERED** that a **preliminary conference** with all remaining defendants is scheduled for **July 21, 2011 at 9:30 a.m.** at 60 Centre Street, NY, NY, Room 232, Part 10; and it is further

**ORDERED** that any requested relief not expressly addressed is hereby denied; and it is further

**ORDERED** that this constitutes the decision and order of the court.

Dated: New York, New York  
June 15, 2011

So Ordered:

  
HON. JUDITH J. GISCHE, J.S.C.

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).