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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan PART 36

Index Number : 109410/2009

CARTER, ARTHUR L.

INDEX NO. _____

vs

MOTION DATE _____

PRAETORIAN INSURANCE COMPANY

MOTION SEQ. NO. _____

Sequence Number : 001

SUMMARY JUDGMENT

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2, 3

Answering Affidavits — Exhibits _____ | No(s). 4, 5

Replying Affidavits _____ | No(s). 6

Upon the foregoing papers, it is ordered that this motion for summary judgment is granted in accordance with the attached decision/order.

FILED

JAN 18 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/11/12

_____, J.S.C.

JUDGE DORIS LING-COHAN

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 36

----------X

Arthur L. Carter and Utilities & Industries Management Corp.,
Plaintiffs,

Index Number 109410/2009

-against-

Praetorian Insurance Company,
Defendant.

Motion Seq. No.: 001

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Doris Ling-Cohan, J.:

Defendant moves for summary judgment dismissing plaintiffs' complaint based upon their failure to give timely notice of the claim, no physical loss of the covered property and a lack of any insurable interest in the covered property, at the time of the claim.

Background

Arthur L. Carter (Carter) is the claimant under an insurance policy issued by Insurance Company of Hannover (Hannover) for six pieces of artwork known as Nockamixon, La Femme au Pinceau, Vertical Abstraction, an untitled artwork by Benno, an untitled artwork by Diller and composition number 127 (the Property) (amended complaint, ¶¶ 6, 15). Defendant is an insurance company and it was formerly known as Hannover (*id.*, ¶ 5, admitted in amended answer, ¶ 4). Utilities & Industries Management Corp. (Utilities) is a corporation that, among other things, operates as a holding company for Carter's operating businesses (Carter Examination Under Oath [EUO], at 8).

Hannover issued a Valuable Personal Articles Policy, number H5314055708 (the Policy) for the period from September 11, 2005 through September 11, 2006 to Utilities and, subsequently by general endorsement number 2, effective November 22, 2005, made Carter the named insured (amended complaint, ¶¶ 8-9; Guevara affidavit dated April 15, 2011, ¶¶ 3, 5).

Plaintiffs allege that the Property was stolen or converted by Lawrence Salander (Salander) (amended complaint, ¶¶ 8-10) and that they are entitled to compensation under the Policy.

Plaintiffs allege that, in 1996 or 1997, Carter met Salander, who was the owner of an art gallery, the Salander-O'Reilly Gallery (the Gallery), and that Carter was an art collector, who bought the artwork that constituted the Property (Carter EUO, at 5-7, 10-18). Carter states that he insured his artwork, including the Property (*id.* at 12). According to Carter, he had shown his own artwork in the Gallery and that, in 2006, he arranged with Salander for the sale of the Property for $1.5 million, with Salander to provide full payment on taking the Property, but that Salander failed to bring a check when he picked up the Property (*id.* at 55-58).

Carter further contends that Salander told him that he would get him a check soon, that this went on for some time with Salander assuring him that payment was imminent, but Carter never received full payment (*id.* at 59-60). Carter also alleges that

Salander sent him paintings as collateral, made repeated promises to pay and, eventually, on January 10, 2007, entered into a security agreement and executed a promissory note dated January 10, 2007 in the amount of $1.1 million (the Note) to secure the outstanding debt (*id.* at 70-73, 79, 84).

Carter further states that Salander made some payments, but did not pay the full amount and, therefore, on March 13, 2007, Carter sent Salander a default notice (*id.* at 88). On August 13, 2007, Utilities commenced an action against the Gallery under index number 111040/2007 for summary judgment in lieu of complaint based upon the Note (*id.* at 112).

Thereafter, Salander filed for bankruptcy in the United States Bankruptcy Court in the Southern District of New York on November 2, 2007 (motion, exhibit Q) and Justice Bernard Fried, by order filed November 23, 2007, permitted the motion for summary judgment in lieu of complaint to be withdrawn with leave to renew on lifting of the bankruptcy stay.

Utilities filed a corporate tax return in 2007, which stated that it had received $300,000 for the Property, and took a bad debt deduction in the amount of $707,500 relating to the Property (*id.* at 124, 126-127, 130). On June 16, 2008, Utilities filed a proof of claim in the Bankruptcy Action. On December 8, 2008, Carter testified in the Bankruptcy Action, setting forth the circumstances of the sale of the property to Salander (Carter

Bankruptcy EBT, at 25-31).

Carter filed a claim under the Policy on July 14, 2008, contending that the Property had been given to Salander under a consignment, rather than a sale (*id.* at 133) and that he had not received payment. On August 19, 2008, defendant sent Carter a letter, stating that it was investigating the claim and reserving its rights. By letter dated October 29, 2008, defendant demanded that Carter submit to an examination under oath ("EUO"), pursuant to the Policy and the EUO was held on March 12, 2009.

On July 2, 2009, Carter purchased an index number, commencing this action. On September 17, 2009, defendant sent a letter (the Denial Letter), stating that Carter had provided information that the loss occurred in November 2005 when he sold the Property and denied Carter's claim, based upon late notice of the claim, no physical loss, a lack of an insurable interest and that the Property was last listed on a schedule of covered items on the renewal policy for the period of September 11, 2006 through September 11, 2007.

On December 9, 2010, Carter served a complaint in this case and defendant interposed an answer on January 5, 2011. On January 31, 2011, plaintiffs served a supplemental summons and amended complaint, adding Utilities as a party plaintiff. Defendant interposed an amended answer on February 28, 2011 and, thereafter, moved for summary judgment.

Defendant asserts that the Property was listed on the schedule form for the Policy, but was not listed on the schedule form for the renewal policy, number H531505708 (the Renewal Policy), for the period of September 11, 2006 through September 11, 2007 or for subsequent renewals and, therefore, was not covered (Guevara affidavit dated April 15, 2011, ¶¶ 4-9).

Defendant also contends that Carter's notice of July 14, 2008 was untimely and a breach of the Policy's requirement that notice of the loss be given as soon as practicable, since the Property was given to Salander in 2006 (Adams affidavit, ¶¶ 9-10). Defendant further states that, since Carter stated that he sold the Property to Salander, there was no physical loss of the Property and that Carter merely had a bad debt (*id.*, ¶¶ 10-13, 24, 30). It also asserts that, since Carter sold the Property, he had no insurable interest in it (*id.*, ¶ 33-34).

Defendant, therefore, contends that since it has established that plaintiffs have no entitlement to recovery under the Policy and the Renewal Policy, the action should be dismissed.

In opposition, plaintiffs state that they need time for discovery (Gergel affirmation, ¶ 4), that there is a conflict in defendant's proof because the Denial Letter states that the Property was scheduled on the Renewal Policy, that defendant's affidavits were not executed in conformity with CPLR 2309 (c) and that, when the Property was given to Salander in November 2005,

it was "for the sole purpose of consignment" (Carter affidavit, ¶ 12).

Discussion

A. Affidavits

CPLR 2309 (c) requires that an affidavit taken outside the state must be accompanied by an appropriate certificate and defendant has submitted such a certificate to the Adams affidavit and a new affidavit by Guevara dated August 1, 2011 has an accompanying certificate. A defect in the form of an affidavit under CPLR 2309 (c) can be cured nunc pro tunc (*Moccia v Carrier Car Rental, Inc.*, 40 AD3d 504 [1st Dept 2007]). Consequently, defendant has presented adequate evidentiary proofs in affidavit form. Defendant has restated that the Property was not scheduled on the Renewal Policy (Guevara affidavit dated August 1, 2011, ¶¶ 6, 10).

B. **Summary Judgment**

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material

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fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). However, the Court of Appeals has made clear that bare allegations or conclusory assertions are insufficient to create genuine, bona fide issues of fact necessary to defeat such a motion (*see Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223, 231 (1978).

1. Contract Interpretation

An insurance policy is a contract and, where provisions of a policy are clear and unambiguous, they should be given their plain and ordinary meaning (*United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986]). While ambiguities are construed against the insurer, the court should not disregard the plain meaning to create an ambiguity, since this improperly rewrites the parties' agreement (*id.* at 232; *Catucci v Greenwich Ins. Co.*, 37 AD3d 513, 514 [2d Dept 2007]).

In this case, the Policy required the insured to "[r]eport as soon as practicable in writing ... any loss or damage which may become a claim under [the Policy]".

The Policy provides that defendant is "insure[d] for all risks of direct physical loss to your covered [Property]".

The Policy covered "[a]ll valuable personal items on a scheduled basis ... [listed on a] schedule indicating the description and agreed value of each item [which] is attached to the [P]olicy".

2. Late Notice

Notice provisions in an insurance policy, requiring an insured to give notice, affords the insurer an opportunity to protect itself and are binding (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440 [1972]; *Heydt Contr. Corp. v American Home Assur. Co.*, 146 AD2d 497, 498 [1st Dept], *app dismissed* 74 NY2d 651 [1989]; *see also Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332, 339 [2005]).

An insured must show a valid reason for the delay in giving notice and a delay of three months has been held to be unreasonable as a matter of law (*Heydt*, 146 AD2d at 498; *Quality Invs., Ltd. v Lloyd's London, England*, 11 AD3d 443 [2d Dept 2004], *lv denied* 5 NY3d 701 [2005]).

Carter filed the notice of claim on July 14, 2008 for the loss that occurred in November 2005, when the Property was given to Salander. Even assuming that Carter had a valid reason for the delay in seeking return of the Property, Utilities sued the Gallery on August 13, 2007 under the Note, eleven months prior to Carter's giving notice of the claim. Delay beyond this point cannot be considered to be giving notice as soon as reasonably practicable and, accordingly, defendant's motion for summary judgment based upon lack of timely notice is granted (*Quality*, 11 AD3d at 443).

3. Title

Defendant also seeks dismissal, since there was no physical loss of the property, but rather a sale of the Property to Salander who defaulted on payment. Plaintiffs have contended that there was a consignment of the Property to Salander and that when Salander defaulted on payment, this made the transaction a theft (Carter affidavit, ¶ 12-14). In a consignment, the purchaser is essentially an agent for the sale of the property, with title remaining in the seller (*Rahanian v Ahdout*, 258 AD2d 156, 158-59 [1st Dept 1999]).

However in this matter, Carter testified that he sold the Property to Salander (Carter EUO at 54-58; Carter Bankruptcy EBT at 28-30). Carter's statement in his affidavit opposing defendant's motion that contradicts his "prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment" (*Harty v Lenci*, 294 AD2d 296, 298 [1st Dept 2002]; *Schwartz v JPMorgan Chase Bank, N.A.*, 84 AD3d 575 [1st Dept 2011]; *AGFA Photo USA Corp. v Chromazone, Inc.*, 82 AD3d 402 [1st Dept 2011]; *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [1st Dept 2000]). Plaintiffs cannot show a consignment, since this contradicts the prior sworn testimony that the transaction was a sale of the Property. The fact that Salander defaulted in making payment does not change the transaction from a sale and, consequently, the

default in payment does not constitute a physical loss of the property. Accordingly, defendant has shown entitlement to summary judgment based upon the lack of a physical loss of the Property

4. **Insurable Interest**

Defendant also seeks dismissal of the complaint based upon a lack of insurable interest in the Property. Insurance Law § 3401 requires an insurable interest in property for a contract of insurance to be enforceable (*Scarola v Ins. Co. of N. Am.*, 31 NY2d 411, 413 [1972]; *National Superlease v Reliance Ins. Co. of N.Y.*, 123 AD2d 608 [2d Dept 1986]), *lv denied*, 69 NY2d 611 [1987]. Once Carter sold the property to Salander, he had no "substantial economic interest in the safety or preservation of [the] property from loss, destruction or pecuniary damage" (Insurance Law § 3401). Therefore, defendant is entitled to summary judgment based upon plaintiffs' lack of an insurable interest in the Property.

5. **Scheduled Loss**

Plaintiffs assert that the Denial Letter states that the property was listed on the Renewal Policy and that this raises a factual issue. However, the Policy listed the Property as scheduled items and the Renewal Policy did not list the Property as scheduled items (Guevara affidavit dated August 1, 2011, ¶¶ 3-6; Adams affidavit, ¶¶ 33-34). Any error in the Denial Letter

cannot rewrite the Policy and create coverage. Therefore, dismissal based upon this ground is also warranted.

Conclusion

It is, therefore,

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy upon plaintiffs, with notice of entry.

Dated: Jan 11, 2012

Doris Ling-Cohan, J.S.C.

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