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

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

EXQUISITE APPAREL CORP.,

Plaintiff,

- v -

NATIONAL LIABILITY & FIRE INSURANCE COMPANY,

Defendant.

Index No.: 116432/09

Motion Date: 06/08/12

Motion Seq. No.: 01

Motion Cal. No.: _____

The following papers, numbered 1 to 6 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1 - 4
Answering Affidavits - Exhibits	5
Replying Affidavits - Exhibits	6

Cross-Motion: ☐ Yes ☒ No

The issue on the parties' respective motions for summary judgment in this action brought by plaintiff insured seeking recovery from defendant insurer upon a warehouse coverage all risk commercial policy of insurance, is whether the plaintiff's claim is barred by the "unexplained or mysterious disappearance" exclusion clause.

Plaintiff seeks to collect on a first-party insurance claim alleging theft of its goods from a warehouse on or about June 28, 2007. Plaintiff claims that it sustained a loss of over one million dollars and that under the terms of the policy it should

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SETTLE/SUBMIT ORDER/JUDG.

be granted summary judgment on its causes of action seeking reimbursement under the policy.

Defendant argues that based upon the facts adduced here the plaintiff is not entitled to coverage under the relevant terms of the "Warehouse Coverage Endorsement" to the policy. That endorsement reads in pertinent part that

> Notwithstanding anything contained elsewhere herein to the contrary, this policy shall not pay for loss of or damage to the goods and merchandise while covered under this endorsement caused by of resulting from:
>
> a. Unexplained or mysterious disappearance, or loss or shortage disclosed upon taking inventory where there is no evidence that the loss was occasioned by perils specifically insured against.

Defendant argues that plaintiff's claim is barred by the "mysterious disappearance" clause of the policy because plaintiff has failed to adduce facts that would allow a fact finder to conclude that plaintiff's goods were stolen as plaintiff alleges.

The Court of Appeals has considered the interpretation of the "mysterious disappearance" clause in an insurance contract. In Maurice Goldman & Sons, Inc. v Hanover Ins. Co. (80 NY2d 986, 987 [1992]), plaintiff's president while on a business trip noticed that a bag containing jewelry was missing from his personal effects but he was unable to say how or where the loss occurred. Plaintiff thereafter submitted a claim to defendants and they disclaimed liability for the loss, relying on the clauses in their policies that excluded from coverage

"[u]nexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory." Id. The Court held that

> Where the provisions of an insurance contract are clear and unambiguous, the courts should not strain to superimpose an unnatural or unreasonable construction . Contrary to plaintiff's argument, the clause in issue here is susceptible of only one interpretation. Each of the enumerated casualties, i.e., "[u]nexplained loss," "mysterious disappearance," and "loss or shortage discovered on taking inventory," is plainly an independent basis for exclusion. There is nothing in the grammar or syntax of the exclusionary clause to suggest that the phrase "discovered on taking inventory" was intended to modify each one. To the extent that the court reached a contrary conclusion in McCormick & Co. v Empire Ins. Group Co. (878 F2d 27), its holding is an inaccurate interpretation of New York State law.
> Equally unpersuasive is plaintiff's argument that the ruling of the courts below improperly shifted the burden of proof from the insurer to the insured. While it is true that an insurer generally has the burden of proving that a loss is within the scope of a policy exclusion, defendants satisfied that burden here by simply showing that plaintiff's claim concededly involved an "unexplained loss" or "mysterious disappearance."

Id. at 987 -988 (citations omitted).

A number of cases in the First Department have clarified the legal standard to be applied to summary judgment motions based upon a policy's "mysterious disappearance" clause. In Gurfein Bros., Inc. v Hanover Ins. Co. (248 AD2d 227 [1st Dept 1998]), plaintiff-insureds' sales representative surmised that the diamonds in his possession had been stolen when he pulled over to change a flat tire. Defendant insurer, having disclaimed coverage, moved to dismiss plaintiff's complaint seeking reimbursement under the policy on the grounds of the "mysterious

disappearance" clause. "Defendant argued that since [the representative] could not specify exactly when or where he had stopped and had not seen or heard the diamonds being stolen, plaintiffs' claim that a theft had occurred was mere speculation." Id. at 228. The Court held that

> [T]he motion court granted summary judgment to defendants because the record was "devoid of proof as to the exact manner in which plaintiffs' goods were lost or disappeared." We agree with plaintiffs that this ruling impermissibly shifted the burden onto them to prove that the exclusion did not apply, and that contested factual issues do indeed preclude a grant of summary judgment.

Id. at 229. The Court, analyzing the precedents interpreting the policy provision concluded that

> In the case at bar, by contrast, plaintiffs have offered an explanation, supported by circumstantial evidence from several sources, which if believed by the trier of fact could reasonably support an inference of theft. From the evidence presented by plaintiffs, the trier of fact could infer the approximate time and place of the theft as well as the methods and possible identity of the thieves. Defendant has failed to show that this version of events is so illogical, implausible or speculative as to warrant summary judgment for the insurer. The complaint should therefore be reinstated.

Id. at 231. See S. Bellara Diamond Corp. v First Specialty Ins. Corp., 287 AD2d 368, 369 (1st Dept 2001) (summary judgment denied to insurer where insured surmised that he accidentally threw the paper parcel of diamonds into the garbage as he hurriedly cleaned off his desk before going to lunch as this explanation, supported by circumstantial evidence, if believed by the trier of fact,

could reasonably support an inference that the diamonds were accidentally thrown away).

In another case involving diamonds alleged to have been lost, the Court denied summary judgment to the plaintiff-insured finding "there are issues of fact precluding a determination, at this juncture, whether the "mysterious disappearance exclusion" is applicable. There are a number of explanations proffered by plaintiff for the disappearance of the small leather pouch of diamonds. . . Because questions as to the plausibility of plaintiff's explanations cannot be resolved on the existing record, we affirm the determination of the motion court to deny plaintiff's motion for summary judgment." Nussbaum Diamonds, LLC v Hanover Ins. Co., 64 AD3d 488, 493-494 (1st Dept 2009).

In this case, plaintiff asserts that the mere fact that goods valued at over one million dollars went missing in the time that the inventory was shifted from one warehouse to another warehouse is sufficient to establish that the loss was due to theft. However, as defendant argues, the cited precedents require some evidence that the plaintiff's proffered explanation for the loss set was not merely speculative. That is, in the absence of facts upon which a fact finder could determine that there is some explanation for the loss beyond the fact that inventory is unaccounted for, the exclusion would apply to the benefit of the insurer.

In this case however, Benito Hernandez who worked at the warehouse where plaintiff's goods were originally stored testified at his deposition that the manager of such warehouse gave him a sheet of paper and instructed him to open plaintiff's boxes and remove "samples" therefrom. Chris Van Hulse, plaintiff's vice president, stated in an affidavit that plaintiff did not request anyone at such warehouse to open their boxes to remove samples. Hernandez indicated that he did not know what happened to the boxes after he opened them, removed the "samples" and gave the "samples" to his manager as directed. This testimony, supported by the circumstantial evidence that plaintiffs goods were missing prior to the transfer to the new warehouse, such as the discovery of some of plaintiff's items in unmarked boxes that were stored in a warehouse never used by plaintiff, is sufficient if believed to allow the trier of fact to reasonably conclude the plaintiff's goods were stolen. See Gurfein Bros., Inc. v Hanover Ins. Co., supra, 248 AD2d at 231. This is because the exclusion from coverage only applies where the cause of the loss is wholly unknown and without explanation. In this case, if the plaintiff's evidence is believed the loss is not without explanation and is covered under the terms of the policy.

Therefore, the parties respective motions for summary judgment shall be denied.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is DENIED; and it is further

ORDERED that the parties are directed to appear at a pre-trial conference in IAS Part 59, Room 103, 71 Thomas Street, New York, NY 10013 on May 7, 2013, at 2:30 P.M. to set a date for trial of this action.

This is the decision and order of the court.

Dated: March 19, 2013 ENTER:

J.S.C.
DEBRA A. JAMES