

Talisman Servs., Inc. v Hermitage Ins. Co.
2018 NY Slip Op 31955(U)
August 14, 2018
Supreme Court, New York County
Docket Number: 151351/2016
Judge: William Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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INDEX NO. 151351/2016

TALISMAN SERVICES, INC.
MOTION DATE 07/12/2018

Plaintiff,
MOTION SEQ. NO. 002

- v -

HERMITAGE INSURANCE COMPANY,
Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45
were read on this motion to/for DISMISSAL

Upon the foregoing documents, defendant Hermitage Insurance Company moves for summary judgment pursuant to CPLR §3212, seeking an order dismissing the complaint on the grounds that the insurance policy issued by defendant does not provide coverage for personal property of others and that plaintiff is not entitled to the business personal property limit, provided by the policy. Plaintiff, Talisman Services, Inc., cross moves for an order pursuant to CPLR §3212, on the grounds that the alleged damage to plaintiff's consigned business personal property that was caused by water damage on January 9, 2015, is covered business personal property, under the terms and conditions of the policy issued by defendant.

FACTUAL BACKGROUND and CONTENTIONS

Plaintiff, Talisman Services, Inc., operates a thrift shop in a commercial building located in Staten Island, New York, where it sells antique items on consignment. (Tesser Aff., Ex. 4, pp. 10:7-9; 11:15-24; 12:25-13:17). On January 9, 2015, the premises where plaintiff's consignment shop was located sustained water damage as a result of a pipe leak/break, which resulted in water

damage to certain items kept on consignment in the retail store. (Tesser Aff., Exs. 1, 8).

Thereafter, plaintiff submitted a claim under Hermitage Commercial General Liability Policy number CPC 0038721-01 (hereinafter the "Policy"), for water damage to certain items of consigned property located in plaintiff's retail store. (Tesser Aff., Ex. 8).

After receipt of the claim, Hermitage paid plaintiff the \$2,500 limit under the Policy's Property of Others extension, for the water damage to the consigned property; on December 18, 2015, Hermitage disclaimed coverage for the consigned property as it was property that was excluded from coverage under the Policy. (Tesser Aff., Ex. 1, ¶8; Rabinovich Aff., Ex. 2). Plaintiff retained an attorney and through counsel sent a letter to Hermitage, providing seven copies of undated letters, allegedly from consigners advising that plaintiff had purchased various items of consigned property from its consignors and indicating that these property items were part of plaintiff's submitted claim; the letters were not notarized and did not contain the purchase price or value for the various items. (Tesser Aff., Ex., 5).

Thereafter, plaintiff commenced this action against Hermitage alleging that it is entitled to the \$52,000 limit of insurance listed in the Policy's Declarations for Business Personal Property coverage, claiming that it owned the water damaged property; plaintiff asserts a breach of contract claim in the amount of \$52,000 and is seeking consequential damages, claiming it was forced to close its business. (Tesser Aff., Ex., 1).

In support of its motion for summary judgment, Hermitage contends that the terms and conditions of the policy are clear and unambiguous, and the Policy does not provide coverage for the personal property of others, except under a coverage extension limiting this coverage to \$2,500, which was already paid to plaintiff. Additionally, Hermitage argues that plaintiff's

rights under the Policy were fixed on the date of the loss, January 9, 2015, not nine months later when plaintiff chose to purchase the damaged items from its consignors.

In support of its cross motion and in opposition to defendant's motion for summary judgment, plaintiff argues that the term "Business Personal Property" is ambiguous and that plaintiff expected that the consigned property would be covered as Business Personal Property under the terms and conditions of the Policy. (Tesser Aff., Ex. 3; Affidavit of Adelina Talisveyber-Man, dated May 22, 2018). For the reasons that follow, defendant's motion for summary judgment is granted and plaintiff's cross motion for summary judgment is denied.

STANDARD OF REVIEW and ANALYSIS

On a summary judgment motion in a case involving an insurance contract or policy, "[t]he evidence will be construed in the light most favorable to the one moved against" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82, 978 NYS2d 13 [1st Dept. 2013]). The insured, however, has the burden of showing that an insurance contract covers the loss for which the claim is made (*Kidalso Gas Corp. v Lancer Ins. Co.*, 21 AD3d 779, 780-781, 802 NYS2d 9 [1st Dept. 2005]). *City of New York v Wausau Underwriters Ins. Co.*, 145 A.D.3d 614, 617 (1st Dept. 2016).

"Generally, the courts bear the responsibility of determining the rights or obligations of parties under insurance contracts based on the specific language of the policies" (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671, 486 NE2d 827, 495 NYS2d 969 [1985]). "[W]ell-established principles governing the interpretation of insurance contracts . . . provide that the unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and that the interpretation of such provisions is a question of law for the court" (*Broad St. LLC v Gulf Ins. Co.*, 37 AD3d 126, 130-131, 832 NYS2d 1 [1st

Dept. 2006)). "If, however, there is ambiguity in the terms of the policy, any doubt as to the existence of coverage must be resolved in favor of the insured and against the insurer, as drafter of the agreement" (*Id.* at 131).

"A contract of insurance is ambiguous if the language therein is susceptible of two or more reasonable interpretations, whereas, in contrast, a contract is unambiguous if the language has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Id.* [citations and internal quotations and marks omitted]).

Here, plaintiff posits that the term Business Personal Property is ambiguous as it can be read to include the Personal Property of Others and that if Hermitage sought to exclude coverage for business property of others, it should have listed "Your Business Personal Property" in the Declarations page, rather than "Business Personal Property" with coverage limits of \$52,000. Plaintiff also contends that all the "non-building items" in the consignment shop are covered as business personal property, because the items were offered for sale to the public at a marked-up price that both the owner and consignor had arrived at, and because plaintiff was responsible for the consigned property. (Affidavit of Adelina Talisveyber-Man, dated May 22, 2018). Plaintiff's argument that the consigned property was part of its regular inventory and should be covered as "Your Business Personal Property", ignores the plain meaning of the Policy's terms, conditions and exclusions, and would render the Personal Property of Others coverage extension provision, meaningless.

As defendant correctly argues, plaintiff's interpretation of the Policy's "Business Personal Property" and "Your Business Personal Property" provisions, is an attempt to circumvent the plain language of the Policy. Attempting to create an ambiguity where none

exists, plaintiff argues that defendant should have listed “Your Business Personal Property” rather than “Business Personal Property” on the Declarations page, because using the broader Business Personal Property term noting coverage limits of \$52,000, created a “reasonable expectation” that all non-building items in the consignment shop were covered as business personal property of Talisman. Plaintiff’s interpretation strains credulity and is simply not supported by the plain language set forth in the Policy.

The Policy defines the term “Covered Property” as three separate types of property, specifically, Building, Your Business Personal Property and Personal Property of Others. (Tesser Aff., Ex. 3). The Policy states that coverage for Covered Property is provided “if a Limit of Insurance is shown in the Declarations for that type of property.” (Tesser Aff., Ex. 3). The only type of property listed in the Declarations with a limit of insurance shown, is Business Personal Property with a limit of \$52,000; there is no other type of Covered Property noted on the Declarations page. (Tesser Aff., Ex. 3, Declarations Page). Finally, the Policy contains a coverage extension for Property of Others which allows the insured to extend the insurance that applies to Your Business Personal Property to apply to “personal property of others in your care, custody, or control. The most we will pay for loss or damage under this Extension is \$2,500 at each described premises.” (Tesser Aff., Ex. 3, p.7 of 15).

"[T]he goal of a court reviewing an insurance policy is to ascertain whether, afford[ing] a fair meaning to all of the language employed by the parties in the contract and leav[ing] no provision without force and effect[,] . . . there is a reasonable basis for a difference of opinion as to the meaning of the policy" (*Jacobson Family Invs., Inc. v National Union Fire Ins. Co. of Pittsburgh, PA*, 102 AD3d 223, 231, 955 NYS2d 338 [1st Dept. 2012], lv dismissed in part, denied in part 22 NY3d 948, 999 N.E.2d 540, 977 NYS2d 177 [2013] [internal quotation marks

and citation omitted]). *Five Towns Nissan, LLC v Universal Underwriters Ins. Co.*, 125 AD3d 580, 581, 5 NYS 3d 35 (1st Dept. 2015).

As such, in accordance with the plain language of the Policy, the only Covered Property with a coverage limit of \$52,000, is Business Personal Property; and based on the definition of Your Business Personal Property and Property of Others, as set forth in the Policy, it is clear that the consigned items were not owned by plaintiff at the time of the loss but were, by her own admission, “given to her to be prepared for sale within the shop”, and thus, do not fall within the definition of Covered Property as set forth in the Policy. (Affidavit of Adelina Talisveyber-Man, dated May 22, 2018, ¶ 5; Tesser Aff., Ex. 3).

Similarly, plaintiff’s contention that it had a reasonable expectation that the Policy provided coverage for the consigned property of others it offered for sale in its retail shop, is equally unpersuasive and is at odds with the plain language of the Policy. In support of its contention, plaintiff cites to the dictionary definition of the word “Consign” and claims that defendant knew the nature of plaintiff’s business as the business description in the Policy was identified as “Thrift Store/Consignment”. (Tesser Aff., Ex. 3). However, as noted above, the Policy is clear and unambiguous and provides that there must be a limit of insurance set forth in the Declarations page for the specific type of Covered Property and the only Covered Property listed with a limit of coverage is Business Personal Property with a limit of \$52,000. (Tesser Aff., Ex. 3).

Plaintiff also relies on caselaw that is distinguishable from the facts at issue here. In *Italian Designer Import Outlet, Inc. v New York Central Mut. Fire Ins. Co.*, 26 Misc.3d 631 (Kings Cty. 2009), the issue of whether the damaged goods were personal property as defined by the policy, turned on whether the relationship between the consignor and the shop owner was a

true consignment or a sale or return transaction. Here, there is no doubt that the property plaintiff seeks coverage for was not owned by plaintiff as it was consigned to her by others seeking to have plaintiff sell the items in her retail store. (Affidavit of Adelina Talisveyber-Man, dated May 22, 2018, ¶ 5). Likewise, *General Star Indem. Co. v Cusom Editions Upholstery Corp.*, 940 F. Supp. 645 (S.D.N.Y 1996), is inapposite to the facts at issue here, as the issue before the court was whether Personal Property of Others constituted “Contents” where the Declarations page listed three types of covered property.

"An insurance agreement is subject to principles of contract interpretation. 'As with the construction of contracts generally, 'unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court.'" *Universal Am. Corp. v Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680, 16 N.Y.S.3d 21, 37 N.E.3d 78 (2015), quoting *Vigilant Ins. Co. v Bear Stearns Cos.*, 10 NY3d 170, 177, 884 N.E.2d 1044, 855 N.Y.S.2d 45 (2008), quoting *White v Continental Cas. Co.*, 9 NY3d 264, 267, 878 N.E.2d 1019, 848 N.Y.S.2d 603 (2007); see *Oppenheimer AMT-Free Municipals v ACA Fin. Guar. Corp.*, 110 AD3d 280, 284, 971 N.Y.S.2d 95 (1st Dept 2013) ("policies of insurance [] should be analyzed in accordance with general principles of contract interpretation and insurance law").

Plaintiff readily admits that “[w]hen the policy was procured, Talisman did not even have \$52,000.00 of business personal property which it owned”; and that “at the time of the loss most of the items that were damaged or destroyed consisted of consigned goods which I had prepared for sale and sold at a markup from an agreed upon price with Talisman’s consignors”. (Affidavit of Adelina Talisveyber-Man, dated May 22, 2018, ¶12, ¶5). As noted, the Policy contains a coverage extension for Property of Others which allows the insured to extend the insurance that

applies to Your Business Personal Property to apply to “personal property of others in your care, custody, or control. The most we will pay for loss or damage under this Extension is \$2,500 at each described premises.” (Tesser Aff., Ex. 3, p.7 of 15). Based on the unambiguous terms of the Policy, the limits of coverage for Personal Property of Others is \$2,500, which plaintiff admits was already paid by defendant. Accordingly, it is

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 the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

8/14/2018
DATE


W. FRANC PERRY, J.S.C.

CHECK ONE:	☒ CASE DISPOSED	☐ NON-FINAL DISPOSITION
APPLICATION:	☒ GRANTED ☐ DENIED	☐ GRANTED IN PART ☐ OTHER
CHECK IF APPROPRIATE:	☐ SETTLE ORDER	☐ SUBMIT ORDER
	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT ☐ REFERENCE