SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **IAS MOTION 18EFM**

Justice

----------X

TENTH AVENUE, LLC,

Plaintiff,

- v -

ASPEN AMERICAN INSURANCE COMPANY,

Defendant.

----------X

INDEX NO. 152935/2018

MOTION DATE 10/30/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion to/for JUDGMENT - SUMMARY.

In this insurance coverage dispute, and upon the foregoing documents, defendant Aspen American Insurance Company moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Background

Plaintiff Tenth Avenue, LLC is the owner of a commercial building located at 3795 Tenth Avenue in the County, City and State of New York (the Building) (NY St Cts Elec Filing [NYSCEF] Doc No. 31, Stanley W. Kallman [Kallman] affirmation, exhibit A, ¶¶ 1 and 4). Three separate businesses – a grocery store, a distributor, and a bar/nightclub – occupied the Building (NYSCEF Doc No. 48, Kallman affirmation, exhibit Q at 9-10; NYSCEF Doc No. 55, Craig A. Blumberg [Blumberg] affirmation, exhibit 2 at 4).

Defendant issued Commercial Property Policy no. WKA FT01975-00 (the Policy) to plaintiff, in effect from January 5, 2017 to January 5, 2018, with a $3.6 million limit of liability for the Building and $456,000 limit of liability for rental value (NYSCEF Doc No. 33, Kallman affirmation, exhibit C at 2 and 6). The Building and Personal Property Coverage Form CP 00 10

10 1 in the Policy states, in part, that "[w]e will pay for direct physical loss or damage to Covered Property at the premises described in the Declaration caused by or resulting from any Covered Cause of Loss" (*id.* at 8). Section B in the Causes of Loss – Special Form CP 10 30 10 12 in the Policy lists a number of exclusions, and reads, in pertinent part:

> "**2.** We will not pay for loss or damage caused by or resulting from any of the following:
>
> ...
>
> **h.** Dishonest or criminal act (including theft) by you, any of your partners, members, officers, managers, employees (including temporary employees and leased workers), directors, trustees or authorized representatives, whether acting alone or in collusion with each other or with any other party; or theft by any person to whom you entrust the property for any purpose, whether acting alone or collusion with any other party.
>
> This exclusion:
> **(1)** Applies whether or not an act occurs during your normal hours of operation;
> **(2)** Does not apply to acts of destruction by your employees (including temporary employees and leased workers) or authorized representatives is not covered; but theft by your employees (including temporary employees and leased workers) or authorized representatives is not covered"

(*id.* at 35-36).

In February 2016, plaintiff, as "landlord," and nonparty Luis Santos (Santos), as "tenant," entered into a 10-year lease commencing February 1, 2016 for a portion of the Building's first and second floors for use as a bar and restaurant (the Premises) (NYSCEF Doc No. 48 at 73; NYSCEF Doc No. 35, Kallman affirmation, exhibit E at 3, 6 and 38). Section 1 (B) of the lease for the Premises provides, in part:

> "In addition to the lease of the Premises set forth herein, Landlord leases to the Tenant and Tenant hereby hires from the Landlord the fixtures, equipment, chattels listed in Schedule '_'. Tenant agrees that none of the fixtures, equipment, chattels listed in Schedule '_'

> may be removed from the Premises without the prior written consent of the Landlord"

(NYSCEF Doc No. 35 at 5). Although the "schedule" is blank, the schedule purportedly consisted of items listed on a marshal's inventory that had been created after plaintiff evicted the prior tenant at the Premises for nonpayment of rent (NYSCEF Doc No. 48 at 13 and 26-27).

Annexed to the lease are two nearly identical "key money" agreements, with the terms differing only in the amounts listed. Both key money agreements read, in part:

> "Tenant acknowledged the [P]remise[s] was more than 95% built out for tenant's use. To induce landlord to rent the space to tenant, tenant agreed to pay the landlord the key fee ... [t]his money is nonrefundable and is paying for the build out only. It is NOT for the purchase of any equipment for furniture in the [P]remise[s] (which remained as landlord's properties)"

(NYSCEF Doc No. 35 at 41 and 44). Susan Wu [Wu], plaintiff's managing member (NYSCEF Doc No. 53, Wu affidavit, ¶ 1), confirmed that Santos paid $600,000 as a key money fee (NYSCEF Doc No. 48 at 20).

When Santos ceased paying rent, plaintiff commenced a nonpayment proceeding against him captioned *Tenth Avenue LLC v Santos*, Civ Ct, NY County, Index No. LT-074408-16/NY (NYSCEF Doc No. 53, ¶ 5; NYSCEF Doc No. 57, Blumberg affirmation, exhibit 4 at 1). A decision entered June 20, 2017 awarded plaintiff a monetary judgment of $272,000, together with possession of the Premises (NYSCEF Doc No. 57 at 1).

Wu avers that shortly after a warrant of eviction was issued, she discovered that "Santos had significantly damaged the [P]remises, vandalized the [P]remises and removed items from the [P]remises" (NYSCEF Doc No. 53, ¶ 8). In an email to an officer with the New York City Police Department dated August 3, 2017, Wu wrote that her "tenant, Luis Santos, stole the following items from the property" (NYSCEF Doc No. 36, Kallman affirmation, exhibit F at 1). Other email

correspondence from Wu to her insurance broker and a public adjuster contain similar statements claiming that Santos had stolen items from the Premises (NYSCEF Doc No. 37, Kallman affirmation, exhibit G at 1; NYSCEF Doc No. 38, Kallman affirmation, exhibit H at 1).

Plaintiff directed its insurance broker to submit a claim to defendant (NYSCEF Doc No. 37 at 2). In a "reservation of rights" letter dated August 30, 2017, nonparty U.S. Adjustment Corp., representing defendant, acknowledged receipt of plaintiff's property loss notice for stolen furniture, equipment and fixtures and damage (NYSCEF Doc No. 39, Kallman affirmation, exhibit I at 1). The letter specifically pointed to the "entrustment exclusion" found in Section B (2) (h) of the Causes of Loss – Special Form CP 10 30 10 12 (*id.* at 2).

In December 2017, plaintiff submitted two sworn proof of loss statements, both of which claimed that a "vandalism loss" had occurred at the Premises on August 4, 2017 (NYSCEF Doc No. 46, Kallman affirmation, exhibit O at 1; NYSCEF Doc No. 47, Kallman affirmation, exhibit P at 1). Plaintiff estimated its lost income at $210,525 and damages at $519,191 (*id.*). On February 20, 2018, Wu appeared for an examination under oath (EUO) (NYSCEF Doc No. 48, Kallman affirmation, exhibit Q at 1). She testified that Santos "brought a truck" and "[o]vernight take [sic] all the things doesn't [sic] belong to him, destroy the place" (*id.* at 38). Wu explained that the grocery store manager told her items were being removed from the Premises (*id.* at 11), and that surveillance cameras outside the Building recorded Santos's actions (*id.*).

Defendant issued a denial letter to plaintiff on March 12, 2018 (NYSCEF Doc No. 31, ¶ 10-11; NYSCEF Doc No. 32, ¶¶ 10-11). Wu avers that defendant predicated the denial of the claim on the Policy's entrustment exclusion (NYSCEF Doc No. 53, ¶ 9).

Plaintiff commenced this action on April 2, 2018 by filing a summons and complaint asserting a cause of action for breach of contract. After interposing an answer, defendant moves

for summary judgment on the ground that the entrustment exclusion precludes recovery. Plaintiff, in opposition, contends that Santos's actions constitute vandalism, a covered risk under the Policy.

Discussion

On a motion for summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the moving party fails to meet its prima facie burden, the motion will be denied, "regardless of the sufficiency of the opposing papers" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013], citing *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

To prevail on a cause of action for breach of contract, the plaintiff must prove the existence of the contract, the plaintiff's performance, a defendant's breach, and damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). "An insurance policy is a contract between the insurer and the insured… [and] the extent of coverage … is controlled by the relevant policy terms" (*see Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 145 [1st Dept 2008]). Thus, where a dispute over coverage arises, the court must look to the language in the policy (*see Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264 [2011] [internal quotation marks and citation omitted]). "An insurance agreement is subject to principles of contract interpretation … [and] 'unambiguous provisions of an insurance contract

must be given their plain and ordinary meaning'" (*Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015] [internal quotation marks and citation omitted]; *Government Empls. Ins. Co. v Kligler*, 42 NY2d 863, 864 [1977] [same]). "[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'" (*Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 131 [1st Dept 2006] [internal quotation marks and citations omitted]). Language is considered ambiguous if it is "susceptible of two or more reasonable interpretations" (*id.*). That said, the parties cannot create an ambiguity where none exists (*Universal Am. Corp.*, 25 NY3d at 680).

While an insured bears the burden of demonstrating that coverage exists (*see Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 218 [2002]), an insurer seeking to invoke a policy exclusion bears the burden of demonstrating that the exclusion bars coverage (*see Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]). An insurer meets this burden by showing "that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case" (*Lend Lease [US] Constr. LMB Inc. v Zurich Am. Ins. Co.*, 136 AD3d 52, 59 [1st Dept 2015], *affd* 28 NY3d 675 [2017] [internal quotation marks and citation omitted]).

As discussed above, the subject exclusion bars coverage for a "[d]ishonest or criminal act … by you …; or theft by any person to whom you entrust the property for any purpose, whether acting alone or collusion with any other party" (NYSCEF Doc No. 33 at 36). The exclusion is divided into two parts (see *Easy Corner, Inc. v State Nat. Ins. Co.*, 56 F Supp 3d 699, 704 [ED Pa, 2014]; *see Matter of Momand*, 7 AD2d 280, 281 [1st Dept 1959] [Frank, J., dissenting] [stating that a semicolon indicates a degree of separation]). Neither party disputes that the first part of the

exclusion is inapplicable, since it has not been alleged that plaintiff or its employees were engaged in a dishonest or criminal act. The second part discusses "theft by any person to whom you entrust the property for any purpose." While the term "entrust" is not defined in the Policy, "language employed in the contract of insurance must be given its ordinary meaning, such as the average policyholder of ordinary intelligence, as well as the insurer, would attach to it" (*Abrams v Great Am. Ins. Co.*, 269 NY 90, 92 [1935]). "When the word 'entrusted' appears in the contract the parties must be deemed to have entertained the idea of a surrender or delivery or transfer of possession with confidence that the property would be used for the purpose intended by the owner and as stated by the recipient" (*id.*). It is the state of mind the person turning over the property that determines whether there is an entrustment (*see Cougar Sport v Hartford Ins. Co. of Midwest*, 190 Misc 2d 91, 94 [Sup Ct, NY County 2000], *affd* 288 AD2d 85 [1st Dept 2001]).

Applying these precepts here, under the plain terms of the lease and the key money agreement, it is evident that plaintiff entrusted the Premises and the furniture, equipment and fixtures therein to Santos, its tenant. Thus, to the extent that plaintiff's claim arose from the theft of property that had been entrusted to Santos, the clear, unambiguous terms of the entrustment exclusion precludes recovery for those items (*see Lexington Park Realty LLC v National Union Fire Ins. Co. of Pittsburgh, PA*, 120 AD3d 413, 413 [1st Dept 2014] [granting an insurer summary judgment against the plaintiff insured whose lessee had removed kitchen cabinets and appliances from the demised premises where the insurance policy precluded coverage for any loss sustained for a dishonest or criminal act committed by anyone to whom the plaintiff had entrusted the property]; *AXA Art Ins. Corp. v Renaissance Art Invs., LLC*, 32 Misc 3d 1223[A], 2011 NY Slip Op 51397[U], *4 [Sup Ct, NY County 2011] *affd* 102 AD3d 604 [1st Dept 2013], *lv denied* 21 NY 855 [2013], *cert denied* 571 US 1095 [2013] [concluding that there was no insurance coverage

available to the defendant insured who had entrusted artwork to a gallery under a consignment agreement]).

Nevertheless, defendant has not met its prima facie burden of demonstrating that the entirety of plaintiff's claim, namely the physical damage Santos allegedly caused, falls within the scope of the entrustment exclusion (*see Easy Corner, Inc.*, 56 F Supp 3d at 707 [denying that part of the insurer's summary judgment motion seeking to dismiss the plaintiff insured's claim for vandalism]). Importantly, the Policy does not preclude coverage for losses resulting from vandalism (*see Cestaro v Fire & Cas. Ins. Co. of Conn.*, 30 AD3d 263, 264 [1st Dept 2006] [concluding that damages caused by vandalism were covered, but damages from theft were not]). Defendant agrees that damages caused by acts of vandalism qualify as covered losses (NYSCEF Doc No. 29, defendant's mem of law at 3). Thus, it bears the burden of demonstrating that plaintiff's loss was not caused by vandalism (*see Wai Kun Lee v Otsego Mut. Fire Ins. Co.*, 49 AD3d 863, 864-865 [2d Dept 2008]).

"Vandalism, as the term is ordinarily understood, need not imply a specific intent to accomplish any particular result; vandals may act simply out of a love of excitement, or an unfocused desire to do harm, or … out of a desire to enrich oneself without caring about the consequences to others" (*Georgitsi Realty, LLC v Penn-Star Ins. Co.*, 21 NY3d 606, 610-611 [2013]). A "forceful or violent severing and removal of property that had been affixed to the premises constitutes vandalism and the loss of the property thus removed is not excluded as … theft" (*Benson Holding Corp. v New York Prop. Ins. Underwriting Assn.*, 124 Misc 2d 955, 956 [Civ Ct, Bronx County 1984]). Here, defendant principally argues that plaintiff's complaints largely stem from the theft of its property, as evidenced in Wu's correspondence, but Wu also testified in an EUO that Santos had "destroy[ed] the place" (NYSCEF Doc No. 48 at 38). She

explained that Santos removed the sink from the bathroom (*id.*); hired a welder to cut railings in a "VIP" area (*id.* at 42); removed custom "windows" (*id.* at 43); left holes in the walls (*id.* at 45); ripped decorative wallpaper (*id.* at 62); cut wiring to the sound system (*id.* at 55); broke floor tiles (*id.* at 67 and 72); took important components from an ice maker (*id.* at 70); ripped off the wood face of the bar (*id.* at 75); and broke decorative wall panels (*id.* at 81-82). Estimates prepared by consultants for the public adjuster and for defendant document the damage to the interior (NYSCEF Doc No. 54, Blumberg affirmation, exhibit 1 at 2-3; NYSCEF Doc No. 55 at 4-5). Such actions can be construed to implicate vandalism, even though a theft also occurred (*see Cresthill Indus. v Providence Washington Ins. Co.*, 53 AD2d 488, 497 [2d Dept 1976] [concluding that "it seems undeniably clear that there was an act of vandalism or malicious mischief committed, since the severing of the pipes and fixtures *prior* to their removal constituted a completed act of vandalism"] [emphasis in original]; *Benson Holding Corp.*, 124 Misc 2d at 956).

Defendants' reliance on *Winking Group, LLC v Aspen Am. Ins. Co.*, 2018 WL 485974, 2018 US Dist LEXIS 8241 [SD NY, Jan. 18, 2018, No. 16 Civ. 7401 (LGS)], *appeal withdrawn* 2018 WL 7458656 [2d Cir., Oct. 12, 2018]), although factually similar, is misplaced. The plaintiff building owner in that action had claimed that a sublessee had vandalized its property after the sublessee had been evicted for nonpayment of rent (2018 WL 485974, *1, 2018 US Dist LEXIS 8241, *1). The defendant insurer denied the plaintiff's claim based upon the entrustment exclusion in the policy. The court agreed, concluding that "the vandalism was causally related to Plaintiff's initial entrustment of the premises to [the sublessee]" (2018 WL 485974, *3, 2018 US Dist LEXIS 8241, *9). The entrustment exclusion in that action, though, differs from the exclusion applicable herein. The exclusion in *Winking Group, LLC* precluded coverage for a "[d]ishonest or criminal act by you ... or anyone to whom you entrust the property for any purpose" (2018 WL 485974,

*1, 2018 US Dist LEXIS 8241, *3). In contrast, the entrustment exclusion in this action is more restrictive, since it "includes only theft in the list of excluded losses" (*Easy Corner, Inc.*, 56 F Supp 3d at 704).

Because defendant has not dispelled all questions of material fact (*see Cestaro*, 30 AD3d at 264; *Easy Corner, Inc.*, 56 F Supp 3d at 705), the motion must be denied.

Accordingly, it is ORDERED that the motion of defendant Aspen American Insurance Company for summary judgment dismissing the complaint (motion sequence no. 001) is denied.

3/31/2021
DATE

ALEXANDER M. TISCH, J.S.C.

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