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

PRESENT: HON. BERNARD J. FRIED PART 60

E-FILE

Index Number : 651844/2010
AXA ART INSURANCE CORPORATION
vs
RENAISSANCE ART INVESTORS LLC
Sequence Number : 003
DISMISS

INDEX NO. 651844/10
MOTION DATE
MOTION SEQ. NO. 003
MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on 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

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED

Dated: 7/25/2011

HON. BERNARD J. FRIED J.S.C.

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

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 60

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AXA ART INSURANCE CORPORATION, a New York corporation,

Plaintiff,

Index No. 651844/10

-against-

RENAISSANCE ART INVESTORS, LLC, a Nevada limited liability company,

Defendant.

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APPEARANCES:

For Plaintiff:	For Defendant:
Wade Clark Mulcahy 111 Broadway, 9th Floor New York, New York 10006 (Dennis M. Wade; Michael A. Bono) (212) 267-1900	Buchanan Ingersoll & Rooney PC New York Times Building 620 Eighth Avenue, 23rd Floor New York, New York 10018 (Barry I. Slotnick; Kristi A. Davidson) (212) 440-4400

FRIED, J.:

In this declaratory judgment action, defendant Renaissance Art Investors, LLC (RAI) moves for an order dismissing this action with prejudice, based upon the principle of res judicata. Plaintiff AXA Art Insurance Corporation (AXA) cross-moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor, and declaring that it has no duty to indemnify RAI.

AXA, an insurer of fine art, issued two policies of insurance to RAI under policy number 01-334-31-06-00026 (collectively, the Policies). According to the complaint,

RAI was one of many fraud victims of Lawrence Salander (Salander) and the Salander-O'Reilly Galleries, LLC (the Gallery). The complaint asserts that RAI was formed by a group of investors, including the Gallery and L. Salander LLC (Salander LLC). AXA alleges that RAI then entered into a series of transactions with the Gallery, which was supposed to find art buyers on RAI's behalf, using Salander's many contacts in the art world. Instead, according to the complaint, Salander and the Gallery fraudulently swindled RAI out of millions of dollars.

On January 8, 2008, RAI sent a claim letter to AXA in connection with the alleged loss of works of art worth at least $42,197,660.00 that RAI had "consigned to" the Gallery.[1] On June 3, 2008, after concluding its investigation of RAI's claim, AXA denied coverage. In the instant action, AXA seeks a judicial declaration that it has no duty to indemnify RAI for its claimed loss, which AXA asserts resulted from the fraud of the Gallery and Salander.

On July 22, 2010, AXA filed a complaint in *AXA Art Ins. Corp. v Renaissance Art Invs., LLC*, Civil Action No. 10 CIV 5581, SD NY (the Federal Action). Three months later, AXA commenced the instant action, alleging the same claims, based upon the same underlying facts and circumstances, as those set forth in the Federal Action. On November 29, 2010, the parties to the Federal Action entered into a Stipulation and Order of Dismissal that stated that the Federal Action was "discontinued with prejudice." The stipulation was "so ordered" by the Judge.

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[1] RAI states that, since the time it notified RAI of its loss in January 2008, it has recovered a number of works of art, thereby reducing its insurance claim to approx $23 million (exclusive of interest).

RAI argues that its motion to dismiss should be granted because, pursuant to basic res judicata principles, AXA may not continue to pursue its claims in the instant action after the same claims were dismissed "with prejudice" in the Federal Action. AXA argues that RAI's motion should be denied because the Federal Action was discontinued due to lack of subject matter jurisdiction, and such dismissal was not on the merits. AXA explains and it is undisputed, that before RAI answered or otherwise responded to the complaint in the Federal Action, RAI informed AXA that it intended to move to dismiss that action on the ground of lack of subject matter jurisdiction, due to the lack of diversity between AXA and Donald Schupak, one of RAI's principals. AXA asserts that, upon learning of potential jurisdictional issues in the Federal Action, it commenced the instant lawsuit. AXA maintains that, after it received sufficient information that Donald Schupak was a citizen of New York, it agreed to discontinue the Federal Action.

RAI's motion is denied. Although the phrase "with prejudice" in a stipulation of discontinuance creates a presumption of "res judicata effect in a subsequent action on the same cause of action, a court may always consider evidence that the parties intended otherwise." *Singleton Mgt. v Compere*, 243 AD2d 213, 216 n * (1st Dept 1998) (internal citations omitted); *see also Van Hof v Town of Warwick*, 249 AD2d 382, 382 (2d Dept 1998) (holding that, although "with prejudice" is generally given res judicata effect, it should be "narrowly interpreted when the interests of justice, or the particular equities involved, warrant such an approach").

A New York state court's dismissal of an action "with prejudice" due to lack of jurisdiction is not an adjudication on the merits, and thus does not bar a plaintiff from pursuing the action in a proper jurisdiction. *Brown v Bullock*, 17 AD2d 424, 428 (1962).

In the instant case, it is undisputed that AXA commenced the instant action prior to the discontinuance of the Federal Action, and that the Federal Action was discontinued on the basis of lack of subject matter jurisdiction because there was not complete diversity among the parties. "In properly seeking to deny a litigant two 'days in court', courts must be careful not to deprive [the plaintiff] of one." *Matter of Reilly v Reid*, 45 NY2d 24, 28 (1978). RAI's motion is denied.

In support of its cross motion for summary judgment, AXA asserts that the applicable provisions in the Policies are clear and unambiguous. The Policies provide coverage to RAI against "direct physical 'loss' to Covered Property unless the loss is excluded in Section B - Exclusions." Section B(3) of the Policies' Corporate Fine Art Coverage sets forth the following exclusions to coverage:

> 3. Any fraudulent, dishonest, or criminal act or acts by:
> (a) You, anyone else with an interest in the property or your or their employees whether or not committed alone or in collusion with others, whether or not such act or acts be committed during the hours of employment; or
> (b) Anyone entrusted with the Covered Property.
> But the exclusion does not apply to a carrier for hire

(hereinafter, the Fraud Exclusion).

AXA notes that on October 26, 2007, RAI commenced an action in this court against Salander, Salander LLC and the Gallery entitled *Renaissance Art Invs., LLC v Salander-O'Reilly Galleries*, index no. 406611/07 (the 2007 Action). In the 2007 Action, RAI alleged causes of action including fraud, breach of fiduciary duty and unjust enrichment due to Salander's and the Gallery's fraud. The complaint in the 2007 Action alleges that Salander and the Gallery "swindled" millions of dollars from RAI by fraudulently promising RAI ownership of a large private collection of Renaissance

artwork. According to the complaint in the 2007 Action, the fraud consisted of, among other things, secretly selling over 200 pieces of RAI's artworks without informing RAI and without transferring the proceeds of the sales to RAI.

AXA notes that Salander's partners in RAI sued Salander and the Gallery, ultimately forcing them into bankruptcy. The Manhattan District Attorney also indicted Salander and the Gallery, charging them with theft of more than $120 million, including RAI's assets. On March 18, 2010, Salander and the Gallery pled guilty to grand larceny in the 1st, 2nd and 3rd degrees. Counts I and II of the indictment, to which both Salander and the Gallery pled guilty, are the counts that refer to their theft of property from RAI.

According to RAI's January 1, 2006 Operating Agreement, Salander was one of three principals of RAI, along with Donald Schupak and Andrew Schupak. Salander's crucial role in forming RAI and managing its operations is highlighted by, among other things, the requirement in the Operating Agreement that RAI maintain a $50,000,000 "key-man" life insurance policy to insure Salander's life "for the benefit of [RAI]." (Operating Agreement at 4.2[b]ii.)

The Gallery was RAI's exclusive consignee pursuant to a January 1, 2006 Consignment Agreement between the Gallery, as consignee, and RAI and a wholly-owned subsidiary of RAI. The Consignment Agreement, inter alia, sets forth Salander's critical and central role as the sole manager of Salander LLC, which is the sole manager of the Gallery. At section 11(f), Salander agrees to continue to hold and exercise his rights and powers in that role throughout the term of the Consignment Agreement. Furthermore, in the Operating Agreement, Salander personally and unconditionally

guarantees the Gallery's obligations as consignee as they are set forth in section 4.3(b) therein.

In applying the language of the Fraud Exclusion to the facts of this case, AXA contends that both Salander and the Gallery qualify as at least one of the following: "You"; "Anyone else with an interest in the property"; An employee of "You" or of "Anyone else with an interest in the property"; or "Anyone entrusted with the Covered Property." RAI, by contrast, contends that none of the language of the Fraud Exclusion applies to Salander and the Gallery. If it is determined that any one part of the Fraud Exclusion is applicable, there is no need to address each separate possible exclusion within section B(3). Since B(3)(b), which excludes "[a]ny fraudulent, dishonest, or criminal act or acts by: [a]nyone entrusted with the Covered Property" is clearly applicable to the circumstances herein, AXA, has no duty to indemnify RAI.

RAI entrusted its artworks to the Gallery when it entered into the Consignment Agreement, giving the Gallery possession of those works, as well as granting the Gallery and Salander power to buy, sell, and make other decisions regarding those works. Entrustment involves

> 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. The controlling element is the design of the owner rather than the motive of the one who obtained possession. Because plaintiff was deceived and [its] confidence was abused, [plaintiff] *entrusted* [its] property to a thief.

Abrams v Great Am. Ins. Co., 269 NY 90, 92 (1935). Similarly, here, it is clear that the art works were entrusted to the Gallery, even though RAI was deceived by the Gallery and Salander as to their intentions.

RAI argues that the word "Anyone" in the phrase "Anyone entrusted with the Covered Property" applies only to human beings and not to organizations. It contends that, because the art works were entrusted to the Gallery, which is a limited liability company, and not to Salander, who is a person, the exclusion cannot apply. RAI offers no support for such an interpretation. If the Gallery, as an organization, can plead guilty to grand larceny, as it did on March 18, 2010, for the thefts it committed, surely it can also be found to have been entrusted with the items that it stole. There is no plausible reason why an *individual* who committed fraud related to property entrusted to him/her would be excluded from coverage while an *organization* that committed fraud related to property entrusted to it would not be excluded from coverage. *See e.g. Cougar Sport v Hartford Ins. Co. of Midwest*, 190 Misc 2d 91 (Sup Ct, NY County 2000), *affd* 288 AD2d 85 (1st Dept 2001) (applying exclusion of "anyone" to whom property is entrusted to an organization).

Furthermore, the terms of the Consignment Agreement indicate the key role played by Salander, as well as the power he was given to make determinations as to the purchase and sale of artworks on behalf of RAI, as they were held by and consigned to the Gallery.

Finally, RAI now contends, for the first time, that some of the artworks at issue may not have been stolen by Salander and the Gallery, but may instead have been lost through negligence or otherwise. Such an assertion at this point, without any proof or explanation as to what may have happened to the art works, does not create an issue of material fact. AXA is thus entitled to summary judgment. In several pleadings and statements before courts, both in New York and in an action RAI filed against AXA in

Nevada on October 13, 2010, RAI stated that the facts giving rise to the loss were not in dispute, and that the only issue was whether or not the Policies covered the loss. RAI cannot now undo those statements, with no explanation as to what has changed or why. Thus, AXA is entitled to summary judgment, as there is no issue of fact that the Fraud Exclusion's subsection dealing with entrustment applies to the circumstances herein.

Accordingly, it is

ORDERED that defendant's motion to dismiss is denied; and it is further

ORDERED that the cross motion of plaintiff for summary judgment seeking a declaration that it is not obliged to indemnify defendant is granted; and it is further

ADJUDGED and DECLARED that plaintiff herein is not obliged to indemnify defendant with respect to defendant's claimed loss.

DATED: 7/25/2011

ENTER:

J.S.C.

HON. BERNARD J. FRIED