2014 WL 4185220 (N.Y.Sup.), 2014 N.Y. Slip Op. 32272(U) (Trial Order)
Supreme Court, New York.
New York County

ILICO JEWELRY, INC.,
v.
HANOVER INSURANCE GROUP.

No. 157168/2012.
August 25, 2014.

Summary Judgment

Present: Hon. Carol R. Edmead, Justice.

SEQUENCE NUMBER: 001

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

***1** The following papers, numbered 1 to _____. were read on this motion to/for _____

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits _____	No(s). _____
Answering Affidavits -- Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In this insurance declaratory judgment action, defendant, The Hanover Insurance Group ("defendant") moves for summary judgment dismissing the complaint of the plaintiff Ilico Jewelry, Inc. ("plaintiff").

Factual Background

Plaintiff issued a "Jewelers Block Insurance" policy to defendant, a jeweler, for coverage of plaintiff's goods, with certain conditions and exceptions (the "Policy").

The incident giving rise to this insurance claim dispute occurred while defendant's principal Michael Ilian ("Ilian"), was on a business trip in Aruba in February 2012. According to Ilian's deposition testimony, he went to Aruba to collect monies from his customers and inform them of his new line of jewelry, as well as to retrieve certain jewelry ("initial jewelry") that he left

with Kaushalsingh Pratapsingh Dobie ("KP"), a proprietor of the store "Gold Palace over 10 years ago in order to avoid paying customs duty on them.

While visiting Gold Palace, KP returned for credit 42 items valued at approximately $60,000 ("returned jewelry"), which Ilian placed into his backpack. Afterwards, KP gave Ilian the initial jewelry, which was also placed in his backpack.

Later that evening, Ilian, with his backpack of jewelry, met with his cousin, Allen Enayatian ("Allen"), a competitor jeweler, for dinner. Ilian did not advise of or show Allen the jewelry At the restaurant, Ilian and Allen were seated at a table, and Ilian decided to use the restroom Ilian placed the backpack in between Allen's legs and told him to "watch my bag, and proceeded about 150-200 feet from the table to the restroom. After returning to the table after about three or four minutes later, Ilian did not see the backpack and asked Allen where it was. Allen looked down, realized the backpack was missing, and both of them began searching for the backpack to no avail. Thereafter, waitresses advised them two women approached the table after the men were seated, and left with the backpack. Ilian and Allen unsuccessfully searched for the two women in the parking lot. Several days later, the police recovered Ilian's laptop computer and sunglasses which were inside the backpack, but the jewelry, valued at approximately $204,000, was never found.

***2** In support of dismissal, defendant argues that the loss is not covered under the Policy. The jewelry was not in Ilian's custody at the time it was stolen as required by the territorial limits extension and Personal Conveyance Clause. Nor does the loss fall under the exception to the Personal Conveyance Clause as property "left for safekeeping with a jeweler in the trade" because (1) Allen was not acting as a "jeweler in the trade" when he accepted the backpack (as Allen never knew the contents of the backpack), (2) the transfer of the goods to Allen does not qualify as a "safe keeping" under the Policy, since Allen was not a "customer" of Ilian and the jewelry was not put into a locked safe or vault of Allen. Simply placing the backpack at Allen's feet inside a public restaurant was not sufficient to qualify as coverage.

In opposition, plaintiff argues, based on the affidavits of Ilian and Allen, that it is unreasonable for defendant to expect that the jewelry at all times would be in a safe or a vault, inasmuch as the entire purpose of the trips to the Carribean was to show the jewelry line by plaintiff and Ilian did not have access to a vault or home or rented premises. Ilian attests that he "was seeing customers shortly before the theft and thus needed to have the merchandise available to me for sale purposes. I thus could not lock it up in a vault and at the same time conduct business by showing it to customers." It was reasonable to assume that the jewelry would not be in a safe or vault for most of the time, but in the possession of Ilian or qualified jewelers. Using a restroom is a foreseeable, normal occurrence. Although Allen is not plaintiff's employee, it is undisputed that he is a jeweler, and knew, based on the parties' relationship, that the backpack contained valuable items connected with Ilian's trip. And, any uncertainty regarding the import of the Policy's language must be construed against the drafter, defendant herein. Further, defendant bears the burden of establishing exceptions to coverage and the presumption lies against the insurer and in favor of the insured. Allen was watching the backpack, not moving around, seated in a semi-public area, while Ilian was only away for a few moments and a few feet away. The intention of the Policy was therefore fulfilled by not leaving the jewelry unattended, but by having an adult professional put in charge of them.

In reply, defendant points out that the jewelry was not in Ilian's custody at the time they were allegedly lost. He was approximately 150-200 feet away when the jewelry was allegedly stolen. Allen was not aware of the level of care that should have been taken to safeguard the backpack, and thus, was not acting as a "jeweler in the trade."

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action ... has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make *a prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to

demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

***3** Once this showing is made, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi*, 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

In interpreting an insurance policy, "words and phrases are to be understood in their plain, ordinary, and popularly understood sense, rather than in a forced or technical sense" (*Hartford Ins. Co. of the Midwest v Halt*, 223 AD2d 204, 212, 646 NYS 2d 589, 594 [4th Dept 1996]). The policy must be construed "in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect" (*Raymond Corp. v National Union Fire Ins. Co.*, 5 NY2d 157, 162, 800 NYS2d 89, quoting *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221-222, 746 NYS2d 622 [2002]; *see also United Stated Fid. & Guar. Co. v Annumiata*, 67 NY2d 229, 232, 501 NYS2d 790 [1986] ["Where the provisions of the policy "are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement]). "Unambiguous provisions of a policy are given their plain and ordinary meaning" (*Lavanant v General Ace. Ins. Co.*, 79 NY2d 623, 629, 584 NYS2d 744 [1992]; *Seaport Park Condominium v Greater New York Mutual Ins. Co.*, 39 AD3d 51, 828 NYS2d 381 [1st Dept 2007]).

Here, defendant failed to establish that the loss is excluded from coverage under the clear and unambiguous terms of the Policy.

Section 4 of the Policy, entitled "Territorial Limits" states, in relevant part:

> ***4** The property described above is covered while within or in transit between the states of the United States, District of Columbia, Puerto Rico and Canada, *but subject always to the limitations, conditions, exclusions and exceptions stated herein*. (Emphasis added).

As relevant herein, by "Amendment," the "Territorial Limits" was modified as follows:

> It is understood and agreed that the territorial limits hereunder is extended to cover property in the custody of employee, Michael Ilian for an amount of insurance of $500,000 away from premises *while traveling to, from and while at the Caribbean Islands."* (Emphasis added).

And, by a separate "Endorsement" entitled" "Safe Keeping Clause," the Policy was extended to include coverage as follows:
1.) It is understood and agreed that Paragraph 2/(D) of this policy is extended to include in respect of property insured hereunder deposited by "The Insured"

a) outside business hours in locked safe and/or vault and/or fully alarmed and locked room within the alarmed premises of "the assureds *customer*

b) during business hours in a locked safe and/or locked safe and/or vault and/or locked cabinet and/or locked room with alarmed premises of *"customers"* for safe keeping while traveling. (Emphasis added).

However, by an "Endorsement" entitled "Personal Conveyance Clause," the Policy excluded from coverage certain risks as follows:

> This insurance excludes all risks of loss or damage to the property insured when in transit *unless the property insured is in the close personal custody and under the direct control of a Director or employee* of the Assured's firm and/or sales representatives, commission salesmen or selling agents at all times *other than when deposited in a bank safe and/or vault and/or while left for safekeeping with a jeweler in the trade and/or while in the custody of customs*.

Based on a plain reading of the above terms, coverage under Section 4 and the Amendment to the Territorial Limits apply so as to afford coverage, unless defendant establishes an exclusion, limitation or unsatisfied condition, such as the Personal Conveyance Clause, applies as a matter of law.

It is noted that the Safe Keeping Clause which extended coverage does not apply as a separate basis to afford coverage since the goods were not locked in any safe or vault, or alarmed and locked room within an alarmed premises of any customer of plaintiff. Nor was Allen a "customer" of plaintiff. And, plaintiff's reasonableness argument concerning the Policy language fails. That Ilian was "seeing customers shortly before the theft" and "could not lock it up in a vault and at the same time conduct business by showing it to customers" is unpersuasive, as Ilian was not showing it to customers at the time of the theft. He was having dinner, and left the backpack with his cousin. And, while Allen attests that he knew it was important for him to watch the backpack in light of Ilian's nature of business, notwithstanding, the jewelry was stolen while Ilian was "gone for perhaps three or four minutes." (¶5). However, since the loss is covered under Section 4 and the Amendment to the Territorial Limits, that the Safe Keeping Clause does not apply is inconsequential.

***5** Therefore, defendant insurer, as the movant reliant on a policy exclusion, bears the burden of demonstrating that the policy exclusion "defeats an insured's claim by establishing that the exclusion is 'stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case' " (*Monteleone v Crow Const. Co.*, 242 AD2d 135, 673 NYS2d 408 [1st Dept 1998]; *Continental Cas. Co. v Rapid-Am. Corp.*, 80 NY2d 640 652, 593 NYS2d 966 [1993]; *see also Mazzuoccolo v Cinelli*, 245 AD2d 245, 247 [1st Dept 1997]). "[P]olicy exclusions are given a strict and narrow construction, with any ambiguity resolved against the insurer" (*Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383, 763 NYS2d 790, 792 [2003]; *see Monteleone v Crow Const. Co.*, 242 AD2d 135).

As to the Personal Conveyance Clause exclusion, the goods are not covered unless shown to have been "in the close personal custody *and* under the direct control" of Ilian "at all times" unless, as relevant herein, left with a "jeweler in the trade." Given that Ilian was at least 100 feet away from the goods at the time they were allegedly stolen, it cannot be said that they were in his close personal custody or control. However, it is uncontested that Allen was a "jeweler in the trade" with whom the goods were left.

The parties' dispute as to whether "jeweler in the trade" applies to Allen cannot be resolved on this motion for summary judgment. While defendant argues that this phrase does not apply to jewelers, such as Allen, who were not working as jewelers at the time of loss, plaintiff argues that the unambiguous term applies to jewelers of the trade, such as Allen, *regardless* of whether they were working in this capacity at the time of loss. As defendant failed to establish its interpretation of this phrase as a matter of law, summary judgment dismissing the complaint based on the applicability of this Policy exclusion cannot be granted.

Therefore, based on the foregoing, it is hereby

ORDERED that the motion by defendant, The Hanover Insurance Group moves for summary judgment dismissing the complaint of the plaintiff Ilico Jewelry, Inc. is denied; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

DATED *8/21/2014*

<<signature>>

HON. CAROL EDMEAD

J.S.C.