IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

ELEGANT SLUMMING, INC.	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. S10C-11-013 RFS
	)	
NGM INSURANCE COMPANY and	)	
MAIN STREET AMERICA GROUP,	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

Cross Motions on Summary Judgment.
Judgment for Plaintiff.

Submitted Date: October 20, 2011
Decided Date: November 30, 2011

Craig A. Karsnitz, Esquire, Young Conaway Stargatt & Taylor, LLP, Georgetown, Delaware, 19947, attorney for Plaintiff.

Christian G. Heesters, Esquire, Mintzer Sarowitz Zeris Ledva & Meyers, LLP, attorney for Defendants.

STOKES, J.

This insurance coverage case presents an issue of first impression in Delaware. The issue is whether the so-called "physical evidence requirement" in a commercial insurance policy is ambiguous. At stake is Plaintiff's claim of $141,640 for reimbursement of lost jewelry otherwise covered under the policy. Cross motions for summary judgment have been filed by Plaintiff Elegant Slumming, Inc. ("Elegant Slumming" or "Plaintiff") and National Grange Mutual Insurance Company ("NGM" or "Defendant").

Elegant Slumming is a jewelry and home accessories store in Rehoboth Beach, Delaware, owned and operated by Philip Livingston ("Livingston"). On Thursday, June 24, 2010, two packages of jewelry were delivered to the store by U.S. Mail. They were received by Ben Killebrew ("Killebrew"), an employee who was authorized to accept and sign for deliveries. The packages were delivered around 10 a.m. on Thursday morning. Livingston looked to see who sent them but did not open them because the store was busy that day.

At his deposition, Livingston testified that on Saturday he went to work and looked all over the store for the packages. He knew that the garbage had been collected on Friday, his day off. After searching without success, he called Killebrew, who did not recall the packages in question. When Killibrew came to the store a little later that day, he said he realized he had thrown out the packages when he was cleaning up the store before going home. With minor inconsistencies, Livingston related a similar narrative to

Defendant's investigator shortly after the loss occurred.

Killibrew testified that on Thursday he gathered up what he thought was trash, including the newly delivered packages and threw everything into the trash can. He had had a busy day and was distracted by the lack of cooperation of a fellow employee. Killibrew said that when Livingston called him on Saturday and asked him about the packages, he did not have any immediate recollection of them. After thinking about it on the way to work, Killibrew realized he had thrown the packages out and told Livingston when he got to the store.

The jewelry has not been recovered. After NGM refused to pay Plaintiff's claim for their value, Plaintiff sought declaratory judgment that Defendant owes it $141,640 under the policy as reimbursement for the lost jewelry. The parties have agreed to file cross motions on the language of the contested exclusion.

Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.[1] Neither party's motion will be granted unless no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law.[2] Filing of a cross motion for summary

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[1]Del.Super.Ct.Civ.R. 56(h).

[2]*Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 745 (Del. 1997).

judgment does not serve as a waiver of the party's right to assert the existence of a factual dispute as to the other party's motion.[3]

The Elegant Slumming/NGM insurance policy is an all-risk policy which contains certain limitations or exclusions, as do all general commercial liability policies. Section 4 lists the limitations on coverage. Section 4a.(3), the disputed provision, provides that NGM will not pay for loss or damage to:

> [P]roperty that is missing, but there is no physical evidence to show what happened to it, such as shortage disclosed on taking inventory.

This exclusion and others like it are sometimes referred to as the "physical evidence" requirement[4] or the "inventory limitation."[5] A somewhat similar provision is the "mysterious disappearance" exclusion, which sometimes but not always includes the physical evidence requirement.[6]

At dispute in this case is the phrase "physical evidence." Plaintiff argues that this phrase is ambiguous because it can reasonably mean either evidence in material form or evidence perceived by the senses, such as verbal descriptions or observations. Defendant

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[3] *United Vanguard Fund, Inc. v. TakeCare, Inc.,* 693 A.2d 1076, 1079 (Del. 1997).

[4] *Seagull Enterprises, LLC v. Travelers Property Cas. Co. of America*, 2010 WL 663346 (C.A.11 Ga.)).

[5] *Nat'l American Ins. Co. v. Columbia Packing Co., Inc.*, 2003 WL 21516586 (N.D. Tex.).

[6] *S. Bellara Diamond Corp. v. Indiana Lumbermen's Mutual Ins. Co.*, 2009 WL 3462510 (E.D. Mich.).

asserts that the phrase is clear and unambiguous, arguing for a narrow construction that precludes verbal evidence of any kind.

Clear and unambiguous language in an insurance contract is to be given its ordinary and usual meaning.[7] Where the language is clear and unequivocal, the parties are bound by its plain meaning.[8] An insurance contract is ambiguous when it is reasonably or fairly susceptible of different interpretations or may have two or more different meanings.[9] Courts in other jurisdictions have reached differing conclusions about the physical evidence requirement, as discussed *infra*.

A few points are worth highlighting. The fact that the parties disagree about the construction of contract language does not always mean it is ambiguous.[10] Also, the lack of a definition of terms in the contract does not necessarily mean that the terms are ambiguous.[11] Finally, some courts have addressed the physical evidence requirement where the parties have not argued ambiguity.[12]

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[7]*O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 288 (Del. 2001)(citing *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 2003)).

[8]*Id.* (citing *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 745 (Del. 1997)).

[9]*Id.*

[10]*Conagra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 69 (Del. 2011) (citing *Rhone-Poulenc*, 616 A.2d at 1196)).

[11]*Blasiar, Inc. v. Firemen's Fund Ins. Co.*, 76 Cal.App.4th 748, 755 (Ct.App.2nd D.1999).

[12]*GSD Production Services, Inc. v. Vigilant Ins. Co.*, 2010 N.Y. Misc. LEXIS 5858; *C.T.S.C. Boston, Inc. v. Continental Ins. Co.*, 2001 WL 1667279 (C.A.6 Mich.))(finding that

For example, the 11th Circuit considered an employee's statement that he knew who took the missing property but refused to identify the person.[13] The court rejected this evidence as speculative and unsupported, but not because it was offered verbally. The court discussed possible meanings of the phrase "physical evidence," suggesting perhaps that ambiguity warrants consideration. A Texas court found physical evidence in a confession and sworn testimony, both statements, again without argument on ambiguity.[14]

Other courts have stated that the phrase is clear and unambiguous without explaining that meaning. The Sixth Circuit found the phrase "physical evidence" to be unambiguous, but found no evidence existed because the plaintiff had "no idea when any of the [missing] computers were allegedly stolen, whether they were stolen on one day or over a period of time, or, for that matter, whether they were stolen at all.

Insurance policies may also exclude from coverage property that mysteriously disappeared with no suggestion or explanation of what happened to the property. The fact that property disappeared without any explanation was the essence of the exclusion.[15]

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plaintiff presented no physical evidence); *Blasiar, Inc. v. Fireman's Fund Ins. Co.*, at 756, 757 (construing a mysterious disappearance exclusion that required physical evidence to show what happened to the property).

[13]*Seagull Enterprises, LLC v. Travelers Property Casualty Company of America*, 2010 WL 663346, at **2 (C.A.11 (Ga.)).

[14]*Nat'l American Ins. Co. v. Columbia Packing Co.,* 2003 U.S. Dist. LEXIS 5969, at *20.

[15]*Mid-South Sales Co., Inc. v. Continental Cas. Co.*, 2007 WL 3273451, *6 (E.D. La.)(quoting early language of this exclusion as "any disappearance or loss under unknown, puzzling or baffling circumstances which arouse wonder, curiosity, or speculation, or circumstances which are difficult to understand or explain." *Claiborne v. United States Ins. Co.*,

If some evidence exists, a fact question arises for the jury.[16]

In a Michigan case, the policy limitation grafted several familiar exclusions into one: "We do not cover missing property when the only proof of loss is unexplained or mysterious disappearance, or shortage discovered on taking inventory, or other instance where there is no physical evidence to show what happened to the property."[17] Plaintiff's president observed thieves make off in a truck with some of his lumber and recorded the license plate number. A resulting inventory search revealed that a substantial amount of lumber was missing. The plaintiff theorized that the observed thieves were responsible for all the missing property. The court found the physical evidence requirement to be unambiguous but rejected plaintiff's theory, not because it was verbal but because it was "conclusory and mere conjecture.[18]

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193 So.2d (La.App.4th Cir.1966)).

[16]*Nussbaum Diamonds, LLC v. Hanover Ins. Co.*, 883 N.Y.S.2d 509 (N.Y.A.D. 1 Dept., 2009)(holding that plaintiff was not required to establish the cause of the loss of jewelry and finding that employee's statement that he may have left a small bag of jewelry at a convenience store raised fact questions); *Topliffe v. U.S. Art Co., Inc.*, 838 N.Y.S.2d 571 (N.Y.A.D. 2 Dept. 2 2007)(finding that employees' explanation that artwork was accidentally thrown away, if believed by jury, would take loss out of mysterious disappearance exclusion); *Gurfein Bros., Inc. v. Hanover Ins. Co.*, 670 N.Y.S.2d 423 (N.Y.A.D. 1 Dept.1998)(finding that plaintiff's circumstantial evidence that a ring of jewel thieves stole missing jewels created fact issue).

[17]*Banner Lumber Company, Inc. v. Indiana Lumbermen's Mutual Ins. Co.*, 2009 WL 3462510, n. 5 (E.D.Mich.))(not addressing ambiguity because not raised, but citing with approval *C.T.S.C. Boston, Inc. v. Continental Ins. Co.*, 2007 WL 3273451 (C.A.6 Mich.), where the court found the physical evidence requirement to be "clear and unambiguous").

[18]*Id.* at *5.

In a mysterious disappearance case with facts similar to those at bar, the plaintiff surmised that he accidentally threw out a small package of diamonds when he was hurriedly cleaning his desk.[19] The court accepted this statement as a possible explanation of what happened to the property and found that the exclusion was triggered only for cases where the insured could provide "no explanation whatsoever." Thus, the facts are similar to those at bar, but the outcome is different because the language of the limitation was different.

In *ACR Machine, Inc. v. Hartford Mutual Insurance Company*,[20] the court found the physical evidence requirement to be unambiguous. The court held that physical evidence existed in an employer's statement that empty boxes of castings had been rearranged in a way that suggested they were full and a police report confirming that this is what the employer had told him. A similar application of the physical evidence requirement to the facts in this case would result in a denial of Defendant's motion and a credibility issue for a jury to resolve.

In *Moneta Development Corporation v. General Insurance Company of Trieste and Venice*,[21] the court found the phrase to be sufficiently ambiguous as to require that it be construed against the insurer. Plaintiff submitted a claim for coverage of the

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[19]*S. Bellara Diamond Corp. v. First Specialty Ins. Corp.*, 731 N.Y.S.2d 185 (N.Y.A.D. 1 Dept. 2001).

[20]2006 WL 1517293 (E.D.Pa.).

[21]622 N.Y.S.2d 930 (N.Y.A.D 1 Dept. 1995).

disappearance of 22 tons of forklifts and other heavy equipment based on an employee's observation. Because large equipment is not easily lost or misplaced, the Court found that the observation constituted physical evidence sufficient to support an inference of theft, thus creating a question for the jury. The *Moneta* court distinguished the facts from those in *Maurice Goldman & Sons v. Hanover Ins. Co.*, where the missing evidence was jewelry and small items easily misplaced.[22]

Defendant in this case argues that *Moneta* was effectively overruled in *Westcom Corporation v. Greater New York Mutual Insurance Company.*[23] In *Westcom*, an employee observed a key broken off in a padlock that secured a storage unit that contained the company's digital line interface cards ("DLIC's"). After the padlock was replaced, another employee entered the storage unit and discovered that the DLIC's were gone. Based on the employees' observations, plaintiff filed a claim with its insurer, who denied the claim on grounds that it fell within the exclusion for missing property for which there is no physical evidence to show what happened to the property. The court found that the broken key established nothing because the unit remained secure by the jammed padlock. The second employee's discovery that the DLIC's were gone did not show what had happened to them. Thus, the court agreed with the defendant that there was no evidence whatsoever of what happened to the missing property, thus placing the

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[22]*Moneta Development Corp. v. General Ins. Co. of Trieste and Venice*, 622 N.Y.S.2d 930 (N.Y.A.D. 1 Dept.1995).

[23]839 N.Y.S.2d 19 (N.Y.A.D. 1 Dept. 2007).

claim within the exclusion.

The *Westcom* court distinguished the small-sized DLIC's from *Moneta'*'s large forklifts and found that the case was governed in *Maurice Goldman & Sons*, where the missing property was jewelry and other small items. The *Westcom* court did not overrule *Moneta,* but distinguished it as applying to the unexplained loss of very large items of personal property.[24] *Westcom* has been cited only once in an unreported trial ruling since it was issued in June 2007.

Thus, NGM's argument that *Moneta* has no bearing here is misplaced. The result in both *Westcom* and *Moneta* is based on the facts presented. They also differ from this case in the nature of the proffered evidence. In *Westcom* there was "no evidence at all" because the storage unit remained secure and the subsequent discovery of the missing DLIC's showed nothing other than loss. The *Moneta* evidence was an observation that numerous pieces of heavy equipment had suddenly gone missing, and the court limited its ruling to such facts.

For our purposes, the notable thing about *Moneta* is that the evidence disclosed a loss but no explanation, which generally does not meet the physical evidence requirement. However, the court found that the disappearance of massive equipment created "a sufficient inference of theft to withstand summary judgment."[25] The notable thing about

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[24]*Id.* at 23.

[25]*Moneta*, at 931.

Westcom is that the court found no evidence whatsoever, not because the employee's evidence was verbal, but because the fact that it was missing provided no explanation of what happened to it.

In *CTSC Boston, Inc. v. Continental Ins. Co.*, a substantial number of laptops were found to be missing during a prolonged inventory search. However, CTSC officials knew only that an indeterminate number of laptops were unaccounted for. The 6th Circuit, disagreeing with *Moneta,* found the physical evidence requirement to be unambiguous but acknowledged that *Moneta* involved multiple pieces of large equipment, whereas *CTSC* involved missing laptops designed for easy transport.

The case at bar differs from *CTSC* because Killebrew gave evidence of what happened to the missing packages, which were neither massive nor especially small. Killibrew explained that he threw out the packages with the rest of the trash because he was distracted by and resentful of an employee who was not doing her job. The cases discussed herein do not resolve the question of whether the phrase "physical evidence" is ambiguous.

At argument, counsel for the defense stated that a videotape showing the packages in the garbage can would have sufficed to take the incident out of the exclusion. The Court sees no relevant distinction between a video image of the packages in the trash and a percipient witness who observed the packages being put in the trash. Nor is there any discernible difference between the statements of a percipient witness and the recollections

of an employee who himself put the packages in the trash.

After Defendant conceded that a video image would satisfy the physical evidence requirement, Plaintiff offered a definition of "physical" to mean "having material existence; perceptible especially through the senses and subject to the laws of nature."[26] Under this standard definition, Killibrew's statement to Livingston had a material existence because it was perceptible through the sense of hearing. Being aware of one's own action is in perfect harmony with the laws of nature. In addition, Killibrew's testimony differed from a mere discovery of loss because it explain exactly what happened to the packages and why. If Defendant NGN Insurance Company had wanted to exclude testimony of an employee who takes responsibility for a loss, it could have done so.

These cases show the various methods used to apply the contested phrase, as well as the confusion that can occur when ambiguity is not addressed or is ruled on without explanation. The question of whether the phrase "physical evidence" in this context is ambiguous has not been addressed in Delaware.

A case involving an employee who surmised that he threw out a parcel of diamonds when cleaning off his desk is *S. Bellara Diamond Corp. v. First Specialty Insurance Corporation*.[27] However, the *Bellara* court was construing a mysterious

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[26]Webster's Collegiate Dictionary 1995.

[27]731 N.Y.S.2d 185 (N.Y.A.D. 1 Dept. 2001).

disappearance limitation which applies only when there is no explanation for what happened to the missing property. The employee's explanation took the event out of the mysterious disappearance exception. Thus, the acts were similar to those at bar, but the provisions of the limitation were different.

A case where a court accepted verbal statements as physical evidence is *ACR Machine, Inc. v. Hartford Mutual Insurance Company,* discussed *supra.* The insurance policy in question provided that there was no coverage for missing property where the only evidence is a shortage shown upon inventory or other instances where there was no physical evidence to show what happened to the property. The available evidence was the owner's observation that certain boxes had been rearranged in a way that suggested they were full, although, in fact, they were empty. The other evidence was a police report reiterating the owner's statement. The court accepted that the rearranged of boxes described in the verbal reports constituted physical sufficient to survive the defendant's motion for summary judgment.

These two cases are helpful but not determinative. Here again is the language in question:

> We will not pay for loss or damage to property that is missing but there is no physical evidence to show what happened to it, such as shortage disclosed on taking inventory.

The sentence shows itself to be unambiguous as to physical evidence by way of the sole example chosen to illustrate "no physical evidence." The example is a shortage

found during inventory. Such a finding shows a loss and nothing else. Thus a discovery made during inventory is akin to a mysterious disappearance where there is no evidence whatsoever of how the property went missing. As clarified by the example, the physical evidence requirement demands something more than nothing. That is the only conclusion that can be reached by reading the entire sentence and accepting its plain meaning. The Court holds that the language in question clearly and unambiguously requires some evidence of what happened to the missing property. The exclusion is not ambiguous.

A number of the cases discussed above relied on evidence that originated with a statement, usually offered by an employee. As another court has reasoned, to reject verbal observations or statements as evidence would mean that any illicit removal of property would be excluded from coverage if there were no material signs of the removal.[28] Nothing in the language of the limitation indicates that this was the intention of the drafters, as shown by the example of an inventory search.

In this case, the evidence shows that Mr. Killibrew recalled that he threw out the unopened packages along with the actual trash when he was straightening the store, feeling frustrated and resentful. Livingston confirmed that this is the substance of what Killibrew reported to him. This is evidence about what happened to the packages, unlike an inventory case where no suggestion or explanation exists. Viewed in conjunction with Livingston's testimony, it is clear that Killibrew maintained a generally consistent

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[28]*Moneta Development Corp. v. Generali Ins. Co. of Trieste and Venice*, 622 N.Y.S.2d at 931.

explanation over the eight months that elapsed between Livingston's statement to the insurance investigator and the time of Killibrew's deposition. This evidence at a minimum creates an inference that Killibrew did indeed throw out the packages. It is for a jury to weigh and determine Killibrew's credibility.

Judgment on the motions is for Plaintiff.

IT IS SO ORDERED.

Richard F. Stokes, Judge

cc: Prothonotary