SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK Justice PART 39

Index Number : 603015/2009
FRELINGHUYSEN MORRIS
vs.
AXA ART INSURANCE CORPORATION
SEQUENCE NUMBER : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001

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

MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/18/13

_____, J.S.C.
BARBARA R. KAPNICK J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 39

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FRELINGHUYSEN MORRIS FOUNDATION,

Plaintiff,

- against -

AXA ART INSURANCE CORPORATION,

Defendant.

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DECISION/ORDER
Index No. 603015/09
Motions Seq. Nos.
001 and 002

BARBARA R. KAPNICK, J.:

Motion sequence numbers 001 and 002 are consolidated herein for disposition.

In motion sequence 001, plaintiff seeks partial summary judgment, pursuant to CPLR 3212, for liability only on its cause of action for breach of contract, with respect to forty-one works of art that were owned by plaintiff and sold pursuant to a consignee agreement.

In motion sequence 002, defendant seeks summary judgment dismissing plaintiff's Complaint in its entirety. Alternatively, defendant seeks an order compelling non-party Cravath, Swaine & Moore LLP to provide documents responsive to defendant's January 6, 2012 subpoena duces tecum.

Background

Plaintiff Frelinghuysen Morris Foundation ("FMF") is a private operating foundation, organized as a trust under the laws of the State of New York, with its principal place of business in Lenox, Massachusetts. (Compl ¶ 1.) FMF is named after L.K. Morris and his wife Estelle "Suzy" Frelinghuysen, American abstract artists who died in 1975 and 1988, respectively. (Beshar Aff. ¶ 2, Compl. ¶ 4). Morris' will bequeathed all of his property, including unsold paintings he had created, to his widow, who in turn created FMF and left to it the artworks that she owned at the time of her death. (Compl. ¶¶ 5, 7.) The sole trustees of FMF, who are also the executors of the Frelinghuysen estate, are Christine Beshar ("Beshar") and T. (or Thomas) Kinney Frelinghuysen ("Kinney"), who is domiciled in Massachusetts. (*Id.* ¶ 8.)

Commencing in 1995, pursuant to written consignment agreements, plaintiff from time to time delivered works of fine art created by Morris and Estelle Frelinghuysen into the possession of Salander-O'Reilly Galleries ("the Gallery") and its principal, Lawrence B. Salander ("Salander") (collectively, "SOG"), on consignment for exhibition and/or sale. (*Id.* ¶ 9.) Pursuant to the terms of the written consignment agreements, SOG was required to remit to plaintiff 60% of the proceeds of any sale of the consigned

artworks, with the price of each work to be agreed upon in advance with plaintiff. (*Id.* ¶ 12.)

Plaintiff claims that in October 2007, it learned for the first time from news articles about the court-ordered closure of the Gallery in response to a consignor's lawsuit. (Compl. ¶ 15.) FMF alleges it learned through its own investigation that SOG had secretly sold or otherwise disposed of forty-one artworks owned by plaintiff and consigned by it to SOG (*Id.* ¶ 19.)

On October 26, 2007, plaintiff brought suit in this Court against SOG for, *inter alia*, breach of fiduciary duty and conversion, Index No. 603563/07 (the "Action"). The Action was stayed in early November 2007, when involuntary bankruptcy proceedings were commenced against the Gallery, and Salander declared personal bankruptcy. (*Id.* ¶ 18.) Plaintiff asserts that almost contemporaneously with its filing of the Complaint in the prior Action, it moved for a seizure order to recover any unsold works of art.

Plaintiff further contends that shortly after it filed the prior Action, the Manhattan District Attorney searched the Gallery premises, as well as Salander's townhouse, and seized business records as part of a criminal investigation, and subsequently

arrested Salander. (*Id.* ¶ 17.) When Salander pleaded guilty to grand larceny in 2010, included in his allocution was an admission that he stole property from FMF with a value of approximately $2.1 million. (Sentencing Tr. 25:7-13, March 18, 2010.)[1]

Plaintiff notified defendant of its potential loss under AXA's Commercial Inland Marine policy, No. 01-333-20-97-00308 (the "Policy") on or about October 23, 2007, and defendant declined coverage by letter dated June 13, 2008 (the "disclaimer letter"). In the disclaimer letter, defendant stated that: (1) the alleged loss was not a fortuitous physical loss of the artwork; (2) the works of art were seized by the order of a governmental authority (the New York State Court) and, therefore, claims for it were excluded under the Policy; and (3) the works of art that were still in Salander's possession at the time that the Gallery was closed could be recovered through a protocol that had been established to resolve claims of ownership for those works.

Plaintiff seeks partial summary judgment on liability only for the defendant's breach of the policy as to the forty-one works of art that Salander and the Gallery sold prior to the close of the Gallery. Defendant opposes plaintiff's motion, and separately moves

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[1] Plaintiff contends that neither Salander nor the Gallery have made any restitution to it, nor has any of the art been recovered.

for summary judgment dismissing the Complaint, contending that this action is time-barred, in that the Policy requires an insured to commence a legal action within two years of learning of its loss.

Additionally, defendant maintains that the Policy only covers physical loss or damage to the works of art, and that of the forty-one works of art that plaintiff asserts were converted by the Gallery and Salander, none suffered physical loss or damage; rather, those works of art duly passed to third-party bona fide purchasers for value.

Defendant further argues that the alleged loss was not fortuitous nor accidental, as plaintiff either had actual or constructive notice of the Gallery/Salander's misconduct long before plaintiff gave notice to AXA and should have investigated and taken action to remove the works from this consignee.

Finally, defendant contends that once these forty-one works of art were consigned to Salander and then sold to third parties, plaintiff no longer had an insurable interest in them as required for recovery under the Policy.

The AXA Policy

The Policy, which provides Museum Coverage, was issued to "The George and Suzy Frelinghuysen Morris Foundation," for the term of January 10, 2007 through January 10, 2008.[2] The policy limit was $30,000,000 (with a $25,000 deductible), and contained insurance for "Covered Property"[3] located at 159 West St, Lenox, Massachusetts, as well as coverage at unnamed locations and while in transit. Coverage is, however, limited to "Covered Property" in which the named insured had an "Insurable Interest."[4]

"Loss" is defined as "accidental loss or damage" (Policy at General Conditions, Section F), and the "Covered Causes of Loss"

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[2] The initial policy had commenced in 1995, and had been renewed annually.

[3] "Covered property" is defined in the policy as "property consisting of objects of art or rarity or historic merit of every nature and description, and their frames, crates, cases, and packing materials." (Policy at Museum Coverage, Section A.1.(b).)

[4] Included within the definition of "Insurable Interest" is:

> "(1) Property owned by you;
> (2) Property of others for which you have agreed prior to 'loss' to insure;
> (3) Property of others offered as gifts to you or for sale to you and while waiting formal acceptance by the Trustees or other authorized representatives;
> (4) Your interest in jointly owned property, but only to the extent of your interest at the time of 'loss'."

(Policy at Museum Coverage, Section A.1.(a).)

under the policy are "all risks of physical loss or damage to property insured hereunder unless the 'loss' is excluded in Section B-Exclusions." (*Id.* at Museum Coverage, Section A.5.)

One of the exclusions is entitled "Governmental Action," which states in relevant part: "Seizure or destruction of property by order of governmental authority." (*Id.* at Museum Coverage, Section B.1.(b).)

In the event of a loss, plaintiff was required to "[a]s soon as possible, give [defendant] a description of how, when and where the 'loss' occurred." (*Id.* at Commercial Inland Marine Conditions, Loss Conditions, Section C.3.)

Regarding "Concealment, Misrepresentation or Fraud," the Policy states: "This coverage is void in any case of fraud by you relating to it. It is also void if you intentionally conceal or misrepresent a material fact concerning: 1. This coverage; 2. The Covered Property; or 3. Your interest in the Covered Property." (*Id.* at General Conditions, Section A.)

Finally, with respect to "Legal Action Against [Defendant]", the policy provides the following: "[n]o one may bring a legal action against [defendant] under this coverage unless: 1. There has

been full compliance with all the terms of the coverage; [and] 2. The action is brought within 2 years after [the plaintiff] first [has] knowledge of the 'loss'." (*Id.* at General Conditions, Section B.)

Discussion

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957); *see also DuLuc v Resnick*, 224 AD2d 210 (1st Dept 1996).

Timely Commencement of this Action

Prior to examining whether plaintiff's instant claim for loss of the forty-one sold works of art is covered under the Policy, this Court must examine whether or not, pursuant to the terms of the Policy, plaintiff tendered a timely claim.

The Policy requires that an insured bring legal action "within 2 years after [the plaintiff] first [has] knowledge of the 'loss'." Although this action was commenced within two years of plaintiff giving the October 23, 2007 notice of its potential loss, defendant asserts that plaintiff's trustees had actual or constructive knowledge of the potential claims long, perhaps even years, before such notice was given. Plaintiff asserts, however, that even if plaintiff's trustees were aware of reasons to be suspicious of the Gallery or Salander, defendant waived this defense because there was no mention of it in the disclaimer letter.

"A notice of disclaimer must provide a claimant with a very specific ground upon which the disclaimer is predicated. . . . A ground not raised in the letter of disclaimer may not later be asserted as an affirmative defense." *Benjamin Shapiro Realty Co. v Agricultural Ins. Co.*, 287 AD2d 389, 389 (1st Dept 2001) (internal citation omitted).

Although defendant contends that it only became aware of the extent of plaintiff's prior knowledge of Salander and the Gallery's possible misdeeds through the trustees' Examinations Before Trial and other discovery conducted after the June 13, 2008 disclaimer letter, plaintiff correctly maintains that defendant sent its disclaimer letter almost eight months after being notified about

the potential loss and after it had conducted an extensive investigation.

Further, the disclaimer letter does not contain a reservation of rights, alerting plaintiff that it was considering additional reasons to disclaim coverage.

Accordingly, this Court finds that defendant waived its defense that plaintiff failed to timely commence the instant action.

Concealment of Material Facts

Defendant additionally seeks dismissal of this action based upon plaintiff's concealment of material facts which, pursuant to the terms in the "General Conditions" of the Policy, voids coverage for the alleged loss. Without ruling on the validity of the allegation that plaintiff concealed material facts, this Court holds that any such defense is waived, as it also was not included within the disclaimer letter, and defendant did not reserve its rights to add further grounds upon which it might decline coverage after further investigation.

Breach of Contract

Plaintiff seeks partial summary judgment on its sole cause of action for breach of contract with respect to the forty-one works of art that were sold by Salander and the Gallery.

"[A] policyholder bears the initial burden of showing that the insurance contract covers the loss" (*Roundabout Theatre Co. v Continental Cas. Co.*, 302 AD2d 1, 6 [1st Dept 2002]), a principle that does not change when that policy covers "all risks." *See United States Dredging Corp. v Lexington Ins. Co.*, 99 AD3d 695, 696 (2d Dept 2012).

Plaintiff contends that the works of art were "Covered Property" within the meaning of the Policy, and that the loss it sustained was included within the "Covered Causes of Loss" therein.

Under New York law, "[w]here the terms of an insurance policy are clear and unambiguous, interpretation of those terms is a matter of law for the court." *Town of Harrison v National Union Fire Ins. Co. of Pittsburgh*, Pa., 89 NY2d 308 (1996), *rearg den* 89 NY2d 1031 (1997). Clear and unambiguous provisions are "given their plain and ordinary meaning" (*United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986]), and ambiguous provisions

are construed in favor of the insured. *Id.*; *see also Handelsman v Sea Ins. Co.*, 85 NY2d 96, 101 (1994).

The Loss

A loss under the Policy is defined as "accidental loss or damage." Defendant contends that the loss for which plaintiff is attempting to recover was not fortuitous as to the plaintiff.

"[A]s a matter of law[,] insurance coverage, even under an all risk policy, extends only to fortuitous losses . . . ." *Renaissance Art Investors, LLC v AXA Art Ins. Corp.*, 102 AD3d 604, 605 (1st Dept. 2013), *lv den* 21 NY3d 855 (2013), (quoting *Redna Marine Corp. v Poland*, 46 FRD 81, 87 [SDNY 1969]). "Whether or not a loss is fortuitous, however, is a legal question to be resolved by the Court, and the characterization of a loss as 'fortuitous' is a legal conclusion to be distinguished from the facts upon which it is based." *Redna Marine Corp. v Poland*, 46 FRD at 87.

Under Insurance Law § 1101 (a) (2), a "[f]ortuitous event" means "any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party." Fortuitous has been defined in this context as "happening by chance or accident." *See Wider v Heritage Maintenance, Inc.*, 14 Misc 3d 963, 968 (Sup Ct, NY Co 2007); *see*

also 80 Broad St. Co. v United States Fire Ins. Co., 88 Misc 2d 706, 707 (Sup Ct, NY Co 1975), *affd*, 54 AD2d 888 (1st Dept 1976). "As such, losses that result from inherent defects, ordinary wear and tear, or intentional misconduct of the insured do not constitute fortuitous losses." *40 Gardenville, LLC v Travelers Property Cas. of Am.*, 387 F Supp 2d 205, 211 (WDNY 2005).

Although the fraud engaged in by Salander and the Gallery was not fortuitous as to them or any entity related to them (*see Renaissance Art Investors, LLC,* 102 AD3d at 604), as to this insured - the plaintiff - it was fortuitous. Defendant has raised issues of whether or not plaintiff's trustees should have investigated some alleged irregularities in reporting by the Gallery and Salander, but this is irrelevant because, as to these trustees, at the time it happened, the alleged loss was an accident. Therefore, this Court holds that as a matter of law, the alleged loss was fortuitous.

As to whether or not plaintiff's alleged loss is a "Covered Cause[] of Loss," the coverage under the policy is for "all risks of physical loss or damage to property insured hereunder unless the 'loss' is excluded in Section B - Exclusions."

Defendant's disclaimer letter only asserted that there was no coverage because plaintiff's artwork had been seized, which, according to the insurer, would trigger the exclusion for governmental seizure of the artwork. However, defendant did not proffer any evidence that any governmental authority had seized any of plaintiff's forty-one works of art that were sold to third parties prior to the closing of the Gallery.

Additionally, this Court notes that the Policy that defendant issued to plaintiff had no fraud exclusion, which in at least one other action has been successfully invoked to preclude a plaintiff from recovering from this same insurer for the SOG fraud. *See* AXA *Art Ins. Corp. v Renaissance Art Invs.*, LLC, 32 Misc 3d 1223(A) (Sup Ct, NY Co 2011), *affd*, 102 AD3d 604 (1st Dept 2013). Absent a fraud exclusion in the Policy, this Court holds that the alleged loss is a "Covered Cause of Loss."

The Property

Finally, plaintiff contends that the works of art are property within the meaning of "Covered Property." Defendant, however, maintains that, (1) because plaintiff transferred title to the works of art to the Gallery, pursuant to the consignment agreement, it no longer had an "insurable interest" in such works of art, and therefore, those works of art were no longer "covered property," or

alternatively, (2) when the Gallery sold the forty-one works of art to third-parties in the ordinary course of business, it no longer had an "insurable interest" in those works of art, and therefore, those forty-one works of art were no longer "covered property."

It is uncontested that the forty-one works of art were "covered property" until they were consigned to Salander and the Gallery. It is at that point that the insurer maintains that plaintiff no longer had an "insurable interest." (See definition, *supra* at 6, n. 4).

No evidence of a formal transfer of title to the artwork to either Salander or the Gallery was proffered by either party herein. Defendant has submitted a December 14, 1995 "brief synopsis" of the agreement between plaintiff and the Gallery, which is signed by Salander and both of plaintiff's trustees. (*See* Defendant's Rule 19-A Statement and Counterstatement, Exhibit 8.) Nowhere in this "brief synopsis", however, does it mention transfer of title, nor even give a hint of this being the intention of the parties.

Plaintiff contends that it was "entrusting" the artwork to the Gallery, as that term is defined in New York Uniform Commercial Code ("NYUCC") § 2-403, which gave the Gallery the "power to

transfer all rights of the entruster to a buyer in ordinary course of business." (*see* NYUCC § 2-403 [2]), but does not cut off plaintiff's title. *Porter v Wertz*, 53 NY2d 696 (1981).

Therefore, during the time that Salander and the Gallery had possession of the works of art, and had not sold them, plaintiff had an "insurable interest" in them.

However, "[u]nlike a thief, an entrustee has voidable, as opposed to void, title, and therefore can pass good title to a third party." *Interested Lloyd's Underwriters v Ross*, 2005 WL 2840330, *5 (SDNY, Oct. 28, 2005). Therefore, the consignment allowed the Gallery to sell a painting to a buyer in the ordinary course of business.

The question at issue thus becomes whether a sale to a buyer in the ordinary course of business terminated any "insurable interest" the plaintiff had in such artwork.

Pursuant to NYUCC, a "seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him." NYUCC § 2-501 (2); *see also Zurich Am. Ins. Co. v Felipe Grimberg Fine Art*, 324 Fed Appx 117, 120 (2d Cir 2009). The proffered evidence reveals that the forty-one works of art were

sold to buyers in the ordinary course of business, who paid either Salander or the Gallery for the sale. Even if plaintiff somehow retained the right to challenge any of these buyers' title to the works of art, that is not an "insurable interest" as defined in the Policy. *Id.*

Because plaintiff has not offered any evidence that it retained an "insurable interest" in any of the forty-one works of art that were sold, plaintiff's claims as to those works of art must be dismissed.

As to claims for the value of the unsold works of art, the plaintiff continues to have an "insurable interest" (as defined in the Policy) in the property entrusted to Salander and the Gallery which was not sold.

Further Discovery

That portion of defendant's motion which seeks an order compelling Cravath, Swaine and Moore LLP to provide documents responsive to defendant's January 6, 2012 subpoena duces tecum, is reserved for further discussion at the next conference which is scheduled in IA Part 39, 60 Centre Street - Room 208 on November 20, 2013 at 10:30 a.m.

Conclusion

Accordingly, it is hereby

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

ORDERED that defendant's motion is granted only to the extent of dismissing plaintiff's claims regarding the 41 works of art that were sold by Lawrence Salander and the Salander-O'Reilly Galleries; and it is further

ORDERED that plaintiff's claims as to the other works of art are severed and continued.

This constitutes the decision and order of this Court.

Dated: October 18, 2013

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.