

**Carlyle Commodity Mgt. LLC v Certain Underwriters
at Lloyd's London Subscribing to Policy with**

2020 NY Slip Op 32339(U)

July 17, 2020

Supreme Court, New York County

Docket Number: 651151/17

Judge: O. Peter Sherwood

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

.....x
CARLYLE COMMODITY MANAGEMENT
LLC (f/k/a VERMILLION ASSET
MANAGEMENT, LLC), CELADON
COMMODITIES LTD., CARLYLE GLOBAL
MARKET STRATEGIES COMMODITIES
FUNDING 2014-1, LTD, CARLYLE GLOBAL
MARKET STRATEGIES COMMODITIES
FUNDING 2015-1, LTD, VMF SPECIAL
PURPOSE VEHICLE SPC, VMF Q1
SEGREGATED PORTFOLIO, and ANY OTHER
INSUREDS AS DEFINED HEREIN,

Plaintiff,

-against-

CERTAIN UNDERWRITERS AT LLOYD'S
LONDON SUBSCRIBING TO POLICY WITH
UNIQUE MARKET REFERENCE
B0753PC1410840000, CERTAIN
UNDERWRITERS AT LLOYD'S LONDON
SUBSCRIBING TO POLICY WITH UNIQUE
MARKET REFERENCE B1353DC1500748000,
and CERTAIN UNDERWRITERS AT LLOYD'S
LONDON SUBSCRIBING TO POLICY WITH
UNIQUE MARKET REFERENCE
B1353DC1500837000,

Defendants.
.....x

WHEREAS, on January 14, 2020, Defendant Certain Underwriters at Lloyd’s London
Subscribing to Policy with Unique Market Reference B1353DC1500837000 (“Defendant” or
“Excess Insurers”) filed a Motion for Summary Judgment and supporting papers in the captioned
action [NYSCEF Doc. Nos. 544-596];

WHEREAS, on February 25, 2020, Plaintiffs Carlyle Commodity Management LLC
(f/k/a Vermillion Asset Management, LLC), Celadon Commodities Ltd., Carlyle Global Market

Present: Hon. O. Peter Sherwood

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ORDER

Strategies Commodities Funding 2014-1, Ltd, Carlyle Global Market Strategies Commodities Funding 2015-1, Ltd, VMF Special Purpose Vehicle SPC, and VMF Q1 Segregated Portfolio (collectively, "Plaintiffs" or "Carlyle") filed their Opposition to Excess Insurers' Motion for Summary Judgment and papers in support of said Opposition [NYSCEF Doc. Nos. 599-714];

WHEREAS, on April 23, 2020, Excess Insurers submitted via email Excess Insurers' Reply in Further Support of its Motion for Summary Judgment and supporting papers, pursuant to this Court's instruction to do so in light of the COVID-19 pandemic and related filing restrictions, and on May 5, 2020, Excess Insurers filed its Reply and supporting papers [NYSCEF Doc. Nos. 717-722];

WHEREAS, on May 6, 2020, Carlyle filed Plaintiffs' Further Rule 19-a(b) Counter-Statement in Response to Defendants Statement of Additional Material Facts [NYSCEF Doc. No. 723];

WHEREAS, on June 5, 2020, this Court held oral argument on Excess Insurers' Motion for Summary Judgment via Skype;

WHEREAS, later on June 5, 2020, this Court held a conference via Skype with the lead attorneys for Carlyle and Excess Insurers for the purpose of issuing an oral decision, the transcript of which is e-filed at NYSCEF Doc. No. 740, wherein the court granted Excess Insurers' Motion for Summary Judgment;

WHEREAS, that decision (*see id.*, Tr. 66-76) is incorporated herein by reference;

WHEREAS, in granting Excess Insurers' Motion for Summary Judgment, this Court made the following findings:

1. There are no material issues of fact precluding this Court from ruling on summary judgment;

2. SAMIR was an operating oil refinery in Morocco.

3. SAMIR entered into agreements with various third-party suppliers to purchase oil that SAMIR would use as feedstock in its refinery.

4. SAMIR entered into a Master Commodity Transaction Agreement (“MCTA”) with Carlyle, pursuant to which Carlyle would purchase some of the oil SAMIR had contracted to buy from third-party suppliers. Under the MCTA, Carlyle owned the purchased oil, stored it at SAMIR’s refinery at no cost at and, had put rights that when exercised obligated SAMIR to purchase the oil from Carlyle. SAMIR could not use the oil until SAMIR paid Carlyle for it except upon Carlyle’s prior written consent.

5. In practice, SAMIR processed the oil and sold the resulting refined oil products on an ongoing basis without either payment to Carlyle or prior written consent, and then paid Carlyle at some period of time after the oil had already been refined and sold (*see id.* at pp. 60-62).

6. The Moroccan government seized SAMIR’s bank accounts for non-payment of taxes in August, 2015. At the time of the seizure, SAMIR owed Carlyle for multiple shipments of oil for which Carlyle had paid.

7. Carlyle claims that the oil feed stock was stolen by SAMIR. The record before the court does not support that assertion.

8. As discussed in the transcript, theft is an instance of stealing (*id.* at 70). The word “steal” has many meanings but in the sense used here it means “to take or appropriate another’s property or ideas without permission dishonestly or unlawfully, especially in a secret or surreptitious manner” (*id.*).

9. SAMIR did not steal the oil by refining it in the normal course of its refining

operations. Carlyle's losses were not due to theft by SAMIR, because SAMIR and Carlyle had an ongoing business relationship and Carlyle expected that the oil it purchased and that was delivered to SAMIR would be used in the refining process and eventually paid for (usually after the time for payment provided in the MCTA). Carlyle's losses were not occasioned by the unlawful taking of the oil, but rather by SAMIR's non-payment (*see, e.g., Sutro Bros. & Co. v. Indem Ins. Co. of N. Am.*, 386 F.2d 798 (2d Cir. 1967); *Zurich Am. Ins. v. Felipe Grimberg Fine Art*, 324 F. App'x 117 (2d Cir. 2009)).

10. SAMIR's refining of the oil in accordance with SAMIR's and Carlyle's expectations and SAMIR's inability to pay when the Moroccan government seized SAMIR's bank accounts is distinguishable from those cases where there was a "pretend purchaser" with fraudulent intent (*see, e.g., Hanson v. Nat'l Sur. Co.*, 257 N.Y. 216 (1931); *Underwood v. Global Indem. Co.*, 245 N.Y. 111 (1927); *Great North Insurance Co. v. Dayco Corp.*, 620 F.Supp. 346 (S.D.N.Y. 1985); *AGCS Marine Insurance Co. v. World Fuel Services, Inc.*, 187 F. Supp. 3d 428 (S.D.N.Y. 2016)).

11. Loss due to non-payment is not covered by the insurance policy issued to Carlyle by Excess Insurers.

It is hereby **ORDERED** as follows:

1. Defendant Excess Insurers' Motion for Summary Judgment is **GRANTED**.
2. Plaintiffs' Complaint is **DISMISSED WITH PREJUDICE**.

SO ORDERED this 17th day of July 2020.


Honorable O. Peter Sherwood, J.S.C.