| **Inter-Governmental Philatelic Corp. v Aspen Am. Ins. Co.** |
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| 2021 NY Slip Op 31976(U) |
| June 24, 2021 |
| Supreme Court, Kings County |
| Docket Number: 514795/2017 |
| Judge: Leon Ruchelsman |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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INTER-GOVERNMENTAL PHILATELIC CORP., and IDEAL STAMP CO., INC.,

Plaintiff, Decision and order

- against - Index No. 514795/17

ASPEN AMERICAN INSURANCE COMPANY, FINE ART & COLLECTIBLES ENTERPRISES d/b/a FACE INSURANCE SERVICES and/or FINE ARTS COVERAGE ENTERPRISES, 718 INSURANCE AGENCY, INC., and YECHEZKEL "CHESKY" KLEIN,

Defendants, June 24, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendants, Aspen American Insurance Company, Fine Art and Collectibles Enterprises [hereinafter FACE] and 718 Insurance Agency Inc., and Yechezkel Klein have all moved pursuant to CPLR §3212 seeking summary judgement dismissing the lawsuit. The plaintiff has opposed the motions. In addition, the defendants have opposed the motions of the other defendants. Papers were submitted by the parties and argument held. After careful review of all the arguments, this court now makes the following determination.

The plaintiff Inter-Governmental Philatelic Corp., [hereinafter IGPC] is an entity that markets wholesale and commemorative stamps throughout the world. Plaintiff Ideal Stamp Company [hereinafter Ideal] buys and sells collectible stamps. The two entities share the same office space, many of the same employees and they are both owned by the same individuals. In

the fall of 2014 the plaintiffs sought to obtain insurance and contacted a retail insurance broker, defendant 718 Insurance. On November 3, 2014 defendant Yechezkel Klein of 718 Insurance Agency completed an insurance application provided by FACE a wholesale insurance broker. That application included both IGPC and Ideal as insureds. Indeed, the application from both 718 and FACE included two entities, namely IGPC and Ideal. The defendant Aspen, the underwriter of the policy only listed plaintiff IGPC as the policyholder and named insured.

During the summer of 2016 both companies decided to move from a warehouse in South Plainfield New Jersey to Brooklyn. During the move it was discovered that a cabinet full of stamps was missing. On August 17, 2016, Samuel Malamed, one of the owners of both companies notified the police claiming that a cabinet containing valuable stamps was missing. No specific evidence of a theft was ever established and the cabinet containing the stamps was never found. The plaintiffs submitted a claim for the lost stamps to Aspen. On August 3, 2017 Aspen declined coverage on the grounds that Ideal the owner of the stamps that were inside the cabinet was not a named insured on the policy and that in any event the stamps were lost due to a mysterious disappearance and that such loss is excluded pursuant to the insurance policy. This lawsuit was commenced and following the completion of discovery these motions have been

filed. The defendants argue they cannot be required to cover the loss claimed and the lawsuit should be dismissed. The plaintiffs counter there are questions of fact which must be resolved by a jury.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury (Aronson v. Horace Mann-Barnard School, 224 AD2d 249, 637 NYS2d 410 [1st Dept., 1996]). However, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Derdiarian v.Felix Contracting Inc., 51 NY2d 308, 434 NYS2d 166 [1980]).

In Snell v. Atlantic Fire and Marine Insurance Company, 98 US 85, 8 Otto 85, 25 L.Ed. 52 [1878] the Supreme Court held that where an insurance "contract from which, by mistake, material stipulations have been omitted, whereby the true intent and meaning of the parties are not fully or accurately expressed" then reformation of the contract is appropriate. To hold otherwise, the court explained, would allow the "insurance company to obtain an unconscionable advantage, through a mistake, for which its agents were chiefly responsible" (id). A mutual

mistake exists where both parties "share the same erroneous belief and their acts do not in fact accomplish their mutual intent" (Healy v. Rich Products Corp., 981 F.2d 68 [2d. Cir. 1992]). Thus, to succeed upon a claim for reformation of a written agreement upon the grounds of mutual mistake, the party seeking reformation must establish, by clear an convincing evidence "the agreement does not accurately express the parties' intentions or previous oral agreement" (313-315 West 125th Street LLC v. Arch Specialty Insurance Company, 138 AD3d 601, 30 NYS3d 74 [1st Dept., 2016]).

In this case the applications and documentation from FACE and 718 both indicate that insurance was sought for IGPC as well as Ideal. Thus, a handwritten 'Dealer's Insurance Program' Form supplied by FACE listed both "Inter Governmental Philatelic Corp" and "Ideal Stamp Co" in the space to insert the 'Gallery's Name' (see, Form, submitted as Exhibit P within 718's motion for Summary Judgement). In addition, that handwritten form was then reduced to a typewritten form and again the Gallery's Name states "Inter Governmental Philatelic Corp/Ideal Stamp Co" (see, Form, submitted as Exhibit Q within 718's motion for Summary Judgement). Nevertheless, when the policy was actually written by Aspen it only included IGPC. Aspen asserts that it "made no mistake and dutifully acted on information provided through the plaintiffs' brokers, who acted solely in behalf of the

plaintiffs" (see, Memorandum in Support of Aspen's Motion for Summary Judgement, page 20). Aspen argues that neither FACE or 718 ever realized there were two distinct companies seeking insurance. However, the failure of FACE or 718 to learn the true nature of the two companies seeking coverage was surely a mistake on their part. Indeed, Mr. Klein, the representative of 718 testified that "I was under the impression that both of these companies acted in the exact same capacity" (see, Deposition of Yechezkel Klein, page 109). Mr. Klein admitted he did not know how the two companies were treated from a corporate or tax perspective or how they were treated regarding officers and directors but that "I only know with the capacity that I was working with the insured that the company operated under two names, it is a very common practice" (id at page 110). Likewise, Kimberly Anderson a representative of FACE testified and stated she "made the assumption that Ideal Stamp Company was a doing business name" for IGPC (see, Deposition of Kimberly Anderson, page 21). She admitted she never sought to verify that information and based it on the fact she believed one company was 'doing business as' the other. She admitted her assumption had been incorrect. There can be no dispute that FACE and 718 made 'mistakes' concerning the actual status of Ideal and thus in conjunction with the plaintiff's specific inclusion of Ideal on the application, a mutual mistake surely existed. Aspen argues

that the applications "did not clearly distinguish between IGPC and Ideal" and that "different versions of the application...list the intended named insured slightly differently, bolstering Aspen's argument that IGPC was the intended insured" (see, Memorandum in Support of Aspen's Motion for Summary Judgement, pages 20, 21). However, there is no disagreement that IGPC was the intended insured. Nor does Aspen explain why the insurance contract should not have also included Ideal. The mere fact the application did not distinguish between IGPC and Ideal does not excuse Aspen's failure to include Ideal without relying upon a mistake. Likewise, if true that different applications contained slight differences regarding the names of the insured, again, Aspen's failure to inquire or verify the specific insureds under the policy can only be described as a mistake. Aspen insists that there is no clear and convincing evidence the contract as reformed is the one "the parties understood and intended for it to be" (see, Omnibus Memorandum of Law in Opposition to FACE Insurance Services', 718 Insurance Agency, Inc and Yechezkel "Chesky" Klein's Motion for Summary Judgement, page 14). However, it is undisputed that IGPC and Ideal are distinct entities and that the application itself seeks coverage for both entities. It is thus difficult for Aspen to argue that Mr. Melamed, the owner of both entities did not intend for such dual coverage. Moreover, Aspen has not sufficiently explained why

they actually failed to include Ideal within the policy. They argue that "neither wholesale broker FACE nor retail broker 718/Klein even knew that two separate companies wanted to be insured under the same policy" (see, Memorandum in Support of Aspen's Motion for Summary Judgement, page 20). However, it has already been established and is even urged by Aspen that FACE and 718 were mistaken in those beliefs. Thus, Aspen really does not offer any compelling reason why they failed to insure Ideal as well. The failure to do so was nothing more than a mistake on its part. Whether Aspen, FACE or 718 can pursue claims against each other is beyond the scope of these motions, however, there can be no dispute the insurance contract must be reformed to include Ideal as insured on Aspen's policy. The motion seeking such reformation is granted.

Turning to the next issue, Aspen disclaimed coverage on the grounds the loss was the result of a mysterious disappearance for which no coverage is available and Aspen seeks summary judgement that as a matter of law it is not required to provide coverage for the mysterious loss in this case.

Page 9 of the Insurance Policy states that there is no payment for "missing property where the only proof of loss is unexplained or mysterious disappearance of covered property...or any other instance where there is no physical evidence to show what happened to the covered property" ("Perils Excluded"

'Missing Property' ¶2(f)).

It is well settled that an insurance policy provision excluding coverage of a mysterious loss does not exclude coverage when the loss has been caused by theft (Gurfein Bros. Inc., v. Hanover Insurance Company, 248 AD2d 227, 670 NYS2d 423 [1st Dept., 1998]). However, the precise language the exclusion will apply unless there is "physical evidence" of such theft has been held ambiguous (see, Moneta Development Corp., v. General Insurance Company of Trieste and Venice, 212 AD2d 428, 622 NYS2d 930 [1st Dept., 1995]). In Moneta a claim of theft was presented to the insurer after an officer of the company observed equipment had disappeared. The court held the policy provision that required physical evidence of a theft was ambiguous because it was open to two opposite yet reasonable interpretations. The insurer argued for a narrow interpretation which would include "only evidence which is physically present after the property's disappearance, such as a broken lock showing that there was a forced entry" (id). However, the court adopted the interpretation of the insured and defined the term as any "descriptive evidence of a change in physical circumstances, which, in this case, would include the depiction by plaintiff's officer of the physical presence of the property and of its subsequent physical absence" (id). The court explained that to hold otherwise would mean that "even a theft which was actually

observed by eyewitnesses, who watched as the thieves physically removed the property, would be excluded, merely because the thieves were skilled enough to leave no signs of forced entry behind them" (id). Further, the court emphasized that if "tangible remaining evidence of forced entry were required as proof of theft...such provision could have been included in the policy" (id). Therefore, the court held the language ambiguous and denied the insurance company's motion seeking summary judgement.

Indeed, many courts have struggled to classify the type of evidence that would satisfy the 'physical evidence' requirement and whether that phrase is indeed ambiguous. Moneta inferred that eyewitness evidence would not satisfy the physical evidence requirement. However, in Blasair, Inc., v. Fireman's Fund Insurance Company, 76 Cal.App.4th 748, 90 Cal.Rptr2d 374 [Court of Appeal, Second District, Division 4, California 1999] the court held that eyewitness testimony of a theft is considered physical evidence. In that case, the insured, an entity doing business as Alert Communications, filed a claim for goods allegedly stolen from their warehouse. There was no physical evidence, as required by the policy, supporting the theft. Alert argued the term 'physical evidence' was ambiguous and proposed a hypothetical "scenario in which a percipient witness watches a burglar enter an insured's building and leave carrying property.

The burglar does not leave fingerprints, footprints or signs of forced entry" (id). The court explained that "because the Policy uses the term 'physical evidence,' Alert contends that the exclusion might apply even though a witness can testify about the burglary" (id). The court rejected that contention and asserted "the answer to Alert's hypothetical really is not in doubt" (id). The court concluded that "testimony about the physical movements of a burglar into and out of a building and about the carrying of property would be testimony about physical evidence of theft" (id). While the court ultimately concluded the term 'physical evidence' was not ambiguous it clearly held that eyewitness testimony constituted the requisite physical evidence. In National Grange Mutual Insurance Company v. Elegant Slumming Inc., 59 A3d 928 [Supreme Court of Delaware, 2013]) the court disagreed and held that "to find that a requirement of 'physical evidence' is satisfied exclusively by testimonial evidence would be contrary to the plain and ordinary meaning of the term. 'Physical evidence' means any article, object, document, record or other thing of physical substance. Accordingly, we hold that that testimonial evidence, by itself, is insufficient to constitute the 'physical evidence' intended by the coverage exclusion" (id). Therefore, in that case the mysterious disappearance exclusion which required 'physical evidence' was not satisfied rendering any insurance coverage unavailable.

Likewise, in Seagull Enterprises LLC v. Travelers Property Casualty Company of America, 366 Fed.Appx. 979 [11th Cir. 2010] the court agreed that statements made to an insurance agent did not constitute physical evidence.

Essentially, Moneta held the term physical evidence was ambiguous because it was anomalous to require only tangible evidence to the exclusion of other relevant evidence such as eyewitness testimony of theft or legitimate claims of theft. Other courts have recognized this anomaly even though they have rejected its logical outcome. In Will Repair Inc., v. Grange Insurance Company, 15 NE3d 386 [Court of Appeals of Ohio, Eight District, Cuyahoga County 2014] the court dismissed the insured's argument that "the policy's 'physical evidence' requirement for coverage of losses resulting from missing property is inconsistent with 'real world' scenarios in which 'missing property has obviously been stolen, and yet no one has any idea who committed the theft'" (id). The court further rejected the contention the requirement "'essentially gut[s] the other provisions in the contract which purport to provide coverage for theft'" (id). The court explained that "the policy's 'physical evidence' requirement for coverage of losses from missing property (the 'missing property exclusion') does not require that an insured solve a theft, be able to show exactly what happened to missing property, or establish who stole missing property in

order to obtain coverage for a theft loss. It simply requires some 'physical evidence' of what happened to the missing property. We can envision a number of factual scenarios in which an insured would be able to point to some physical evidence of what happened to its missing property and, thereby, obtain coverage under the policy even where a suspected 'theft' or other cause of property loss remains unsolved—for example, where a third-party theft occurs and is captured on videotape, a security alarm is triggered in connection with a loss, property damage such as broken doors, windows, or locks are found in connection with missing property, items used in connection with a suspected third-party theft are left behind, or the insured has some documentation establishing how and when covered property likely disappeared" (id).

Further, in C.T.S.C. Boston Inc., v. Continental Insurance Company, 25 Fed. Appx. 320 [6th Cir. 2001] the court disagreed with Moneta and held the plain language of the exclusion required the existence of actual physical evidence which by its very terms is not ambiguous. Therefore, the court granted the insurer's motion to dismiss the lawsuit when claims of stolen laptops were presented without any physical evidence. The court specifically addressed the anomaly or paradox raised by Moneta and concluded the fact "a term may have undesirable consequences, such as those described in *Moneta*, does not make it ambiguous" (id). Thus, in

WestCom Corp., v. Greater New York Mutual Insurance Company, 41 AD3d 224, 829 NYS2d 19 [1st Dept., 2007] the insured alleged that digital line interface cards had been stolen from their property. These cards were "small, easily transported items of personal property" (id). The court held that even though there was evidence of a broken padlock, such evidence did not provide the necessary physical evidence of a theft since there was no proof the broken padlock led to a successful theft. In distinguishing Moneta and harmonizing C.T.S.C. Boston the court explained that in Moneta the items that were missing were large and heavy which created a "sufficient inference of theft to withstand summary judgement on the issue of whether the evidence 'show[s] what happened to [the property]'" (id). On the other hand, in WestCom the items were small and personal, therefore, they were susceptible to being accidentally lost without explanation. The court in WestCom further noted that C.T.S.C. Boston distinguished Moneta on "precisely the same ground" (id). While a careful reading of C.T.S.C. Boston reveals that it disagreed with Moneta because it held the words 'physical evidence' was not ambiguous, it did address the distinction raised in a footnote. Thus, footnote 4 of C.T.S.C. Boston states "in fairness to the *Moneta* court, we note that it reached this problematic conclusion based, in large part, on 'the fact that a very large amount of heavy equipment disappeared in a short period of time'...This reasoning

is less persuasive in a case involving laptop computers, which are designed to be easily transported, and an undefined period of time in which the computers disappeared" (C.T.S.C. Boston, supra). In any event Westcom construed Moneta to narrow its applicability only in "cases involving the unexplained loss of heavy equipment or other massive items of personal property" (id).

The distinction drawn between small, personal items for which the exclusion applies and large and perhaps heavy items where the exclusion may not apply is compelling. If the missing items are small, personal items their disappearance could be attributed to other facts, such as accidental or inadvertent loss, misplacement or some other disappearance not connected to any theft. By contrast, if the items missing are large and could not so easily be explained by mishap, inadvertent misplacement or any other reason then such mere disappearance could be the necessary physical evidence to render the exclusion inapplicable. C.T.S.C. Boston criticized Moneta's conclusion the mere fact the items were missing established physical evidence of the possibility of a theft. The court explained that "this interpretation of the exclusion term as a whole is not reasonable as it conflates 'physical evidence' of theft with the mere fact that the property is 'missing.' Under this interpretation, there would always be 'physical evidence' of what happened to missing

property because the insured's mere description of the property as 'missing,' and presumed stolen, would count as 'physical evidence' of what happened to it. This line of reasoning leads to the paradoxical conclusion that all missing property would be covered by the policy when there is no physical evidence of what happened to it, based on the 'missing property' exclusion itself" (id). However, as explained, that categorical conflation would only be true if the items missing were small, personal items whereby their disappearance could not primarily be attributed to any theft. By contrast, if the items missing are large and their disappearance cannot be explained in any other way then the very disappearance could be the necessary physical evidence to render the exclusion inapplicable. For example, in Stella Jewelry Manufacturing Inc., v. Naviga Belgamar Through Penem International Inc., 885 F.Supp. 84 [S.D.N.Y. 1995] the insured placed a bag containing jewelry on the ground to make room in the trunk of his vehicle. About ten seconds later the insured noticed the bag was missing. The court held the disappearance was not mysterious and that really the issue was the credibility of the custodian of the jewelry. The court explained that "there is no evidence from which one could deduce that the nylon bag had blown away or been lost in any other manner than by theft. Under those circumstances no reasonable jury could reach the conclusion that the loss occurred otherwise" (id).

Summarizing the above cases it is clear there is a disagreement whether eyewitness testimony can serve as physical evidence. More importantly, there is a clear disagreement among various jurisdictions whether the physical evidence requirement can ever be satisfied with less than tangible evidence, especially where the items missing are large and not susceptible to easy or random disappearance. The opinions of Moneta and WesCom are sufficient New York authority that the disappearance of large items and the claim of a theft can satisfy the physical evidence requirement necessary to succeed on a claim of such stolen property. Indeed, any other interpretation of the 'physical evidence' requirement, where the items are large, really rests upon the competence of the thieves. A skilled and professional thief who is savvy enough to leave no trace of his crime would foreclose an insurance claim since there is no evidence to substantiate the theft. However, a bungling or clumsy thief who is caught on videotape or trips an alarm or breaks a window would thereby permit such claim (Moneta, supra). The availability of insurance cannot rest upon so arbitrary and so fortuitous a distinction. To the extent other cases are not persuaded by that argument, this court is not bound by their guidance.

In this case, the cabinet that was reported stolen was large enough that it required three people to successfully move it

(see, Deposition of Samuel Melamed, page 83). The cabinet is not the sort of item such a diamond ring (Midlo v. Indiana Lumberman's Mutual Insurance Company, 160 So2d 314 [Court of Appeal of Louisiana, 4th Circuit 1964] or a wristwatch (Johnson v. General Accident, Fire and Life Assurance Corp., 454 SW2d 837 [Court of Civil Appeals of Texas 1970]) which could have disappeared for any number of reasons. Rather, the sheer size and weight of the cabinet necessarily impacts its very disappearance (WestCom, supra). Therefore, there are questions of fact whether the cabinet is missing due to a theft and consequently the motions of the defendants seeking summary judgement is denied. Further, any issues relating to whether the loss occurred while in transit are factual, foreclosing any summary determination. Thus, all motions seeking summary judgement are denied.

So ordered.

ENTER:

DATED: June 24, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC