Alpha & Omega Manhattan Corp. v Lonmar Global Risks Ltd.
2023 NY Slip Op 32913(U)
August 21, 2023
Supreme Court, New York County
Docket Number: Index No. 653451/2022
Judge: Margaret A. Chan

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **49M**

Justice

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Alpha and Omega Manhattan Corp.

Plaintiff,

- v -

Lonmar Global Risks Limited trading as Lonmart Insurance; Certain Interested Underwriters at Lloyd's of London identified as Names "2001AML," "0609AUW," "1686AXS," "1686AXS," "0382HDU," and "500TRV"; CHLS, LLC, and John Enders,

Defendants.

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INDEX NO. 653451/2022

MOTION DATE 11/11/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for DISMISSAL.

In this action for declaratory relief and monetary damages against defendants for breach of contract and violation of New York General Business Law (GBL) § 349(h), defendants Certain Interested Underwriters at Lloyd's of London identified as Names "2001AML", "9975ASC", "2012AAL", "4711ASP", "0609AUW", "1686AXS", "0382HDU" and "500TRV" (the Insurers), CHLS, LLC and John Enders (collectively, defendants) move pursuant to CPLR 3211(a)(7) for an order dismissing the complaint. Plaintiff opposes the motion.

Defendants' motion to dismiss the complaint is granted for the reasons below.

Background[1]

Plaintiff Alpha and Omega Manhattan Corp. (Alpha and Omega) is a jewelry business that buys and sells jewelry, rare valuable property, and precious metals in New York, other regions in the country, and internationally (NYSCEF # 1 – Complaint, ¶ 11). Plaintiff and two other jewelry businesses, namely Golden Dreams LLC, and Now and Forever Jewelry & Antiques, Inc.[2] (collectively, the

[1] Unless otherwise noted, the following facts are based on the allegations in the Complaint, which for the purpose of this motion must be accepted as true, as well as the documentary evidence submitted by the parties.

[2] A nearly identical action was filed before the New York State Supreme Court, Nassau County, by plaintiff Now and Forever Jewelry & Antiques, Inc. against the same defendants in this action (*see Now and Forever Jewelry & Antiques Inc. v. Lonmar Global Risks Limited et al.*, Index No. 612516/2022 [Sup Ct, Nassau County]) (the Nassau

Insureds) contracted with the Insurers through the broker, Lonmar Global Risks Limited trading as Lonmart Insurance,[3] under insurance policy number B079920OA730023 (the Policy) (*id.*, ¶¶ 5, 16; NYSCEF # 2 – Policy Document; NYSCEF # 8 at 2). The Policy provides insurance coverage for jewelry owned by the Insureds (the Insured Properties) with certain conditions and exceptions (NYSCEF # 2 at 5-22).

Of relevance here are two exclusions under the Policy. The first exclusion is the Personal Conveyance Clause of the Policy, which excludes coverage for property that is "*in transit*" if the property is not "*in the hand or sight*" of the Insured or a responsible staff member or Insured's designee, "other than when deposited in a bank, and/or safe and/or vault and/or whilst left for safekeeping with a Jeweler in the trade and/or whilst in the custody of customs" (NYSCEF # 2 at 18 [emphasis added]).

The next exclusion is the Unattended Automobile Exclusion clause, which excludes coverage of the Insured Properties "while in or upon any automobile *unless*, at the time the loss or damage occurs, there is *actually in or upon* such vehicle, the Insured, or a permanent employee of the Insured, or a person whose sole duty it is to attend the vehicle" (*id.* at 10 [emphasis added]).

The incident giving rise to this dispute occured while a four-person team organized by Alpha and Omega attended a marketing event known as the Manhattan Vintage show at the Metropolitan Pavilion at 120 West 18th Street, Manhattan on June 18 and 19, 2021 (the Event) (NYSCEF #1, ¶ 33). At the conclusion of the Event on June 19, Alpha and Omega's team loaded the Insured Properties, including Alpha and Omega's 84 specific items that were packed in a blue duffel bag, and put into an SUV that was used to transport the Insured Properties to and from the Event (*id.*, ¶¶ 16, 35, 37, 40).

According to the Complaint, the Alpha and Omega team could not load the Insured Properties into the SUV at the intended loading dock because other vehicles occupied the space and a construction site blocked the area at that moment (*id.*, ¶¶ 49-54). Hence, the Event's security personnel directed the SUV to double park on a busy street next to a forklift so that Alpha and Omega's team could load

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Action). After briefing on defendants' motion to dismiss concluded in the Nassau Action, the court issued a Recusal Order indicating that plaintiff's claims did not meet the threshold for being in the Nassau County Commercial Division because the action was an "insurance dispute seek[ing] declaratory relief concerning damages to property" (*see Now and* Forever NYSCEF # 43). In this court's view, just like the Nassau Action, this case also does not qualify for the Commercial Division in New York County pursuant to Section 202.70(c). However, to avoid prejudice for the parties given the time that has passed since briefing concluded on defendants' motion, the court will address the merits of defendants' motion.

[3] Defendant Lonmar Global Risks Limited trading as Lonmart Insurance is also named in this action but has not appeared. Defendants inform that Lonmart Insurance is not an insurer or one of the subscribing Underwriters, but acted as the insureds' agent (NYSCEF # 8 at 2).

the Insured Properties and other items into the vehicle (*id.*, ¶¶ 55, 56). Alpha and Omega alleges that during the loading of the vehicle, its team members kept the vehicle, as well as the blue duffel bag containing the Insured Properties, in their sight at all times (*id.*, ¶ 57). In particular, the driver, James Gavin, stood within three feet of the open rear door of the SUV at all times, keeping an eye on the vehicle and its contents (*id.*). Despite this, Alpha and Omega alleges that a gang of professional thieves took advantage of the chaotic situation and covertly removed the duffel bag containing the Insured Properties from the SUV (*id.*, ¶ 58). Upon arrival in Great Neck later that evening, plaintiff discovered the theft and notified the police (NYSCEF # 16).

Plaintiff also notified the Insurers of the theft the next day; the Insurers appointed John Enders from CHLS, LLC, as an adjuster, to investigate the circumstances surrounding the loss (*id.*, ¶ 59). In response, on August 4, 2021, Enders sent a letter to the Insureds reserving the Insurers's rights under the Personal Conveyance Clause of the Policy (*id.*, ¶ 60). On October 11, 2021, the Insurers denied the claim, again relying on the Personal Conveyance Clause (*id.*, ¶ 62). In their denial letter, the Insurers explained that they determined that Insureds failed to keep the duffel bag in hand or in sight at the time of the theft and, as a result, failed to establish that their claim was entitled to coverage under the Policy (*see id.*, ¶¶ 60-62; NYSCEF #'s 15, 16).

Upon the denial, Alpha and Omega commenced this action by filing a summons and complaint on September 20, 2021 (NYSCEF # 1). Alpha and Omega alleges a cause of action under the Policy for breach of contract and, in the alternative, violation of GBL §349(h). Defendants now move to dismiss. In support of dismissal, defendants argue that denial of coverage was proper under the Personal Conveyance Clause exclusion because, at the time of the theft, the duffel bag containing the Insured Properties was not *in the hand or sight* of the Insured while *in transit* (NYSCEF # 8 – Defts' MOL at 6 [emphasis added]). And, defendants now add that the Unattended Automobile Exclusion also precludes plaintiff's claim because, at the time of the theft, neither the Insureds nor a permanent employee or a person whose sole duty it is to attend the vehicle was *actually in or upon* such vehicle (*id.* at 8 [emphasis in original]).

In opposition, Alpha and Omega argues that the Personal Conveyance Clause does not apply because (1) the Insured Properties were not in transit at the time of the theft; or (2) even if the Personal Conveyance Clause does apply, the Insured Properties were "in sight" and were "left for safekeeping with a Jeweler in the Trade" at the time of the theft, (NYSCEF # 13 – Pltf MOL in Opp at 8-11). Plaintiff argues that " 'the requirement that the property be "in sight" while "in transit" do not apply to insured property "whilst left for safekeeping with a Jeweler in the trade' " (*id.* at 10). Plaintiff further argues that the Unattended Automobile Exclusion does not apply because the driver, James Gavin, whose sole duty was to

attend the vehicle, was standing within three feet from the SUV and thus, he was upon the vehicle at the time of the theft (*id.* at 11-14).

Discussion

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). Significantly, "whether a plaintiff . . . can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss" (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009]). Additionally, "to withstand dismissal, a plaintiff may submit opposing affidavits which can be considered to amplify the pleadings" (*M&E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1, 5 [1st Dept 2020], *lv dismissed* 38 NY2d 1086 [2021]).

When analyzing insurance contracts, the general rules of contract interpretation apply (*see Jin Ming Chen v Ins. Co. of the State of Pennsylvania*, 36 NY3d 133, 138 [2020]). Accordingly, when resolving the coverage disputes, the courts look to the specific language in the relevant insurance policies (*id.*). If "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" (*U.S. Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986]).

Generally, a policy "must be construed in favor of the insured, and ambiguities, if any, are to be resolved in the insured's favor and against the insurer" (*id.*, at 492). "[A]n insurer bears the burden of demonstrating that a 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 [1st Dept 1998], citing *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652 [1993]). Further, when the policy in question contains more than one exclusion, they "must be read *seriatim,* not cumulatively, and if any one exclusion applies there can be no coverage since no one exclusion can be regarded as inconsistent with another [citation omitted]" (*id.* at 141, citing *Zandri Constr. Co. v Firemen's Ins. Co.*, 81 AD2d 106, 109 [3d Dept 1981]).

Personal Conveyance Clause

Defendants first contend that Alpha and Omega's claim is precluded under the Personal Conveyance Clause.

Under the Personal Conveyance Clause,

> "[the] Policy only covers the [Insured] Property in transit when in the hand or sight of the Insured and/or responsible staff in their permanent employment and/or responsible person designated by a principal of the Insured, other than when deposited in a bank, and/or safe and/or vault and/or whilst left for safekeeping with a Jeweler in the trade and/or whilst in the custody of customs" (NYSCEF # 2 at 18).

In essence, here, in asserting that plaintiff's claim is excluded under the Personal Conveyance Clause, defendants argue that the Insured Property was "in transit" and that the Insured Properties were not "in the hand or sight of the Insured (NYSCEF # 8 – Defts' MOL at 7).

Accepting the allegations in the Complaint as true, it is evident that the Insured Properties were "in transit" under the Personal Conveyance Clause. To support this position, defendants rely on *Irv-Bob Formal Wear, Inc. v Pub. Serv. Mut. Ins. Co.*, 81 Misc 2d 422, 425 [Civ Ct 1975], affd, 86 Misc 2d 1006 [App Term 1976]). In that case, the court held that "merchandise loaded into a vehicle, which arrived a short time before and is about to continue on after some unloading and loading is in transit" (*id.*). In opposition, plaintiff argues that "in transit" means actual movement of the SUV and since the SUV was stationary, has not yet started to move at the time of the theft, the Insured Properties were not "in transit" (NYSCEF # 1, ¶ 61; NYSCEF # 13 at 8).

Because the term "in transit" is not defined in the Policy, it should be given a meaning consistent with the "reasonable expectation and purpose of the ordinary businessman when making an ordinary business contract" and "any ambiguity is to be resolved in favor of the insured and against the insurer" (*Irv-Bob Formal Wear, Inc.* at 425). The ordinary meaning of the term "in transit" is "being conveyed by a carrier" (Black's Law Dictionary [11th ed 2019], in transit) [Note: online version]. Thus, the duffle bag being loaded on to the SUV for later transit from the Event's location to plaintiff's business location fits within the ordinary meaning of "in transit" (NYSCEF # 1, ¶ 57).

The court is not persuaded by plaintiff's argument relying on the cases of *Mayflower Dairy Prod. v Fid.-Phenix Fire Ins. Co. of New York*, 170 Misc 2, 3 [1st Dept 1938] and *San Nap Pak Mfg. Co. v Firemen's Ins. Co. of Newark*, N.J., 47 NYS2d 542, 546 [City Ct NY Cty 1944]. In *Mayflower*, the goods were loaded one day to be transited next day and the court held "such a situation implies storage" (*Mayflower*, 170 Misc 2, 3). Similarly, in *San Nap Pak,* the court held that goods, which were loaded on the vehicle on Saturday night and left in the parking lot to be started on delivery the following Monday, were not in transit (*San Nap Pak*, 268 AD 905). Unlike the situations in *Mayflower* and *San Nap Pak*, plaintiff clearly

intended to transport the duffel bag containing the Insured Properties to another business location right after loading it into the SUV (NYSCEF # 1, ¶¶ 46, 54, 57).

Defendants next argue the Insured Properties were not in the hand or in sight of the Insured when the theft occured. Although plaintiff alleges its team members, including the driver, James Gavin, kept the Insured Properties in sight at the time of the theft, none of them witnessed the theft occurring (*id.*, ¶¶ 46, 47, 57, 58). Thus, based on the facts alleged, the Insured Properties were not "in the hand or sight of the Insured" under the Personal Conveyance Clause.

Plaintiff's argument that the Personal Conveyance clause does not apply to insured property "whilst left for safekeeping with a Jeweler in the trade' " (*id.* at 10) is nowhere alleged in the complaint. Further, plaintiff misreads the Personal Conveyance clause as the phrase – "safekeeping with a Jeweler in the trade" – is preceded by the words "other than when deposited in a bank . . . or safe . . . or vault" and then continuing to "or whilst left for the safekeeping with a Jeweler . . . ." (NYSCEF # 2 at 18). The part of the clause "other than" separates the Insured Property in the hands of the Insured or its employee or designee from when the jewelry is the bank, safe, vault or jeweler.

In sum, defendants have shown that coverage in excluded under the Personal Conveyance clause in that the Insured Property was not in the hand or sight of the Insured or its designees/employees while in transit.

B. Unattended Automobile Exclusion

Defendants' denial of coverage is proper under the Unattended Automobile Exclusion for the following reasons:

As noted above, the Unattended Automobile Exclusion excludes any loss of property "while in or upon any automobile *unless*, at the time the loss or damage occurs, there is *actually in or upon* such vehicle, the Insured, or a permanent employee of the Insured, or a person whose sole duty it is to attend the vehicle" (NYSCEF # 2 at 10 [emphasis added]). Relying on this provision, defendants argue that at the time of the theft, neither the Insureds nor a permanent employee or a person whose sole duty it was to attend the vehicle was *actually in or upon* such vehicle (NYSCEF # 8 at 8).

In opposition, plaintiff argues that the driver whose sole duty was to attend the vehicle was standing within three feet from the SUV, and thus, he was upon the vehicle at the time of the theft (NYSCEF # 13 at 11-14). Plaintiff further contends that the term "upon the vehicle" in this exclusion clause is ambiguous.

Both parties agree that the Policy should be interpreted consistent with "reasonable expectations of the average insured" (NYSCEF # 13 at 7, NYSCEF # 40 at 6, citing *Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122 [2011]). If the Policy's language is clear and unambiguous, "interpretation of such provision is a question of law for the court" (*White v Cont'l Cas. Co.*, 9 NY3d 264, 267 [2007]).

Contrary to Alpha and Omega's contention, courts have routinely concluded that the same language as the Unattended Automobile Exclusion is not ambiguous (*see e.g. Davidoll Designs, Inc. v Reliance Ins. Co.*, 279 AD2d 364 [1st Dept 2001]; *Cordova, Inc. v Lloyd's Underwriters*, 228 AD2d 179 [1st Dept 1996]; *Royce Furs, Inc.*, 30 AD2d at 238, 240; *see also Jerome I. Silverman, Inc. v Lloyd's Underwriters*, 422 F Supp 89, 90 [SD NY 1976]). Alpha and Omega otherwise urges an interpretation of the "actually in and upon" language to mean "close enough that one could reach out and touch the vehicle" (NYSCEF # 13). But courts have similarly rejected this particular construction of this language and held that the "actually in or upon" language contained in similar insurance policies does not include being "near" or "in close proximity" or any other constructive possession theories (*Wideband Jewelry Corp. v Sun Ins. Co. Of New York*, 210 AD2d 220 [2d Dept 1994]; *see Royce Furs, Inc.*, 30 AD2d at 238 [noting that courts have held that exclusion applied in both cases when the insureds were only a short distance (6 to 10 feet) away from the vehicle]). In reaching this conclusion, courts have reasoned that the word "actually" must be given "due recognition ... and means that which exists in fact or reality, in contrast to that which is constructive, theoretical or speculative" (*Greenberg v Rhode Island Ins. Co.*, 188 Misc 23, 26 [1st Dept 1946]; *Royce Furs, Inc.*, 30 AD2d at 240 [the "in or upon such vehicle" language of the exclusion is prefixed by the word 'actually'. That word must be given a meaning."]; *see also Lackow v Ins. Co. of N. Am.*, 52 AD2d 579 [2d Dept 1976] [physical contact such as "standing at the rear of the vehicle opening the trunk" satisfied the exception of this exclusion]).

Here, although Alpha and Omega's team members were no more than six feet from the SUV, and Gavin, the driver, was standing within three feet beside the rear door of the car, the only reasonable conclusion drawn from the facts alleged in the Complaint is that Alpha and Omega's team left enough space between themselves and the SUV so as to not be "actually in or upon" the vehicle (*see* NYSCEF # 1, ¶ 57). Indeed, Alpha and Omega concedes that no one from its team at the Event saw the theft occur (NYSCEF # 1, ¶ 58; NYSCEF # 13 at 13).

New York courts have repeatedly denied coverage in similar situations. For example, in *Royce Furs, Inc.*, the court was confronted with exclusion language that mirrors the Unattended Automobile Exclusion: "This policy insures against all risks of direct physical loss of or damage to the insured property from any external cause

except as hereinafter excluded [. . .] (c) Theft from any automobile, motorcycle, truck, trailer or any other vehicle unless at the time the theft occurs there is *actually in or upon such vehicle*, the insured or a permanent employee of the insured or a person whose sole duty it is to attend such vehicle" (30 AD2d 238, 239). Relying on this language, the court concluded that the policy exclusion applied where "the plaintiff's representative was not in the automobile but was far enough from it [approximately 6 to 10 feet] to have given the thief the opportunity to enter the car" (*id.* at 240). A similar conclusion was reached in *Wideband* (210 AD2d 220). In that case, the policy excluded coverage for loss of property "by '[t]heft from any vehicle unless you, an employee, or other person whose only duty is to attend the vehicle, are *actually in or upon* such vehicle at the time of the theft" (*id.* at 220 [emphasis added]). The *Wideband* court finding that plaintiff's employee being six feet away from the vehicle when thieves opened the trunk and stole the jewelry from his vehicle, concluded that the insurer properly denied coverage based on the policy's exclusion.

Although the above cases were resolved at the motion for summary judgment phase of litigation, they nevertheless confirm that courts adopt a consistent approach when analyzing nearly identical policy language as a matter of law: the insured must be literally in or upon the vehicle at the time of losses. Here, despite Gavin's position being only three feet away from the SUV, as plaintiff alleged, he still did not see the theft happen and only discovered the loss after his arrival in Great Neck (NYSCEF # 1, ¶¶ 57, 58). Accordingly, the allegations, accepted as true, fall squarely within the Policy's Unattended Automobile Exclusion

Plaintiff's reliance on *Lackow v Ins. Co. of N. Am.* does not compel a different conclusion (52 AD2d 579 [2d Dept 1976]). In *Lackow*, the court held that the assured employee's position "at the rear of the vehicle opening its trunk" was in compliance with the exclusion requirement "actually in or upon such vehicle" (*id.*). Here, by contrast, neither Alpha and Omega's employee nor the driver satisfied this requirement to avoid the Policy's Unattended Automobile Exclusion.

Thus, because none of Alpha and Omega's employees, or any person whose sole duty is to attend the Insured Properties, was "actually in or upon" the SUV at the time of theft under the unambiguous terms of the Policy, the denial of coverage was proper under the Unattended Automobile Exclusion.

As for its remaining claims, Alpha and Omega, in its opposition, indicated that it has withdrawn its breach of contract claims against CHLS and John Enders, as well as its claim for violation of GBL § 349 against all defendants (NYSCEF # 13). Accordingly, this branch of defendants' motion is also granted and these claims are also dismissed (*Saidin v Negron*, 136 AD3d 458 [1st Dept 2016] [granting dismissal after plaintiff abandoned his claim by failing to oppose to defendant's part of motion to dismiss against him]).

Conclusions

In view of the above, it is

ORDERED that defendants' motion to dismiss is granted, and it is further

ORDERED that the claims against defendants Certain Underwriters at Lloyd's of London, identified as Names "2001AML", "9975ASC", "2012AAL", "4711ASP", "0609AUW", "1686AXS", "0382HDU" and "500TRV", CHLS, LLC and John Enders are dismissed; and it is further

ORDERED that plaintiff take action with regard to the remaining defendant Lonmar Global Risks, and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly in favor of defendants Certain Underwriters at Lloyd's of London, identified as Names "2001AML", "9975ASC", "2012AAL", "4711ASP", "0609AUW", "1686AXS", "0382HDU" and "500TRV", CHLS, LLC and John Enders.

This constitutes the Decision and Order of the Court.

8/21/2023
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE