GSD Prod. Servs., Inc. v Vigilant Ins. Co.
2010 NY Slip Op 33354(U)
November 22, 2010
Supreme Court, Nassau County
Docket Number: 020955/08
Judge: Thomas P. Phelan
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 3
NASSAU COUNTY

GSD PRODUCTION SERVICES, INC.,

Plaintiff(s),

-against-

VIGILANT INSURANCE COMPANY,

Defendant(s).

ORIGINAL RETURN DATE:07/23/10
SUBMISSION DATE: 10/15/10
INDEX No.: 020955/08

MOTION SEQUENCE #1

The following papers read on this motion:

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Defendant, Vigilant Insurance Company ("Vigilant"), moves pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint.

Plaintiff, GSD Production Services, Inc. ("GSD"), was a corporation domiciled in New York, with its principal place of business located at 25-29 Hempstead Gardens Drive, West Hempstead, New York (*see* Wamser Aff, Ex. A). Glen Davis was the President and sole shareholder of GSD, which was in the business of selling and renting theatrical lighting and audio equipment (*Id.*, Ex. G, p. 9; *see also* Ex. F, p. 33). The subject premises was equipped with a central station monitoring alarm system, provided by Intelli-Tec Security Service, access to which was obtained by the entering of a numeric code upon several key pads located throughout the building (*Id.*, ¶¶41, 43, 45, 46 and 47; *see also* Ex. F, p. 77). In addition to Glen Davis, the following GSD employees each had their own security access codes: Sarah Stasaitas, Larry Kowlessar, Frank Danko and Candice Harripersed (*Id.*, ¶48; *see also* Ex. F, p. 79). Mr. Davis and Ms. Stasaitas were allegedly both administrators of the alarm system and in said capacity had knowledge of all of the access codes which were assigned to the other GSD employees (*Id.*, Ex. G, p. 15; *see also* Ex. F, p. 127).

In or about 2007, GSD defaulted on a loan it procured from GSL of Illinois, Inc. ("GSL"), an asset-based lender (*see, Id.*, ¶¶24-26; Ex. F, p. 23; *see also* Exs. O and P). As a result thereof, on April 11, 2007, GSL commenced an action in the United States District Court for the Eastern District (*Id.*, ¶24; Ex. F, pp. 22-23). By order dated October 15, 2007, Joseph L. Trippi, a non-party herein, was ordered by Federal District Court Judge Leonard D. Wexler "to manage the business affairs of [GSD], including the accounts receivable and rents without interference from [GSD]" (*Id.*, ¶¶25 and 26; Ex. O; Ex. F pp. 15, 17, 18, 21, 22, 23, 32 and 33).

Following Mr. Trippi assuming control of GSD, Glen Davis briefly remained with the organization in a limited capacity, which involved "designing shows" and "recommending equipment" but did not include any management authority or control over the business operations (*Id.*, Ex. F p. 35). Within this time period, Mr. Trippi changed "all the locks on all the building doors," and thereafter only four employees were provided with a set of keys, to wit: Candice Harripersed, Larry Kowlessar*, Frank Danko and Joe Trippi (*Id.*, Es. F, pp. 36, 65 and 68). Within this same period of time, Mr. Davis allegedly became "uncooperative" in relation to Mr. Trippi's election to change the locks, as well as with respect to Mr. Trippi's management of GSD (*Id.*, Ex. F, pp. 36 and 39). Subsequent to the locks being changed, Mr. Davis failed to show up for work, and after a conversation between Mr. Trippi and "one of the lending partners," as well as "the special master assigned by the court," a decision was made to terminate his employment with GSD (*Id.*, Ex. F, pp. 39-41). Said termination took place "in October of 2007," at which time, and on the same day, Sarah Stasaitas, the office manager and purportedly the girlfriend of Glen Davis, also left GSD (*Id.*, Ex. F, pp. 39 and 59). Upon the departure of Davis and Stasaitas, their security access codes were deactivated; however, the codes assigned to the other GSD employees, and of which Davis and Stasaitas had knowledge, were allegedly never changed (*Id.*, Ex. G, pp. 126-127; Ex. G, p. 15; *see also* Def's Mem. of Law, p. 6).

Thereafter, at some point between Wednesday, November 21, 2007, and Monday, November 26, 2007, a theft allegedly occurred at GSD, whereupon approximately 160 pieces of audio and sound equipment were stolen from the premises (*see* Wamser Aff. ¶¶64, 65, 70 and 72; *see also* Ex. F, p. 165). In connection therewith, GSD filed a notice of loss with defendant which had issued a policy of insurance to GSD for the period between October 24, 2007, to October 24, 2008 (*see* Wamser Aff., ¶¶20 and 63; *see also* Exs. C and Q). On February 26, 2008, Vigilant, citing "Dishonesty and Disappearance" exclusions contained in the policy, denied the claim stating, *inter alia*, that the investigation revealed no "signs of forced entry and [that] there was no access to the property by unauthorized personnel" (*see* Wamser Aff., Ex. X). A reading of the record reveals

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* Larry Kowlessar was the operations manager at the time of the theft and left GSD shortly thereafter in December 2007 (*see* Wamser Aff., ¶¶77 and 78).

that the theft was investigated by Detective Bittner of the Nassau County Police Department, who allegedly had identified the following three suspects: Glen Davis, Robert Jordan (a technician with GSD) and Larry Kowlasser (*see* Wamser Aff., Ex. M, p. 23). However, said investigation was ultimately closed purportedly because Detective Bittner had no leads in the case, he had not interviewed the three suspects and because the stolen items did not contain serial numbers (*Id.*, Ex. R).

The underlying action was thereafter commenced by GSD on or about November 20, 2008, and alleges a breach by Vigilant of the contract of insurance (*Id.*, Ex. A). The instant application interposed by Vigilant for an order granting summary judgment dismissing the within action subsequently ensued and is determined as is set forth hereinafter.

In support of the application seeking dismissal of the within complaint, Vigilant contends, *inter alia*, that the evidence establishes that the theft was committed by one or more of GSD's employees, thus bringing same within the dishonesty exclusion and beyond the coverage afforded by the policy (*see* Wamser Aff., ¶¶126, 127, 129, 137 and 142; *see also* Def's Mem. of Law, pp. 15-24). Specifically, counsel for Vigilant contends that the record herein indisputably demonstrates that there were no signs of forced entry and the only individuals who gained access to GSD when the loss occurred were employees who utilized the security access codes assigned to Frank Danko and Larry Kowlessar (*see* Wamser Aff., ¶¶128, 129, 133-137; *see also* Def's Mem. of Law, pp. 17-19). Counsel relies primarily upon the annexed activity report generated by Intelli-Tec Security Service, which indicates that on the dates in issue only the access codes assigned to Frank Danko and Larry Kowlessar were utilized (*see* Wamser Aff., ¶¶134, 136 and 137; Exs. Z and EE; *see also* Def's Mem. of Law, pp. 10-14). The Court notes that while counsel for Vigilant states that the code assigned to Larry Kowlessar was utilized between November 21, 2007, and November 26, 2007, a review of the alarm activity report indicates that nowhere thereon does the name Larry Kowlessar appear (*see* Wamser Aff., Exs. Z and EE). Rather, the name of GSD employee, Jerry Lynch, appears on the activity report (*Id.*). However, Mr. Lynch testified that he did not receive an access code until the first week in December 2007 (*Id.*, Ex. H, p. 35).

Counsel also relies upon the annexed deposition testimony of Frank Danko, wherein he stated that while he worked on Wednesday, November 21, 2007, and Friday, November 23, 2007, he did not return to GSD until Monday November 26, 2007 (*see* Def's Mem. of Law, p. 12; *see also* Ex. G, pp. 24-26). Counsel argues that notwithstanding Mr. Danko's sworn testimony that he did not work on November 24, 2007, and November 25, 2007, the alarm activity report indicates that his access code was used on those dates to gain access to GSD, thus demonstrating that the theft was an "inside job" which could have only been undertaken by an employee (*see* Def's Mem. of Law, pp. 10-14, 17-19).

In addition to the foregoing, counsel asserts that as the alarm access codes assigned to other GSD employees, to which Davis and Stasiastis had access, were not changed subsequent to the departure of Davis and Stasiastis, said failure of GSD to change the security codes was the equivalent of

entrusting the contents of the warehouse to said individuals thus precluding coverage under the policy (*see* Wamser Aff., at ¶¶143-155; *see* Def's Mem. of Law, pp. 21-24).

In the alternative, counsel for Vigilant contends that inasmuch as GSD has been unable to conclusively establish that the equipment missing was a result of a theft, coverage under the policy is precluded due to the disappearance exclusion (*see* Wamser Aff., ¶¶156-161; *see* Def's Mem. of Law, pp. 24-25).

In opposing the within application, GSD contends that same should be denied as there exist questions of fact as to whether an employee was actually responsible for the subject theft (*see* Blumberg Aff., ¶¶13-16, 34 and 53; *see also* Pl's Mem. of Law, at pp. 4-6). Particularly, GSD contends that no one individual has ever been interviewed by either the police or Vigilant, and no one has ever been arrested or convicted in connection therewith (*see* Blumberg Aff., ¶¶47-50; *see also* Pl's Mem. of Law, p. 4).

With particular regard to the disappearance exclusion contained in the contract of insurance, GSD contends that same is inapplicable herein because the equipment was determined to have been stolen when a GSD employee noticed an empty storage container and not as a result of the taking of an inventory, the latter of which could bring the theft within the scope of the exclusion (*see* Blumberg Aff., ¶¶41, 42, 54-56; *see also* Pl's Mem. of Law, pp. 6-8).

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*Sillman v Twentieth Century Fox*, 3 NY2d 395 [1957]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). To obtain summary judgment, the moving party must establish its claim or defense by tendering proof, in admissible form, sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation (CPLR 3212 (b); *Olan v Farrell Lines*, 64 NY2d 1092 [1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). Upon a motion for summary judgment, the function of the Court is one of issue finding and not that of issue determination (*McKinney v Setteducatti*, 183 AD2d 879 [2d Dept 1992]; *Sillman v Twentieth Century Fox*, 3 NY2d 395 [1957]).

With particular respect to the contract of insurance at issue herein, "[a]s with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning and the interpretation of such provisions is a question of law for the court" (*White v Continental*

Cas. Co., 9 NY2d 264, 267 [2007] [internal citations omitted]). It is well established that "a contract is unambiguous if the language it uses 'has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion' " (*Greenfield v Philles Records , Inc.*, 98 NY2d 562, 569-570 [2002] quoting *Breed v Insurance Co. of North America*, 46 NY2d 351, 355 [1978]). Therefore, if the contract or agreement "on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity" (*Greenfield v Philles Records , Inc.*, 98 NY2d 562, 569-570 [2002]). "To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case" (*Continental Casualty Co. v Rapid-American Corp.*, 80 NY2d 640, 652 [1993]; *see also Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304 [1984]).

As is relevant herein, the exclusions to coverage provide the following, in pertinent part:

> **Dishonesty**:
>
> This insurance does not apply to loss or damage caused by or resulting from fraudulent, dishonest or criminal acts or omissions committed alone or in collusion with others by you, your partners, directors, trustees, employees, anyone performing acts coming within the scope of the ususal duties of your employees, or by anyone authorized to act for you, or anyone to whom you have entrusted covered property for any purpose.
>
> **Disappearance**:
>
> This insurance does not apply to loss or damage caused by or resulting from disappearance or shortage disclosed on taking inventory, where there is no physical evidence to show what happened.

In the instant matter, having reviewed the governing insurance policy and the exclusions therein contained, the Court finds that same are expressed in clear and unambiguous language (*Greenfield v Philles Records, Inc.*, 98 NY2d 562 [2002]). Here, the dishonesty exclusion quite clearly excepts coverage for losses, which result from criminal actions undertaken by GSD's employees or others acting in collusion therewith (*Id.*). Similarly, the language contained in the disappearance exclusion plainly articulates that losses, which are discovered during the course of an inventory and which are not supported by corroborative physical evidence, are not within the scope of coverage provided by the insurance policy (*Id.*)

However, notwithstanding the lack of ambiguity contained in the insurance exclusions, the Court finds that a review of the record herein reveals the existence of questions of fact which preclude an award of summary judgment (*Zuckerman v City of New York*, 49 NY2d 557 [1980]. Here, while the alarm code activity report indicates that someone possessing an employee-access code gained entry to GSD, there is an absence herein of any evidence which conclusively establishes that it was a GSD employee or an individual acting in concert therewith that committed the theft (*Id.*). As noted above, the police investigation conducted by the Nassau County Police Department yielded no arrests of any of the purported suspects.

Further, in the matter *sub judice*, a determination as to who committed the theft is integral to determining coverage or lack thereof under the policy of insurance. However, establishing who committed the theft based upon the evidence presented herein is not a legal question but clearly a factual question to be resolved by a jury (*McKinney v Setteducatti*, 183 AD2d 879 [2d Dept 1992]; *Sillman v Twentieth Century Fox*, 3 NY2d 395 [1957]).

Based upon the foregoing, the application by defendant for an order granting summary judgment dismissing plaintiff's complaint is hereby denied.

All applications not specifically addressed are denied.

This decision constitutes the order of the court.

Dated: 11-22-10

HON THOMAS P. PHELAN
J.S.C.

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