Anjay Corp. v. Those Certain Underwriters at Lloyd's of London subscribing to Certificate Number HN01AAF4393N.Y.A.D. 1 Dept.,2006.

Supreme Court, Appellate Division, First Department, New York.

ANJAY CORPORATION, et al., Plaintiffs-Appellants,

v.

THOSE CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO CERTIFICATE NUMBER HN01AAF4393, Defendants-Respondents.

Oct. 3, 2006.

Background: Insured jewelry manufacturer sued insurers, after they denied coverage for loss of gold and diamonds at Mexican facility on grounds that insured breached warranty in jewelers' block insurance policy requiring insured to maintain video tapes. The Supreme Court, New York County, Carol Edmead, J., granted insurers' motion for summary judgment. Insured appealed.

Holding: The Supreme Court, Appellate Division, held that insurers failed to establish that insured's breach of video tape warranty materially increased the risk of loss, damage, or injury within policy coverage.

Reversed.

West Headnotes

[1] Insurance 217 **3055(1)**

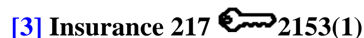
217 Insurance
217XXV Forfeiture
217XXV(B) Particular Kinds of Insurance
217k3047 Property Insurance
217k3055 Increase of Risk or Hazard
217k3055(1) k. In General. Most Cited Cases

Insurers failed to establish that insured jewelry manufacturer's breach of warranty in jewelers' block insurance policy, requiring insured to maintain video tapes, materially increased the risk of loss, damage, or injury within policy coverage, with regard to explosion and fire at Mexican facility that was caused when worker inadvertently poured acetone into pot of boiling water, and that resulted in loss of gold and diamonds; loss was caused by an event the occurrence of which could not possibly have been affected by video surveillance system, and insurers' assertion that footage of events occurring prior to power outage at facility would have provided “valuable information” about extent of fire and activities of persons in building prior to outage was pure speculation. McKinney's Insurance Law § 3106(b).

[2] Insurance 217 **3054(1)**

217 Insurance
217XXV Forfeiture
217XXV(B) Particular Kinds of Insurance
217k3047 Property Insurance
217k3054 Keeping Books, Papers, and Safe
217k3054(1) k. In General. Most Cited Cases

Assuming record-keeping provisions of jewelers' block insurance policy required insured to keep and maintain records sufficient to determine the amount of loss without any need to resort to evidence outside records to explain the records, other than would possibly be necessary to disclose the bookkeeping methods employed, insurers' factual averments, which possibly established that there were curiosities in the records reviewed and that the accounting firm retained by insurers had difficulties determining the extent of the loss of gold and jewelry in explosion and fire at Mexican facility, established either that all of insureds' records had been reviewed or that it was not possible to determine the amount of loss with sufficient precision from insured's records.

[3] Insurance 217  **2153(1)**

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2139 Risks or Losses Covered and Exclusions
217k2153 Theft or Burglary
217k2153(1) k. In General. Most Cited Cases

Insurers' argument that extent of claimed loss of gold and jewelry at Mexican facility was explicable only on the basis of the occurrence, after the explosion and fire, of varieties of theft not covered by the jewelers'

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block insurance policy rested on speculation and did not support denial of coverage.

***250** Weg and Myers, P.C., New York (Joshua L. Mallin of counsel), for appellants.
Vedder, Price, Kaufman & Kamholz, P.C., New York (John H. Eickemeyer of counsel), for respondents.

SULLIVAN, J.P., NARDELLI, CATTERSON, McGUIRE, MALONE, JJ.

***1** Order, Supreme Court, New York County (Carol Edmead, J.), entered December 23, 2004, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, with costs, the motion denied and the complaint reinstated.

Plaintiffs, entities engaged in the business of manufacturing jewelry, own and operate a facility in Mexico where they manufacture jewelry from gold and diamonds. Defendants insurers issued to plaintiffs a Jewelers' Block policy of insurance that insured against loss or damage to plaintiffs' jewelry stock. The policy was not an all-risk policy, but rather provided that "coverage under this Insurance shall be restricted to loss and/or damage arising from the perils of Fire, lightning, Explosion, Aircraft, Storm, Tempest, Flood, Burst Pipes, Impact, Hold-Up (as defined herein), Robbery (as defined herein), or Safe Burglary (as defined herein). Any other loss or damage not specified above shall be excluded." The policy also contained certain warranties, one of which, denominated the "Video Tape Warranty," reads in full as follows: "It is a warranty of this insurance that the Assured shall maintain all video tapes for a minimum of seven days or, in the event of a loss occurring, shall keep such video tapes until they have been viewed by the Loss Adjuster appointed by Underwriters."

On March 7, 2002, an employee in the Mexico facility inadvertently poured acetone into a pot of boiling water in a room, the "washout room," where assembled items of jewelry are cleaned. An explosion and fire ensued, and plaintiffs claimed a resulting loss of gold and diamonds of just over $1.2 million. Following an investigation by a loss adjusting firm, defendants denied the claim. On this appeal, the principal issue relates to one of the grounds defendants asserted for denial of the claim, plaintiffs' breach of the Video Tape Warranty. On the basis of this breach, Supreme Court granted defendants' motion for summary judgment.

Apparently, the facility's video surveillance system included cameras at various locations, monitors and a videocassette recorder. The breach defendants rely upon is plaintiffs' failure to preserve the videotapes until viewed by the loss adjuster. According to the affidavit of the facility's general manager, he located the tape depicting the washout room prior to the explosion***251** and set it aside. However, that tape was reused in accordance with normal procedures at some point after defendants allegedly lulled plaintiffs into believing that defendants regarded as irrelevant any videotapes recorded on the day of the fire. The general manager also asserted that none of the cameras were working after the explosion due to a loss of electric power, the cameras were damaged by the fire and the surveillance system did not again become operational until March 25, 2002.

As Supreme Court recognized, a breach of a policy warranty by an insured does not necessarily relieve the insurer of its obligations under the policy. Rather, "a breach of warranty does not defeat recovery under an insurance contract 'unless such breach materially increases the risk of loss, damage or injury within the coverage of the contract' " (*Continental Ins. Co. v. RLI Ins. Co.,* 161 A.D.2d 385, 387, 555 N.Y.S.2d 325 [1990], quoting Insurance Law § 3106[b]). The question of the materiality of a breach of warranty is "[o]rdinarily ... a question of fact for the jury" and "[i]t is only where the evidence concerning the materiality is clear and substantially uncontradicted that the question is a matter of law for the court to decide" (*id.* [citation omitted]). The burden is on the insurer to show the materiality of the breach (*cf. Carpinone v. Mutual of Omaha Ins. Co.,* 265 A.D.2d 752, 754, 697 N.Y.S.2d 381 [1999]).

***2** [1] Defendants' various contentions on the ostensible materiality of plaintiffs' breach are unavailing. That a video surveillance system decreases the risk of loss generally-principally by reducing the incidence of various forms of larceny, including "Hold-Up" and "Robbery"-is irrelevant when the loss is caused by an event the occurrence of which cannot possibly be affected by such a system. Defendants do not dispute that the explosion and fire were caused by a worker's inadvertence. Also irrelevant are defendants' assertions that the Video Tape Warranty was particularly important to the underwriters in light of the prior loss history of the policyholders. Presumably, all insurers regard as important the warranties for which they negotiate. The importance of a warranty, however, does not

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establish anything about the materiality of a particular breach. Defendants' assertion that footage of events occurring prior to the power outage would have provided "valuable information" about the extent of the fire and the activities of persons in the building prior to the outage is pure speculation. Nor do defendants offer any explanation of what that information might be or how plaintiffs' failure to preserve it materially increased the risk of loss.

To be sure, it is possible that some portion of the gold and jewelry losses could have been the result of acts of theft occurring in the aftermath of the explosion. To the extent defendants rely on that possibility, it is unavailing as well. Obviously, plaintiffs would not be in breach of the Video Tape Warranty if the occurrence of one of the risks for which it obtained insurance made it impossible for it to comply with the warranty. As noted, the facility manager asserted in opposition to defendants' motion that the cameras stopped working simultaneously with the power outage and did not again become operational for more than two weeks.

[2] Nor could summary judgment properly be granted to defendants on the basis of either of the two alternative grounds raised in their motion which Supreme Court did not reach. We assume without deciding that the record-keeping provisions of the policy required plaintiffs to keep and maintain records sufficient to determine the amount of any loss without "any need to resort to evidence outside the records to explain the records other than might be necessary to disclose the bookkeeping***252** methods employed" (*Globe Jewelry, Inc. v. Pennsylvania Ins. Co.,* 72 Misc.2d 563, 564, 340 N.Y.S.2d 295 [1973] [citations omitted]). Although the factual averments submitted by defendants may have established that there were curiosities in the records reviewed and that the accounting firm retained by defendants had difficulties determining the extent of the loss, neither the sworn nor the unsworn averments established either that all of plaintiffs' records had been reviewed or that it was not possible to determine the amount of loss with sufficient precision from plaintiffs' records (*see* *Diamond Den, Ltd. v. Jefferson Ins. Co.,* 127 A.D.2d 998, 513 N.Y.S.2d 64 [1987]).

***3** [3] Finally, defendants argue that the extent of the claimed losses is explicable only on the basis of the occurrence, after the explosion and fire, of varieties of theft not covered by the insurance policy. This argument, however, rests on speculation. Given our disposition of this appeal, we need not reach plaintiffs' contention that defendants are estopped from relying on the breach of the Video Tape Warranty.

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--- N.Y.S.2d ----, 2006 WL 2806563 (N.Y.A.D. 1 Dept.), 2006 N.Y. Slip Op. 07112

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