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To commence the statutory
time for appeals as of right
(CPLR 5513[a]), you are
advised to serve a copy
of this order, with notice
of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

---x

LATASHA MARBURY

PlaintiffS,

-against-

CHAUCER SYNDICATES, LTD., THE CCL PARTNERSHIP, LLP, ARGENTA HOLDING, PLC., LIBERTY SYNDICATES, TALBOT UNDERWRITING LTD., AON RISK SERVICES NORTHEAST, INC., NAVIGATORS INSURANCE COMPANY, AON, LTD. and DAVID SHIMANOV,

Defendants.

Index No. 59532/2011
DECISION & ORDER
Motion Sequence 3

---x

CHAUCER SYNDICATES, LTD., THE CCL PARTNERSHIP, LLP, ARGENTA HOLDING, PLC., LIBERTY SYNDICATES, TALBOT UNDERWRITING LTD., AON RISK SERVICES NORTHEAST, INC., NAVIGATORS INSURANCE COMPANY

Third-Party Plaintiffs,

-against-

DAVIT SHIMUNOV,

Third-Party Defendant.

Index No.: 59532/2011T

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The following papers numbered 1 through 55 were received and considered in connection with the above-captioned matter:

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PAPERS	NUMBERED
Notice of Motion/Affidavit/Affirmation/ Exhibits A-W	1-25
Memorandum of Law in Support of Motion	26
Affirmation in Opposition by Plaintiff/Exhibit A-C	27-30
Affirmation by Shimanov's Attorney in Opposition/Exhibit A	31-32
Affirmation by Ann B. Sekel, Esq.	33
Reply Affirmation by Movant/Exhibit A-N	34-48
Memorandum of Law in Reply	49
Sur-Reply by Aon Risk Services Northeast, Inc./Exhibit A-E	55

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Plaintiff moves by Notice of Motion for an Order pursuant to CPLR § 3212 dismissing Plaintiff's First and Fourth causes of action asserted in her Second Amended Complaint against the Underwriting Defendants, on the ground that (1) the Plaintiff's alleged loss is excluded from coverage under the applicable policy of insurance and (2) the Plaintiff breached a warranty in the applicable policy.

On December 6, 2011, Plaintiff filed a Summons and Complaint in Supreme Court, Westchester County against Underwriting Defendants, Aon Risk Services Northeast, Inc., and Aon Ltd.; On December 23, 2011, Plaintiff filed an Amended Summons and First Amended Complaint against Underwriting Defendants and Aon alleging breach of contract and seeking damages in the amount of $1 million, alleging tort-bad faith breach of an insurance policy and seeking damages in the amount of $2.5 million, alleging a Declaratory Action and seeking Specific Performance against all defendants, and alleging negligence against Aon Risk Services Northeast, Inc., and Aon Ltd. and seeking damages in the amount of $1 million; On January 13, 2012, Underwriting Defendants answered Plaintiff's First Amended Complaint, denied the relevant allegations and asserted eleven affirmative defenses and filed a Cross-claim

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against Aon Risk Services Northeast, Inc. and Aon Ltd. for indemnity; On January 30, 2012, Aon Risk Services Northeast, Inc. answered Plaintiff's First Amended Complaint, denied the relevant allegations, asserted fifteen affirmative defenses and answered Underwriting Defendant's Cross-claim; On February 10, 2012, Underwriting Defendants filed a Third-Party Summons and Complaint against Third Party Defendant, David Shimanov ("Shimanov"); On May 1, 2012, Plaintiff filed a Second Amended Summons and Complaint against Underwriting Defendants, Aon Risk Services Northeast, Inc., and David Shimanov alleging breach of contract and seeking damages in the amount of $1 million alleging tort-bad faith, breach of an insurance policy and seeking damages in the amount of $2.5 million, alleging a Declaratory Action and seeking Specific Performance against all defendants, and alleging negligence against Aon Risk Services Northeast, Inc., and Aon Ltd. and seeking damages in the amount of $1 million, and alleging conversion and fraud against Shimanov and seeking damages in the amount of $1 million; On or about May 24, 2012, Underwriting Defendants served Plaintiff with an Answer to the Second Amended Summons and Complaint, which denied the relevant allegations and asserted eleven affirmative defenses and Cross-claims against Aon Risk Services Northeast, Inc. for indemnity. Underwriting Defendants also served an Amended Third-Party Complaint against Shimanov; On December 20, 2012, this Court issued a Decision and Order dismissing Plaintiff's Second Cause of Action for bad faith breach of an Insurance Policy; On October 7, 2013, the Hon. Joan B. Lefkowitz issued a Trial Readiness Order; On October 28, 2013, Plaintiff filed a Note of Issue; On November 4, 2013, Plaintiff filed a Note of Issue correcting the amount demanded to $1 million.

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In this action, Plaintiff seeks damages for an alleged breach of an insurance contract due to the Underwriting Defendants denial of coverage for Plaintiff's alleged May 24, 2011 loss of jewelry. Plaintiff alleged that this loss occurred when or after she gave or cosigned two items of jewelry to Shimanov, a jewelry dealer, whom she alleges failed to return them to her.

It is alleged that the personal jewelry collection policy issued by the Underwriting Defendants, was procured to insure approximately $2.5 million of Plaintiff's jewelry in a bank vault. The policy covered the period May 23, 2011 through May 22, 2012 and covered articles of jewelry described in a Marbury Jewelry Schedule comprising 14 items of jewelry with aggregate appraised value of $2,494,831.00. The policy also provided coverage for any one loss of the scheduled jewelry kept within the Bank of America safe deposit box. The policy also provided that up to $750,000 in jewelry could be removed from the vault, but the policy excluded any out-of-vault loss from coverage unless the jewelry was being worn, being carried by hand under the personal supervision of the Plaintiff, or deposited in a locked safe. The Plaintiff voluntarily consigned and transferred possession and physical control to Shimanov, Item 11, a ladies GIA certified fancy yellow oval diamond chandelier pair of earrings with an appraised value of $458,300.00, and Item 12, a ladies GIA certified fancy yellow pear shaped diamond pendant with an appraised value of $434,400.00, whom the Plaintiff alleged failed to return the items to her.

The Underwriting Defendants denied coverage based upon the out-of-vault loss exclusion in that the Plaintiff did not comply with the policy warranty requiring that the Plaintiff deposit the insured jewelry in the Bank of America safe deposit box as

required. The Underwriting Defendants seek summary judgment.

The Risk Details provision of the Policy provides:

SUM INSURED: 1. USD 2,494,831 any one loss in respect of scheduled jewelry kept within a Safe Deposit Box located at:

Bank of America
433 Boston Post Road
Port Chester, NY 10573

2. Sub-limit for Exclusion B of USD 750,000 any one loss.

The Exclusion Provision provides:

EXCLUSIONS
This Insurance does not cover:
* * * *
B. Loss of or damage to jewelry or watches unless such items are:
(I) being worn or
(ii) being carried by hand under the personal supervision of the insured or
(iii) deposited in a bank or locked safe, unless the insured is staying at a hotel or motel when such items are kept in the principal safe of the hotel or motel."

A party on a motion for summary judgment must assemble affirmative proof to establish his entitlement to judgment as a matter of law, *Zuckerman v. City of* N.Y., 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718(1980). To demonstrate its entitlement to relief the moving party must come forward with evidentiary proof that establishes the absence of any material issues of fact, *McDonald v. Mauss*, 38 A.D.3d 727, 728 (2nd Dept. 2007). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," *Alvarez v. Prospect Hosp.*, 68

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N.Y.2d 320, 324(1986). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact, *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985).

The Underwriting Defendants claim that Plaintiff's First and Fourth cause of action in her Second Amended Complaint for Breach of Contract and Declaratory Judgment/Specific Performance must be dismissed because her alleged loss is excluded from coverage under the Policy. The Underwriting Defendants contends that the Insurance Policy is clear and unambiguous and that the interpretation of an unambiguous contract provision is a function for the court, and matters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument, *Chimart Assoc. v Paul* 66 N.Y.2d 570, 498 N.Y.S.2d 344 (1986). Also, in a dispute over insurance coverage, the insured bears the initial burden of establishing that the loss claimed falls within the scope of the Policy, *Bread & Butter, LLC v Certain Underwriters at Lloyd's, London* 78 A.D.3d 1099, 913 N.Y.S.2d 246 (2d Dept. 2010). "Once coverage is established, the insurer bears the burden of proving that an exclusion applies" *id.* at 1101.

The Plaintiff alleges that wearing the jewelry and carrying it personally by hand to the consignor, Shimanov, is covered under the Policy. Exclusion B of the Policy provides coverage for out-of-vault losses where the loss occurred while the jewelry was being worn, being carried by hand under the personal supervision of the Plaintiff, or when deposited in a bank or locked safe. Here, the yellow diamond earrings and pendant were not being worn, were not being carried by hand under the Plaintiff's

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supervision, and were not deposited in a bank or locked safe by Plaintiff on May 24, 2011, which was both the date of loss and the date Plaintiff allegedly entrusted these items to Shimanov.

To support her claim that she was wearing the items at the time of the loss, the Plaintiff testified at her deposition that she put on the yellow diamond earring and pendant at her home in Purchase, New York and that she was wearing them while she drove to Shimanov's office in New York's, Manhattan Diamond District on May 24, 2011, and that she took off the items after she parked, placed them in a black Jacob & Company bag while she was waiting for Shimanov to arrive. Once he arrived, she handed Shimanov the bag containing the jewelry.

"In resolving insurance disputes, we look first to the language of the applicable policies," *Fieldston Prop. Owners Assn., Inc. v. Hermitage Ins. Co., Inc.*, 16 N.Y.3d 257, 264, 920 N.Y.S.2d 763, 945 N.E.2d 1013 (2011). "If the plain language of the policy is determinative, we cannot rewrite the agreement by disregarding that language." (*Id.*) "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," *Vigilant Ins. Co. v. Bear Stearns Cos., Inc.*, 10 N.Y.3d 170, 177, 855 N.Y.S.2d 45, 884 N.E.2d 1044 (2008). Based upon the plain meaning language of the Policy, the items were not being worn and Plaintiff could not have been wearing them when she handed them to Shimanov in a bag. These items, therefore, could not have been covered by the "out-of-vault" provision of the Policy at the time of delivery to Shimanov.

The Policy also provides coverage up to $750,000 for out-of-vault losses that occur while the insured jewelry in being carried by hand under the Plaintiff's personal

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supervision. The question is whether voluntarily handing her jewelry to Shimanov on consignment constitutes "carried by hand under the personal supervision of the insured." Here, the Underwriting Defendants cite, *Zimring v English & Am. Ins. Co.* 91 A.D.2d 889, 457 N.Y.S.2d 504 (1st Dept.1983) where the Court denied the insured claim based upon the exclusion provision, "under the Plaintiff's personal supervision," when the insured placed an attache case containing the insured items of jewelry in the trunk of his automobile and left the car in the care of his chauffeur while the insured and his wife attended a wedding. The attache case was stolen from the trunk when the insured and his wife were at the wedding and the chauffeur was having dinner. The Underwriting Defendants also cited, *Saritejdiam, Inc. Excessive Insurance Company, Ltd. et al.*, 971 F.2d 910 (2d Cir. 1992) for the same proposition. In this case, the insured's independent contractor placed a bag containing the insured's diamonds on top of an empty chair next to him at a restaurant. After finishing and paying for his meal, the contractor inadvertently left the bag with the diamonds in the restaurant. While the Second Circuit read the exclusion in the light most favorable to the insured and ruled in the insured's favor, the Court did hold that, "under any reasonable interpretation of the Policy Saritejdiam's salesman relinquished 'close personal custody and control' at least when he walked out of the diner door." *Id* at 912.

Here, the Plaintiff admitted that she stopped carrying the pendant and earrings when she handed Shimanov the black Jacob & Company bag containing the items. Based upon the record, the Plaintiff did not personally supervise Shimanov carrying the bag with the items. In other words, the Plaintiff voluntarily turned over her jewelry to

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Shimanov and relinquished physical dominion and control to him. The items were neither lost nor misplaced. Furthermore, even though this was to be a consignment, the Plaintiff offered no agreement with Shimanov to include date of return if the item was not sold, the specific price and Shimanov's commission, either before or after she turned her jewelry over to him. Therefore, the Plaintiff ceased to personally supervise Shimanov's carrying or handling of her jewelry as soon as she watched him walk away with the jewelry.

With respected to the items being "deposited in a bank or locked safe . . . ," Plaintiff is not alleging that she deposited the yellow diamond earrings and the pendant in a bank or locked safe at the time of the loss. However, the Underwriting Defendants argue alternatively, that the Plaintiff did not comply with the warranty to deposit the jewelry valued at $2,494,831 in the safety Deposit Box at Bank of America. The Plaintiff testified at her deposition that she did not recall depositing any of her jewelry in the safety deposit box before May 23, 2011, the day the policy went into effect, nor did she recall removing any from the safety deposit box between May 14, 2011 and May 24, 2011. In other words, as of May 24, 2011, the Plaintiff had the earring and pendant with appraised value which exceeded the out-of-vault limit out of the safety deposit box at her home. The Plaintiff by not depositing the items in the safety deposit box increased the risk of loss, damage, or injury within the coverage of the policy, thereby defeating the plaintiff's right to recovery, *Fabrikant & Sons v Overton & Co. Customs Brokers*, 209 AD2d 206, 618 N.Y.S.2d 294 (1st Dept. 1994).

The Underwriting Defendants have made out a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate

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the absence of any material issues of fact, Alvarez, *68 N.Y.2d 320, 324*. The burden now shifts to the Plaintiff to set forth evidentiary proof establishing the existence of a material issue of fact, *Winegrad v. New York Univ.*, 64 N.Y.2d 851, 853.

The Plaintiff in opposition argues that the Policy itself entirely rebuts the Underwriting Defendants arguments that her loss is excluded from the Policy. As stated above, "In resolving insurance disputes, we look first to the language of the applicable policies," *Fieldston Prop. Owners Assn., Inc.*, 16 N.Y.3d 257, 264. "If the plain language of the policy is determinative, we cannot rewrite the agreement by disregarding that language." (Id.) "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," *Vigilant Ins. Co.*, 10 N.Y.3d 170, 177. In interpreting the contract terms, [t]his court may not make or vary the contract of insurance to accomplish its notions of abstract justice or moral obligation, since "[e]quitable considerations will not allow an extension of the coverage beyond its fair intent and meaning in order to do raw equity and to obviate objections which might have been foreseen and guarded against," *Breed v Insurance Co. of N. Am.* 46 N.Y.2d 351, 413 N.Y.S.2d 352 (1978): *Weinberg & Holman v Providence Washington Ins. Co.*, 254 N.Y. 387 (1930).

The Plaintiff agrees that the terms and limits of the coverage under the Policy are fairly straightforward. The Policy provided for coverage amount of $2,494,831 for any one loss of the scheduled jewelry kept in a safety deposit box at a specified branch of Bank of America, and the sub-limit of $750,000, for any one loss to which Exclusion B applies. The Court also concurs with the Plaintiff that Exclusion B is not an exclusion

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from coverage but rather, limits coverage under certain circumstances.

Exclusion B is also fairly straightforward. It states that:

This insurance does not cover:

"B. Loss of or damage to jewelry or watches unless such item are:
(I) being worn or
(ii) being carried by hand under the personal supervision of the insured or
(iii) deposited in a bank or locked safe, unless the insured is staying at a hotel or motel when such items are kept in the principal safe of the hotel or motel."

The overall Policy would cover any loss unless the circumstances of the loss falls within Exclusion B in which case coverage would be denied. Therefore, if the loss or damage falls outside of Exclusion B, then the Plaintiff would not be subject to its sub-limits and would be covered to the full limit of the policy. The Policy simply states that so long as the jewelry is kept at the Bank of America, it is covered for the entire $2,494,831. If the jewelry is lost while at Bank of America the Policy covers the entire loss. It is only when the jewelry is removed from the Bank of America safe that a sub-limit of $750,000 applies. So if the Plaintiff removes the jewelry and the jewelry is lost or stolen the Policy will cover up to $750,000 for any one loss so long as it does not fall within Exclusion B. This "out of safe/wearing" coverage of $750,000 was negotiated between the parties and was a function of the premium that the Plaintiff paid.

The Plaintiff then argues that the Exclusion B of the Policy does not define or contain the term "vault" or "out-of-vault." As the Plaintiff stated, "[U]nambiguous provisions of an insurance contract must be given their plain and ordinary meaning," *Richner Communications, Inc. v. Tower Ins. Co. Of N.Y.*, 72 A.D.3d at 671. The plain and ordinary meaning of "being worn" and "being carried by hand under the personal

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supervision of the insured," or when the jewelry is "deposited in a bank or locked safe, unless the insured is staying at a motel or hotel when such items are kept in the principal safe of the hotel or motel," is that Exclusion B applies when the jewelry is not within the Bank of America. Common sense suggests that the jewelry cannot be in the Bank of America safe and at the same time being in a vault or safe some place else, or being worn or in a hotel safe at the same time. Therefore, the $750,000 "out of safe/wearing coverage" limit as negotiated by the parties is clearly defined by the wording of Exception B.

The Plaintiff also challenged the "Cover" provision of the Policy because no location or territorial limits are shown in the schedule and as such an ambiguity is created concerning the Policy's coverage. This argument is also without merit. Just as the Plaintiff's current claim is based upon a New York City loss, if the Plaintiff chose to travel to the remaining continents or to the moon she would still be covered under the policy. If there is no limitation listed then the Policy covers loss occurring "anywhere" and "everywhere" particularly with individuals at the income level of the Plaintiff.

The Plaintiff goes on to argue that since Exclusion B (iii) cover loss "while the jewelry is deposited in a bank or locked safe," then the sub-limit for Exclusion B is not a sub-limit for Exclusion B because it limits the recovery for loss if the jewelry is in a bank or locked safe to $750,000 and not the $2,494,831. However, this is not the case. The Risk Details of the Policy clearly states that to recover $2,494,831 for any one loss, the jewelry must be kept within a Safe Deposit Box located at Bank of America, 433 Boston Post Road, Port Chester NY 10573. Exlcusion B (iii) makes no reference to the Bank of America, but it goes on to clarify when "out of safe/wearing " coverage will be available.

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It states that if the jewelry is deposited in any bank or locked safe *other than at the Bank of America*, there will be no coverage "unless the insured is staying at a hotel or motel when such items are kept in the principal safe of the hotel or motel." In other words, if the Plaintiff claims a loss from her locked safe at home, it would be excluded under Exclusion B of the Policy. So the language clearly applies to bank or locked safe other than at the Bank of America, which would make it an "out of safe loss." The language in the Exclusion B is clear and unambiguous and the Plaintiff is trying to confuse and mislead the Court by misreading and misinterpreting the plain language to suit her needs.

The Plaintiff also argues that based upon the Policy she is entitled to recover the actual value of her loss which is $892,700.00 and not the $750,000 sub-limit of Exclusion B. The Plaintiff's argument has no merit. Exclusion B clearly applies in this instance and the language is clear and unambiguous. The only remaining question for the Court to address is whether the Plaintiff raised any questions of fact regarding her transfer of the jewelry to Shimanov. It is undisputed that the Plaintiff was wearing the jewelry while driving to meet Shimanov, removed the items and placed them in a bag when she arrived at his office, and handed them to Shimanov. This was a voluntarily transfer and once Shimanov took possession of the jewelry the plain and ordinary meaning of the language of Exclusion B (ii) would suggest that the jewelry was no longer being worn, carried by hand or being personally supervised by the insured, *Richner Communications, Inc.*, 72 A.D.3d at 671.

The Plaintiff argues that the loss occurred at the moment the Plaintiff handed Shimanov the items under the mistaken belief that he would endeavor to sell them on

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her behalf. However, there is nothing in the record to support Shimanov's intent to steal the jewelry. In fact, the New York City Police Department voided the police report after determining that the Plaintiff's allegations were a civil and not a criminal matter. Also, Shimanov himself testified that he returned the Jewelry to the Plaintiff. Since the court's function on a motion for summary judgment is "issue finding" rather than issue determination, *Sillman v. Twentieth Century–Fox Film Corp.*, 3 N.Y.2d 395, 404 (1957), the Court will not attempt to address the dispute between the Plaintiff and Shimanov. It is simply up to the Court to interpret the unambiguous provisions of an insurance contract by giving these provisions their plain and ordinary meaning, *Vigilant Ins. Co.*, 10 N.Y.3d 170, 177. Exclusion B is clear as to the limit of Plaintiff's coverage and it does not provide protection to voluntarily consigning jewelry for sale.

The Plaintiff seems to be of the opinion that alleging a theft or robbery would create a question of fact for a jury. But Exclusion B which is the subject of this motion only addresses loss when the jewelry is being worn, carried by hand under the personal supervision of the insured or when it is deposited in a bank or locked safe at a hotel or motel other than the Bank of America. In other words, if the theft or robbery, occurred under any of these circumstances then the Underwriting Defendants would clearly be responsible. That not being the case, the Plaintiff has failed to set forth evidentiary proof establishing the existence of a material issue of fact. The Underwriting Defendants motion for summary judgment with respect to the First and Fourth Cause of Action is granted.

The parties are directed to appear before the Settlement Conference Part, 914-824-5350 on August 13, 2014 at 9:15am in Courtroom 1600. To the extent

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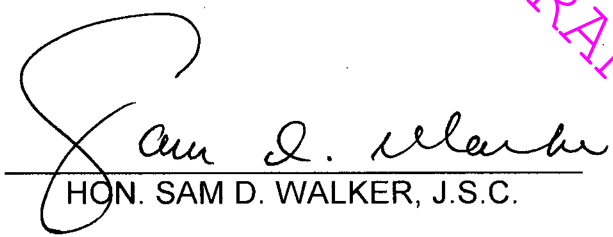
any relief requested in Motion Sequence 3 was not addressed by the Court, it is hereby deemed denied. The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
June 23, 2014



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