IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX AT CHRISTIANSTED

| | |
|---|---|
| ST. CROIX CAR RENTALS, INC., A V.I. CORPORATION,<br><br>Plaintiff,<br><br>v.<br><br>COMPANION, INC., TRADING as COMPANION CASUALTY and SURETY ASSURANCE COMPANY, a V.I. CORPORATION,<br><br>Defendant. | CIVIL NO. 83/1982<br><br>ACTION ON INSURANCE CONTRACT |

KENNETH ROSSKOPF, ESQUIRE
#55 Kings Alley
Christiansted, St. Croix
U.S. Virgin Islands 00820
(809) 773-5910
(Attorney for Plaintiff)

RICHARD D. KEELING, ESQUIRE
#55 Company Street
Christiansted, St. Croix
U.S. Virgin Islands 00820
(809) 773-4150
(Attorney for Defendant).

PETERSEN, Judge

MEMORANDUM OPINION
June 23 , 1983

INTRODUCTION

This case requires the Court to interpret a mercantile open stock burglary endorsement included in a special multi-peril insurance policy issued to St. Croix Car

Rentals, Inc. (hereinafter referred to as Plaintiff) by Companion Casualty and Surety Assurance Company (hereinafter referred to as Defendant), and determine its applicability to an alleged burglarious loss of gasoline stored in underground storage tanks. The case came to trial and is before this Court on Defendant's motion for a directed verdict under Rule 50(a), Fed. R. Civ. Pro., following the presentation of Plaintiff's case. [1/] Plaintiff claims to have suffered loss of gasoline by burglary within the terms of its insurance

---

[1/] It should be noted that the Defendant's motion for a directed verdict under Rule 50(a) is procedurally improper, since this is a nonjury case. Rule 50 applies only in cases tried to a jury. In a nonjury case, the appropriate motion is for involuntary dismissal due to insufficiency of evidence under Rule 41(b). _See_ 9 C. Wright & A. Miller, _Federal Practice and Procedure: Civil_, Sections 2371 and 2523 (1971). Although a motion for a directed verdict in a nonjury case will be treated as if it were a motion to dismiss under Rule 41(b), _see id_, section 2371, the difference is significant because the standard a court applies in a motion for involuntary dismissal is not the same as the standard utilized in a motion for a directed verdict. _Id_, section 2524. In rendering a decision on a defendant's motion for involuntary dismissal, the court is not to make any special inferences in favor of the plaintiff. _Id_, section 2371. Instead, the court is to weigh the evidence itself and resolve where the preponderance lies, whereas on a motion for a directed verdict, the court must consider the evidence in a light most favorable to the party against whom the motion is made. _Id_, section 2524. _See, e.g._, _Cox_ v. _C.H. Masland & Sons, Inc._, 607 F.2d 138 (5th Cir. 1979); _Sanders_ v. _General Services Administration_, 529 F. Supp. 551 (N.D. Ill. 1982); _Bertolino_ v. _Italian Line_, 414 F. Supp. 279 (S.D.N.Y. 1976).

policy. The Defendant contends that the loss does not come within the definition of burglary in the policy. For the reasons stated in this opinion, Defendant's motion will be granted, and Plaintiff's action will be dismissed.

## FACTS

Plaintiff is a corporation doing business as a gas station, car rental and sales agency on St. Croix. Defendant is a Virgin Islands insurance corporation. Pursuant to an insurance contract Defendant agreed to insure Plaintiff against certain losses which might occur between June 14, 1979 and June 14, 1982. The premium paid for the entire coverage was Seven Thousand Eight Hundred Sixty Three ($7,863.00) Dollars. The policy issued was a special multi-peril policy which included a mercantile open stock burglary endorsement. The insuring agreement on this endorsement states, in relevant part, that Defendant agrees

> "[t]o pay for loss by burglary . . . . while the premises are not open for business, of merchandise . . . within the premises . . . ."

Defendant also agreed

> "[t]o pay for damage to the premises and the exterior thereof . . . by such burglary . . . or attempt thereat . . . ."

Liability under this endorsement was limited to Five Thousand

Dollars, with a Two Hundred and Fifty ($250.00) Dollars deductible for each claim. The list of exclusions contains a provision that "[t]his coverage shall apply only to gasoline while stored in locked underground tanks." On the back of the burglary endorsement is a list of conditions, including a series of definitions of various terms used in the insuring agreement. "Premises" is defined as "the interior of that portion of the building at the location designated in the schedule which is shown in the schedule as occupied by the insured in conductingthe business . . . ." The definition of burglary is one generally used in the insurance business today. "Burglary" is defined, in pertinent part, as

> the felonious abstraction of insured property (1) from within the premises by a person making felonious entry therein by actual force and violence, of which force and violence there are visible marks made by tools, explosives, electricity or chemicals upon, or physical damage to, the exterior of the premises at the place of such entry, or . . . (3) from within the premises by a person making felonious exit therefrom by actual force and violence as evidenced by visible marks made by tools, explosives, electricity or chemicals upon, or physical damage to, the interior of the premises at the place of such exit.

It is apparent from the testimony of Ernst Foerster, the owner, president and manager of Plaintiff corporation, that he has handled businesses similar to that conducted by Plaintiff in the past. Mr. Foerster testified that he specifically requested coverage for loss, by burglary, of gas from his underground storage tanks. The insurance broker evidently thought such coverage was unusual, but the insurance company accepted it and issued the policy, covering the requested burglary provisions by endorsement. The insurance agent discussed with Mr. Foerster the essential elements necessary to recover under the burglary endorsement. Thus, it is clear that both parties were in agreement regarding the provisions of the burglary endorsement.

One of the unused gasoline pumps located on Plaintiff's property had been padlocked. In late January, 1981, Mr. Foerster discovered that the meter on this locked pump had moved, indicating that gasoline had been pumped out, despite the fact that it was turned off and locked. Mr. Foerster notified the insurance company and asked his accountant to complete a monthly statement so as to determine whether this gas had been paid for or whether it had been feloniously removed. Then, on approximately February 16, 1981, Mr. Foerster noted that the meter on this same pump had again moved. A third change in the meter reading was discovered the following evening. On that evening, Mr. Foerster replaced the padlock on the pump. The following morning, he found that the handle on the pump was broken, and the nozzle was discovered on the ground. The new padlock was still on the pump. Mr. Foerster made a police report. The meter reading had not changed from the night before when Mr. Foerster replaced the padlock. Mr. Foerster told the police that the pump was damaged in an unsuccessful attempt to remove gasoline. The monthly statements for January and February indicated that the Plaintiff had lost gasoline in the amount of Four Thousand and Three ($4,003.07) Dollars and Seven Cents. The replacement cost for the nozzle is approximately Eighty ($80.00) Dollars. There was no loss of gas before January, 1981, and after February, when Mr. Foerster changed the padlock, eliminated two electrical outlets near the pump, and dismantled the pump, there has been no further loss of gas. Plaintiff presented its claim for loss which was denied on the ground that the loss was not covered by the policy.

## DISCUSSION

### A. Ambiguities in Policy

Before determining the applicability of the burglary endorsement to the facts, the policy itself must be examined to determine whether the expressed terms of the policy are clear. An insurance contract is patently ambiguous when, on the face of the written contract, it is susceptible to opposing interpretations. A policy is latently ambiguous when, even though it is clear when read by itself, its application becomes uncertain as it is considered in the light of the object insured. 1 Couch on Insurance 2d, Section 15:58 at 752 (1959).

The policy in the instant case purports to cover loss by burglary of merchandise within the premises. On the back of the endorsement, "premises" is defined as the "interior of the building occupied by insured," and "burglary" is defined as "felonious abstraction of property from within the premises by forcible entry into or exit from the premises." At this point, the policy seems clear. However, when read together with the exclusion on the front of the endorsement that this coverage only applies to gasoline while stored in underground tanks, the clarity of the policy becomes questionable. The application of the definition of "premises" to the underground storage tanks and the gasoline pumps is confusing. Furthermore, the loss sustained by the Plaintiff was allegedly occasioned by a person or group of persons who extracted gasoline from the tanks by illegally opening and turning on the gas pump. The requirement in the policy that there be a felonious abstraction of gasoline from within the premises by a felonious entry therein or exit therefrom is again highly confusing when applied to the underground storage tanks and the pumps. The policy also requires visible marks of force and violence on or damage to the place of entry to or exit from the premises. The policy, as worded, raises numerous questions. What is included in the definition of "premises"? The storage tanks? The gasoline pumps? Is the gas pump the place of entry to or exit from the "premises"? Can operation of the pump be considered "entry" into the "premises"? As a result of these uncertainties, it is this Court's conclusion that the burglary endorsement included in this policy suffers from patent and latent ambiguities.

When the language of an insurance policy is ambiguous, resort may be had to parol evidence to remove the ambiguity, determine the intent of the parties, and apply the contract accordingly. 1 Couch on Insurance 2d, Sections 15:57 - 58 (1959). Also, ambiguities in insurance policies must be construed against the insurer and are to be interpreted in a manner which favors coverage. Houghton v. American Guaranty Life Insurance Co., 692 F.2d 289 (3d Cir. 1982) (applying Pennsylvania law). See also 1 Couch on Insurance 2d, Section 15:73 & 15:82 (1959). In light of the discussions and agreement of the parties as to what type of insurance coverage Plaintiff sought, it must be concluded that the definition of "premises" does include the storage tanks and gasoline pumps. Furthermore, the alleged method of siphoning the gasoline out of the tanks, by unlocking the gas pump, opening it, turning it on and pumping gas out of the tanks, must be considered as coming within the requirement in the policy that there be an "entry" into the "premises." See Chaney v. State, 142 So. 103 (Ala.); Moss v. Commonwealth, 111 S.W.2d 628 (Ky. 1937). Also, the "place of entry" to the "premises" which, according to the policy, must exhibit visible marks of force and violence or physical damage, must be interpreted to include the gas pump. Therefore, as stated, it is this Court's conclusion that the above-stated provisions of the burglary endorsement are ambiguous. As such, the policy must be interpreted so as to insure against the loss of gasoline from the storage tanks resulting from unauthorized operation of the gasoline pumps provided, however, that the Plaintiff can meet the further requirement that there be physical damage to or visible marks of force and violence at the place of entry which damage or marks are connected with felonious entry into and abstraction of gasoline from the underground tanks. A restriction in a burglary policy requiring visible marks or some evidence of forcible and violent entry is common, and the purpose behind this limitation of liability is to protect insurers from "inside jobs" or the frauds and complicity that could take place without such a restriction. 10A Couch on

Insurance 2d, Section 42:141 (Rev. ed. 1982). See also Weldcraft Equipment Co. v. Crum & Forster Ins. Cos., 312 A.2d 68 (Pa. Super. Ct. 1973); Kretschmer's House of App., Inc. v. United States F. & G. Co., 410 S.W.2d 617 (Ky. 1966); Ferguson v. Phoenix Assurance Co. of New York, 370 P.2d 379 (Kan. 1962); Kline v. Ocean Accid. & Guarantee Corp., 9 Orleans App. 210 (La. Ct. App. 1912) (cited in Annot., 99 A.L.R.2d 129, 139 (1965)). There is a wealth of authority holding that an open stock burglary policy containing the requirement of entry by actual force and violence, evidenced by visible marks or physical damages, is valid and unambiguous. See, e.g., Western Cas. & Sur. Co. v. Smith-Caldwell Drug Store, Inc., 506 S.W.2d 116 (Ark. 1974); American Mutual Fire Ins. Co. v. Llewellyn 237 S.E.2d 227 (Ga. Ct. App. 1977); Markline Co., Inc. v. Travelers Ins. Co. 424 N.E. 2d 464 (Mass. 1981); Norman v. Banasik, 283 S.E.2d 489 (N.C. 1981); Hopson v. Southern American Ins. Co., 618 S.W.2d 745 (Tenn. Ct. App. 1980). See generally Annot., 22 A.L.R.3d 1305 (1968); Annot., 99 A.L.R.2d 129 (1965). Cf. C&J. Fertilizer, Inc., v. Allied Mutual Ins. Co., 227 N.W.2d 169 (Iowa 1975))(in circumstances of case, same burglary insurance policy held unconscionable, held to violate doctrine of reasonable expectations, and held to be a breach of implied warranty).

B. Applicability of Policy to Loss Sustained

The Plaintiff is asking this Court to rule that the loss sustained is within the coverage provided by the burglary endorsement by inferring that the loss of gas and the damage to the pump are related occurrences. As stated earlier, there was no loss of gas on the night the pump was damaged. The Plaintiff has propounded the theory in support of its claim, that the loss of gas was the result of a scheme of one burglary. Plaintiff argues that, notwithstanding there was no loss on the night the actual damage was sustained, the damage to the pump was the final act of one, continuing, month-long burglary, and therefore the loss and the damage are connected, and the loss of gasoline over a period of approximately one month comes within the requirement that there be physical damage or visible marks of force and violence.

The courts are not in agreement on the "continuing scheme" theory. In Knight v. State, 280 So.2d 163 (Ala. Crim App. 1973), the court reasoned that an initial breaking and entering followed by a subsequent re-entry the same evening constituted one continuing offense. And in People v. Matarese, 394 N.Y.S.2d 643 (1977), it was held that two entries within minutes of each other through the same window were performed in the pursuance of one scheme of burglary. However, in Commonwealth v. Carey, 82 A.2d 240 (Pa. 1951), the court ruled that a re-entry of the premises which the defendant had burglarized four nights earlier, leaving the door unlocked, constituted a second burglary as opposed to one continuous burglary. And in Warden v. State, 335 S.W.2d 786 (Tex. Crim. App. 1963), the court held that two entries into a house, one at 11:30 a.m., which was the result of removing a screen and opening a window, and a second at 9:30 p.m., resulting from unlatching the door during the 11:30 a.m. entry, were sufficient evidence for two burglary convictions.

The theory offered by Plaintiff in explanation of the loss is that, during the time period when gasoline was being extracted from the tanks, some person or group of persons obtained or had made a duplicate padlock key. The pump was then opened, and through the transmission of electric current to the pump, either from the Plaintiff's outlets using extension cords or from use of a separate generator, the pump was "jump-started," thus facilitating operation of the pump to extract gasoline from the tanks. After a certain amount was removed, everything was replaced to its original condition. Plaintiff's president knew gas had been removed from the supposedly inoperative pump since the meter had moved overnight, indicating flow of gasoline from the tanks and out through the pump. The person or persons extracted gasoline more than once. Plaintiff's president eventually foiled the plan by replacing the padlock on the pump. The night after the padlock was replaced, Plaintiff's theory is that the person or persons returned and upon discovering the replaced padlock, the culprits tried to either force the nozzle of the pump or break the new padlock but only succeeded in breaking the pump nozzle and handle. No gasoline was abstracted thereafter. It is this Court's conclusion that the facts herein cannot be considered as one scheme of burglary. The circumstances are more akin to those cases holding that there were numerous burglaries. Each night that the padlock was unlocked, the pump turned on and gas extracted was an independent burglary. Thus, there was a series of burglaries resulting in the loss of gasoline to the Plaintiff.

Although it was held in Chaney v. State, 142 So. 103, that the breaking of a lock securing a pump handle on a gasoline tank, thereby releasing the handle, was sufficient "breaking" to sustain a conviction for burglary, it must be noted that the statutory definition of the crime of burglary does not control the provisions of an insurance policy covering burglary. An insurance policy may specifically define what conduct is to be deemed a burglary for the purpose of policy coverage, and in such a case, the policy definition is binding on the parties. See Western Mass. Theatres, Inc.

v. Liberty Mut. Ins. Co., 241 N.E.2d 826 (Mass. 1968); Terminal News Stands Inc. v. General Casualty Co., 278 P.2d 158 (Or. 1954); Commercial Casualty Ins. Co. v. City Jewelry Co., 137 S.W.2d 874 (Tex. Civ. App. 1940). Furthermore, when the policy limits liability to losses sustained by forcible entry or exit evidenced by visible marks, the provision is literally construed, and "no recovery can be had for loss by theft, larceny, or mysterious disappearance where there are no visible marks of violence." 10A Couch on Insurance 2d, Section 42:142 at 273 (Rev. ed. 1982).

The entry need not be a result of the force and violence alone. The force must, however, be a contributing factor to the illegal entry, without which the entry could not have been effected. Couch, supra, Section 42:143 at 274. See also Inglis v. General Casualty Co. of America, 316 P.2d 546 (Or. 1957) (burglary of safe). See, for example, Hanover Insurance Co. v. Spicola Appliance Co. 178 So.2d 898 (Fla. Dist. Ct. App. 1965), and Edgar's Warehouse, Inc. v. United States F. & G. Co., 134 N.W.2d 756 (Mich. 1965).

There is no question in the instant case that the pump was damaged. The only instance wherein there was damage was on the evening when the alleged perpetrator or perpetrators were unsuccessful in abstracting insured property from the tanks. It is evident, then, that the violent force applied to the pump, as evidenced by its damaged condition, did not in any way contribute to an "entry" into the underground tanks by way of the pump. On the previous nights, when there was a loss of gasoline, there was never any visible marks of force and violence or damage to the pump. The singular instance of damage to the pump will not relate back to the nights wherein there was a loss of gasoline since this was not one continuing scheme but rather a series of independent occurrences. Furthermore, there was no proximate connection between the losses which were not accompanied by physical damage or visible marks of force and violence and the instance when the pump was damaged. Loss of gasoline occurred before the damage to the pump. Thus, the damage to the pump does not satisfy the requirement in the insurance policy that there be a felonious abstraction of property by a person making a felonious entry evidenced by visible marks of force and violence or physical damage.

Plaintiff theorizes that the alleged burglar(s) had a duplicate key which was successfully used to extract gasoline until the owner changed the padlock. Plaintiff can recover from the Defendant for the loss of gasoline only if the alleged use of a duplicate key can satisfy the requirement that there be physical damage or visible marks of force and violence evidencing a felonious entry.

In Johnson v. Pacific Indemnity Co., 52 Cal. Rptr. 76 (Cal. Ct. App. 1966), with precisely the same words as are at issue, the court held that removal of a locked padlock does not amount to entry by force, reasoning that the lock may have been opened with a key, and such effort was not the type of force and violence contemplated by the policy. Cf. Kretschmer's House of Appliances, Inc., v. United States F. & G. Co., 410 S.W.2d 617 (Ky. 1966) (holding that removal of old padlock and installation of new one by thief warrants inference that original padlock was removed by force and violence resulting in its damage, but implying that the same inference would not lie were the theft committed by one possessing a key). And in Offutt v. Liberty Mutual Ins. Co., 247 A.2d 272 (Md. 1968), where the burglary policy was similar to the policy at issue before this Court, the court held that picking a lock or using a master key does not constitute 'forcible entry' as the term is commonly understood. Likewise, in Cochran v. MFA Mutual Ins. Co., 271 N.W.2d 331 (Neb. 1978), the court held that a policy insuring against burglary of an automobile, which required visible marks of forcible entry, did not cover a situation where entry was made by the use of a "jiggle key" which was found in the ignition. See also Hazuka v. Maryland Casualty Co., 160 N.W.2d 174 (Neb. 1968) (policy requiring visible marks of forcible entry does not protect against burglary of safe by use of a key, whether or not legitimately obtained). And in Rosenthal v. Travelers Indemnity Co., 240 N.Y.S.2d 355 (N.Y. App. Div. 1963), where burglars forcibly opened a key cabinet in the superintendent's office on the sixth floor, and then entered the plaintiff's premises on the fifth floor without any evidence of force, the court held that the loss suffered by plaintiff was not covered by the burglary insurance policy since there was no evidence of forcible entry, implying that the use of a stolen key to enter a place is not forcible. See also United Sponging Co. v. Preferred Accid. Ins. Co., 97 Misc. 396, 161 N.Y.S. 309 (use of a key to open a lock in the usual and ordinary manner did not constitute forcible or violent entry), and Rosenthal v. American Bonding Co., 207 N.Y. 162, 100 N.E. 716 (1912) (cited in Annot., 99 ALR2d 129, 142 (1965)), a well-reasoned case defining visible marks as "visible traces upon the premises themselves which survive the act that produces them" and stating that one is not within a burglary insurance policy similar to the policy presently at issue if the "marks" are "only visible to one who happens to be watching at the instant they [the acts] are performed." Cf. Weldcraft Equipment Co. v. Crum & Forster Ins. Cos., 312 A.2d 68 (Pa. Super. Ct. 1973) (if lock picked or key used, force still must be used to move lock, so amounts to a forcible entry); National Surety Co. v. Silberberg Bros., 176 S.W. 97 (Tex. Civ. App. 1915) (thrown lock bolt is evidence of force since it takes force to throw bolt back into lock, even if key used).

There are also a number of cases which hold that scratches around a keyhole are not visible marks of violence and do not establish forcible entry. See, e.g., Sydor v. Harris, 480 F. Supp. 804 (E.D.N.Y. 1979); Shattuck & Jones, Inc. v. Travelers Indemnity Co., 80 N.E.2d 313 (Mass. 1948); Hopson v. Southern American Ins. Co., 618 S.W.2d 745 (Tenn. Ct. App. 1980).

It is this Court's determination that those cases holding that use of a key to open a lock does not constitute forcible or violent entry not only represent the majority opinion, but also express the more well-reasoned viewpoint. This, together with the cases which hold that scratches on a lock made by a key are not visible marks of force and violence, lead this Court to conclude that use of a key as theorized by the Plaintiff in the instant case does not satisfy the Plaintiff's burden of establishing that the loss of gasoline was occasioned by forcible and violent entry into the storage tanks by way of the gasoline pump. Thus, despite the fact that the Plaintiff did suffer a loss of gasoline, and despite the allegation by Plaintiff that everything possible was carefully done to prevent such a loss, there is simply insufficient evidence of forcible and violent entry to bring this loss within the coverage of the burglary insurance policy. See Lacombe v. Zurich Ins. Co., 210 So.2d 338 (La. Ct. App. 1968). Defendant's motion for involuntary dismissal will be granted, and the case dismissed. [2/]

---

[2/] The damage to the nozzle and hose which were broken, amounting to Eighty ($80.00) Dollars, is not a recoverable loss, for even though the policy covers damage to the premises by burglary or an attempt thereat, Two Hundred and Fifty ($250.00) Dollars is deductible from each claim.

Eileen R. Petersen

EILEEN R. PETERSEN
Judge