

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION**

PHILADELPHIA MUSEUM OF ART
26th Street and Benjamin Franklin Parkway
Philadelphia, PA 19101-7646

Plaintiff,

v.

**AXA ART INSURANCE
CORPORATION**
3 West 35th Street
New York, NY 10001

Defendant.

Civil Action No.

COMPLAINT

Plaintiff, Philadelphia Museum of Art (the “Museum”), by and through its undersigned attorneys, hereby files this Complaint against Defendant AXA Art Insurance Company (“AXA”), and in support thereof avers as follows:

THE PARTIES AND JURISDICTION

1. This is an action for breach of contract and for bad faith arising from AXA’s failure and refusal to pay a claim by the Museum under an all risk first party policy issued out of the State of Maryland by AXA to the Museum, which loss occurred when the Museum transferred two paintings to a gallery for sale under and pursuant to a consignment agreement between the Museum and the gallery, but the gallery, through fraud and conversion: (a) sold one of the paintings to a third party in breach of the consignment agreement; (b) failed to return the other painting to the Museum; and (c) never paid the Museum the fair market value of the paintings.

2. The Museum is a Pennsylvania not-for-profit corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal place of business located at 26th Street and Benjamin Franklin Parkway, Philadelphia, PA 19101. The Museum is a tax exempt charitable corporation which collects, cares for and exhibits works of art and provides a variety of educational and other programs to the public.

3. AXA is a corporation organized and existing under the laws of the State of New York, with a place of business at 3 West 35th Street, New York, NY 10001. AXA is engaged in the business of providing insurance for fine art and collectibles to museums, galleries and others throughout the United States.

4. AXA issued the insurance policy at issue in this action from the State of Maryland, and, on information and belief, AXA regularly conducts business in Maryland.

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)(1) because the parties are residents of different states and the amount in controversy exceeds \$75,000, exclusive of interests and costs.

6. Venue in the District Court is proper under 28 U.S.C. § 1391(a)(1) and (a)(2) because AXA resides in Maryland and a substantial part of the events giving rise to the claim occurred in Maryland.

THE RELEVANT FACTS

The Negotiation And Issuance Of The Policy In Maryland

7. In 2005, Willis Fine Art, Jewelry and Specie, of Willis of Maryland, Inc. (“Willis”), with a place of business in Bethesda, Maryland was an insurance brokerage firm specializing in placing fine art insurance

8. At that time, and, on information and belief, continuously thereafter, Willis and AXA had a contractual agreement that authorized Willis to prepare and to issue first party policies covering fine art on behalf of AXA.

9. In 2005, the Museum contacted Willis in Maryland and requested that it serve as the insurance broker for the Museum in connection with the placement of all risk first party coverage, and liability coverage, for the entire art collection of the Museum.

10. Willis, operating from its offices in Bethesda, Maryland negotiated with AXA representatives located in Chicago, Illinois concerning the placement of a primary level policy for the Museum, including, without limitation, the terms and conditions of coverage that AXA was willing to provide to the Museum.

11. Willis also negotiated with various Lloyds' syndicates for umbrella coverage in excess of the AXA coverage, however, the umbrella policy with Lloyds is not at issue in this action.

12. As noted, AXA had given Willis authority to prepare and to issue first party property policies on behalf of AXA to AXA insureds.

13. Acting on behalf of the Museum, Willis reached agreement with AXA on the terms and conditions of a first party policy to be issued to the Museum.

14. Willis then prepared and issued from Maryland AXA insurance policy number 05-333-06-03-00251, effective between October 1, 2005 and October 1, 2006, with limits of liability of \$100 million (the "Policy"). A true and correct copy of the Policy is attached hereto as Exhibit A.

15. The Policy contains the legend “Willis” on each page and it is signed by Eric Fischer, a representative of Willis, who was located in Maryland when the Policy was signed and issued to the Museum.

16. The Policy is an “all risk” first party property policy that provides broad coverage to the Museum against “all risks of direct physical loss or damage” to, inter alia, works of art of all kinds owned by the Museum.

17. In October 2006, acting through Willis in Maryland, AXA renewed the Policy to the Museum for the policy year October 1, 2006 to October 1, 2007.

18. In October 2007, acting through Willis in Maryland, AXA renewed the Policy to the Museum for the policy year October 1, 2007 to October 1, 2008.

19. In October 2008, acting through Willis in Maryland, AXA renewed the Policy to the Museum for the policy year October 1, 2008 to October 1, 2009.

The Consignment Agreement Between The Museum And Salander

20. On September 15, 2006, Salander-O’Reilly Galleries (“Salander”), a New York gallery, and the Museum entered into a Consignment Agreement (the “Agreement”), whereby the Museum authorized Salander to sell two paintings, -- “The Harbor” by Maurice Prendergast (the “Prendergast”) and “Mountain Landscape” by Arthur B. Davies (the “Davies” and together with the Prendergast the “Paintings”) -- but only under and pursuant to the terms of the Agreement. A true and correct copy of the Agreement is attached hereto as Exhibit B.

21. The Agreement gave Salander the right to sell the Paintings for six months for the aggregate sale price of \$1.5 million. Offers below that price required notice to, and approval of, the Museum.

22. The Agreement also provides that “[t]he two Works may not be sold in separate transactions” unless the Museum and Salander reached agreement on how the sale of only one of the Paintings would affect the Agreement.

Salander’s Conversion And Fraudulent Sale Of The Prendergast

23. Within days after September 15, 2006, a representative of Salander came to the Museum, picked up the paintings and took them to New York.

24. On or about September 29, 2006, Salander sold the Prendergast to Davis & Langdale Company, Inc. (“Langdale”), a New York City art gallery for \$1.5 million.

25. Although required to do so by the express terms of the Agreement, Salander did not seek or obtain the approval of the Museum to sell the Prendergast, but not the Davies, to Langdale.

26. The Museum did not know at the time of the sale to Langdale that the sale had been made, much less that Salander had sold the Prendergast separate and apart from the Davies, and for years after the sale Salander did not tell the Museum about its breach of the Agreement and sale of the Prendergast.

27. In fact, it was not until May, 2009 that the Museum determined that Salander had sold the Prendergast to Langdale in late September, 2006.

28. Salander’s conduct with respect to the Prendergast was fraudulent, was in breach of the Agreement and constituted conversion.

Salander’s Continued Fraudulent Conduct Designed To Cover-Up The Conversion

29. During 2007, Salander engaged in a scheme to cover up his conversion and sale of the Prendergast.

30. In particular, in about February 2007, Lawrence Salander, the chief executive of Salander, communicated to representatives of the Museum that he was having difficulty selling one (or both) of the Paintings.

31. In March 2007, Mr. Salander told representatives of the Museum that he had an offer to sell both Paintings together (as contemplated by the Agreement) for \$800,000 and he asked the Museum's approval to sell the Paintings for that price.

32. The Museum agreed to the sale of the Paintings for \$800,000 "net to the Museum" with payment completed by the end of 2007.

33. On April 4, 2007, the Museum sent a letter to Salander confirming what it believed, based on Salander's representations, to be the sale of the Paintings for \$800,000 to the Museum, with eight (8) equal payments, payment in full by December 31, 2007 and bill of sale upon receipt of full payment. (This fraudulent "agreement" is referred to as the "Fictitious Agreement.")

34. In May, 2007, Salander failed to pay the Museum any installment payment under the Fictitious Agreement.

35. Throughout the remainder of 2007, the Museum pressed Salander to make payments under the Fictitious Agreement, but no payments were ever made by Salander.

36. On November 2, 2007, Salander entered bankruptcy.

37. Salander's entire course of conduct during 2007 with respect to the Paintings was a continuation of its effort to cover up the fact that, in violation of the Agreement, it had sold the Prendergast for \$1.5 million and taken the proceeds for its own use.

Submission Of The Coverage Claim To AXA and AXA's Investigation And Denial Of The Claim

38. On April 23, 2008, after learning that neither of the Paintings was included in a court ordered inventory compiled by the Restructuring Officer for the Salander estate, the Museum provided notice to AXA of a potential loss under the Policy.

39. AXA assigned the Museum's claim to a claims adjuster, and on May 13, 2008, the adjuster visited the Museum to gather information and documents.

40. Between May and July 2008, the Museum provided the AXA adjuster with all information that was requested relevant to the coverage claim, including, among other things, images of the Paintings and copies of communications with Salander regarding the Agreement and the Fictitious Agreement.

41. Throughout 2008, the Museum had no knowledge that, in fact, Salander had converted the Prendergast and sold it to Langdale in September, 2006.

42. On July 2, 2008, the Museum filed a proof of claim in the Salander bankruptcy for \$800,000, which was what it then believed to be the amount for which Salander had sold the Paintings.

43. Between July and December, 2008, AXA failed to communicate any information to the Museum or Willis about its investigation of the Museum's coverage claim or whether the claim would be honored.

44. As a result of the lack of communication, on December 17, 2008, the Museum, through Willis, asked AXA about the status of the claim; however, AXA still failed to advise the Museum about the status of its investigation or whether the claim would be honored.

45. Between December, 2008 and May, 2009, AXA continued to fail to communicate any information to the Museum or Willis about its investigation of the Museum's coverage claim or whether the claim would be honored.

46. As a result of the continued lack of information, in May, 2009, the Museum sent AXA an email inquiring as to the status of the claim.

47. Despite this additional inquiry AXA continued to fail to advise the Museum as to the status of its investigation or whether the claim would be honored.

48. In May, 2009, after finally learning that the Prendergast had been sold in September 2006, as part of Salander's fraudulent scheme, the Museum notified Willis of the actual circumstances surrounding the loss of the Prendergast and the amount for which it had been sold by Salander in violation of the Agreement.

49. On July 30, 2009, which was more than fourteen months after he began to investigate the coverage claim, the AXA adjuster advised the Museum that he was "waiting for further instructions from AXA."

50. On August 24, 2009, AXA sent the Museum a letter denying the coverage claim. AXA asserted that the Museum has not suffered a "direct physical loss or damage to" the Paintings, and that an exclusion for the assumption of governmental control over property supposedly applied. A true and correct copy of this letter is attached as Exhibit C.

51. On September 30, 2009, General Counsel for the Museum wrote to AXA in response to the letter denying coverage, explaining the reasons why the denial of coverage for the Museum's claim was improper under the Policy and the law. A true and correct copy of this letter is attached as Exhibit D.

52. On December 3, 2009, counsel for AXA responded to the Museum's September 30, 2009 letter and continued to deny coverage for the Museum's claim. A true and correct copy of this letter is attached as Exhibit E.

53. On December 23, 2009, representatives of the Museum and AXA met in an effort to resolve the Museum's coverage claim, but to no avail.

54. On February 5, 2010, counsel for the Museum responded to the December 3, 2009 letter of counsel for AXA, and explained why the Museum's claim was a covered loss under the Policy, and why none of the defenses asserted by AXA had any merit. A true and correct copy of this letter is attached as Exhibit F.

55. On March 3, 2010, counsel for AXA wrote to counsel for the Museum persisting in AXA's position that the Museum's claim was not covered under the Policy. A true and correct copy of this letter is attached as Exhibit G.

56. None of the reasons asserted in the March 3, 2010 letter, some of which were newly advanced legal arguments, have any merit, and the March 3 letter is premised on factual and legal misstatements that are known, or should be known, to AXA to be untrue.

COUNT ONE - BREACH OF CONTRACT

57. The Museum hereby incorporates by reference the allegations of paragraphs 1 through 56 as fully as if the same were set forth at length herein.

58. The Policy covers "all risks" of physical loss of fine art that is property of the Museum, unless expressly excluded.

59. Mr. Salander and the Salander gallery engaged in conversion and fraud in September 2006 when, in violation of the Agreement's requirement that Salander could sell one of the Paintings separately from the other if the Museum gave its approval for such a sale, Mr.

Salander and the Salander gallery misappropriated the Prendergast for their own purposes, sold it to Langdale for \$1.5 million and never gave the proceeds to the Museum, or even told the Museum what they had done. Mr. Salander and Salander, in effect, stole the Prendergast from the Museum.

60. On information and belief, Mr. Salander and the Salander gallery misappropriated the Davies for their own purposes, and, in effect, stole the Davies from the Museum.

61. The conduct of Mr. Salander and the Salander gallery in regard to the Paintings resulted in a direct physical loss of covered property of the Museum and therefore covered under the Policy.

62. The Museum has demanded that AXA acknowledge, accept and undertake its contractual obligation to the Museum under the Policy to provide coverage for the loss of the Paintings.

63. AXA has failed and refused to pay the Museum's claim for the Paintings under the Policy, but, instead, has asserted factual and legal arguments as purported defenses to the Museum's claims, which arguments are entirely without merit.

64. As a legal, direct and proximate result of the foregoing material breach of the Policy by AXA, the Museum has sustained damages in excess of \$1.5 million for the loss of the fair market value of the Paintings.

WHEREFORE, the Philadelphia Museum of Art requests judgment in its favor and against defendant AXA Art Insurance Corporation for: (a) the fair market value of the Prendergast at the time of the loss, which is \$1.5 million; (b) the fair market value of the Davies; (c) prejudgment interest from the time when AXA should have paid the Museum's claim; and (d) such other and further relief and the Court deems just and equitable.

COUNT II - STATUTORY BAD FAITH

65. The Museum hereby incorporates by reference the allegations of paragraphs 1 through 64 as fully as if the same were set forth at length herein.

66. AXA has a contractual and statutory duty to exercise good faith and fair dealing in connection with the investigation of the Museum's coverage claim and in determining whether the claim is a valid one under the Policy.

67. AXA's conduct in the investigation and subsequent denial of the Museum's claim for coverage of the Paintings included, among other conduct:

- a. refusing to pay a claim for an arbitrary and capricious reason based on all available information;
- b. failing promptly to settle and pay the Museum's claim when liability became reasonably clear;
- c. failing to provide promptly on request a reasonable explanation for the basis of the coverage denial;
- d. failing to act in good faith in the investigation of the coverage claim;
- e. misrepresenting pertinent facts relating to the claim;
- f. failing to affirm or deny coverage within a reasonable time after the submission by the Museum of all information and documents sufficient to constitute a proof of loss; and
- g. failing to act in good faith as defined by applicable law.

68. As a legal, direct and proximate result of AXA's bad faith, the Museum has and may continue to sustain damages, including but not limited to loss of the market value of the Paintings, interest on that amount and the costs of pursuing coverage for the claim, including substantial attorneys' fees.

69. AXA's conduct constitutes bad faith under and pursuant to MD. CODE ANN., INS. §§ 27-1001, 27-303, 27-304 (2007).

WHEREFORE, the Philadelphia Museum of Art requests judgment in its favor and against defendant AXA Art Insurance Corporation for compensatory damages, prejudgment interest, its attorneys' fees incurred in pursuing the coverage claim and in bringing this action, its costs of suit and such other and further relief as the Court deems just and equitable.

Dated: March 8, 2010

/s/ Gerald P. Konkel

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