

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

HENRY F. and ANNE MARIE FRIGON,)	
)	
)	Case No. 05 C 6214
Plaintiffs,)	
)	JUDGE ROBERT W. GETTLEMAN
-vs-)	
)	Magistrate Judge Morton Denlow
PACIFIC INDEMNITY COMPANY, a)	
Wisconsin Corporation,)	
)	
Defendants.)	

**DEFENDANT PACIFIC’S RESPONSE BRIEF IN OPPOSITION TO PLAINTIFFS’
MOTION FOR PARTIAL SUMMARY JUDGMENT**

NOW COMES Defendant PACIFIC INDEMNITY COMPANY (“Pacific”), by and through its attorneys, John W. Carver and Karen L. Choudhury and pursuant Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1, submits the following Response in Opposition to Plaintiffs’ Motion For Partial Summary Judgment:

I. BUSINESS DEBT IS NOT CONVERSION

1. Plaintiffs ask this court to take business debt and change it into conversion, theft or fraud. Their goal: to make an insurance claim for their paintings sold under consignment. The Masterpiece Policy of insurance that covered Plaintiffs' property was never intended to be a performance bond for Plaintiffs’ business dealings with the Love Galleries. Therefore, Plaintiffs request must be denied.

2. Pacific adopts and incorporates all arguments and legal authorities in Pacific’s Memorandum of Law in Support of Its Motion for Summary Judgment as its arguments and legal authorities supporting this Memorandum of Law in Opposition to Plaintiffs’ Motion for

Summary Judgment. (See Pacific's Memorandum of Law in Support of Its Motion for Summary Judgment filed September 29, 2006)

3. The majority of Plaintiffs' arguments represent Plaintiffs' disappointment with their business dealings with Love Galleries. Plaintiffs' accusations of wrongdoing against the Love Galleries, although vituperate and inflammatory, are irrelevant to the matter at hand. Plaintiffs' have created a complicated argument that the consignee, the Love Galleries, converted the subject paintings. This is not supported by the evidence, which simply shows that: (1) the Frigons entered consignment agreements with Love Galleries to sell the subject art, and (2) the Love Galleries sold all of the art under consignment. Plaintiffs argue that certain promises were broken, and as a result, the Love Galleries owe Plaintiffs money from the consignment sales. That Love Galleries may have failed to meet the obligations under the consignment agreements does not change the fact that the paintings were sold pursuant to the agreements for money or other valuable art. The Love Galleries owe Plaintiffs a business debt.

4. Since all of the subject paintings were sold at Plaintiffs' request on consignment, they were no longer under the Masterpiece policy, and therefore, Defendant requests that this court deny Plaintiffs motion for summary judgment with respect to both the Declaratory Judgment in Count I and the Breach of Contract in Count II and find that Plaintiffs' only actionable claim is for breach of contract against Richard Love and/or the Love Galleries as a business debt.

II. BREIF TIMELINE OF KEY INFORMATION

5. By the end of 2002, all of the subject paintings were sold on consignment to arguably *bone fide* purchasers.

6. Early Spring 2003, the Frigons still had many paintings displayed at Love Galleries to be sold under consignment. After Love Galleries missed some installment payments on a

consignment sale, Plaintiffs demanded all unsold paintings in the custody of Love Galleries be returned. Love Galleries returned all unsold paintings.

7. On April 8, 2005, Plaintiffs demanded the return of the subject paintings. Love Galleries told Plaintiffs that the subject paintings were sold. At that point, all Plaintiffs had was a right to receive proceeds pursuant to the consignment agreements.

8. Plaintiffs attempted to collect the debt owed by Love Galleries. Henry Frigon requested certain pieces of art from Love Galleries inventory in exchange for the debt. Failing to collect the debt, on May 5, 2003, Plaintiffs filed an insurance claim for loss of the paintings. Plaintiffs represented that the paintings were “lost” as of March 1, 2003.

9. As a result of Plaintiffs reported claim for lost or stolen art, Pacific Indemnity registered the art with the Art Loss Register and began an investigation as to circumstances of the alleged loss. On September 12, 2003, Pacific Indemnity denied the claim for those paintings sold under consignment. Plaintiffs filed this lawsuit and a lawsuit against Love Galleries to recoup their business losses.

10. The Masterpiece Policy insured “physical loss to valuable property.” Admittedly, the paintings are “valuable property.” However, at the time Plaintiff made a claim for loss, they no longer owned the subject paintings. The real claim is for money following unrealized expectations attendant to a commercial transaction, not paintings. The Policy does not cover this type of loss.

III. RESPONSE TO PLAINTIFFS FACTS

11. Certain of Plaintiffs arguments in the Introduction and Facts sections of the Plaintiffs' Memorandum of Law are inconsistent with the documents produced and testimony completed prior to the close of discovery. Contrary to Plaintiffs' argument, the aggregate

consignment price of the eleven paintings is less than \$1,600,000 based upon the typewritten consignment agreement terms; Henry Frigon admitted that he would not follow up on the sale of paintings, sometimes for years; the Masterpiece Policy of insurance does not cover business debt; listing paintings on the Art Register based upon Plaintiffs' report of loss before an investigation is not an admission that the paintings were actually stolen; *Harborside Reflections* and *A Summer Visit* did not have a written consignment agreement so there is no verification as to the minimum consignment price; A letter from Love Galleries dated May 30, 1996 is not a complaint letter, rather, it is a letter in response to Henry Frigon's May 14, 1996 inquiry into changing the Love Galleries commissions on paintings sold under consignment; The reference to the handwritten amounts for Consignment Sale price for paintings, such as *The Bath*, are contrary to Richard Love's testimony that he would not have approved such changes; the total sale for some of the paintings, including cash and trade, was at or in excess of the minimum Consignment Sale price; Some of the paintings identified as "traded away" were sold for a combination of cash and trade; The January 9, 2003 letter regarding the sale of *Brooklyn Bridge* indicates that the painting was sold for an undisclosed amount and the payments made to the Frigons would be in installments for a total of \$435,000; Richard Love testified that he intends to repay Plaintiffs all money owed under the Consignment Agreements; No term in the consignment agreements precluded a consignment sale for either money and trade or simply trade; and, the paintings were all sold and none of them lost.

IV. INSURED FAILED TO SHOW A LOSS UNDER THE POLICY

12. The insured initially has the burden of showing the existence of a loss. *Harbor House Condominium Association v. Massachusetts Bay Ins. Co.*, 915 F2d. 316 (7th Cir. 1990). In this case, on March 1, 2003, the time of the claimed loss, Plaintiffs had sold the subject paintings

through consignment agreements and only had a claim in the money owed under the consignment agreement. The Masterpiece Policy covered loss of valuable articles, not money owned under consignment agreements. As a result, Plaintiffs fail to meet their burden of showing the existence of a loss under the Policy.

13. Plaintiffs' reliance on *Great Northern Ins. Co. v. Dayco Corp.*, 620 F. Supp. 346, (S.D.N.Y. 1985), does not support their claim that insurance covers the business debt. In *Dayco*, the plaintiff was a manufacturer that sold products to the Soviet Union on contract. Reich was a broker which would procure the contracts and send a letter to Dayco with an order for the manufactured products. Reich was paid a commission on the orders. Reich sent many orders which had no corresponding contract. Dayco manufactured and shipped the product, which sat in a warehouse in Germany. The product was "picked up" from the warehouse, but not by anyone with authority to do so. Dayco filed an insurance claim for the unsold goods claiming stolen product. The insurer denied the claim reasoning that Dayco had a credit loss by theft and that it was seeking money that Dayco expected to receive after the goods are sold. The court held that the policy covered theft, that Dayco physically lost the goods and therefore coverage was available under the policy if Dayco can prove the theft and the loss. The facts in *Dayco* are distinguishable. In *Dayco*, the goods were never sold, there was no contract and there were no purchasers. In this case, Plaintiffs had contracts for consignment sales with Love Galleries, the paintings were sold under the consignment agreements and now the paintings are owned by *bone fide* purchasers. The Love Galleries is tardy in paying the money due to Plaintiffs. The ruling in *Dayco* has no application to the instant case.

14. The cases Plaintiffs cite regarding insurance policies covering conversion claims do not apply because those cases involve property that was taken but never sold. In both

Intermetal Mexicana S.A. v. Insurance Co. of North America, 866 F.2d 71 (3rd Cir. 1988) and *Consolidated International Corp. v. Pakistan Nat'l Shipping Corp.*, 1989 U.S. Dist. LEXIS 9050 (N.D. Ill. 1989), the plaintiffs both involuntarily lost control of their products before those products were sold. By contrast, in this case, it is undisputed that Plaintiffs' paintings were sold after they voluntarily transferred possession of them to Love Galleries. *Intermetal* and *Consolidated* simply do not apply here.

15. The argument that Pacific admits the subject paintings were stolen by registering them with the Art Loss Register (ALR) is wrong. Plaintiffs reported lost paintings to Pacific. Pacific registered the reported loss with the ALR then conducted an investigation into Plaintiffs claims. After the investigation, Pacific denied any claim for loss of a painting sold under consignment and removed many of the paintings from the ALR. There is no “tacit” admission by Pacific that the paintings were stolen.

16. As more fully argued in Pacific’s Memorandum of Law Supporting its Motion for Summary Judgment, the Masterpiece Policy covered claims for “physical loss to valuable property.” The policy was not a performance bond for the Love Galleries’ execution of the consignment agreements. Plaintiffs admit that all of the subject paintings were sold under the Consignment Agreements entered with Love Galleries. Plaintiffs are disappointed in the return on their investment; however, there is no basis for an insurance claim for the loss of money due under the Consignment Agreements. Plaintiff fail to prove a valid claim for loss under the Masterpiece policy.

17. Since Plaintiffs fail to state a valid claim for loss, whether an exclusion applies is moot. However, Plaintiffs correctly identified that there exists an exclusion for any loss caused intentionally by the insured or by a person directed by the insured. (Masterpiece Policy, p. N-4)

In this case, the Love Galleries was an agent of Plaintiffs directed to execute the sale of the subject paintings pursuant to the Consignment Agreements. Plaintiffs now claim that their loss was caused by the actions of the Love Galleries. Plaintiffs put the Love Galleries in motion by entering the Consignment Agreements and would not be able to claim a loss for any intentional acts by Love Galleries taken pursuant to the Consignment Agreements.

V. BAILMENT IS NOT THE SAME AS CONSIGNMENT

18. Plaintiffs Memorandum of Law attempts to discuss the consignment agreements under the law of bailment. Bailment is not the same as consignment. Bailment deals with the intended return of the article; whereas, consignment, is a bailment coupled with agency for the purpose of a sale. Plaintiffs' reliance on the law of bailment alone is misplaced.

19. A consignment is more than just bailment. Plaintiffs accurately cite a bankruptcy court case which states that a consignment is bailment coupled with agency. *In re: Aaura, Inc.*, 2006 WL 2568048 at *3 (no. 06 B 01853 N.D. Ill. Bankr. Sept. 1, 2006). The *Aaura* case cites the language of an 1893 Federal court sitting in Indiana, *Sturm v. Boker*, 150 U.S. 312, 329-330 (1893). However, the court in *Sturm* goes further to state that, “[t]he recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. On the other hand, when there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed; the transaction is a sale.” *Sturm* at 330. In this case, the consignment agreements between the Love Galleries and Plaintiffs were for the sale of the subject paintings in return for money. When the Love Galleries sold the paintings, title passed to the new owners and Love Galleries became a debtor of Plaintiffs.

20. Plaintiffs' case law regarding bailment does not support conversion in this matter. First, the case law discussing bailment alone does not apply to the subject paintings sold under consignment. Contrary to Plaintiffs argument, the *Knight* case is factually dissimilar. In *Knight*, the plaintiff entrusted securities with the defendant which were to be returned to the Plaintiff after a business transaction. Instead, the defendant sold the securities without closing the deal. The *Knight* facts relate to bailment only since the securities were intended to be returned to the plaintiff. The *Knight* facts do not relate to bailment with agency for the purpose of sale. *Knight v. Seney*, 290 Ill. 11, 124 N.E. 813 (Ill. 1919); see also *Puerto Rico Industrial Development Co v. J H Miller Mfg Corp*, 173 F. Supp. 596, 606-607 (S.D. Ill. 1959)(In a lease transactions where the lease was guaranteed by the defendant corporation, the defendant fell behind in rent payments, the plaintiff seized property of the defendant in attempt to satisfy the debt owed, plaintiff sued for payment under the lease and defendant counterclaimed for trover and conversion of property seized by plaintiff and the court found judgment in favor of defendant on the direct action the counter-defendant on the conversion.)

21. Second, the other cases Plaintiffs are not applicable for various reasons. The case of *Nelson v. Sotheby's Inc.*, 128 F. Supp. 2d 1172, 1175 (N.D. Ill. 2001), does not discuss bailment pertaining to consignment. *Nelson v. Sotheby's Inc.*, 128 F. Supp. 2d 1172, 1175 (N.D. Ill. 2001)(Where the plaintiff alleged that Sotheby's wrongfully kept the plaintiff's painting when it was placed in Sotheby's control for evaluation, the court held that evaluation was the purpose of the bailment, that the statute of limitations barred Plaintiffs' conversion claim, that the plaintiff's claim for breach of Sotheby's internal rules and regulations, fraudulent concealment and breach of fiduciary duty was denied, and that a timely breach of contract action was allowed to proceed against Sotheby's.) The case of *W.O. Dean Co. v. F.G. Lombard*, 61

Ill.App. 94 (Ill. App. 1895), generally discusses that conversion is bailment with agency for the purpose of a sale. *W.O. Dean Co. v. F.G. Lombard*, 61 Ill.App. 94 (Ill. App. 1895)(The court discusses that a consignment agreement is a bailment were the title does not pass to the consignee.)

22. The only bailment case cited which has applicability is *Hercules Powder Co. v. Rowan*, 245 Ill.App.291, (4th Dist. 1924). In *Hercules*, Rowan operated a coal mine and gave Hercules an order for powder at a set price. Hercules shipped the powder but never received the money. Apparently, Rowan turned over unsold powder to another coal mine business and informed Hercules to bring an action in replevin. Hercules brought an action to recover the purchase price against Rowan, but Rowan prevailed. The appellate court reversed the verdict holding that Rowan was a bailee under the agreement, that as a bailee Rowan had a duty to return any unused powder to Hercules and that Rowan improperly released the unused powder to a third-party in contravention to the agreement. *Hercules* sets forth the general proposition that, “if a bailee for a special purpose **uses the property for another purpose** he is liable as for a conversion” and that “[a] bailee who has converted **the subject of a bailment** may be made liable for its value in an action of assumpsit.” *Hercules* at 294. Taking *Hercules* its logical next step, if the property is used properly under the agreement, there is no conversion under bailment.

23. Applying the rationale in *Hercules*, concerning bailment with agency for the purpose of sale, a conversion occurs only when the property is used in contravention to the agreement. Unlike *Hercules*, in this case, the Love Galleries did not turn over the paintings to another business in the art consignment industry. Love Galleries executed the sale of the paintings. Sale of the paintings was in conformance with the consignment agreements. The paintings were sold to *bona fide* purchasers. Once the sale was executed, Love Galleries ceased

being a bailee and the money from the sale became a business debt owed to Plaintiffs. Therefore, Plaintiffs argument that Love Galleries actions constituted conversion by a bailee fails.

VI. PAROL EVIDENCE MUST BE DISREGARDED

24. Similarly, Plaintiffs argument that Love Galleries engaged in unauthorized sales is not supported by the evidence or the law. Plaintiffs improperly attempt to interject parol evidence of an oral agreement between Plaintiffs and the Love Galleries related to the Consignment Agreements. However, parol evidence is not permitted under Illinois law and no exceptions apply in this case. Therefore, this court should not consider any of the statements that the Love Galleries engaged in unauthorized sales.

25. Pursuant to Illinois law, if language in a contract is facially unambiguous, the "four corners" rule requires that it be interpreted as a matter of law without the use of parol evidence. *Dean Management, Inc. v. TBS Construction, Inc.*, 339 Ill.App.3d 263, 269, 790 N.E.2d 934, 939-40, (2nd Dist. 2003) The mere fact that the parties disagree on some term, however, does not render the term ambiguous." *Id.* at 939.

26. Plaintiffs attempt to introduce self-serving facts that they had an oral agreement with the Love Galleries that their paintings would be sold for money only. This information contradicts the Consignment Agreements and Richard Love's testimony. Plaintiffs cite the *Duldulao v. St. Mary of Nazereth Hospital Center*, 115 Ill. 2d 482, 493 (1987), to support that trades or barter are not a form of sale in the art industry. However, *Duldulao* is a breach of employment contract action. The *Duldulao* court held that an employee *handbook* or other policy statement creates enforceable contractual rights if the traditional requirements for contract formation are present. The *Duldulao* court further held that the employment handbook was a

contract and the terms were unambiguous in defining the employee probationary period as an “initial probationary period” which ends “[a]t the end of 90 calendar days since employment.” *Duldulao* at 492. *Duldulao* makes no determination on the sale of a painting for money versus trade.

27. In this case, the written consignment agreements clearly state that the Gallery, at its sole discretion, will determine the manner, method and time of sale. (**Exhibit 2**, Group Exhibit D Consignment agreements, paragraphs 3 and 7). Richard Love testified that in the art industry practice a painting is sold for either money, a trade or a combination of money and a trade. (**Exhibit 2**, Exhibit E, p.49, lines 18-24; p.50, lines 1-24; p.51, lines 10-13.) Additionally, of the five paintings Plaintiffs claim were traded away in Paragraph 17 of Plaintiffs' Statement, the invoices actually show that *Sunset Little Hills* was sold for a combination of money and the trade of two paintings, *Grove of Trees* was sold for a combination of money and the trade of a painting, *Boats on the Water* was sold for a combination of money and the trade of a painting. (**Exhibit 2**, Group Exhibit D). For the above reasons, the Plaintiffs' attempt to incorporate parol evidence of an oral agreement that their paintings would be sold for cash only into the written consignment contracts must be disregarded.

VII. CONCLUSION

28. It is undisputed that the subject paintings were sold under consignment agreements. Plaintiffs admit that they voluntarily entered consignment agreements with the Love Galleries. The intent of the consignment contracts was to sell the subject paintings. Love Galleries, acting as agent of Plaintiffs sold the paintings to *bone fide* purchasers and title transferred at the point of sale. Love Galleries may owe Plaintiffs the money as agreed under the consignment contract, but Love Galleries does not, and could not, owe a return of the paintings.

The Masterpiece Policy covered the paintings before they were sold. The Masterpiece Policy did not insure the performance of the Love Galleries under the consignment agreements. The insurance claim for the value of paintings sold under consignment was properly denied by Pacific Indemnity.

WHEREFORE, Defendant PACIFIC INDEMNITY COMPANY respectfully requests that this Honorable Court enter judgment as a matter of law denying Plaintiffs, HENRY F. and ANNE MARIE FRIGON motion for summary judgment on Count I and Count II of the Complaint, with a specific finding that:

- (1) That the subject paintings were sold under consignment; and
- (2) That Pacific Indemnity is not liable under the Policy for indemnification of the subject paintings sold on consignment.

Respectfully Submitted,

PACIFIC INDEMNITY COMPANY

By: /s/ Karen L. Choudhury
One of Its Attorneys

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