



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SHARON LISSAUER,

Plaintiff,

-against-

09 Civ. 10073 (LAK)

FIREMAN'S FUND INSURANCE COMPANIES,

Defendant.
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MEMORANDUM AND ORDER

LEWIS A. KAPLAN, *District Judge.*

Plaintiff Sharon Lissauer is among the victims of the Bernard Madoff Ponzi scheme, having invested over \$11.4 million with him while receiving back approximately \$8.9 million. She here seeks to recover her alleged loss from the issuer of her homeowner's insurance policy. Defendant Fireman's Fund Insurance Companies ("Fireman's") moves for summary judgment dismissing the complaint. While Ms. Lissauer's loss certainly was tragic, this square peg cannot be fit into a round hole. The motion is granted.

Facts

All of the material facts are undisputed.¹ Moreover, there is no need to recount here

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Fireman's properly submitted a Rule 56.1 statement. Plaintiff's response does not comply with S.D.N.Y. Civ. R. 56.1(d). Accordingly, all of the properly supported assertions in Fireman's' Rule 56.1 statement are deemed admitted. In any case, plaintiff's deficient Rule 56.1 statement does not dispute any of the factual as opposed to legal contentions by Fireman's.

the details of plaintiff's investments with and withdrawals from Madoff. What is important is only the language of the insurance policy.

The policy is a conventional homeowner's policy issued by Fireman's' affiliate, The American Insurance Company. It is a homeowner's policy covering contents and tenant's improvements at a Manhattan address, doubtless an apartment, as well as scheduled valuable possessions. The policy declarations reflect two coverages (in addition to the valuable possessions): "Coverage For Damage To [The Insured's] Property" and "Coverage For Liability and Medical Payments To Others." Under the damage to property heading falls also "Additional Property Coverages."

The personal property damage insuring clause provides in relevant part that the carrier covers "direct physical loss to property described in Dwelling, Other Structures, or Personal Property resulting from an occurrence." As this claim obviously does not involve the Dwelling or Other Structures, the threshold question is whether the claim is for "direct physical loss to property described in . . . Personal Property." There is no definition of Personal Property. But assuming *arguendo* that plaintiff's investments with Madoff constituted personal property within the meaning of the policy, her claim would depend upon whether she alleges "direct physical loss" to such property.

Although there appears to be no controlling New York case law on the point, it is crystal clear for the reasons stated in Fireman's memorandum that plaintiff's investment losses, whatever else they may be, were not a "direct physical loss," even if they involved "property described in . . . Personal Property."² They were consequences of plaintiff's unfortunate but unmistakably voluntary transfers of money to Madoff and his theft of the funds.

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Def. Mem. [DI 19] at 7-10.

Plaintiff attempts to avoid this common sense result by arguing that the policy is ambiguous, that it reasonably might be interpreted as covering this sort of loss, and that she therefore should prevail under the doctrine of *contra proferentem*.³ But the argument is singularly unpersuasive. Even if plaintiff's investments involved "property described in . . . Personal Property," the question would be whether there is any reasonable argument that Madoff's theft of the money was a "direct physical loss" within the meaning of this policy, as the existence of an ambiguity depends on whether there is a reasonable basis for difference of opinion as to the meaning of the contract.⁴ A contractual provision "is not made ambiguous simply because the parties urge different interpretations" of it.⁵ And I simply do not regard plaintiff's proposed interpretation as within the bounds of reason.

Conclusion

For the foregoing reasons, defendant's motion for summary judgment dismissing the complaint [DI 16] is granted. The Clerk shall close the case.

SO ORDERED.

Dated: December 20, 2010



Lewis A. Kaplan
United States District Judge

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Pl. Mem. [DI 22] at 8-10.

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E.g., Morgan Stanley Group, Inc. v. New England Ins. Co., 225 F.3d 270, 275-76 (2d Cir. 2000); *Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyd's, London*, 136 F.3d 82, 86 (2d Cir.1998).

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Seiden Assocs., Inc. v. ANC Holdings, Inc., 959 F.2d 425, 428 (2d Cir.1992).