

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

VIDEX MACHINERY CORPORATION, INC., Plaintiff	:	CIVIL ACTION
v.	:	
YORK INSURANCE COMPANY, Defendant.	:	No. 97 Civ. 4587

MEMORANDUM AND ORDER

Yohn, J.

March , 1998

Videx Machinery Corporation, Inc. ("Videx") brings this declaratory judgment action against York Insurance Company ("York"). Videx seeks a declaration that, under the terms of a commercial insurance policy issued by York, it is entitled to indemnification for damages incurred in a replevin action that it instituted against Cutler Sign Associates, Inc. ("Cutler Sign") in the Court of Common Pleas of Bucks County. See Complaint ¶ 5. York has moved for judgment on the pleadings, pursuant to Federal Rule of Civil Procedure 12(c). See Motion for Judgment on the Pleadings Pursuant to Rule 12(c). For the reasons stated below, York's motion will be granted.

I. Background

On August 27, 1992, Videx filed a complaint in replevin against Cutler Sign and

Mark Cutler in the Court of Common Pleas of Bucks County. See Complaint ¶ 6.¹ Videx alleged that Cutler Sign had failed to make lease payments on office and manufacturing equipment, entitling Videx to the return of the leased equipment. See Complaint, Exhibit B (Complaint in Civil Action--Replevin) ¶¶ 4-12. After posting a bond, Videx caused the leased equipment to be seized. See Complaint, Exhibit D (Videx Machinery Corp. v. Cutler Sign Assocs. Inc., No. 92-08093-21-1, Findings of Fact, Conclusions of Law, and Order, Dec. 30, 1993) at 1. In its answer, dated October 12, 1992, Cutler Sign conceded that it had failed to make lease payments, but alleged that Videx had knowingly waived all payments under the lease as part of a complex business relationship between the two companies. See Complaint, Exhibit C (Answer and New Matter Counterclaim) ¶ 4, 15. Cutler Sign filed a counterclaim to recover for the “loss of benefit of its bargain,” “loss of business,” and “lost profits.” Id. ¶ 22. The trial occurred on June 28-29, 1993. See Complaint ¶ 9.

In its Findings of Fact, Conclusions of Law, and Order, dated December 30, 1993, the Bucks County court found that Videx “expressly agreed that no payments under the Videx lease would be required.” Complaint, Exhibit D (Videx Machinery Corp. v. Cutler Sign Assocs. Inc., No. 92-08093-21-1), Findings of Fact ¶ 57. The court concluded that Videx's replevin action was “wrongful, and without legal and factual justification.” Complaint, Exhibit D (Videx Machinery Corp. v. Cutler Sign Assocs. Inc., No. 92-08093-21-1), Proposed Conclusions of Law ¶ 7. It held that “the actions and

¹ The individual defendant, Mark Cutler, was subsequently dismissed from the action. See Complaint, Exhibit D (Videx Machinery Corp. v. Cutler Sign Assocs. Inc., No. 92-08093-21-1, Findings of Fact, Conclusions of Law, and Order, Dec. 30, 1993) at 1.

conduct of Videx in instituting and prosecuting this action were in bad faith, dilatory and vexatious.” Id. ¶ 9. Pursuant to Pennsylvania Rule of Civil Procedure 1075.3 and 42 PA. CONS. STAT. ANN. § 2503, the court entered judgment against Videx and in favor of Cutler Sign in an amount equal to the value of the replevied property (\$155,000.00 plus interest) as well as all of its attorneys' fees and costs. See Complaint, Exhibit D (Videx Machinery Corp. v. Cutler Sign Assocs. Inc., No. 92-08093-21-1, Order, Dec. 30, 1993) at 27.²

Videx subsequently filed several post-trial motions seeking to set aside the court's decision. The court denied these motions in an opinion and order dated March 8, 1995. See Complaint, Exhibit E (Videx Machinery Corp. v. Cutler Sign Assocs., Inc., No. 92-08093-09-1, Opinion and Order, Mar. 8, 1995). Videx then filed an appeal in the Pennsylvania Superior Court. See Complaint ¶ 11.³

² Pennsylvania Rule of Civil Procedure 1075.3 provides, in relevant part:
[I]f the plaintiff fails to maintain his right to possession of the property he shall pay to the party entitled thereto the value of the property and all legal costs, fees and damages sustained by reason of the issuance of the writ.
Pa. R. Civ. P. 1075.3(b). Section 2503 of the Pennsylvania Consolidated Statutes Annotated provides, in relevant part:
The following participants shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter:
(9) Any participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith.
42 PA. CONS. STAT. ANN. § 2503(9).

³ It is not clear exactly when Videx filed its appeal. Videx asserts: “Videx then filed a timely appeal to the Pennsylvania Superior court . . . and contemporaneously therewith, on or about April 19, 1995, gave written notice to York” Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Judgment on the Pleadings (“Plaintiff's Mem.”) at 5. York, by contrast, asserts that Videx gave it written notice “after the appeal had been filed.” Defendant's Mem. at 7. To the extent that

On April 19, 1995, Videx notified York that it was seeking coverage for the damages awarded in the court's December 30, 1993 order. See Complaint ¶ 12. By letters dated May 9, 1995 and June 30, 1995, York denied coverage on the ground that Videx had not given York timely notice of the claim and suit. See Complaint, Exhibits F, G. In the first letter, York's Associate Claim Specialist Scott Nirenberg explained:

We believe you have breached the terms and conditions of the policy and you have prejudiced our rights by failing to give timely notice of this claim and suit. . . . Your failure to comply with [Section IV.2] of the policy have [sic] prejudiced our ability to investigate or resolve this matter and determine the extent of our exposure to loss.

Complaint, Exhibit F. In the second letter, Mr. Nirenberg explained:

We were not placed on notice of any claim until more than two years after the alleged offense was committed and the counterclaim was filed, and most importantly, almost one year and one half after the court's order assessing damage against you were [sic] entered. Therefore, we will not defend or indemnify, pay, settle or satisfy any judgments found in favor of the plaintiff due to this occurrence.

Complaint, Exhibit G.

On February 22, 1996, the Pennsylvania Superior Court issued an opinion affirming, in part, and vacating, in part, the decision of the lower court. Although Videx had raised four issues on appeal, the court held that only the fourth issue had been properly preserved for review. See Defendant's Mem., Exhibit D (Videx v. Cutler Sign Assocs., Inc., No. 01244, Memorandum, Feb. 22, 1996) at 2-3.⁴ The court explained

there is a factual dispute as to whether Videx gave York notice at the same time that it filed its appeal, the court will accept, for purposes of this motion, Videx's assertion as true.

⁴ Videx raised the following four issues on appeal:

- (1) Whether the trial court erred in finding for Appellee, who failed to present evidence in support of its burden of proof, in light of the

that Videx had waived its first two arguments by not raising them with reasonable specificity in its post-trial motions. See id. at 2. The court explained that Videx had also waived its third argument because, even though it had raised this argument in its post-trial motions, it had failed to include it in the brief accompanying the motions. See id. at 2-3. The court, however, agreed with Videx's fourth argument that the trial court's determination of damages in the amount of \$155,000.00 plus interest was not adequately supported by the record. See id. at 3. The court affirmed every part of the lower court's opinion except for its calculation of damages. See id. at 4. The case is currently on remand to the Bucks County court for a new determination on the issue of damages.

On June 10, 1997, Videx filed this declaratory judgment action against York in the Court of Common Pleas of Montgomery County. York removed the action to this court on July 14, 1997. See Notice of Removal to Federal Court.

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- trial court's finding that Appellant set forth a prima facie case and thereby shifted the burden of proof to the Appellee?
- (2) Whether the trial court erred in not dismissing Appellee's new matter and counterclaim and thereafter admitting evidence outside the scope of the issues of title and possession to support its judgment on the replevin?
 - (3) Whether the trial court erred in making a duplicative award of both return of the subject seized property and money damages for its value?
 - (4) Whether the trial court erred in improperly valuing the seized property without sufficient basis in fact by relying upon incompetent, inadmissible and irrelevant testimony regarding the replacement cost of "similar property" and ignoring stipulated evidence as to value of seized property?

Defendant's Mem., Exhibit D (Videx v. Cutler Sign Assocs., Inc., No. 01244, Memorandum, Feb. 22, 1996) at 2.

II. Standard of Review

In deciding a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), a district court must view the facts and inferences to be drawn from the pleadings in the light most favorable to the non-moving party. See Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 406 (3d Cir.1993). The court may grant the motion only if no material issue of fact remains to be resolved and the movant is entitled to judgment as a matter of law. See Jablonski v. Pan Am. World Airways, Inc., 863 F.2d 289, 290-91 (3d Cir.1988). To survive a motion to dismiss, the plaintiff must set forth facts that state a claim as a matter of law. See Sterling v. Southeastern Pennsylvania Transp. Auth., 897 F.Supp. 893, 895 (E.D. Pa. 1995).

III. Discussion

York argues that it is entitled to judgment on the pleadings for three reasons. First, it argues that the insurance policy does not afford coverage for the loss sustained by Videx as a result of the judgment entered against it. See Memorandum of Law in Support of Defendant's Motion for Judgment on the Pleadings Pursuant to Rule 12(c) ("Defendant's Mem.") at 3. Second, it argues that, even assuming that there is coverage under the terms of the policy, "Videx waived coverage because it inexplicably delayed until after the trial had concluded, and after post-trial motions had been submitted and denied, before giving notice of a potential claim as required by the insurance contract." Id. Third, York argues that, regardless of the terms of the insurance policy, public policy in Pennsylvania mandates that Videx not be allowed to

recover for its own intentional and wrongful acts. See id.

A. Coverage Under the Policy

Videx seeks coverage under § B.1.b.(1) of the Commercial General Liability Coverage Policy (“the policy”). See Plaintiff’s Mem. at 9. This section provides, in relevant part:

COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement.

b. This insurance applies to:

- (1) “Personal injury”: caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you.

Complaint, Exhibit A (Commercial General Liability Coverage Form) at 4. Section V of the policy defines the term “personal injury”:

SECTION V - DEFINITIONS

13. “Personal injury” means injury, other than “bodily injury,” arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
- e. Oral or written publication of material that violates a person's right of privacy.

Id. at 11. Videx contends that its seizure of the leased property was a “detention” within the meaning of § 13(a). See Plaintiff’s Mem. at 10-11. York argues that the term applies only to wrongfully seized persons, and not to wrongfully seized property. See Defendant’s Mem. at 5. The policy is silent as to the definition of the term.

Any ambiguity in an insurance policy must be construed against the insurer and in favor of the insured. See Burne v. Franklin Life Ins. Co., 301 A.2d 799, 804 (Pa. 1973). When a term is not defined in an insurance policy, but possesses a clear legal or common meaning that may be supplied by a court, the contract is not ambiguous. See City of Erie v. Guaranty Nat'l Co., 109 F.3d 156, 163 (3d Cir. 1997). A term will be considered to be ambiguous if it is reasonably susceptible of more than one interpretation. See C.H. Heist Caribe Corp. v. Am. Home Assurance Co., 640 F.2d 479, 481 (3d Cir. 1981).

Although Pennsylvania state and federal courts have construed many commercial insurance policies with provisions substantially identical to § 13, they have not yet had occasion to consider the meaning of the term, “detention,” as it is used in these policies.⁵ The court will therefore look to cases that have used the term in contexts other than commercial insurance policies. Admittedly, in many of these cases, the term has been used to describe the unlawful confinement of persons. See, e.g., Simmons v. Poltrone, 1997 WL 805093, at *7 (E.D. Pa. Dec. 17, 1997) (“The elements

⁵ Pennsylvania courts have construed other terms, such as “false imprisonment,” “invasion of privacy,” “defamation,” and “wrongful entry or eviction.” See, e.g., Roman Mosaic and Tile Co. v. Aetna Casualty and Surety Co., 1997 WL 795977, at *6 (Pa. Super. Ct. Dec. 31, 1997) (considering whether claims of sexual harassment and gender discrimination are encompassed within the meaning of a “personal injury” provision contained in the insured's comprehensive general liability policy, which provided coverage for injuries “arising out of” the offenses of false imprisonment, invasion of privacy, and defamation); Toombs N.J. Inc. v. Aetna Casualty & Surety Co., 591 F.2d 304, 306-07 (Pa. Super. Ct. 1991) (considering whether a developer's backing out of an agreement to build and operate two restaurants in developer's mall prior to occupancy by restaurateur constituted “wrongful eviction or other invasion of right of private occupancy,” within the meaning of a general comprehensive liability policy).

of false imprisonment are (1) the detention of another person, and (2) the unlawfulness of such detention.”) (quoting Renk v. City of Pittsburgh, 641 A.2d 289, 293 (Pa. 1994)). However, the term has also been used to refer to the unlawful withholding of property. See Reitz v. County of Bucks, 1996 WL 530021, at *2 (E.D. Pa. Sept. 17, 1997) (“This claim stems from the defendants' allegedly unlawful seizure and detention of plaintiffs' personal and real property.”); 66 AM. JR. 2D Replevin § 78 (1973) (explaining that the “wrongful seizure or detention of . . . property” is a necessary element in a cause of action for replevin”) (emphasis added); 42 PA. CONS. STAT. ANN. § 5524(3) (“An action for taking, detaining or injuring personal property, including actions for specific recovery thereof [has a two year statute of limitation].”). Black's Law Dictionary, moreover, defines detention as “[t]he act of keeping back, restraining or withholding, either accidentally or by design, a person or a thing.” BLACK'S LAW DICTIONARY 450 (6th ed. 1990) (emphasis added). To suggest that “detention” refers to the withholding of property is thus not to adopt a “fanciful, curious, or hidden meaning, which nothing but the exigency of a hard case and the ingenuity of a trained and acute mind can discover.” Defendant's Mem. at 5 (quoting LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 22:10 (3d ed. 1996). Rather, the term “detention,” as used in § 13(a), is reasonably susceptible of more than one interpretation. Because there is an ambiguity as to whether the term encompasses the withholding of property, the court finds that York's first argument in support of its motion is unavailing.

B. Untimely Notice

York argues that even if the insurance policy covers the type of injury at issue in

this case, it is entitled to judgment as a matter of law because Videx gave York untimely notice of its claim. See Defendant's Mem. at 7-8. Videx responds that there is a genuine issue of material fact as to whether its notice was untimely. See Plaintiff's Mem. at 17.

In order to prevail on a late notice defense, an insurer must prove (1) that notice was untimely and (2) that the delay caused it prejudice. See Hyde Athletic Indus., Inc. v. Continental Casualty Co., 969 F. Supp. 289, 300 (E.D. Pa. 1997) (citing Brakeman v. Potomac Ins. Co., 371 A.2d 193, 198 (Pa. 1977)). Late notice is an affirmative defense to coverage, for which the insurer bears the burden of proof. See id.

The notice given to York in this case was unquestionably late. The policy contained a notice provision requiring Videx to notify York “as soon as practicable of an 'occurrence' or an offense which may result in a claim.” Complaint, Exhibit A (Commercial General Liability Coverage Form) § IV (2)(a) (emphasis added). Videx filed suit against Cutler Sign on August 27, 1992, and the counterclaim against it was filed in October of 1992. Videx did not notify York that it was seeking coverage for damages awarded in the December 30, 1993 order until April 19, 1995. See Complaint ¶ 12. Even accepting Videx's contention that its duty to notify York arose as of December 30, 1993, when judgment was entered against it, see Plaintiff's Mem. at 16-17, its notice was still over fifteen months late.⁶

⁶ Videx has conceded that its notice was untimely: “Videx did not give notice to York of the claim until after its Motion to set aside Judge Mellon's decision was denied on March 8, 1995, 15 months after Judge Mellon's decision was filed. This period of delay could warrant the denial of coverage if it in fact was a cause of actual prejudice to York in defending the claim.” Plaintiff's Mem. at 17.

Videx's delay, moreover, prejudiced York. The purpose of a reasonable notice requirement is to allow an insurance company to gain early control of the proceedings. See Brakeman, 371 A.2d at 197. The requirement is “designed to protect the insurance company from being placed in a substantially less favorable position than it would have been in had timely notice been provided, e.g., being forced to pay a claim which it has not had an opportunity to defend effectively.” Id. at 197. York did not have the opportunity to gain early control of the proceedings in this case. By the time that York received notice of Videx's claim against Cutler, the Bucks County court had already conducted the trial, issued an order entering judgment against Videx, and denied Videx's post-trial motions. Videx had also already prepared an appeal, which properly preserved only one of four issues for appellate review. York thus did not have an opportunity to consider settling the claim or to participate in the litigation either in the trial or appellate court.

Videx argues that York is not prejudiced because Videx and Cutler Sign are still litigating the question of damages in state court and, therefore, York still has an opportunity to influence the outcome of this aspect of the litigation. See Plaintiff's Mem. at 17. However, even though the Superior Court reversed the lower court's calculation of damages, it affirmed all other parts of the lower court's opinion, including its determination of Videx's liability. In other words, Videx will have to pay Cutler Sign the value of the seized property--whatever that amount is determined to be--as well as all of its attorneys' fees and costs.⁷ York would be prejudiced if it had to indemnify Videx for

⁷ Pennsylvania Rule of Civil Procedure 3170(b) provides:
If judgment is entered for a party not in possession, he may

these damages because it would end up “pay[ing] for a claim which it has not had an opportunity to defend effectively.” Brakeman, 371 A.2d at 197. Because Videx's notice was both untimely and prejudicial, the court holds that Videx waived coverage under the policy and that York is entitled to judgment on the pleadings.⁸

An appropriate order follows.

obtain the possession of the property by a writ of possession, or in the alternative may obtain the value of the property by execution on the judgment or by recovery upon the bond. . . . Pa. R. Civ. P. 31709(b) (emphasis added). Cutler Sign has chosen to recover the value of the property. See Plaintiff's Mem. at 18.

⁸ Having found that York is entitled to judgment on the pleadings because Videx waived coverage, the court need not reach York's third argument that recovery is barred as a matter of public policy.