

2016 WL 1123226 (N.Y.Sup.), 2016 N.Y. Slip Op. 30424(U) (Trial Order)
Supreme Court, New York.
Part 47
New York County

****1** CAC 3, LLC d/b/a Yushi-Maiden Lane, Plaintiff-Petitioner(s),
v.
TOWER NATIONAL INSURANCE COMPANY, Defendant-Respondent(s).

No. 650459/14.
March 9, 2016.

Trial Order

Present: Geoffrey D.S. Wright, Justice.

*1 [This opinion is uncorrected and not selected for official publication.]

MOTION SEQ. NO. 002

The following papers, numbered 1 to 3 were read on this motion to/for dismiss the complaint

	<i>PAPERS NUMBERED</i>
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits...	1
Answering Affidavits – Exhibits	2
Replying Affidavits Memoranda	3

Cross-Motion: # Yes # No

Upon the foregoing papers, it is ordered that this motion by the Defendant to dismiss the complaint granted a/p/o.

Dated: Mar 9, 2016

Motion Seq. #2,3

DECISION/ORDER

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to: dismiss the complaint

PAPERS	NUMBERED
Notice of Petition/Motion, Affidavits & Exhibits Annexed Order to Show Cause, Affidavits & Exhibits	1

Answering Affidavits & Exhibits Annex	2
Replying Affidavits & Exhibits Annexed	3
Cross-motion & Exhibits Annexed	
Supporting Affidavits	

****2** Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

The Plaintiff, the owner of a restaurant on Fulton Street, sues to recover business losses suffered during a temporary loss of power due to Hurricane Sandy, in late October 2012.

The loss of power was due to precautions taken by Con Edison, which shut down in advance of the storm in order to reduce damage to its equipment and allow it to restore service faster. In the event, the loss of power to the Plaintiff, and the resulting loss of business, due in part to food spoilage was tied to flooding suffered by its landlord as a result of water accessing the basement of the premises. The Plaintiff's business is on the first floor.

The Defendant disclaimed coverage for the Plaintiff's claim.

The policy in question excludes from coverage interruption to utility service that ****3** occurs away from the premises. In this case, it is a given that the loss of power in question was due to an anticipatory shut down by Con Edison. To a certain extent, the shut down was caused by the storm. As evidenced by the damage suffered to the Plaintiff's landlord, the premises were going to be affected by the storm, and so was the utility's ability to provide service.

Whether by storm or by the choice of the utility, the loss of power off premises, and the loss is caused "directly or indirectly by the failure of power or other utility...if the failure occurs outside of the covered premises." The losses here were the result of a non-covered cause of loss, to wit, off premises power outage. Whether or not the premises suffered direct water damage, the loss of power was the ultimate cause, and the loss of power was due to the shut down by Con Edison, which was off premises. The motion to dismiss is granted.

Dated: March 9, 2016

<<signature>>

GEOFFREY D. WRIGHT

AJSC