

2016 WL 1268513 (N.Y.Sup.), 2016 N.Y. Slip Op. 30514(U) (Trial Order)
Supreme Court, New York.
Part 35
New York County

****1** NORTHERN SPY FOOD CO., LLC,

v.

TOWER NATIONAL INSURANCE.

No. 650461/2014.

March 22, 2016.

Trial Order

Present: Hon. Carol R. Edmead, Justice.

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

MOTION DATE 2/22/16

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s)._____

Answering Affidavits — Exhibits No(s)._____

Replying Affidavits No(s)._____

Upon the foregoing papers, it is ordered that this motion is

In this action for insurance coverage of losses allegedly sustained by plaintiff, The Northern Spy Food Co., LLC, during the Hurricane Sandy storm, defendant Tower National Insurance Company (“defendant”) moves for summary judgment dismissing the complaint.

Factual Background

Plaintiff, which operates a restaurant in Manhattan, submitted an insurance claim to defendant for “power outage/food spoilage due to windstorm.” Defendant denied the claim based on an investigation which revealed that the “loss of business income and food spoilage claims resulted from an off premise power failure [and that as] verified by the utility company the cause of the power failure was due to flood.” Defendant stated, *inter alia*, that the Policy and endorsements require that the cause of the power failure has to be a listed cause of loss, and that the cause of the power failure was “due to flood,” a cause expressly excluded under the Policy. Thus, the claim was denied, and this action ensued.

In support of summary judgment, defendant argues that Con Edison's engineer attests that the cause of the off premises power failure was severe tidal flooding to the East 13th Street Substation ("Substation") that provided power to the Premises. This Substation was shut down from October 29, 20 November 2, 2012, the same time for which plaintiff was out of power. Defendant argues that the Policy does not provide business income coverage to plaintiff because there was no direct physical loss or damage to the "Property at the Premises," and because the interruption did not result from direct physical loss or damage by a covered cause due to the exclusion based on flood. Further, the Policy does not provide food spoilage coverage because the Policy's Commercial Property Deluxe Restaurant Enhancement Endorsement provides **2 coverage where the off premises power interruption is caused by a covered cause, and flood is excluded as covered cause.

In opposition, plaintiff contends that the cause of plaintiff's loss, as averred to by defendant, was not a flood, but an "Off Premise power failure" and such power failure that results in business property loss, business interruption and extra expenses is a covered peril under the Policy. There was no flood at the insured premises. And, the flood damage exclusion in the Policy for the insured Premises does not apply to premises (*i.e.*, of Con Edison) that are not part of the Policy. The flood damage causing or contributing to the "power failure" was at a facility that plaintiff does not own, operate, control, occupy or possess. Here, the Policy expressly identifies "Covered Property" as "Stock," which sustained spoilage or "physical damage," and the loss is not excluded by the Policy. Further, any ambiguities in the Policy must be construed against the defendant.

*2 In reply, defendant adds that plaintiff cannot create an ambiguity where none exists, and the undisputed facts demonstrate that the flooding that caused ConEdison's power outage, which caused plaintiff's losses, is not a "Covered Cause" to trigger coverage.

Discussion

"An insurance agreement is subject to principles of contract interpretation" (*Universal American Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 N.Y.3d 675, 37 N.E.3d 7816 N.Y.S.3d 21 [2015]). "As with the construction of contracts generally, 'unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court'" (*Universal American Corp., supra, citing Vigilant Ins. Co. v. Bear Stearns Cos., Inc.*, 10 N.Y.3d 170, 177, 855 N.Y.S.2d 45, 884 N.E.2d 1044 [2008]). The "test to determine whether an insurance contract is ambiguous focuses on the reasonable expectations of the average insured upon reading the policy and employing common speech" (*Universal American Corp., supra, citing Matter of Mostow v. State Farm Ins. Cos.*, 88 N.Y.2d 321, 326-327, 645 N.Y.S.2d 421, 668 N.E.2d 392 [1996] [citations omitted]; *see also Cragg v. Allstate Indem. Corp.*, 17 N.Y.3d 118, 122, 926 N.Y.S.2d 867, 950 N.E.2d 500 [2011] ["Insurance contracts must be interpreted according to common speech and consistent with the reasonable expectations of the average insured"]).

The policyholder bears the initial burden of showing that the insurance contract covers the loss; once this burden is satisfied, the insurer bears the burden of proof to show that an exclusion in the policy applies to an otherwise covered loss (*Roundabout Theatre Co., Inc. v. Continental Cas. Co.*, 302 A.D.2d 1751 N.Y.S.2d 4 [1st Dept 2002]; *Moneta Development Corp. v. Generali Ins. Co. of Trieste and Venice*, 212 A.D.2d 428, 622 N.Y.S.2d 930 [1st Dept 1995]).

It is uncontested that plaintiff's claim is for food spoilage and loss of business income losses that resulted from a power outage, and that the power outage was due to flooding at a ConEdison Substation.

The Policy provides coverage for loss of Business Income as follows:

Business Income (And Extra Expense) Coverage Form

A. Coverage

We will pay for the actual loss of Business Income you sustain due to the **3 necessary “suspension” of your “operations” during the “period of restoration”. The “suspension” must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. *The loss or damage must be caused by or result from a Covered Cause of Loss*

(See CP 00 30 10 00, page 1 of 8, Emphasis added)

Therefore, at the outset, the loss of business income sustained during the period of the power outage must have been caused by direct physical loss of property or direct physical damage to property at the premises. Here, the loss of business income was caused by direct physical loss of or damage to property at premises, to wit: the stock at the premises. However, and importantly, such loss of business income was not caused by or the result of a “covered cause of loss” as that term is defined in the Policy.

In describing “Covered Causes of Loss,” the Policy directs one to “See applicable Causes of Loss Form as shown in the Declarations.” (CP 00 30 10 00, page 1 of 8)

*3 The “Causes of Loss-Special Form” page provides that

When Special is shown in the Declarations, Covered Causes of Loss means Risks of Direct Physical Loss *unless the loss is*

1. *Excluded in Section B., Exclusions; or*

2. *Limited in Section C, Limitations.*

(CP 10 30 10 00, page 1 of 7, Emphasis added)

Therefore, in the event the cause is excluded under Section B or limited by Section C, such cause is not a covered cause of loss.

Under Section B., Exclusions, the Policy provides:

1. We will not pay for loss or damage caused *directly or indirectly* by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

g. Water

(1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;

(2) Mudslide or mudflow;

(3) Water that backs up or overflows from a sewer, drain or sump; or

(4) Water under the ground surface pressing on, or flowing or seeping through:

- (a) Foundations, walls, floors or paved surfaces;
- (b) Basements whether paved or not; or
- (c) Doors, windows or other openings.

But if Water as described in g.(1) through g.(4) above, results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused **4 by that fire, explosion or sprinkler leakage.

Upon reading the provisions at issue, the Court finds that the Policy unambiguously excludes from its definition of “Covered Cause” “Water” including but not limited, “Flood, surface water, waves, tidal, tidal wades, or overflow from any body of water, or their spray, all whether driven by wind or not.” Therefore, the Policy does not cover plaintiff’s claim for loss of business income.

Contrary to plaintiff’s contention, inasmuch as “Section B., Exclusions” clearly excludes from the definition of a Covered Cause of Loss losses caused “indirectly” by flood, the fact that the flood occurred at a ConEdison substation facility does not render the exclusion inapplicable. The “flood” exclusion applies regardless of the location of the flood. The purpose of the Policy is to protect against covered risks, regardless of whether (or not) such risks are within the control of the plaintiff.

As to plaintiff’s claim for spoilage coverage, the Policy’s Building and Personal Property Coverage Form provides in relevant part:

A. Coverage

We will pay for direct physical loss of or damage to Covered Property [“Stock” is a “Business Personal Property”] at the premises described in the Declarations caused by or resulting from any *Covered Cause of Loss*. (CP 00 10 10 00, page 1 of 13, Emphasis added).

Again, in describing “Covered Causes of Loss,” the Policy directs one to “See applicable Causes of Loss Form as shown in the Declarations.” (CP 00 30 10 00, page 2 of 13), and the “Causes of Loss-Special Form” page provides, generally, that a risk of direct physical loss is covered unless the loss is

1. Excluded in Section B., Exclusions; or
2. Limited in Section C, Limitations.

(See CP 10 30 10 00, page 1 of 7, Emphasis added)

Under Section B., Exclusions, the Policy provides:

*4 1. *We will not pay* for loss or damage caused *directly or indirectly* by any of the following. Such loss or damage is excluded *regardless of any other cause or event that contributes concurrently or in any sequence to the loss*. (Emphasis added)

e. Utility Services

The failure of power or other utility service supplied to the described premises, however caused, if the failure occurs away from the described premises.

But if the failure of power or other utility service results in a Covered

Cause of Loss, we will pay for the loss or damage caused by that Covered

****5** Cause of Loss.

2. We will not pay for loss or damage caused by or resulting from any of the following:

d. *****

(2) Rust, corrosion, fungus, *decay, deterioration* ... or any quality in property that causes it to damage or destroy itself; [and]

(7) The following causes of loss to personal property:

(b) *Changes in or extremes of temperature;*

(CP 10 30 10 00, pages 1-2 of 7, Emphasis added)

It is uncontested that, as relevant to the spoilage claim, the Commercial Property Deluxe Restaurant Enhancement Endorsement modifies Building and Personal Property Coverage Form by adding to Section A.4, Additional Coverages, as follows:

p. Spoilage, Contamination, Change in Temperature or Humidity

(1) The insurance provided by this Coverage Form applies to loss or damage to "stock" ... at

(a) Your described premises; ... and ...

(3) As the result of spoilage or change in temperature or humidity arising out of a complete or partial interruption of power either;

(a) On premises *if interruption is caused by a Covered Cause of Loss;* or ...

(c) Off premises *if interruption is caused by a Covered Cause of Loss* to property of power supply companies which includes the following property:

- (i) Utility generating plants;
- (ii) Switching stations;
- (iii) Substations;

(CP9 04 08 02 07 page 11 of 12, Emphasis added)

Based on the record and the policy provisions cited above, the spoilage loss was caused “directly” by ConEdison's power failure, “regardless of any other cause or event,” which was caused by a flood at ConEdison's facility, and such off premises power outage was not caused by a Covered Cause of Loss, as required under the Commercial Property Deluxe Restaurant Enhancement Endorsement. Thus, the spoilage was “indirectly” cause by flood, and thus, coverage for such claim is prohibited by the Policy's exclusions.

Plaintiff's remaining contentions as to the intent and purpose of the Policy are insufficient to overcome defendant's showing of entitlement to judgment in its favor. While plaintiff **6 contends that it purchased a policy to cover loss of business income and loss of food inventory damage resulting from power interruption, it did not purchase a policy that covered such losses where the power interruption was caused by a flood.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted, and the Clerk may enter judgment dismissing the complaint; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

*5 This constitutes the decision and order of the Court.

DATED: 3/22/16

<<signature>>

J.S.C.

HON. CAROL R. EDMEAD

J.S.C.