SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* PART 13

XL INSURANCE AMERICA, INC.,

Plaintiff,

-against-

THE HOWARD HUGHES CORPORATION,

Defendant.

INDEX NO. 155680/14
MOTION DATE 04-20-2016
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 13 were read on this motion to/for summary judgment :

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 5
Answering Affidavits — Exhibits ____cross motion ____	6 - 9
Replying Affidavits ____	10 - 13

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is ordered that plaintiff's motion for summary judgment, seeking a declaration, that XL Insurance America, Inc., is not liable to Howard Hughes Corporation for the flood loss which is the subject of Howard Hughes Corporation's claims, is granted.

Defendant, Howard Hughes Corporation (HHC), through the Willis Group, an international insurance broker, obtained insurance coverage from plaintiff for a number of locations in the United States, during the period of November 1, 2011 to April 1, 2013, under policy number US00044121PR11A (hereinafter referred to as "the policy"). The two tiered policy covers various losses including those resulting from a windstorm, earthquakes, and flooding (Mot. Desai Aff., Exh. 1). HHC had multiple policies with other carriers that provided the first $50 million in coverage for loss in excess of policy deductibles.

Coverage under the policy includes HHC's subsidiary, South Street Seaport Limited Partnership (hereinafter referred to as "SSSLP"). As of October of 2012, SSSLP, was and remains, the ground lessee for the following properties (hereinafter referred to collectively as the "Seaport Properties") located in New York, New York: (1) the Pier 17 Pavilion at 89 South Street ("Pier 17"), (2) the Link Building at 89 South Street ("Link Building"), (3) the Fulton Market Building at 11 & 1-13 Fulton Street ("Fulton Market Building"), (4) the Museum Block at 199-210 Front street, 19-25 Fulton Street, and 133 Beekman Street ("Museum Block"), (5) Portions of Schermerhorn Row at 91 South Street, 93 South Street, and 2-18 Fulton Street ("Schemerhorn Row") and (6) the first floor of the Telco Building 19 Water Street ("Telco Building").

Approximately a month after the policy was issued, on December 2, 2011, plaintiff added "Endorsement No. 2, Subscription Endorsement (Excess)," to the policy, amending the liability limits and priority of payments. On December 2, 2011, plaintiff also added the "Policy Revision Endorsement" also known as Endorsement 3, which modified the "limits of liability," and the definition of "flood" for "High Hazard

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Flood Zones," to state in relevant part:

> "This endorsement modifies the Commercial Property Policy identified below and is subject to all definitions in that policy.
>
> 1. Clause 3. Limits of Liability are amended as follows:
> Page 3, item D flood is amended to read as follows:
> D. With respect to High Hazards Flood Zones defined herein, this Company shall not be liable, per occurrence and in any one policy year, for more than its proportion of $50,000,000 which shall apply separately to each peril. Even if the peril of flood or earthquake is the predominant cause of loss or damage, any ensuing loss or damage not otherwise excluded herein shall not be subject to any sublimits or aggregates specified in this Clause D."
>
> "Flood is defined as follows:
> Flood is defined as a temporary condition of partial or complete inundation of normally dry land areas from any of the following:
> 1. The overflow of inland or tidal waters;
> 2. The unusual or rapid accumulation or runoff of surface waters from any source;
> 3. Mud slide or mud flow caused by accumulation of water on or under the ground;
> 4. Wave action, force of water (whether wind driven or not) storm surge, Named Storm, tsunami or the release of impounded water;
> 5. The failure, overtopping, or breach of any structure designed to hold any body of water, river or stream.
>
> If Named Storm or Earth Movement are excluded by this Policy, then Flood Caused by any of the above items that is associated with or related in any way to Named Storm or Earth Movement, respectively, is excluded." (Mot. Desai Aff., Exh. 1)

On October 29, 2012, a large storm initially identified as CAT-90, had traveled up the Eastern Seaboard of the United States and made landfall into metropolitan New York City. CAT-90 was labeled "Superstorm Sandy" by the National Weather Service. Superstorm Sandy substantially damaged the Seaport area, including defendant's Seaport Properties. HHC filed claims for losses at the Seaport Properties that were acknowledged by plaintiff and on August 12, 2013, HHC submitted a sworn Proof of Loss (POL) detailing the alleged loss. On August 15, 2013, plaintiff sent HHC a letter denying all coverage for loss to the Seaport Properties, relying on a High Hazards Flood Zones limit of liability, and the definition of Flood as appears in Endorsement 3 (Davis Aff. In Opp. Exh. B). A dispute arose from the manner in which plaintiff adjusted HHC's claim for losses under the policy, and the plain meaning of the language of the policy, including Endorsement 3.

On June 10, 2014, plaintiff commenced this declaratory judgment action against HHC seeking a declaration of the respective rights, duties, and obligations of the parties under the policy. On June 19, 2014, the complaint was amended, to seek a declaratory judgment that: (a) HHC's loss was caused by storm surge and is subject to the $50 million limit of liability for flood, (b) the policy provides coverage only for loss in excess of $50 million and (c) the claim is not covered under the policy.

Defendant's answer asserts counterclaims for: (1) breach of the insurance contract and (2) a declaration that plaintiff is contractually obligated to pay its proportionate share of HHC's losses, pursuant to the Policy Language and limited only

to the cap of a $50 million payment by plaintiff with respect to flood losses in a High Hazard Flood Zone.

Plaintiff's notice of motion states it is seeking an Order pursuant to CPLR §3212, granting summary judgment, "...dismissing the amended complaint in this action with prejudice." Plaintiff's Memorandum of Law in Support of the Motion states that what is actually being sought is, "a declaration, that XL Insurance America, Inc., is not liable to HHC for the flood loss which is the subject of HHC's claims."

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996] and Alvarez v. Prospect Hospital, 68 N.Y. 2d 320, 501 N.E. 2d 572, 508 N.Y.S. 2d 923 [1986]). Once the moving party has satisfied these standards, the burden shifts to the opponent to produce contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645, 569 N.Y.S. 2d 337 [1999]).

Plaintiff argues that it is entitled to summary judgment under Endorsement 3, which unambiguously changes the definition of the word "flood"under the policy to include "storm surge" and "flooding from a "named storm." Plaintiff also argues that the lower limit or exclusion for flood, applies to the Superstorm Sandy surge. Plaintiff claims that under Endorsement 3, there is no liability per occurrence in any one policy year for more than its proportionate share of $50 million which applies separately to each peril. It is plaintiff's contention that there were multiple insurers providing coverage to HHC, with each participating for a stated percentage, at varying levels of coverage, and that under the policy Endorsement 2, plaintiff had no participation and no liability for loss.

In determining coverage, the Court looks to the language of the policy. As a basic principle, an exclusion clause in a policy will subtract, and not grant, coverage (Fire Ins. Co. of Pittsburgh, Pa., 5 N.Y. 3d 157, 833 N.E. 2d 232, 800 N.Y.S. 2d 89 [2005]). The burden of proof is on the insurer to establish the exclusion of coverage by demonstrating the exclusion is unambiguous and applies to the claim. The insured has the burden of proof that coverage exists and the application of an exception to any exclusion. A policy should be construed to afford a fair interpretation to all of the language used by the parties, leaving no provision without force or effect (Platek v. Town of Hamburg, 24 N.Y. 3d 688, 26 N.E. 3d 1167, 3 N.Y.S. 3d 312 [2015]).

HHC concedes that the Seaport Properties are located in a High Hazard Flood Zone, that SuperStorm Sandy is a "named storm," and that there were storm surges. Defendant seeks to raise an issue of fact arguing that the policy provisions are ambiguous and that Endorsement 3 does not modify the definition of "flood" under paragraph 13 of the policy titled "Flood and Earthquakes." Defendant claims paragraph 13 specifically excludes flood and storm surge as a result of a named storm. Defendant also argues that plaintiff initially agreed to provide coverage as the proportionate share of $50 million within its layer of insurance coverage, but that the exclusion under Endorsement 3, results in no flood coverage for High Hazard Flood Zone properties, including the Seaport Properties, because the initial attachment point is at or above, an amount equal to the imposed sublimit.

Paragraph 13 of the policy titled, "Earthquake and Flood," under the subtitle, "Flood" states in relevant part:

"With respect to peril Flood, and any losses from this cause within a 72 hour period shall be deemed to be one loss insofar as the Limit of Liability and Deductible provisions of this policy are concerned. The Company shall not be liable for any loss caused by any Flood which commences before the effective date and time of this policy, however, the Company will be liable for any loss occurring for a period of up to seventy-two (72) hours after the expiration of this policy provided that the first flood damage occurs prior to the date and time of the expiration of this policy. The term "flood", as used herein, shall mean surface water, waves, tide, or tidal water and the rising (including overflowing or breaking of boundaries) of lakes, ponds, reservoirs, rivers, streams, harbors, and similar bodies of water. The term "surface water," as insured hereunder, shall mean seepage, leakage or inflex of water (immediately derived from natural sources) through sidewalks, driveways, foundations, walls basements or other floors, or through doors, windows or any other openings in such sidewalks, foundations, walls or floods. Flood does not mean Flood and Storm Surge as a result of a named storm." (Mot. Desai Aff., Exh. 1).

Unambiguous policy provisions with precise meaning, are required to be applied in accordance with "their plain and ordinary meaning," and will not permit coverage to be altered or extended beyond the parties intent (White v. Continental Cas. Co., 9 N.Y. 3d 264, 878 N.E. 2d 1019, 848 N.Y.S. 2d 603 [2007]). Any ambiguity identified in an exclusionary clause of an insurance policy, is to be construed in favor of the insured. "Insurance contracts must be interpreted according to common speech and consistent with the reasonable expectations of the average insured" (Cragg v. Allstate Indem. Corp., 17 N.Y. 3d 118, 950 N.E. 2d 500, 926 N.Y.S. 2d 867 [2011] and Universal American Corp. v. National Union Fire Ins. Co. of Pittsburgh, P.A., 25 N.Y. 3d 675, 37 N.E. 3d 78, 16 N.Y.S. 3d 21 [2015]). "The test for ambiguity is whether the language of the insurance contract is susceptible of two reasonable interpretations" (Lendlease U.S. Const. LMB Inc. v. Zurich American Ins. Co., 136 A.D. 3d 52, 22 N.Y.S. 3d 24 [1st Dept., 2015]). A party's attachment of subjective meaning to a term, that is different from the plain meaning, does not result in ambiguity (Lendlease (U.S.) Const. LMB Inc. v. Zurich American Ins. Co., 136 A.D. 3d 52, supra, citing to, Slattery Skanska, Inc. v. American Home Assur. Co., 67 A.D. 3d 1, 885 N.Y.S. 2d 264 [1st Dept., 2009]).

Defendant has not raised an issue of fact as to the definition of "flood" under the policy. Defendant's interpretation of paragraph 13 excluding "named storm" and "storm surge," is different from the plain meaning of the provision in the context of the policy. Paragraph 13 is worded in a manner that is intended to apply to the 72 hour limitation period for purposes of determining whether flood damage occurs prior to the expiration period of the policy. The definition of "flood" in paragraph 13, is self-contained and applies solely to the paragraph, not the entire policy. Furthermore, Paragraph 13 does not specifically refer to "High Hazard Flood Zones," which are identified in other parts of the initial policy. Endorsement 3, which clarifies the definition of "flood" for "High Hazard Flood Zones," and references to both a "named storm" and a "storm surge," is not ambiguous or self-contained.

HHC has also not raised an issue of fact as to ambiguity in the language utilized by plaintiff concerning limitations of coverage. Plaintiff's policy specifically identifies the Seaport Properties as in the "High Hazard Flood Zone" (Mot. Desai Aff., Appendix A, Exh. 1). The exclusion under Endorsement 3, is a restatement of paragraph 3 D, in the initial policy (Mot. Desai Aff., pgs. 1-2 of 36, Exh. 1). There never was flood coverage for "High Hazard Flood Zone" properties, including the Seaport Properties, because the initial attachment point is at, or above, an amount equal to the imposed

sublimit. In other words, coverage for "High Hazard Flood Zone" properties are covered by other insurers and not part of plaintiff's layer of coverage.

Defendant argues that this action is in its early stages and discovery is needed in the form of depositions of Mitali Desai, the plaintiff's Assistant Vice-President and underwriter responsible for the policy. Defendant argues that it should be permitted to depose Mr. Desai with respect to the negotiation and drafting of the policy. Defendant also argues that other representatives of plaintiff are knowledgeable and would provide evidence that is needed to oppose the relief sought.

Pursuant to CPLR §3212[f], summary judgment may be denied if there are facts essential to opposition in existence that cannot be stated. Summary judgment cannot be avoided by a claim that discovery is needed unless an evidentiary basis is provided establishing that the discovery sought will produce relevant evidence (Miller-Francis v. Smith-Jackson, 113 A.D. 3d 28, 976 N.Y.S. 2d 34 [1st Dept., 2013] and Execu/Search Group, Inc. v. Scardina, 70 A.D. 3d 451, 895 N.Y.S. 2d 41 [1st Dept., 2010]).

Defendant has not stated a basis to avoid summary judgment for outstanding discovery. The discovery sought would not avoid the plain meaning of the policy.

Accordingly, it is ORDERED that plaintiff's motion for summary judgment seeking a declaration, that XL Insurance America, Inc. is not liable to Howard Hughes Corporation for the flood loss which is the subject of Howard Hughes Corporation's claims, is granted, and it is further,

ORDERED, ADJUDGED and DECLARED that, XL INSURANCE AMERICA, INC., is not required to provide primary coverage, indemnify or provide a defense for the flood loss that is the subject of, THE HOWARD HUGHES CORPORATION's claims, and it is further,

ORDERED, ADJUDGED and DECLARED, that the counterclaims asserted in THE HOWARD HUGHES CORPORATION's Answer for breach of the insurance contract and (2) seeking a declaration that plaintiff is contractually obligated to pay its proportionate share of HHC's losses, pursuant to the Policy Language and limited only to the cap of a $50 million payment by plaintiff with respect to flood losses in a High Hazard Flood Zone are dismissed, and it is further,

ORDERED, that the Clerk shall enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ,
J.S.C.

Dated: June 27, 2016

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

FILED
JUL 20 2016
COUNTY CLERK'S OFFICE
NEW YORK

Milton A. Tingling
Clerk

5 of 5