

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH

PART 54

Justice

Index Number : 652964/2013
EL-AD 250 WEST LLC
vs
ZURICH AMERICAN INSURANCE
Sequence Number : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 3/4/14
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) <u>8-14</u>
Answering Affidavits — Exhibits _____	No(s) <u>18-19, 21</u>
Replying Affidavits _____	No(s) <u>22</u>

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

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

Dated: 6/27/14

SHIRLEY WERNER KORNREICH
J.S.C.
[Signature]

J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE
- Cross-Motion Granted*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
EL-AD 250 WEST LLC,

Index No.: 652964/2013

Plaintiff,

DECISION & ORDER

-against-

ZURICH AMERICAN INSURANCE COMPANY,

Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.:

Plaintiff El-Ad 250 West LLC (El-Ad) moves, pursuant to CPLR 3212, for partial summary judgment against defendant Zurich American Insurance Company (Zurich). Zurich opposes and cross-moves for partial summary judgment. Partial summary judgment is granted to Zurich for the reasons that follow.

I. Factual Background & Procedural History

The following facts are undisputed.

In October 2012, El-Ad was in the middle of developing a construction project on a building located at 250 West Street in Manhattan (the Property). Zurich had issued El-Ad a Builders Risk Insurance Policy (the Policy), effective January 10, 2011 through December 31, 2012. *See* Dkt. 10. The Policy is an “all-risk” policy and covers, *inter alia*, property damage and delay in completion losses.

On October 29, 2012, while the Policy was in effect, Superstorm Sandy caused damage to the Property, and, as a result, caused delay-in-completion losses. The following day, on October 30, 2012, El-Ad notified Zurich of its loss. After negotiations between the parties and the involvement of adjusters, on July 2, 2013, El-Ad filed a partial proof of loss for \$5 million.

Zurich rejected El-Ad's claims and, to date, has not paid for any of El-Ad's losses. El-Ad commenced this action on August 22, 2013, seeking coverage from Zurich under the Policy.

The Policy has a limitation of \$115 million in coverage per occurrence, with further sublimits and aggregate limits. Dkt. 10 at 6. The two applicable sublimits are \$108 million for "Physical Damage Coverage" and \$7 million for "Delay in Completion" coverage. *Id.* The Policy also contains a \$5 million annual aggregate limit for losses caused by a flood.¹ *Id.* Moreover, flood losses are subject to a deductible that is the greater of either \$250,000 or 5% of the loss. *Id.* at 7. The Policy defines flood losses as "all losses or damages arising" during a flood.²

The parties dispute whether delay in completion losses arising from a flood are subject to the Policy's flood limits and deductible. El-Ad argues that the flood loss aggregate limit and deductible only apply to physical damage to the property caused by a flood and not so-called "downstream" financial losses, such as delay in completion loss.

¹ The Policy defines Flood as "A general and temporary condition of partial or complete inundation of normally dry land areas, including dewatered areas, from: (1) The rising, overflow, or expansion beyond normal boundaries of any body of water or watercourse, whether such body of water or watercourse is natural or man-made; (2) The release or breaking of the boundaries of natural or man-made bodies of water or watercourses including the release or overflow of any water impounded by a dam, dike, reservoir or any other barrier or diversionary device; (3) Tsunami, waves, tide or tidal waters, and storm surge; (4) The unusual and rapid accumulation or runoff of surface waters from any source; (5) Mudslides or mudflows where mudslide or mudflows means a river of liquid and flowing mud on the surfaces of normally dry land areas, as when earth is carried by a current of water and deposited along the path of the current; or the spray from any of the foregoing, whether driven by wind or not." See Dkt. 10 at 19.

² See Dkt. 10 at 20 ("As respects the peril of **FLOOD***, **OCCURRENCE*** shall mean all losses or damages arising during a continuous condition as defined in the definition of **FLOOD***") (capitalization and bold in original).

Zurich counters that nothing in the Policy supports El-Ad's physical/non-physical damage distinction. Indeed, Zurich explains, unlike other similar policies (discussed in the caselaw below), the Policy's definition of flood loss does not refer to physical damage. Rather, "all losses or damages arising" from a flood are covered, and hence, Zurich maintains, delay in completion losses resulting from a flood are subject to the Policy's flood limitations. Additionally, the Policy's delay in completion endorsement states that "[a]ll other terms and conditions of the Policy to which this Coverage form is attached remain unchanged and apply equally hereto." Dkt. 10 at 30. Moreover, such endorsement provides that its \$7 million sublimit on delay in completion coverage "shall not increase the Policy Limit of Liability or any Aggregate Limit of Liability" and is "[s]ubject to all terms, conditions, limitations and exclusions of this Coverage and of the Policy." *Id.* at 27-28.

In sum, Zurich's position is: (1) excluding deductibles, the maximum recoverable under the Policy is \$115 million; (2) if the loss is for delay in completion, the maximum recoverable amount is \$7 million; (3) if the loss is caused by a flood, the maximum recoverable amount is \$5 million; ergo (4) if a flood causes delay in completion losses, the \$5 million cap and flood deductible apply. Zurich's reading of the Policy is correct.

II. Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing

requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

It is well established that “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 NY3d 118, 122 (2011). “[A]mbiguities in an insurance policy are to be construed against the insurer.” *Dean v Tower Ins. Co. of N.Y.*, 19 NY3d 704, 708 (2012), quoting *Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 353 (1978). An insurance policy, like all contracts, is unambiguous if “the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion.” *Fed. Ins. Co. v Int'l Bus. Machs. Corp.*, 18 NY3d 642, 646 (2012) (quotation marks omitted). “[I]f a policy ‘has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion ... a court is not free to

alter the contract to reflect its personal notions of fairness and equity.” *Jacobson Family Invs., Inc. v Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, 102 AD3d 223, 231 (1st Dept 2012), quoting *White v Continental Cas. Co.*, 9 NY3d 264, 267 (2007); accord *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002). Provisions in an insurance policy “are not ambiguous merely because the parties interpret them differently.” *Mount Vernon Fire Ins. Co. v Creative Housing Ltd.*, 88 NY2d 347, 352 (1996).

Though no New York court appears to have addressed the parties’ dispute, the parties cite to a number of persuasive cases from other federal and state courts. The most instructive is an Eighth Circuit case, *Altru Health Sys. v Am. Protection Ins. Co.*, 238 F3d 961 (8th Cir 2001).³ In *Altru*, a flood caused a power failure, leading to the evacuation of a hospital. *Id.* at 962. The hospital filed a \$5 million insurance claim for property damage. *Id.* The hospital’s policy, as in the instant case, had a lower sublimit for flood losses of \$1.5 million. *Id.* The insurance company paid the hospital the \$1.5 million, but refused to pay the full \$5 million, leading to coverage litigation. *Id.*

The hospital argued that its losses did not arise from flood-caused property damage since “the flood waters did not damage the insured building.” *Id.* at 963. Rather, the hospital suffered a business interruption loss because the “health authorities closed the Hospital for three weeks.” *Id.* The Eighth Circuit rejected the hospital’s argument. The hospital’s policy defined a flood loss as any “losses resulting from any one Flood disaster.” *Id.* at 964. Hence, the Eighth Circuit reasoned, the hospital’s business interruption loss “arose out of the flood,” making it “clearly and

³ North Dakota’s principles of insurance contract interpretation appear similar to New York’s. See *Altru*, 238 F3d at 963.

unambiguously subject to the \$1,500,000 sublimit of liability found in the same Flood Coverage Section.” *Id.* The Eighth Circuit, moreover, distinguished *Altru* from other similar cases where the applicable flood sublimit was held not to apply, since the policies in those cases did not state that the flood sublimit applies to all losses caused by a flood. *See id.* at 965.⁴

Indeed, other courts presented with analogous flood sublimit provisions have applied reasoning similar to *Altru*. *See, e.g., For Kids Only Child Dev. Center, Inc. v Philadelphia Indem. Ins. Co.*, 260 SW3d 652 (Tex Ct App 2008); *Gilbert/Robinson, Inc. v Sequoia Ins. Co.*, 655 SW2d 581 (Mo Ct App 1983). In contrast, the cases relied on by El-Ad, such as *Penford Corp. v Nat’l Union Fire Ins. Co. of Pittsburgh*, 2010 WL 300838 (ND Iowa 2010), are inapposite because the policies at issue do not contain a definition of flood loss that is as broad as in *Altru* and in the instant case. For instance, in *Penford*, the policy’s flood definition made clear reference to physical damage. *See id.* at *6. In contrast, here, as in *Altru*, the definition of flood losses includes all losses, not just physical property damage. The court in *Penford* explicitly recognized this distinction⁵ and cited favorably to *Altru* and *Kids* for their analysis of policies where “explicit language [] subjected *all kinds of loss* to certain sublimits.” *See Penford*, 2010 WL 300838, at *12 n.8 (emphasis added).

⁴ The Fifth Circuit takes a somewhat different approach, albeit one that does not alter the result in this case. *See Seacor Holdings, Inc. v Commonwealth Ins. Co.*, 635 F3d 675, 683 (5th Cir 2011) (“when a policy’s flood definition did not exclude damage caused by other perils, then the flood limit of liability *could* apply”) (emphasis added), accord *Six Flags, Inc. v Westchester Surplus Lines Ins. Co.*, 565 F3d 948 (5th Cir 2009). The court in *Six Flags* seemingly distinguished its approach from the *Altru* line of cases. *See Six Flags*, 565 F3d at 960 n.13. However, the Fifth Circuit, there, confronted the issue of which type of weather peril applied (e.g., hurricane vs. flood), not whether an unambiguous and unqualified flood loss definition applies to all economic losses arising from a flood.

⁵ The court held “that the Policy provisions” are not “substantively the same as those at issue in

Nonetheless, while *Altru* is persuasive, the court need not rely on caselaw to interpret the subject Policy because the scope of the Policy's annual aggregate flood limits is clear.

Declaration 7.C.(2) states that "The maximum amount [Zurich] will pay for loss or damage in any one **OCCURRENCE***, and/or in the aggregate annually for loss or damage from all **OCCURRENCES***, shall not exceed ... [\$5 million] by the peril of **FLOOD***." *See* Dkt. 10 at 6. In Section III.7, the Policy provides that "[a]s respects the peril of **FLOOD***, **OCCURRENCE*** shall mean all losses or damages arising during a continuous condition as defined in the definition of **FLOOD***." *See* Dkt. 10 at 20.

In other words, a loss that would not have occurred but for a flood is subject to a \$5 million annual aggregate limit, without regard to the type of loss suffered since the expression "all losses or damages arising during [a flood]" clearly does not exclude non-physical losses. Moreover, the delay in completion endorsement clearly and unambiguously states that it does not alter the sublimits in the Policy. *See* Dkt. 10 at 27, 28, & 30. Nor does any portion of the endorsement state that the delay in completion's \$7 million sublimit is not subject to the flood loss \$5 million aggregate limit, just as all of the Policy's other sublimits are so limited.

Finally, it should be noted that it is of no moment that El-Ad paid an extra premium for delay in completion coverage. Had El-Ad not paid this extra amount, it would not have been entitled to such coverage under any circumstances. To be sure, there are myriad possible causes of delay in completion losses. If the cause is something other than a flood (i.e. a terrorist attack, which has a \$108 million sublimit), the full \$7 million would have been available. However,

Altru." *See Penford*, 2010 WL 300838, at *12.

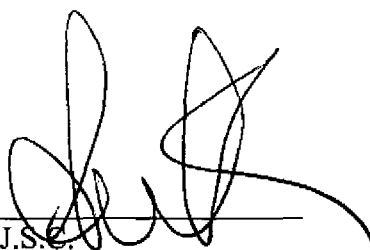
where, as here, the cause of the loss has its own, lower aggregate limit, that lower limit applies.

Accordingly, it is

ORDERED that plaintiff El-Ad 250 West LLC's motion for summary judgment is denied, defendant Zurich American Insurance Company's cross-motion for summary judgment is granted to the extent that the builders risk insurance policy issued to plaintiff, bearing policy no. IM 4857676-00 (the "Policy"), limits the amount defendant must pay for all "loss or damage" caused by the peril of Flood – including physical damage and economic Delay in Completion losses – to \$5 million dollars, and that the policy's flood deductible applies to such payments.

Dated: June 27, 2014

ENTER:



J.S.C.