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

FIVE TOWNS NISSAN, LLC, Plaintiff, v. UNIVERSAL UNDERWRITERS INSURANCE COMPANY, TOWER NATIONAL INSURANCE COMPANY, and PDP GROUP, INC., Defendants.	INDEX NO. 651164/2013 Date Purchased: 04/01/2013 Justice Jeffrey K. Oing

REPLY BRIEF IN FURTHER SUPPORT OF FIVE TOWNS NISSAN, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST TOWER NATIONAL INSURANCE COMPANY

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PRELIMINARY STATEMENT

This dispute involves nothing more than a case of seller's remorse. Tower sold to plaintiff an insurance policy which clearly and unambiguously provides coverage for Five Towns' Sandy-related Business Interruption loss. Because, however, Tower makes more money by denying policyholder coverage claims, the insurer now scrambles to find a way around the policy language it alone drafted. Tower can find no viable escape route:

- The insurer, try as it might, cannot twist and distort the policy language to subject its Business Interruption coverage to the policy's Flood Exclusion;
- The insurer, as a matter of law, cannot use extrinsic evidence to vary its unambiguous policy language;
- The insurer's extrinsic evidence, in any event, constitutes nothing more than irrelevant and inadmissible speculation and hearsay;
- The insurer waived its eleventh-hour "mutual mistake" defense by failing to assert this defense in its two declination letters to plaintiff; and
- The insurer, in any event, cannot demonstrate mutual mistake because it cannot prove – by clear and convincing evidence – the existence and precise terms of an oral agreement entered into between Tower and plaintiff not memorialized correctly by the insurance policy.

This Court should effectuate the clear terms of Tower's Policy and grant plaintiff partial summary judgment.

STATEMENT OF THE CASE

Plaintiff Five Towns Nissan, LLC ("Five Towns") supplements below the Statement Of The Case set forth in its initial Brief.

On April 1, 2013, plaintiff filed its Complaint alleging, among other insurer misconduct, breach of contract by Tower National Insurance Company ("Tower"). *See* Affirmation of Anthony Bartell ("Bartell Aff.") Exh. A. Plaintiff immediately consented to Tower's request for an extension, until the end of May 2013, to answer Five Towns' Complaint. Tower filed its Answer to plaintiff's Complaint on May 30, 2013. Bartell Aff., Exh. B.

The coverage issue being fully joined, plaintiff filed its partial summary judgment motion on June 6, 2013. *See* Notice of Motion. Tower, on June 10, 2013, asked plaintiff to adjourn its motion so the insurer could conduct discovery on its newly disclosed "mutual mistake" coverage defense. Bartell Aff., Exh. C. Plaintiff withheld consent to Tower's request because (a) it believes this Court can and should resolve Five Towns' motion by applying settled law to the undisputed facts, and (b) Tower proferred (and still profers) no evidence of mutual mistake. *Id.*

On June 19, 2013, Tower filed its Amended Answer and Counter-Claim. *See* Bartell Aff., Exh. D. Tower, on that date, also asked this Court to adjourn indefinitely plaintiff's summary judgment motion. Bartell Aff., Exh. C. Tower and plaintiff corresponded further with this Court, on June 21, 2013, regarding the insurer's adjournment request. Bartell Aff., Exh. E. This Court denied Tower's request on June 25, 2013. Bartell Aff., Exh. F.

Five Towns filed its Answer to Tower's Amended Answer and Counter-Claim on June 21, 2013. Bartell Aff., Exh. G.

ARGUMENT

POINT I

THIS COURT SHOULD GRANT PLAINTIFF'S MOTION BECAUSE TOWER'S UNAMBIGUOUS POLICY LANGUAGE RENDERS IRRELEVANT AND INADMISSIBLE THE INSURER'S ALLEGED EXTRINSIC EVIDENCE

A. Tower's Position Contradicts Its Clear Policy Language

Only Five Towns' interpretation of Tower's Policy accords with the Policy's unambiguous language and effectuates each of its provisions. *See* Plaintiff's Initial Brief, Point IC. Tower's position, in stark contrast, renders meaningless several Policy provisions including, most significantly, the Policy's Declarations Table. The Declarations Table – contrary to Tower's assertion (*see* Tower's Brief at p. 4 n. 6) – constitutes part of the Policy's Declarations and, as such, appears in the Policy's Schedule of Forms. Tower issued its Policy on double-sided paper. The Declarations Table appears on the reverse side of the Policy's Declarations. The Schedule of Forms clearly identifies the Declarations (and its included Declarations Table) as "Commercial Property Dec." *See* Affirmation of David Thomas ("Thomas Aff."), Exh. A at P 00005 and Reply Affidavit of Neil Barbagallo, Exh. A at P 00005.[1]

Tower cannot dispute its Business Interruption language – which Tower alone drafted – directs Five Towns to the "applicable Causes of Loss Form as shown in the Declarations." Tower, therefore, pretends its Schedule of Forms somehow constitutes "part of the Declarations." *See* Tower's Brief at pp. 11-12. This Schedule, in truth, forms no part of the Declarations and, in fact, identifies the "Commercial Property Dec." as a separate component of Tower's Policy. *Id.* The Declarations Table, in further truth, constitutes the controlling section

[1] The Declarations Page also states "This schedule, effective 12:01 A.M. 07/01/2012 forms part of Policy No. CPPCU0056012 Insured to Five Towns Nissan LLC." *Id.* at P 00081.

of Tower's Policy for determining whether the Special Form applies to Five Towns' Business Interruption coverage. It does not.

Tower reiterates its argument that because the Policy's Building provisions allegedly provide no coverage for Five Towns' Sandy-related building damage, the Policy's Business Interruption provisions necessarily provide no coverage for Five Towns' separate Business Interruption loss. *See* Tower's Brief at pp. 12-13. Tower's position, again, renders meaningless the Policy's clear requirement that the word "Special" appear next to a specific Coverage part before the Special Form applies to that part. Tower's position also renders the Declarations Table's "Covered Causes of Loss" column superfluous for every Coverage part other than the Policy's "Building" coverage. Courts reject insurers' attempts to condition *sub silentio* their Business Interruption coverage on coverage for the insured's physical premises.

In *Burdett Oxygen Company of Cleveland, Inc. v. Employers Surplus Lines Insurance Company*, 419 F.2d 247 (6th Cir. 1969), the court considered and rejected an argument nearly identical to Tower's. The court applied the same principles of insurance policy interpretation adopted by New York's courts, *i.e.*: (a) a court must give the policy language "its plain and ordinary meaning." *Id.* at 248; (b) the policy must "be read as a whole and each word given its appropriate meaning." *Id.*; and (c) a court must construe "doubtful or ambiguous" policy language "in a manner most favorable to the insured." *Id.* A court applies the ambiguity rule because:

> the insurer – who formulates the insurance contract and proffers it to the insured for the ostensible benefit of the insured in the event of a loss – is responsible for the language employed. Furthermore, the purpose of the contract being to provide insurance coverage, an interpretation of doubtful terms which construes the language to provide such coverage tends to effectuate the presumed good faith intent of the contracting parties.

Id. at 248-49.

The Sixth Circuit refused – in the absence of clear policy language – to condition the policy's Business Interruption coverage on Building coverage for the insured property:

> The language of the contract does not unambiguously condition recovery on the presence of insured property damage under the basic policy as the Appellee insurance company argues; nor does it provide sufficient guidance as to whether a mechanical breakdown is to be treated as a "peril insured against" for purposes of business interruption losses. We believe that from the language employed by the insurance company one cannot clearly ascertain that the exclusionary clause is applicable to the facts in this case. Therefore, applying the principles set out earlier in this opinion, we hold that ambiguous language is to be construed strictly against the insurance company. It could have drawn up a policy unambiguously conditioning recovery for business interruptions solely upon the occurrence of insured property damage. The insured is entitled to the benefit of the ambiguity created by the insurance company's policy.

Id. at 250. The Sixth Circuit's analysis applies equally here.

Five Towns' position, again, effectuates each phrase of the Policy, including the phrase "Covered Cause of Loss." *See* Tower's Brief at p. 12 n. 10. Because the Policy's Declarations Table unambiguously omits "Special" from the Policy's "Business" coverage, "Covered Cause of Loss" means nothing more than "direct physical loss of or damage to" Five Towns' property.[2] The court reached this same conclusion in *Southeast Mental Health Center, Inc. v. Pacific Insurance Company, Ltd.*, 439 F.Supp.2d 831 (D.C. W.D. Tenn. 2006). The policyholder there sought Business Interruption coverage for the suspension of its business arising from the loss of electrical and telephone service and from the corruption of its computer files caused by "Hurricane Elvis."

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[2] The Special Form, somewhat ironically, confirms Five Towns' position because it defines "Covered Causes of Loss" to mean "Risks Of Direct Physical Loss" subject to a number of exclusions. Thomas Aff., Exh. A at P 00113 and Barbagallo Aff., Exh. A at P 00113. This Form and these exclusions, of course, cannot apply to Five Towns' Business Interruption coverage.

The court applied the very same insurance policy interpretation principles adopted by New York's courts, *i.e.*: (a) "the interpretation of an insurance contract is a matter of law to be determined by the court." *Id.* at 835; (b) courts must give policy language "its plain and ordinary meaning." *Id.*; (c) policy language must "be read as a whole and each word given its appropriate meaning." *Id.*; (d) policy exclusions must "be strictly construed against the insurer." *Id.*; and (e) courts must construe ambiguous policy language "in favor of the insured." *Id.* The court applied these principles and concluded the "plain and unambiguous" policy language precluded Business Interruption coverage for loss arising from the suspension of electrical and telephone service. *Id.* at 837.

Business Interruption coverage for the insured's computer files corruption involved a deeper analysis because of factors substantially similar to those facing the Court here. The *Southeast* court recognized the insured's loss must "be caused by or result from a Covered Cause of Loss." *Id.* at 838. The Business Interruption coverage there – like Tower's Policy here –

> includes a provision entitled "Covered Causes of Loss," which states, "see applicable Causes of Loss Form as shown in the Declarations."

Id. The policy there, however – like Tower's Policy here – contained no Causes of Loss Form applicable to Business Interruption coverage. *Id.* The court rejected the insurer's argument – echoed by Tower here – that the absence of an applicable Causes of Loss Form subjected the policy's Business Interruption coverage to the policy's Building coverage exclusions. The court reviewed the Sixth Circuit's *Burdett Oxygen* opinion (*supra* at 4) and concluded:

> In this case, the Policy is similarly ambiguous as to whether it conditions recovery under the business interruption section on a property loss recoverable under the All Risk section. The Court finds it ambiguous whether the exclusions in the All Risk form apply to the business interruption insurance, or whether Plaintiff's loss is a Covered Cause of Loss.

* * * *

> Because the suspension of Plaintiff's business was caused by "direct physical loss of or damage to property" at the premises, and the loss or damage was caused by a Covered Cause of Loss, Plaintiff is entitled to coverage due to the failure of its pharmacy computer.

Id. at 839.

Five Towns believes Tower's Policy unambiguously excepts its Business Interruption coverage from the Policy's Flood Exclusion. If, however, the Court considers this language ambiguous, then Tower cannot receive *carte blanche* to introduce reams of inadmissible and irrelevant "extrinsic evidence" or a license to conduct an unbridled discovery fishing expedition. The Court – like the *Southeast* court – should resolve this ambiguity against the Policy's drafter, Tower.

B. This Court Should Disregard Tower's Alleged Extrinsic Evidence

New York courts refuse to consider extrinsic evidence to interpret an unambiguous insurance policy. *Hartman v. State Farm Ins. Cos.*, 280 A.D.2d 840, 841, 720 N.Y.S.2d 607, 608 (3d Dept. 2001) (a court construes insurance policy language as a matter of law, and the court cannot consider extrinsic evidence to interpret an unambiguous insurance policy); *Furey v. Guardian Life Ins. Co.*, 261 A.D.2d 355, 356, 689 N.Y.S.2d 208 (2d Dept. 1999) (finding extrinsic evidence inadmissible to vary the terms of an unambiguous policy which expresses the parties' entire agreement); *Teal v. Place*, 85 A.D.2d 788, 789-90, 445 N.Y.S.2d 309, 311-12 (3d Dept. 1981) ("Where the intention of the parties is fully determinable from the language employed in the agreement, there is no need to resort to evidence outside these written words to determine their intention"); *Cougar Sport, Inc. v. Hartford Ins. Co.*, 737 N.Y.S.2d 770, 774 (Sup. Ct. New York County 2000) (stating that when a court can determine the meaning of policy

language from the four corners of the document, it cannot consider extrinsic evidence).[3] Tower itself presses this principle when helpful to its coverage defeating ends. The court, at Tower's urging, accepted this principle in *Tower Insurance Company of New York v. Citywide Interior Contractors, Inc.*, 2011 N.Y. Slip Op 32509, *16 (Sup. Ct. New York County Sept. 21, 2011):

> An insurance policy is a contract, the unambiguous terms of which cannot be altered by extrinsic evidence (*See Penske Truck Leasing Co. v. Home Insurance Co.*, 251 A.D.2d 478 [2d Dept. 1998]). Tower is entitled to have its contract of insurance enforced in accordance with its provisions and without a construction contrary to it express terms. (*See White v. Continental Cas. Co.*, 9 N.Y.3d 264, 267 [Sup. Ct. N.Y. Co. 2007]; *Breed v. Insurance Co. of N. Am.*, 46 N.Y.2d 351. 355 [1978]).

Tower agrees with plaintiff that on the issue now before this Court, its Policy contains no ambiguities. *See* Tower's Brief at p. 14.[4] Tower nevertheless spends most of its Brief discussing reams of alleged extrinsic evidence, all of it speculation, hearsay and unrelated to Tower's Policy. Mr. Heagerty's Affidavit ("Heagerty Aff."), for example, contains numerous conclusory statements, lacking any evidentiary support, about the insurance industry's alleged knowledge (unknown and unknowable, of course, to Five Towns).[5]

Mr. Heagerty attaches to his Affidavit equally irrelevant and inadmissible extrinsic evidence. Tower submits, as Exhibits 1 and 2, policy forms which indisputably constitute no

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[3] Even when New York courts find insurance policy language ambiguous, they do not consider extrinsic evidence of the parties' alleged intent in drafting such language. New York courts understand that the insurer, as here, unilaterally drafted the policy and that the policyholder, as here, harbors no drafting intent. The courts, therefore, construe the ambiguous policy "in favor of the insured." *Federal Ins. Co. v. International Business Machines Corp.*, 18 N.Y.3d 642, 646 (2012) (citing *Breed v Insurance Co. of N. Am.*, 46 N.Y.2d 351, 353 (1978), *rearg. denied*, 46 N.Y.2d 940 (1979) (recognizing "the general rule that ambiguities in an insurance policy are to be construed against the insurer")).

[4] Tower incorrectly states plaintiff "urges the Court to find some ambiguity" in Tower's Policy. Five Towns, in truth, contends Tower's Flood Exclusion unambiguously cannot apply to the insurer's Business Interruption coverage. *See* Plaintiff's Initial Brief at p. 10 ("Tower's Policy, on this point at least, contains no ambiguity.").

[5] *See, e.g.*, "It is commonly known among those in the insurance industry...," Heagerty Aff., ¶10; "It is understood in the insurance industry, if not common knowledge in general...," Heagerty.Aff., ¶17; "Gundermann [the producer of the Policy] is well aware that flood coverage...," Heagerty Aff., ¶18; "Gunermann was aware that flood coverage was only provided...," Heagerty Aff., ¶20; "As is customary in the [insurance] industry...," Heagerty Aff., ¶21.

part of Tower's Policy. Tower submits, as Exhibit 4, a government pamphlet providing general advice but bearing no information about Tower's Policy. Tower finally submits, as Exhibit 6, the alleged application for Tower's Policy.[6] This application, if anything, supports plaintiff's position. The charts on page 3 confirm the Special Form applies only to Tower's Building and Contents coverages. Heagerty Aff., Exh. 6. Nothing in the application indicates a flood exclusion applies to Tower's Business Interruption coverage.

The Haas Affirmation constitutes pure inadmissible hearsay. *See* Point II, *infra*. Tower, preliminarily, offers no evidence that Gundermann & Gundermann ("Gundermann") acted as plaintiff's agent. The fact that Tower's counsel spoke *ex parte* with Thomas Gundermann, after plaintiff filed its summary judgment motion, casts serious doubt on the entity to which Gundermann owes its primary allegiance.

An insurer cannot impose an exclusion on its policyholder based solely on the parties' failure to discuss the exclusion. Tower argues that because Gundermann allegedly failed to request flood coverage, and because the parties allegedly never discussed flood coverage, Tower's Flood Exclusion applies to its Business Interruption coverage, notwithstanding crystal clear Policy language to the contrary. Tower's argument finds no support under New York law. New York courts, in fact, allow a policy exclusion to negate coverage only if (a) the insurer states the exclusion in clear and unmistakable language, and (b) the exclusion remains subject to no other reasonable interpretation. *Rapid-American Corp.*, 80 N.Y.2d at 652; *Seaboard Sur. Co.*,

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[6] Tower offers no evidence Gundermann prepared this application form. The application itself, in fact, contains the following heading:

> AIG DEALER INSURANCE PROGRAM
> EDWARD E. HALL & CO
> 99 Mill Dam Road
> Centerport, NY 11721

This heading indicates either insurance giant AIG or Tower's agent Edward E. Hall & Co. drafted the application form.

64 N.Y.2d at 311. Tower bears the burden of proving its Flood Exclusion applies to, and bars coverage for, Five Towns' Business Interruption loss. *Rapid-American Corp.,* 80 N.Y.2d at 652. Tower cannot satisfy its burden based solely on a lack of conversation between the parties' alleged agents and on its unsupported claim about alleged custom and practice in the insurance industry.

POINT II

THIS COURT SHOULD GRANT PLAINTIFF'S MOTION BECAUSE THE HEAGERTY AFFIDAVIT AND HAAS AFFIRMATION CONTAIN ONLY INADMISSIBLE HEARSAY AND SPECULATION INSUFFICIENT TO CREATE A GENUINE ISSUE OF MATERIAL FACT

Tower violates the fundamental precept that a party can oppose summary judgment only with evidence that would prove admissible at trial. *Bielak v. Plainville Farms, Inc.*, 299 A.D.2d 900, 750 N.Y.S.2d 729 (2002) (disregarding an affidavit based on hearsay rather than personal knowledge). The Heagerty Affidavit and Haas Affirmation both contain inadmissible out-of court statements offered to prove the truth of the matters asserted. This Court cannot consider these hearsay statements because they fall under no exception to the hearsay rule. *Nucci v. Proper*, 95 N.Y.2d 597 (2001); *People v. Slaughter*, 189 A.D.2d 157 (1st Dep't 1993).

The Haas Affirmation contains nothing more than inadmissible hearsay arising allegedly from counsel's *ex parte* conversation with Thomas Gundermann. Courts reject hearsay evidence because they find same inherently unreliable. *Nuccie v. Proper*, 95 N.Y.2d 597, 602 (2001) (confirming a court can consider hearsay evidence only if it falls "within one of the recognized exceptions to the hearsay rule, and then only if the proponent demonstrates that the evidence is reliable." (internal citations omitted)). The Haas Affirmation confirms the wisdom of these courts' rulings. The Affirmation, among other shortcomings, contains no information concerning the context in which Mr. Gundermann made the alleged statements, including the

attorney questions to which Mr. Gundermann responded and Mr. Gundermann's other statements during this *ex parte* conversation. The Affirmation, moreover, provides no detail about whether Mr. Gundermann's alleged comments concern Building coverage, Contents coverage, Business Interruption coverage or any combination of such coverages. The Haas Affirmation, perhaps most importantly, contains nothing which overrides the unambiguous language of Tower's Policy.

The Heagerty Affidavit also cannot undercut Tower's unambiguous Policy language. Mr. Heagerty offers only rank speculation an unqualified expert testimony.[7] The Affidavit offers absolutely no evidence Gundermann "was well aware" or "fully understood" Tower's Flood Exclusion applies to its Business Interruption coverage. The evidence, in fact, demonstrates the parties reached no oral agreement on this issue.

Because the Heagerty Affidavit and Haas Affirmation include no admissible or relevant information, this Court should disregard these documents in deciding plaintiff's motion.

POINT III

THIS COURT SHOULD GRANT PLAINTIFF'S MOTION BECAUSE FIVE TOWNS TIMELY FILED ITS MOTION AND BECAUSE TOWER CANNOT SECURE REFORMATION OF ITS POLICY

A. Five Towns Timely Filed Its Partial Summary Judgment Motion

Plaintiff filed this motion on June 6, 2013, six days after Tower filed its Answer on May 30, 2013.[8] Tower's Answer fully joined the issue of coverage for Five Towns' Business

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[7] New York courts do not consider insurance producers part of a "profession" for the purpose of professional malpractice actions. *See Port Authority of New York and New Jersey v. Evergreen Intern. Aviation, Inc.*, 686 Misc.2d 674 (1999).

[8] Plaintiff attaches its Complaint and Tower's Answer as Exhibits A and B to the Affidavit of Anthony Bartell. The Bartell Affidavit moots Tower's argument that plaintiff submitted no pleadings with its moving papers. Tower suffers no prejudice from Five Town's current filing. Tower, of course, knew full well of plaintiff's Complaint, which it Answered twice, and a full record now exists before the Court. Plaintiff similarly has re-

Interruption loss. *See* Bartell Aff., Exh. A at ¶¶ 40, 41, and 62–66; Exh. B at ¶¶ 40, 41, and 62–66. Tower's filing of its Amended Answer merely added its new mutual mistake defense (which Tower waived under New York law, *see infra*, ¶B) and its new reformation counter-claim. Bartell Aff., Exh. D. The Amended Answer did nothing to disturb the prior joining of the Business Interruption coverage issue.

B. Tower Waived Its New Mutual Mistake Defense

When an insurer possesses actual or constructive notice of facts supporting a coverage defense but fails to advise its policyholder promptly of that defense, the insurer cannot later raise that defense. *See, e.g., Luria Bros. & Co. v. Alliance Assurance Co.*, 780 F.2d 1082, 1090-91 (2d Cir. 1986) (applying New York law); *Kokonis v. Hanover Ins. Co.*, 719 N.Y.S.2d 376, 377 (3rd Dept. 2001); *Dependable Janitorial Services, Inc. v. Transcontinental Ins. Co.*, 622 N.Y.S.2d 632, 634 (3rd Dept.), *leave to appeal denied*, 631 N.Y.S.2d 287 (1995). In *Luria Bros.*, the insurer possessed constructive knowledge the policyholder had not disclosed the un-seaworthiness of the insured ship. The court held the insurer's failure to raise a nondisclosure defense in its declination letter estopped the insurer from later asserting this defense in the coverage action. 780 F.2d at 1091.

Tower, from day one, possessed actual or constructive knowledge of all the information needed to assert its bogus mutual mistake defense.[9] Tower, however, never even hinted at mutual mistake or reformation in its initial January 25, 2013 declination letter to Five Towns. *See* Barbagallo Aff., Exh. E. Five Towns thereafter wrote to Tower, on February 25, 2013, and

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submitted the allegedly unauthenticated documents as attachments to the July 10, 2013 Affidavit of Neil Barbagallo ("Barbagallo Aff."). Tower, again, suffers no prejudice arising from these documents.

[9] Tower complains it "has not been given an opportunity to obtain discovery" to secure facts concerning the suspension of Five Towns' business caused by Sandy. *See* Tower's Brief at p. 7 n. 7. Tower, however, only needed to ask Five Towns for this information, and Five Towns immediately would have provided same. Tower, of course, requested no such information before denying coverage.

explained in detail why no Flood Exclusion applies to Tower's Business Interruption coverage. Thomas Aff., Exh. B; Barbagallo Aff., Exh., B. Tower responded to Five Towns with a second declination letter, on March 11, 2013, which still said nothing whatsoever about mutual mistake or reformation. *Id.* at Exh. C. Tower's omission of this alleged defense from its two declination letters prevents the insurer from now denying coverage on this ground. *Kokonis*, 719 N.Y.S.2d at 377; *Dependable Janitorial Services* 622 N.Y.S.2d at 634; *Luria Bros.*, 780 F.2d at 1090. Tower, therefore, can secure no relief, and certainly no discovery, on this issue.

C. Tower Cannot Demonstrate Mutual Mistake

Tower cannot bypass New York's fundamental principles of insurance policy interpretation, defeat summary judgment and force meaningless discovery simply by alleging mutual mistake. The Court of Appeals holds that:

> [w]here a written agreement between sophisticated, counseled businessmen is unambiguous on its face, one party cannot defeat summary judgment by a conclusory assertion that, owing to mutual mistake or fraud, the writing did not express his own understanding of the oral agreement reached during negotiations.

Chimart Assoc. v. Paul, 66 N.Y.2d 570, 571 (1986).[10] The Court reacted to "the danger," so very evident here, "that a party, having agreed to a written contract that turns out to be disadvantageous, will falsely claim the existence of a different oral contract." *Id* at 574.

Tower can show mutual mistake only by proving "the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement." *Id.* at 573. Tower must prove, "in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties." *Id.* at 574 (citation omitted). Tower must

[10] The Court of Appeal's ruling applies even more strongly here because the party alleging mutual mistake (*i.e.*, Tower) unilaterally drafted the Policy and possesses all of the insurance sophistication and bargaining power. Five Towns, in stark contrast, owns a small business employing no insurance professional.

prove these elements by clear and convincing evidence. *See, e.g., Eldridge v. Shaw*, 952 N.Y.S.2d 360, 362 (4th Dept. 2012).

New York law sets forth the following elements of a contract:

> an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound (22 *NY Jur 2d, Contracts* § 9). That meeting of the minds must include agreement on all essential terms (*id.* § 31).

Kowalchuk v. Stroup, 61 A.D.3d 118, 121 (1st Dept. 2009); *see also Roer v. Cross County Med. Ctr. Corp.*, 83 A.D.2d 861, 861 (2nd Dept. 1981)(holding that without an "absolute and unqualified assent" ... "no binding contract was formed."). Tower's inadmissible extrinsic evidence, viewed in the light most favorable to the insurer, demonstrates the parties never reached an oral agreement to apply Tower's Flood Exclusion to the Policy's Business Interruption coverage. Tower's inadmissible extrinsic evidence, in fact, demonstrates the parties never even discussed application of the Policy's Flood Exclusion to any of the Policy's coverages. Tower, in short, cannot prove the existence of any oral agreement much less the terms of this agreement.

The insurer's eleventh-hour mutual mistake defense cannot obviate the unambiguous Policy language clearly showing the Flood Exclusion cannot apply to Tower's Business Interruption coverage.

POINT IV

THIS COURT SHOULD DISREGARD TOWER'S FLOOD/STORM SURGE ARGUMENT BECAUSE NEITHER THE INSURER NOR PLAINTIFF MOVES FOR RELIEF ON THIS ISSUE

If (and only if) Tower's Flood Exclusion somehow applies to its Business Interruption coverage, then the parties will litigate the issue of whether this Exclusion bars coverage for Five Towns' Sandy-related loss. Neither plaintiff nor Tower moves for relief on this issue. This issue

will require, at the very least, expert testimony on the exact nature of the event resulting in Five Towns' loss. This identical issue, moreover, lies at the heart of Five Towns' coverage dispute with Zurich.[11] Zurich, of course, has submitted no papers on this motion.

If this Court decides to consider now this factual issue, then Five Towns respectfully requests a full opportunity to submit papers regarding same.

CONCLUSION

Plaintiff respectfully requests this Court grant its motion for partial summary judgment.

Respectfully submitted,

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[11] Five Towns, in fact, relies on this common factual issue, among other arguments, in opposing Zurich's and PDP's severance motion, returnable on July 25, 2013.