SCANNED ON 1/10/2007

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

PRESENT: _____ PART 39

Index Number : 601164/2004

ROYAL INDEMNITY CO.

vs

RETAIL BRAND ALLIANCE, INC.

Sequence Number : 004

AMEND

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	
Answering Affidavits – Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

JAN 09 2007

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/8/07

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS PART 39

----------X

ROYAL INDEMNITY COMPANY,

Plaintiff, Index No. 601164/04

-against-

RETAIL BRAND ALLIANCE, INC., as successor-in-interest to Brooks Brothers, Inc. and RETAIL BRAND ALLIANCE, INC. d/b/a BROOKS BROTHERS,

Defendants.

----------X

RETAIL BRAND ALLIANCE, INC.,

Third-Party Plaintiff, Index No. 590771/04

-against-

ROYAL & SUN ALLIANCE INSURANCE, PLC,

Third-Party Plaintiff

FILED
JAN 09 2007
NEW YORK
COUNTY CLERK'S OFFICE

----------X

Helen E. Freedman, J.S.C.:

Retail Brand Alliance, Inc. ("RBA") moves to amend its complaint in this insurance coverage dispute arising from the September 11, 2001 terrorist attacks on the World Trade Center ("WTC") that destroyed the many businesses located in the WTC and its vicinity, and in particular damaged the Brooks Brothers Inc. store ("Brooks Brothers") currently owned by RBA and located across the street from the WTC at One Liberty Plaza, New York, New York. RBA seeks coverage for business income losses that Brooks Brothers sustained after the terrorist attacks under two policies: the "Local Policy" issued by its United States insurer, Royal Indemnity Company ("Royal Indemnity"), which is the primary policy for the One Liberty Plaza Brooks Brothers store and the "Master Policy" issued by its United Kingdom insurer, Royal & Sun Alliance Insurance, PLC ("Royal & Sun"), which

covers global operations and serves to fill coverage "gaps" left in the Local Policy. In the related action, Royal Indemnity seeks a determination concerning the parties' rights and liabilities under the insurance policy that it issued to Brooks Brothers' previous owner Marks & Spencer Finance, Inc.

In its previous motion for partial summary judgment in these cases, the insurers Royal Indemnity and Royal & Sun (collectively, "Royal") sought a ruling that based on the unambiguous language in the policy, the business income loss recovery was limited to the loss RBA sustained during the period that the store was actually closed plus an additional thirty days. RBA opposed that motion contending that the policies entitle it to coverage until December 31, 2009, the "theoretical time" it will take for the World Trade Center to be rebuilt, and that factual issues regarding the policies' meaning preclude granting partial summary judgment. In a decision dated February 23, 2006, this court granted Royal's motion. The First Department affirmed that decision (*Royal Indemnity Co. v. Retail Brand Alliance, Inc.*, 33 A.D.3d 392 (1st Dept. 2006)), holding that coverage was limited under the Master and Local policies to business income losses during the time needed to reopen the store, plus an additional thirty days, under the "Extended Business Income" provision in the Local Policy. This Court and the First Department held that the Extended Business Income provision in the Master Policy did not apply.

This motion to amend the Complaint concerns the scope of the Master Policy's Extended Business Income provision, which provides

> 1.1 The Insurers will pay for the actual loss of Business Income incurred by the Insured in the period that begins on the date the property ... is actually repaired rebuilt or replaced and Operations are resumed and ends on
> a) the date the Business could have been restored with reasonable speed to the condition that would have existed if no Incident had occurred provided that the liability of the Insurers shall cease no later than 36 consecutive months from the date of the incident.

1.2 Loss of Business Income must be caused by an Incident at the Premises.

RBA's proposed Count III asserts a claim for "breach of contract with respect to Extended Business Income coverage for loss resulting from the damage to Brooks Brothers' Liberty Plaza Store." RBA argues that when considering the Master Policy's Extended Business Income provision, both this Court and the First Department focused solely on the argument that RBA lost income because customers were not shopping in lower Manhattan after the destruction of the World Trade Center and ignored RBA's contention that the closing of its Liberty Plaza store for one year during the reconstruction caused its customers to find alternative stores and not return once Brooks Brothers reopened.

Royal argues the motion to amend should be denied because RBA already raised and lost its claim regarding application of the Master Policy's Extended Business Income provision in the February and October 2006 decisions by this Court and the First Department, respectively.

Although leave to amend should be liberally granted (CPLR 3025(b)), the merits of the proposed pleadings must state viable causes of action. *See DiPasquale v. Security Mut. Life Ins. Co. of New York,* 13 A.D.3d 100 (1st Dept. 2004). Here, the proposed amendment does not state a meritorious claim because the proposed Count III does not substantively differ from the claim in the original Complaint that this Court and the First Department already rejected. The proposed Count III duplicates a portion of the original Complaint's Count I, which seeks a declaration that various provisions, including the Master Policy's Extended Business Income Provision, covers Brooks Brothers' loss. Count I of the Complaint seeks a judgment declaring that, *inter alia,* RBA is entitled under the Master Policy "coverage for its loss of business income in the 36 months after termination of damage to and contamination of the Liberty Plaza Store with fumes, soot and contaminants."

Count II of the Complaint asserts a breach of contract action against Royal, claiming that the insurer refused to honor terms of the policies and pay amounts due RBA.

In its reply brief, RBA admits that it does not seek to add any allegations or claims in its proposed amended complaint. Instead, RBA maintains that "it simply seeks to segregate the existing claim for Extended Business Income coverage based upon the closing of the Brooks Brothers store from the other allegations so that claim can, for the first time, be litigated."

Brooks Brothers did suffer actual damage to its store on September 11, 2001, for which it is entitled to insurance coverage for the time that its operations were suspended under the Business Income provision and an extra thirty days under the Local Policy's Extended Business Income provision. However, in order to obtain additional coverage under the Master Policy's Extended Business Income provision, the loss of business income that occurs after the "period of restoration" must be caused by an "incident at the premises." The thrust of Brooks Brothers argument was that its income losses after the "period of restoration" was caused by damage to the WTC because fewer customers were shopping in lower Manhattan. Because the reason for Brooks Brothers' decreased sales volume after the store reopened in 2002 appeared to be the destruction of the WTC, rather than an "incident at the premises," the Court held the Master Policy's Extended Business Interruption provision was inapplicable.

RBA appealed the February 2006 decision in part because it believed this court did not consider damage to Brooks Brothers store as a basis for coverage under the Master Policy's Extended Business Interruption provision. The first question that RBA raised in its appellate brief was

> Did the Trial Court err in granting partial summary judgment, as a matter of law, that

> RBA is not entitled to Extended Business Income coverage under the insurance policy sold by Royal UK (the 'Master Policy') on the ground that coverage is only provided for loss resulting from an 'Incident' at insured premises, not at third party property such as the World Trade Center Complex ('WTC'), despite the fact that an Incident did occur at RBA's premises - RBA's store was damaged when the WTC collapsed - and that Royal UK admitted that RBA is entitled to be paid several million dollars under this coverage?

The First Department addressed this issue when it found that

> ...coverage is unambiguously subject to the limitation that the 'Loss of Business Income must be caused by an Incident at the Premises," which is defined in the Master Policy as 'loss or destruction of or damage to property used by the Insured at the Premises for the purpose of the Business.' Here, the insured seeks coverage based on damage to the World Trade Center, property belonging to a nonparty to this action, and the motion court correctly declared this was beyond the scope of the Extended Business Income coverage.
>
> *Royal Indemnity Co. v. Retail Brand Alliance, Inc.*, 33 A.D.3d 392 (1st Dept. 2006).

Thus, amending RBA's Complaint would be futile as the proposed claim is encompassed in Count I of the original Complaint and has already been rejected. *See Sosa v. Joyce Beverages, Inc.*, 138 A.D.2d 256, 258, 525 N.Y.S.2d 607 (1st Dept. 1988) (holding that the defendants were not entitled to amend their third-party complaint because the cause of action alleged in the proposed amendment was duplicative of the original third-party complaint). RBA is again pursuing its contention that damage to the Brooks Brothers store triggers additional coverage under the Master Policy in its motion for reargument, currently pending before the First Department. Additionally, it should be noted that any calculation of losses sustained more than 30 days after the store reopened and resulting solely from damage to the Brooks Brothers store would be speculative at best. RBA submits an affidavit from John D. Dempsey, a managing partner of the forensic accounting firm Dempsey, Myers & Company LLP, who attests that although a minimum loss caused only by the closing of the store can be determined, the "full extent of the loss attributable to the closing of the

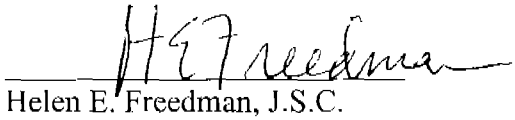
store may not be ascertainable if loss resulting from the damage to the World Trade Center is not included."

Accordingly, it is

ORDERED that RBA's motion seeking leave to amend its complaint is denied.

Parties are directed to appear for a status conference in Room 208 on January 30, 2007 at 9:30 a.m. as previously scheduled.

DATED: January 8, 2007 ENTER:



Helen E. Freedman, J.S.C.

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